TikTok Takedown: National Security & Speech Implications of Social Media

Sujit Raman,[1] Jamil Jaffer,[2] Christopher Newman,[3] & Kate Ruane[4]

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[1] Sujit Raman is the Chief Legal Officer at TRM Labs, a blockchain intelligence firm focused on detecting and investigating crypto-related fraud. He was previously a partner at Sidley Austin LLP, specializing in internal investigations and white-collar defense. Mr. Raman spent nearly twelve years at the U.S. Department of Justice, concluding as U.S. Associate Deputy Attorney General, where he advised on cybercrime and national security, chaired the Attorney General's Cyber-Digital Task Force, and developed the DOJ's "Cryptocurrency Enforcement Framework." He also represented the U.S. in international data-sharing negotiations and co-led the U.S. delegation at the 2019 G6 Interior Ministers' conference in Munich. A recognized commentator, his insights have appeared in The Wall Street Journal, The New York Times, and other outlets. Mr. Raman is a senior fellow at American University's Tech, Law & Security program and an Adjunct Professor of Law at George Mason University. He graduated from Harvard College, Harvard Law School, and the University of Bristol (UK) as a Marshall Scholar, where he also coached the women's varsity rowing team. Email from Sujit Raman, Chief Legal Officer, TRM Labs, to Danielle Saman, Managing Ed., Nat'l Sec. L.J. (Oct. 25, 2024).

[2] Jamil Jaffer is the Founder and Executive Director of the National Security Institute and an Assistant Professor of Law at Antonin Scalia Law School, where he directs the National Security Law & Policy Program and the first Cyber, Intelligence, and National Security LL.M. He is a recent appointee to CISA's National Cyber Safety Review Board and Virginia's Artificial Intelligence Task Force. Professor Jaffer also serves on multiple boards, including the Greater Washington Board of Trade, the Global Cyber Alliance, and the Foundation for the Defense of Democracies' Center on Cyber and Tech Innovation. He is affiliated with Stanford's Center for International Security and Cooperation and is a member of the Center for a New American Security's AI and National Security Task Force. Professor Jaffer previously clerked for Justice Neil M. Gorsuch and Judge Edith H. Jones. He holds degrees from UCLA (B.A., cum laude), the University of Chicago Law School (J.D., with honors), and the Naval War College (M.A., with distinction). Email from Devlin Birnie, Program Assistant, National Security Institute, Antonin Scalia L. Sch., George Mason Univ., to Danielle Saman, Managing Ed., Nat'l Sec. L.J. (Oct. 25, 2024).

[3] Christopher Newman is an Associate Professor of Law specializing in property theory and copyright law, particularly at the intersection of tangible and intellectual property. He serves as an Associate Reporter for the American Law Institute's Restatement (Fourth) of Property project and teaches courses in Civil Procedure,

On November 1, 2024, the National Security Law Journal *at George Mason University Antonin Scalia Law School hosted its fall symposium: "TikTok Takedown: National Security & Speech Implications of Social Media". The event was cohosted by the National Security Institute at George Mason University and the George Mason University Chapter of Phi Alpha Delta. The symposium featured a panel discussion on the Brief of* Amici Curiae *Former National Security Officials in the case of TikTok, Inc. v. Garland.[5] The following is an edited transcript of the panel discussion.[6]*

Copyright, Trademark, Entertainment Law, and Free Speech. Professor Newman co-leads the Liberty & Law reading group to foster discussions on law and liberty. He graduated magna cum laude from the University of Michigan Law School in 1999, where he was Book Review Editor for the Michigan Law Review and received the Henry M. Bates Memorial Scholarship. He also holds a B.A. in Classical Liberal Arts from St. John's College. Following law school, he clerked for Judge Alex Kozinski on the U.S. Court of Appeals for the Ninth Circuit and practiced litigation at Irell & Manella LLP, focusing on intellectual property, business torts, and securities. In 2007, Professor Newman transitioned to academia as an Olin/Searle Fellow in Law at UCLA and subsequently held a research fellowship with UCLA's Intellectual Property Project before joining Scalia Law. *See* Christopher Newman, *Biographical Sketch*, ANTONIN SCALIA L. SCH., GEORGE MASON UNIVERSITY, https://www.law.gmu.edu/faculty/directory/fulltime/newman_christopher (last visited Jan. 30, 2025).

[4] Kate Ruane is the Director of CDT's Free Expression Project. An accomplished attorney, Ms. Ruane advocates for free speech protections that benefit marginalized groups, including communities of color, religious minorities, and LGBTQ+ individuals. Her expertise spans civil rights and free speech intersections, Section 230 of the Communications Decency Act, online privacy, harassment, child protection, and disinformation. Before joining CDT, Ms. Ruane served as the Director of U.S. Free Expression Programs at PEN America, where she advanced advocacy against restrictive legislation, contributed to amicus briefs challenging educational gag orders, and developed initiatives to combat disinformation in the lead-up to the 2024 U.S. elections. She also held key roles at the Wikimedia Foundation, the ACLU, and the Congressional Research Service. Ms. Ruane earned her B.A. from the University of Pennsylvania and her J.D. from American University, Washington College of Law. Kate Ruane, *Director, Free Expression Project,* CTR. FOR DEMOCRACY & TECH., https://cdt.org/staff/kate-ruane/ (last visited Jan. 31, 2025).

[5] *See* Brief of *Amici Curiae* Former National Security Officials in Support of Respondent, TikTok Inc. v. Garland, 93 U.S.L.W. 3174 (U.S. 2025) (Nos. 24-656 and 24-657), 2025 U.S. LEXIS 366.

[6] A recording of the event can be found at: https://youtu.be/ceqeyxe_5wI?si=amCRPMmvFdiBvCSw.

BRITTNEY DEPOTO, EDITOR-IN-CHIEF: Good afternoon, everyone, and thank you all so much for being here today.

Welcome to "TikTok Takedown: National Security & Speech Implications of Social Media" hosted by the National Security Law Journal, the National Security Institute, and George Mason University's Chapter of Phi Alpha Delta. Thank you all for being here.

My name is Brittney DePoto, and I am the Editor-in-Chief of the National Security Law Journal here at Antonin Scalia Law School. The mission of the journal is "to publish thought-provoking, informative, and innovative commentary on national security law issues that contribute to the legal community." Each year we host two symposia with discussions around pressing and relevant national security topics, such as this one.

This fall we are excited to be co-hosting this symposium with two amazing organizations.

Our first co-host is the National Security Institute. NSI's "mission is to strengthen American national security and U.S. global leadership by educating future leaders and advancing actionable solutions based on practical experience." Since its founding in 2017, NSI has drawn "on the expertise of an all-volunteer group of experts who have held senior positions in intelligence, defense, technology, and law sectors to produce research and actionable policy proposals."

Our second co-host is the George Mason University Chapter of Phi Alpha Delta. "Phi Alpha Delta is a professional association of undergraduate students, law students, legal educators, attorneys, and judges who seek to promote professional competence, provide services to students and the community, and to achieve excellence within the legal profession." The Mason chapter was founded in 1973 and "strives to be a premier legal professional organization with a diverse membership that cultivates leaders and serves as a voice for the role of legal professionalism in our society."

Now, an event like this would not be possible without the hard work and dedication of many individuals. In particular, thank you to

National Security Law Journal members Danielle Saman, our Managing Editor, the Assistant Public Relations Editors, and the Assistant Symposium Editors. From the National Security Institute, thank you to Devlin Birnie. And from Phi Alpha Delta, thank you to Cheyenne Young. Their hard work is clearly evident and their dedication to NSLJ, NSI, Phi Alpha Delta's missions are truly inspiring.

It is now my honor to introduce our distinguished speakers.

Our moderator this afternoon is Professor Sujit Raman. Professor Raman is Chief Legal Officer at TRM Labs, a leading blockchain intelligence company that helps organizations detect, assess, and investigate crypto-related fraud and financial crime. Prior to his work at TRM Labs, Professor Raman previously served for nearly a dozen years at the U.S. Department of Justice, culminating in his service as U.S. Associate Deputy Attorney General. Professor Raman is also an adjunct professor here at Scalia Law where he currently teaches the Computer Crime Seminar. Thank you to Professor Raman.

[AUDIENCE APPLAUSE]

MS. DEPOTO: Yes, please, please . . .

[AUDIENCE APPLAUSE]

SUJIT RAMAN, MODERATOR: Those are my students by the way.

[AUDIENCE LAUGHTER]

JAMIL JAFFER, PANELIST: They're required to clap.

MR. RAMAN: Yeah, I know right.

[AUDIENCE LAUGHTER]

MS. DEPOTO: Our first panelist is Professor Jamil Jaffer. Professor Jaffer is the Founder and Executive Director of the National Security Institute. He is also an Assistant Professor of Law and the Director of the National Security Law & Policy Program and the nation's first Cyber, Intelligence, and National Security LLM at Scalia Law. Professor Jaffer is also the faculty advisor for the National Security Law Journal. Thank you to Professor Jaffer.

[**AUDIENCE APPLAUSE**]

MR. JAFFER: I got applause too. Thank you to getting your students to applaud for me too.

[**AUDIENCE LAUGHTER**]

MS. DEPOTO: Our second panelist is Professor Christopher Newman. Professor Newman is an Associate Professor of Law here at Scalia whose areas of teaching include Civil Procedure, Copyright, Trademark, Entertainment Law, and Free Speech. In addition, Professor Newman co-runs the Liberty & Law reading group, which provides a forum for informal discussion among students and faculty based on texts that seek to illuminate difficult questions regarding the relationship between law and liberty. Thank you, Professor Newman, for being here.

[**AUDIENCE APPLAUSE**]

MS. DEPOTO: And last but certainly not least, is our third panelist Ms. Kate Ruane. Ms. Ruane is the Director of the Center of Democracy and Technology's Free Expression Project. Ms. Ruane's expertise is expansive and her work spans many issues including the intersection of civil rights and free speech protections, Section 230 of the Communications Decency Act, online privacy and surveillance, harassment, protecting children online, and disinformation. Thank you, Ms. Ruane, for being here.

[**AUDIENCE APPLAUSE**]

MS. DEPOTO: And now I will turn it over to Professor Raman to begin our discussion.

[**AUDIENCE APPLAUSE**]

MR. RAMAN: Thank you so much. Great to see such a turnout, such a big turnout this afternoon for, I think what's going to be a very interesting conversation among our panelists.

As folks probably know, earlier this year Congress enacted and President Biden signed into law, legislation addressing national security concerns related to TikTok, which, I think everyone knows, is a popular social media platform owned by the Chinese company called ByteDance. The law requires ByteDance to divest its ownership of TikTok within nine months, with a possible three month extension if a sale is in progress. Failure to comply, would result in TikTok being banned from U.S. app stores. The law reflects bipartisan concerns that TikTok could be used by the Chinese government for surveillance or to spread propaganda or influence operations. Given China's laws requiring companies to cooperate with state intelligence services, TikTok has consistently denied these allegations asserting that it operates independently and has implemented measures to protect user data.

In response to the legislation, TikTok and a group of content creators filed lawsuits challenging the constitutionality of the divestiture requirement, arguing that it infringes the First Amendment and lacks sufficient evidence of a national security threat. As of today, those legal challenges are ongoing and the future of TikTok in the United States remains uncertain.

Now, before we turn it over to the panelists, it bears mentioning that 2024 is not the first time that the U.S. government has wrestled with the TikTok issue. In 2020, the Trump Administration through executive action attempted to ban TikTok in the United States over national security concerns, basically for two reasons: One, fears that the Chinese owned app could collect Americans' personal data and potentially share it with the Chinese government. Second, that the Chinese government could therefore

control the dissemination and shaping of content that Americans see and hear. So perhaps those rationales sound familiar.

Now, in 2020, TikTok also fought back in the courts, arguing that the bans were unconstitutional and that there was insufficient evidence to support claims of a national security risk. Several courts blocked the ban. And that's really where things stood before the Biden Administration went the legislative route.

So, this issue is really, really important. At its core, it's a domestic legal dispute. And because we're at a law school, I will push our panelists to focus on the legal issues. But we all need to keep in mind that this domestic legal dispute is taking place against a tremendously important geopolitical background that reflects broader tensions between the United States and China over technology, privacy, and influence, as well as debates over how government should regulate foreign owned technology platforms.

So with that background, let's turn it over to Professor Jaffer. Jamil, you and NSI have filed an amicus brief in the litigation currently in the D.C. Circuit, *TikTok v. Garland*. Now, help us understand the arguments that have been made in that litigation, number one. And I would love to know if courts struck down the ban in 2020, why do you feel like 2024 is any different?

MR. JAFFER: Yeah, look, a few things. One, the ban is a different ban today, legislative. The first effort was an administrative effort by executive order under President Trump. It was only a temporary limitation; it wasn't a fully litigated matter. It didn't go all the way up. This is in front of the D.C. Circuit; by statute it went directly to the D.C. Circuit. It's a different court. And I think the arguments are a little different here today than they were in that case. There's a lot of reasons, by the way, to think that the court there also got it wrong.

What I'll talk about, you know, are the national security issues in play, first, and then we're going talk about the First Amendment issues as well. Those are as important, if not more important at some level. But we should talk about all that. But I'll

start with the national security issues.

The core argument, and then just to be clear, NSI didn't file a brief in this case, a bunch of national security experts did, a lot of that to be associated with NSI . . .

MR. RAMAN: My mistake

MR. JAFFER: But it was because institutionally we talked about it, it was better not to . . .

MR. RAMAN: Understood

MR. JAFFER: So, the basic argument about why TikTok presents a national security problem, you might think to yourself: "I don't get it. This is a bunch of kids dancing, you know, my friends doing silly things, dog ate cat videos, like what's the problem here?" Right. And the real core problem is not the videos themselves. And it's not the platform, it's who runs it, who owns the data that's being collected, and how that data can be utilized in combination with other data sets that we know the same folks have access to and the national security implications of all of that taken together, right?

And so if you look at TikTok itself as you note, it's owned by a Chinese company, ByteDance. ByteDance is viewed by many people, and including the Director of National Intelligence, as essentially a functional proxy for the Chinese government. We lay out the evidence for that in our brief. But the Director of National Intelligence talked about the fact that ByteDance is "beholden" to the Chinese communist party, right. There's a variety of reasons for that, including the fact that China's National Intelligence Law requires Chinese companies, like ByteDance, to comply with direction, with their direction control, for access to information on their platforms. And that with the fact that many companies, including ByteDance, have a CCP committee run by CCP members that oversees the operations of the company. And we know from former TikTok executives that the CCP put individuals at ByteDance to specifically oversee the collection of information data from the TikTok platform.

So we know that they do this. We also know that TikTok itself many, many times has modified its algorithm and the way it puts out data to both collect information and to message either taking the position of the Chinese Communist Party or suppressing information on TikTok that would have been negative to the Chinese Communist Party. So we know this happens, there's documented evidence. We cite a number of examples in our brief.

And so why does any of that matter, right? It's because for all those 170 million Americans who have TikTok on their phone, it's collecting data with, oftentimes, with your explicit authority, right? About your location, about who your friends are, about who you're communicating with, about what information you have on your phone, and could potentially go further. We know other examples of TikTok collecting data and turning the microphones on devices without authorization from users. And so, that's, there's a larger problem here.

But then take that all in the context and, I'll stop here, of all the data we know the Chinese Communist Party, the Chinese government has collected through theft of information from the U.S. government and from private sector entities here in the U.S., including the Anthem data breach, the data breach of a major credit card services provider, the data breach of the United States Office of Personal Management, which involved the collection of information on every holder of TS/SCI security clearance in the entire country, and numerous others. The fact of the matter is that the Chinese government is collecting that data so they can leverage it, along with data from companies like TikTok, to profile American citizens for further collection. And so, giving that information voluntarily through TikTok, and involuntarily through all their data breaches, [for example] the Marriott Hotel Corporation, all Chinese government authorized breaches or conducted breaches, creates a major national security risk for us and our people. So that's the basic thesis in the brief that we filed.

MR. RAMAN: Got it. Well, thank you, Professor Jaffer. We'll get to Ms. Ruane eventually, because I know you've got a point of view, I suspect in response to Professor Jaffer's point. Before we get

there, let's go next to Professor Newman. You are a First Amendment expert and Professor Jaffer says there's no first amendment issue here. This isn't really a ban on content. This is really more about national security. It's more about regulation of ownership. I'm curious, Professor Newman, can you frame the issues raised by this case within the broader First Amendment doctrine? Is Jamil, right? Does the national security aspect make this case different?

CHRISTOPHER NEWMAN, PANELIST: Ok. So we'll put a couple of basic First Amendment markers down, so we're all on the same page. Number one, the Chinese government does not have First Amendment rights nor does ByteDance as a foreign corporation overseas. However, TikTok Inc. is a U.S. entity which does have First Amendment rights, as are all the users of TikTok, all of the American users, who want to both send and receive information through this particular channel. So, the other thing that's important to recognize is that, Jamil mentioned, there seem to be two basic justifications for this law. One is data collection, and the other is the possibility that China, through its proxy ByteDance, might manipulate the algorithm and therefore feed Americans basically propaganda.

Now, to the extent that that latter one is the main concern here, I think it's on extremely shaky First Amendment ground because, let's cut out all the highfalutin text stuff and just imagine that TikTok really is just a vehicle for Chinese propaganda. It's like Pravda, right? Well, it's well-established that American citizens who want to read foreign communist propaganda, assuming that that's all TikTok were, they have a First Amendment right to have access to that. And you can't, there's a famous case called *Lamont* where the Postmaster General was saying, if you want to receive these publications that we have deemed to be communist propaganda, you have to sign up and tell us that you are willing to receive communist propaganda, and the Court struck that down. So, if all we're concerned about is the possibility that TikTok might be an effective means of propagating, of manipulating the feed, that's

really, I think the government's interest in suppressing that possibility is pretty much ruled out by the First Amendment.

I would note also that you said that it has to do with something about it being a difference between ownership and content. But it doesn't sound to me, that sounds to me like a red herring because TikTok is saying that, as a practical matter, it can't divest, that this can't happen on the timeline the government has said, and if it did, it would radically alter the nature of the platform because they wouldn't have access to the algorithm, which is the heart of the platform. Now, let's assume though, that they're wrong about that and that they could divest. If this is really only about ownership, let's assume that TikTok were to, ByteDance were to completely divest TikTok, so now it's an entirely arm's length U.S. entity, no ownership relationship. But let's assume that because they want to keep serving the same, they want to be part of the worldwide, global TikTok app and allow that interoperability and all of that communication, which is one of the key pleasures of being on TikTok. So, they create some sort of arm's length contractual agreement in order to still be able to use this unique proprietary algorithm, which we must continue to assume is under control of the Chinese government. Well, presumably they could still do that. They could still send whatever data they need to send to ByteDance in order to feed the algorithm and to get the recommendations that they're going to use to stream things to the users. It's not clear to me, I think that the description of this as merely being about ownership is a red herring because I don't think that they would regard that as a divestment that would serve the government's purposes, right?

Then, the other side of it is the data collection. Which, you know, I think that, at least as a rationale, is a little bit closer to perhaps being able to survive First Amendment scrutiny. Because then you are saying, "Okay, this is conduct." Now, you can argue of course that data collection isn't merely conduct because, as Jamil said, a lot of the information that people are giving TikTok, they are, in fact, authorizing TikTok to get. So, in a certain sense, that is American TikTok users choosing, as part of a transaction, to

transmit certain information to [TikTok] in exchange for getting this service that [they] like. So, it's not clear that that's merely conduct as opposed to voluntary speech activity. But let's assume, for the moment, even that it is conduct, that we can just characterize collection of data as conduct. Then, the question becomes: "Alright, yes, you can regulate conduct even though it has an incidental impact on speech, but you still have to do it, even under an intermediate scrutiny perspective, you would have to do it in a way that doesn't burden substantially more speech than necessary." So, if the effect of the ban or the forced divestment, which seems, as a practical matter, would lead to the ban is to shut down the entire platform in the U.S., that is obviously a vast impingement on speech. So, then the question becomes this factual dispute: "Aren't there more narrowly tailored options that could be used to regulate, across the board, not just TikTok, but all these social media companies?" There may be room for regulation about how people collect and use data and disclose how they're collecting and using it. But that doesn't seem to justify singling out a specific company, a specific platform and basically shutting it down entirely, and that one and only that one, and leaving all the other data collection services, you know, untouched. So, I'll stop there.

MR. RAMAN: No, that's great. Some interesting threads that I know we're going to pull as we go forward. You mentioned *Lamont v. Postmaster General*, a case from the mid-1960s when the United States was in the Cold War and there were concerns about communist propaganda, particularly coming from the Soviet Union. So, it sounds like, Professor, what you're saying is that these concerns about foreign access to Americans for propaganda purposes is not new, even though it might feel new because of the digital media. So, that's one thread we're going to want to pull a little bit.

Secondly, I would leave the audience with a question of, well, is it really true that if TikTok is somehow beaten down, that the people who want to perform on TikTok don't have other venues? In other words, are there other social media companies out there

where they can do the same dancing, the same messaging, et cetera? We'll get back to that in a minute, Professor.

Ms. Ruane, I assume you oppose the legislation. I think your organization has filed briefs on behalf of TikTok plaintiffs and influencers. Would love to hear from you on your thoughts in response to Professor Jaffer and some of the ideas that he advanced about national security, data collection, concerns about an adversary nation and how it could potentially use American personal data in ways that are maybe not in America's national interest or best interest. How do you think about those issues? How do you respond to those issues? And we'd love to hear more about the litigation that your organization is involved in as well.

KATE RUANE, PANELIST: Sure. Really excited to be here. Thank you so much for having me. I want to make a couple of points. I don't have much to add on top of what Professor Newman has already said. But a couple of points in response. I'm really cautious about expanding the concept of national security to include basic consumer privacy regulations. That's just one thing. But let's assume that it is a national security issue. We'll go ahead and do that. I will grant Jamil everything he just said. Everything he just said is a concern, is a legitimate interest for the government to pursue. But that does not absolve the government of having to comport with First Amendment standards when it seeks to address those issues. And from my organization's perspective—I love that we brought up *Lamont* because *Lamont* is about TikTok users. *Lamont* is about TikTok users' ability to use the platform they want to use in order to get the information that they want to get.

I want to also take just one second to say yes, maybe you can go sing and dance on other platforms, but you won't port your audience. You cannot bring the community that you build on TikTok anywhere else. And so, to me, that is a significant First Amendment issue. That is a significant free expression issue that often gets elided, not just by people that talk about it, but also by the courts themselves. Courts don't really take much of a look at that and I wish that they would.

That being said, a couple things about the TikTok law, we're looking at exactly: one, the idea that this is just ownership and we're just trying to change the ownership and that it has nothing to do with speech. We would not care about the owner if we didn't care about the speech. We wouldn't care about it, because it is right there in the justifications for the law. It is data collection, which I grant you is a concern, but it is a concern more broadly than TikTok, as Professor Newman said. It's also a concern about what they're saying to people. It is also a concern about the message that is being delivered. So that, to me, since TikTok is a U.S. organization, triggers First Amendment scrutiny.

Two other main points. The legislation is wildly overinclusive because the speech that we are concerned about on TikTok, that the government is concerned about and pointing to, is vanishingly small when compared to the ocean of speech that occurs on TikTok. And two, it is underinclusive for all the reasons that Professor Newman pointed out, which is that to the extent that we're worried about the data collection and its use by the Chinese Communist Party, not only can China get it from other places, as the national security brief points out, when it points out all of the various ways that China has involuntarily scooped up all of this information. But also, we could do it differently, right? Every other social media company is collecting data on you all, like right now. It's collecting so much data on you just as you sit here at rest and listen to me. They all know that you are sitting here listening to the four of us, probably. And they can basically, in the United States, do whatever they want with that data because we do not have a consumer privacy law. That would be a more narrowly tailored way and a more effective way to address some of the privacy issues that we've talked about here. So, those are just a couple of other points that I wanted to add on top of what has already been said.

MR. RAMAN: That's very helpful. I should say, by the way, we're going to leave at least 15 minutes at the end for audience questions and audience participation. So please start thinking about your questions because we want to make sure our panelists have a chance to engage with that. Professor Jaffer, . . .

MR. JAFFER: Yeah.

MR. RAMAN: I saw your brow was a little bit furrowed.

MR. JAFFER: All the time.

[**AUDIENCE LAUGHTER**]

MR. RAMAN: Maybe not related to this conversation, but in relation to this conversation, I'd love to hear some responses to the First Amendment point, as well as the points that Ms. Ruane has made.

MR. JAFFER: Well, let's talk about the First Amendment point. Let's talk first about TikTok as an entity, right? TikTok U.S. is an American incorporated entity. TikTok U.S. is completely controlled by ByteDance, which is a Chinese corporation. It is one hundred percent owned by ByteDance. TikTok U.S. is not an independent entity with its own First Amendment rights. TikTok's algorithm is not controlled by TikTok U.S. TikTok U.S. has no ownership authority over the algorithm or what's on the platform or the data that's collected. That's a myth. And this idea, somehow, that TikTok U.S. has First Amendment rights because it just does, because ByteDance is not even incorporated in the U.S., is not accurate and I think that's an overstatement.

Let's talk about the individual users of TikTok and their First Amendment rights. You do not have a First Amendment right on a private platform. Tomorrow, if TikTok decided they're going to kick somebody off, thousands or millions of users notwithstanding, you have no right to say: "I have a First Amendment right to stay on TikTok and keep my user base or take my user base with me." So, just the fact that the government might shut TikTok down is just like if TikTok shuts you down, there's no right to be on TikTok. You have a right to be in a public park. You have a right to be on the GMU campus. You have a right to be on public streets. Under the First Amendment, that's a right against the government, not against a private company. There are no free speech rights against private entities. There's no case law

establishing that and the supporters of TikTok cite no case authority whatsoever on that front. So, you might want to be on TikTok. You might love that you built your platform on TikTok. You might love that you have a huge following. That doesn't give you any First Amendment rights whatsoever as against TikTok or as against the U.S. government.

MR. RAMAN: Okay, Jamil, let me just pause right there . . .

MS. RUANE: Wait, I don't think that's true.

MR. JAFFER: Well, okay, so . . .

MS. RUANE: I don't think that's true.

MR. JAFFER: Cite me one case.

MS. RUANE: *Lamont v. Postmaster General.*

MR. JAFFER: Wait, *Lamont* says I, as a speaker, as an individual American, have a First Amendment right on a private platform? That was a case against the Postmaster General.

MR. RAMAN: Okay, let's pause, let's pause, let's pause . . .

MS. RUANE: No, *Lamont* says that I have the right to receive speech from the speakers that I want to . . .

MR. JAFFER: We're talking about the speakers. Let's talk about the speakers, the individual Americans who have that following you talked about on TikTok, the speakers.

MS. RUANE: They're also the receivers of information as well.

Mr. Jaffer: Let's talk about the speakers first.

MS. RUANE: . . . and they're receiving it from other users on TikTok. It is the government creating a law which will restrict their ability to do that. So, your right is against the government for restricting your ability to get speech from where you want to get it from.

MR. JAFFER: So, TikTok can kick you off the platform, correct?

MS. RUANE: Yes, TikTok can . . .

MR. JAFFER: . . . without a First Amendment problem, right?

MS. RUANE: Yeah, TikTok can . . .

MR. JAFFER: Could the government remove you from the platform?

MS. RUANE: No.

MR. JAFFER: Right. Can the government shut the platform down?

MS. RUANE: No . . .

MR. JAFFER: Can the government shut down foreign ownership of radio stations?

MS. RUANE: No.

MR. JAFFER: They do today.

MR. RAMAN: They do.

MS. RUANE: Oh, I'm sorry. You said . . .

MR. JAFFER: The FCC is allowed to . . .

MS. RUANE: . . . you said foreign ownership over—okay— different First Amendment doctrine there entirely.

MR. JAFFER: But why?

MS. RUANE: Because of the scarcity of broadcast spectrum—that is *Red Lion*, which will probably fall next time it goes up to the Supreme Court . . .

MR. JAFFER: But it hasn't yet—still good caselaw.

MS. RUANE: But it doesn't apply—it doesn't apply to the internet. The Supreme Court has clearly said in *Reno v. American Civil Liberties Union* that the scarcity rationale, which permits stronger regulations of speech on broadcast stations, does not apply to the internet, which is where TikTok operates. So, you actually don't get a lower standard of scrutiny for the free—just for saying that particular people cannot own . . .

MR. JAFFER: Well, we haven't tested that yet. That's this case.

MS. RUANE: But you don't get a lower standard of scrutiny.

MR. JAFFER: No, that was the case involving Americans on an American platform. Not as—not as against a foreign-owned corporation and a foreign-owned platform.

MR. RAMAN: That's what I think does make this case *interesting*, is that we are talking about a foreign-owned platform, right?

MR. JAFFER: Right. You can't cite *Reno*.

MR. RAMAN: And so that's where . . .

MS. RUANE: Sure you can.

MR. RAMAN: So, let's dig into this. So, Ms. Ruane, if you could, help our audience understand what *Reno* was about—in general terms—and why it extends, and I'm sure Jamil will disagree, to the, essentially the ability of a foreign-owned app to communicate into the United States, and for American listeners to

then listen and propagate that message accordingly as well.

MS. RUANE: So, in the most basic terms, *Reno v. the American Civil Liberties Union*—and the First Amendment professor [Mr. Newman] should really correct me here if I get *this* wrong—stands for the principle that restrictions on speech on the internet receive strict scrutiny.

MR. RAMAN: This is the child porn case, right? If I recall, the Section 230—

MS. RUANE: It is—it's the . . . It's the Communications Decency Act.

MR. NEWMAN: It's the Communications Decency Act, and Congress enacted regulations that basically said if you're going to show—It was to try to prevent, you know, internet websites from, you know, showing adult material to minors.

MR. RAMAN: Right.

MR. NEWMAN: And so it requires you to have various safeguards . . .

MR. JAFFER: Click-throughs, verifications . . .

MR. NEWMAN: You know, you had to prove a kind of stuff that's still sort of being argued about. But it would require users, even adult users who were allowed to access the material, to provide information, you know, to provide identification and various things. And the Supreme Court said that that was impermissible because it *burdened*—even though it might be a valid concern to keep certain material out of the hands of children—you can't do that by burdening the speech of all the adults and their ability to access it.

MS. RUANE: And you couldn't—one of the prohibitions was, you couldn't transmit indecent speech when minors might be in the audience, which is one of the restrictions that is applicable and

constitutional as applied to broadcast stations and as applied to broadcast radio and television. So one of the main questions was: can we, can we also have these prohibitions as applied to the internet? And the Supreme Court said no. You do not get intermediate scrutiny here because you do not have the scarcity rationale that supports that supports it on broadcast, and so you have to survive strict scrutiny. And the other important thing there is that restriction, it isn't just about sending emails to minors that contain indecent content. It's about the mere publication of things that might be interpreted to be indecent. So, like, you know, Netflix would have some trouble existing if this law could have been in effect.

MR. RAMAN: Now, can we get back to the national security rationale? Because everything you said so far, Ms. Ruane, makes sense under traditional First Amendment doctrine. But the issue in *Reno*, as I understand it, really didn't have to do with potential national security issues.

MR. JAFFER: There were no foreign ownerships, no national security issues raised . . .

MR. RAMAN: Correct . . .

MR. JAFFER: [It was] solely about whether minors might get access to pornographic material.

MR. RAMAN: So, Professor Jaffer's position is one who would say *Reno* does not go so far, this is a different paradigm, and this is legislative activity; there's no First Amendment problem. Help me understand, Professor Newman . . .

MR. NEWMAN: Well, it is not like national security gets you get-out-of-the-First-Amendment-free card, right? And you know the key case, we can all cite for that, obviously the Pentagon Papers case, right? In which, I would think, if anything, the claims of national security harm from the publication of the Pentagon Papers were far more concrete than the ones being alleged here, which seem very prospective and speculative. And actually—and I don't

want to downplay them—I want to understand them better. I'd like to hear from Jamil, actually. So, on the data collection front. So, we're talking about data like where my location is at various times. What does TikTok know about me? It knows that I watch Taylor Swift videos and that I'm in certain locations at certain times and I like certain things and—Help me understand the cataclysmic parade of horribles: China gets this personal information about me, it puts it together with other information, and "come the revolution." What's the middle step there?

MR. JAFFER: So, a variety of things. One, it has your location; it has every other TikTok user's location, 170 million Americans. So, it knows where you are relative to *every other user* of TikTok . . .

MR. RAMAN: But, Jamil, the user consented to that, according to some of what we've heard before.

MR. JAFFER: There's a lot of evidence to suggest that TikTok collects more data than what users consent to, including turning on microphones when they're not authorized to do so, right.? But it has information about where you are, when you are, who you're next and where you are at three in the morning, who you're with at three in the morning—because if they have TikTok on their phone, they know you guys are in the same place together—they know who you are sharing your data with, they know who you're sharing your TikTok videos with. They combine that with your travel records, your Marriot hotel reservations, your airline records, your credit card statements, all the information you gave about your family, your friends, your neighbors, everywhere you've ever been, when you got your security clearance, right? All that combines, and now they know nearly everything about you. And the fact that American companies might know that much about you, that you allow Facebook or Google or anybody else to know that about you, is immaterial because you're not letting just ByteDance know, you're giving that information to the Chinese Communist Party because ByteDance has an obligation under Chinese law and does, in fact, because the Chinese Communist Party has a cell that runs ByteDance and it's present as they collect data on Americans that oversees all of that. So, you're not just giving it to anybody, you're

not just giving it to an American private corporation and the American government if it complies with the Fourth Amendment and goes to a federal court and obtains an order. You're giving it to the Chinese Communist Party directly and allowing them full, open run over all that data. *That's* the fundamental problem.

MR. NEWMAN: But everything you've just described sounds like potentially *I* should care about it because it's a violation of my privacy, maybe, but where's the national security angle?

MR. JAFFER: That information allows the Chinese government to decide how it might collect, now that it knows all about you—it knows about all your vulnerabilities, when you're at the psychologist, when you're at the psychiatrist—how it's going to target you for intelligence collection. How might it come after you and pressure you to give up classified information that you have from the U.S. government. It knows you're not sleeping with your wife at 3 a.m. because you're at somebody else's house next to the other person with TikTok. It knows that you share a lot of data with that other individual—

MR. NEWMAN: Shh—my wife's actually here, so keep that down.

[AUDIENCE LAUGHTER]

MR. JAFFER: Not *you* personally, you know, my point is that there's a variety of technological capabilities that gives you—you run AI over this, and now you've developed a profile on a huge number of Americans, including a number of people who work in the national security community, including government officials, including the like. And by the way, the shaping of information we're talking about on the other side, since we know that TikTok itself doesn't have any First Amendment rights, now, say the fact that they create a U.S. shell company that has *no* actual authority and *no* actual control of the platform itself, right?

They also shape the messages that are coming out. We just saw that with the [Osama] bin Laden letter, right? There were a

handful of Americans who created videos saying that Osama bin Laden's letter to America in the aftermath of October 7th was a *revelation* to them and how it really demonstrated that the U.S. government was corrupt and horrible and terrible. And TikTok amplified that video, for days on end amplified that video because the algorithm drove that messaging. At the same time, it was de-amplifying information about Tibet, about Taiwan, and about the oppression of Muslims in the Xinjiang province. Why? Because those are the goals of the Chinese Communist Party. That's what happens when you have a CCP cell that runs the company.

That's happening at a time when TikTok is the predominant source of news for Americans under the age of thirty. The *predominant* source of news. Forget radio broadcast. Forget *The New York Times*. It's TikTok. By the way, let me just take a poll. How many people in this room think that when you hear there's a thirty percent chance of rain today, that means that in the area in which you're talking about, thirty percent of it will have rain? How people think that? Raise your hand if you think that. Raise your hand high, high, high, so I can see it.

[SOME AUDIENCE MEMBERS RAISE THEIR HANDS]

MR. JAFFER: OK. And how many of you think that there's a thirty percent chance that somewhere in the area, rain will fall? Raise your hand up high.

[SOME AUDIENCE MEMBERS RAISE THEIR HANDS]

MR. JAFFER: About half and half. The second answer is the correct answer. The first answer is because those of you either saw it on TikTok or heard about it from a friend who saw it on TikTok.

[AUDIENCE LAUGHTER]

MR. JAFFER: That is incorrect information passed on to you through—I mean, now that wasn't intentional by the Chinese government, but it demonstrates the impact it can have in a well-educated, well-informed audience.

MR. RAMAN: Right, let me add another example to Professor Jaffer's, which is when this legislation was pending, TikTok actually launched a . . .

MR. JAFFER: Lobbied—170 million Americans!

MR. RAMAN: . . . a lobbying effort to essentially encourage its users to oppose the legislation. Failed. But, I think we can start to see how, if the Chinese government—if, in fact, it . . . has the ability to control the app, which then [means it is] able to control or throttle messages up or down, you can start to see, perhaps, how there might be a significant national security concern. This is American legislation that a foreign government is essentially trying to weaponize Americans to either support or not support. I'm curious, Ms. Ruane—not a hypothetical, that's actually what happened—how would you respond to that?

MS. RUANE: Couple things. I don't concede that TikTok U.S. has no First Amendment rights. It does; it is in court right now defending them. And so, the First Amendment does apply to this legislation. In terms of TikTok's choice to ask its users to lobby against the bill, that's grassroots advocacy that everybody in the United States gets to do and is First Amendment protected. Now, as a lobbyist, when I saw that, I thought, "Oh God, why?" . . . I was against the bill, and I saw that [it was] not going to help the cause, at all. People make lobbying mistakes all the time. As a tactic, it was a bad one. But in terms of whether they could do it under the First Amendment, yes, they could. And it is something that we actually encourage people to do. Like if you want to take a position about a piece of legislation, we often tell you: "Please tell your friends. Have your friends call their representatives." That is, straight up, the right to petition.

MR. RAMAN: But if you buy my premise, or some of the panelists' premise, that . . .

MR. RUANE: I think I already said that I kind of don't.

MR. RAMAN: My point, though, is that—let's say this really

was a directive from the Chinese Communist Party, right? And they essentially order the people in Beijing who oversee ByteDance: "We need to oppose this legislation." And if that is, in fact, then communicated into the app and sort of how messages are, you know, passed along within the app and then, you know, [the] corporate entity takes a formal position, do you see any concerns there?

MS. RUANE: I mean, I guess I trust the people of the United States to take in information and use it. And . . .

MR. JAFFER: You just saw it right here! They took [in information and] half . . . the audience is wrong about what it means for thirty percent chance of rain.

[AUDIENCE LAUGHTER]

MS. RUANE: So?

MR. JAFFER: Because TikTok told them it was . . .

MS. RUANE: You were also wrong about the First Amendment doctrine, just a few minutes ago. People get things wrong all the time.

MR. JAFFER: I'm not wrong about the First Amendment doctrine. In fact, we're going to find out in this case that I'm not actually wrong about the First Amendment doctrine. TikTok is going to lose this litigation, in a big way.

MR. NEWMAN: [Does this apply to all] of social media? I mean, if you're worried about people getting misinformation, I'm trying . . .

MR. JAFFER: No. I'm just worried about misinformation from the Chinese Communist Party.

MR. RAMAN: Right. Propaganda as opposed to misinformation, right?

MR. NEWMAN: Right . . .

MR. RAMAN: It's their government.

MR. NEWMAN: But I mean, so I'm trying to understand . . . How do you distinguish what's going on *Lamont*? To the extent that you're solely focused on the fear that China will use this tool . . .

MR. JAFFER: But I'm not so focused on that, that's the thing.

MR. NEWMAN: I understand, but . . .

MR. JAFFER: I'm not.

[AUDIENCE LAUGHTER]

MR. NEWMAN: OK, but . . . I'm trying to understand is that you want to say that . . . we shouldn't even regard [TikTok USA] as a separate entity.

MR. JAFFER: It's not.

MR. NEWMAN: Well, is there an argument being made to that effect? . . . Would you literally say that we can . . . pierce the corporate veil because of hostile foreign ownership?

MR. JAFFER: Absolutely.

MR. NEWMAN: I haven't seen in any of the briefs. Is anybody saying that literally this is not . . .

MR. JAFFER: Yes

MR. NEWMAN: . . . a legitimate, separate U.S. entity?

MR. JAFFER: I think the U.S. government's position is that TikTok USA does not have First Amendment rights because it is owned and operated by ByteDance, which is owned and operated by the Chinese Communist Party, or is a functional proxy beholden to the Chinse Communist Party. But, yes.

MR. NEWMAN: So, what would you say to my hypothetical: Let's assume that we severed all actual corporate control. Would you still allow the separate American entity to send data to ByteDance and use their algorithm through a contractual agreement?

MR. JAFFER: Actually the statute would require them to divest. What happens after that divestiture is a different question. The statute only requires divestiture.

MR. NEWMAN: But I'm saying, would that in any sense respond . . .

MR. JAFFER: That's a different case . . .

MR. NEWMAN: . . . . to the concerns that you have?

MR. JAFFER: That's a different case, right? The question here—all the legislation, in fact, does exactly what you're saying, which is sever all corporate ties. If you sever all corporate ties, TikTok can continue to function. It is not a TikTok ban. TikTok can remain functioning and continue to operate so long as it severs all corporate ties. Now, whether a future contract sends data back or not; different question, not currently presented in the litigation. And not the subject of the statute.

MR. NEWMAN: No, I understand. But I'm trying to think through the practicalities of why—why is TikTok saying . . . .

MR. JAFFER: I don't know what I think about that case. That's a great question. I'm not sure.

MR. NEWMAN: I don't see how it would address any of the concerns.

MR. JAFFER: It's the direction of control over the algorithm, right?

MR. RAMAN: And to dig a little deeper—we've got about 15 minutes left so I do want to leave time for questions—but I will say just to respond to Professor Newman's question: TikTok has actually proposed the idea that they would store all user data in the United States. They call it Project Texas—you can look it up—with Oracle or one of the other U.S. based companies. I think then, if you sever the relationship between the U.S. entity and where the data is stored, from the Chinese government, then you're dealing with just normal access to data issues which—you know . . .

MR. JAFFER: The government has said they would consider Project Texas if you would sever algorithmic control.

MR. RAMAN: Right.

MR. JAFFER: TikTok won't do it.

MR. RAMAN: Right.

MR. JAFFER: Why? Because they want to control the algorithm as the primary news source for all Americans under the age of thirty.

MR. RAMAN: Right.

MR. JAFFER: That's why.

MR. RAMAN: Right.

MR. JAFFER: They won't give up the algorithm because it's not about money for them. TikTok is not a money-making entity for the Chinese government. It is a propaganda arm and a collection tool.

MR. RAMAN: Right.

MR. JAFFER: Period. Full stop.

MR. RAMAN: Before we turn it over to the audience—by the way, I think we have lots of potential paper topics for people who are sitting in the audience—I'm going to push Professor Jaffer for a little bit now. Critics—I don't want to speak for Ms. Ruane—but critics have observed that the TikTok ban, or the legislation, essentially borrows from the Chinese playbook, right? It represents a remarkable reversal of long standing U.S. policy towards the internet, including on possible compelled intellectual property transfer—which is not a really American idea, it's very Chinese idea, not an American idea; the compelled disclosure of source code, which is kind of what's happening here—Chinese idea, not an American idea; foreign investment only via a joint venture with a domestic partner—which is also kind of a Chinese idea, not American idea; data localization—which for people who are kind of knowledgeable about internet governance, you know, America has always opposed the idea of data localization and yet here we are kind of pushing for it; and then a great sort of firewall against foreign apps—very much a Chinese concept, not an American concept. So, in your view, is this legislation consistent with how America has always thought about open expression, free flow of ideas, et cetera? Or are we just in an age where things are just different? I'm just curious about how you would respond to that and then we should get to the audience.

MR. JAFFER: Yeah, I think it's a little bit of both. I think one, I think it's consistent with long standing American regulation of foreign ownership of sources coming to Americans, right. So we don't allow you to buy a radio station. And the modern era is TikTok is the new radio. It's the new TV. It's the new methodology by which people communicate with one another and the way that foreign governments communicate with Americans, right? That's what it is, right?

And, this is the case where it's not like Pravda. I get to read Pravda. This is, I want to hear from my friends who have thoughts but all their thoughts are shaped by how the Chinese government decides I'm going to hear those thoughts. And that's the fundamental problem. I'm not on TikTok because I want to hear

from the Chinese Government or I want Chinese propaganda. I'm on TikTok because I want to hear from my friends. It just turns out that with, I'm getting a little Chinese propaganda alongside it that's shifting all that view and making me think that thirty percent of rain means this or that Osama Bin Laden is a hero and a great world leader, right? Or that Tibet is not a problem or that Taiwan is really part of China, right? All those messages that I wouldn't otherwise hear from my friends, but now they're being prioritized at the top of my feed because that's what the Chinese Communist Party wants. So that's number one. It's not a fundamental shift in U.S. philosophy. It's just the realities of the modern era today.

MR. RAMAN: Interesting. OK. That's very interesting. Any response Ms. Ruane? And then I want to turn it over the audience.

MS. RUANE: I mean, I think that Jamil's answer just demonstrated that this is actually about speech and it is about the messages that you are able to receive—however you want them to be received. And so the First Amendment applies and that means we need (a) evidence that that's what's really happening and then (b) we need to know that this is narrowly tailored to address a particular problem. And as far as I know in First Amendment doctrine, that's not enough, like speculation isn't enough. You have to show exactly what is happening and then you have to show exactly how what you have done will address the problem. And I don't think the government can do that. Now, TikTok, you're right, may lose this case. But I am not sure that if it does, it will actually comport with previous First Amendment doctrine.

MR. RAMAN: Any final thoughts, Professor? OK. All right. Well, there is so much on the table. I think we have a microphone and I'll leave it to our organizers here. I would love it if folks maybe say their name before they start and maybe what year they are?

AUDIENCE MEMBER: Thank you all for being here. My name is Cheyenne, I'm a 3L. Particularly we've discussed a lot of the national security issues as well as the First Amendment issues in this case. But I was curious about what the opinion on the Creators Fund is for TikTok users in terms of individual rights for them to

have businesses and how that would be impacted depending on what the output litigation is? I was hoping you all could speak on that.

MS. RUANE: Did you . . .

MR. NEWMAN: Impact on what?

MS. RUANE: The creators, on TikTok . . .

MR. JAFFER: Business, they built a business on TikTok. Their property right.

MR. NEWMAN: Well, yeah, I mean obviously it's going to be a devastating impact to anybody who has built up a business using TikTok, based on TikTok, to disseminate information—which is true of people, who influencers whether you're on Instagram, YouTube, or whatever. Now, I wanted to respond briefly, I mean because what Jamil said before, it's true that as a private party, if you're, you know, you're a private citizen and you're dealing with a private platform, it's true that you don't have any First Amendment rights vis a vis the private platform because they're not a state actor. But of course, what we're talking about here is state action, it's the state coming in and shutting down a particular platform. So I'm not sure—if you're just asking about what the practical effect is on users I take it you can either say, well, too bad, go find a different platform because there are other platforms out there. And that's true. But of course, it's not that—I mean, if you're somebody who is invested in a particular user base, followers, and everything, that's, you know, that's a huge devastating blow.

Now, you might say it's imprudent. In fact, as a general, I would say it's, it's highly imprudent to build up, invest a lot in a business model that depends crucially on your access to a given platform unless you've got a very strong contractual relationship with that platform that requires them to protect it because usually that's not the case, right? YouTube can demonetize you and you know, Instagram can shut you down. So if you're an influencer, you know that, but that's, I don't, I think that's sort of a broader issue

than this particular case, right?

MS. RUANE: I don't know that I have much to add. I don't know if that's a takings question, but I don't know anything about that. So I won't expound on it. I will say that I did do—I have talked to a lot of creators and in anticipation of this, like as the legislation was moving through, they all started diversifying. They all started figuring out how to take their content and move it to other platforms and build audiences on other platforms because they recognize the practicalities of it. That being said, they were having trouble doing that. Because the way the different algorithms work. They, work differently, they respond to different content, you build audiences differently on different platforms. I think that the consequences could be pretty significant for those folks, but I don't know and have not really seen that they would have a legal remedy against the government for having banned their access to a particular platform. That being said, that's one of the reasons that the Supreme Court is so skeptical of restrictions on intermediaries ability to continue to distribute speech.

MS. DEPOTO: Next question . . .

AUDIENCE MEMBER: Hi, thanks for speaking with us today. My name is Emma. I'm a 2L. So if we accept the argument that the First Amendment rights here and the national security concerns here are both of equal weight, is there some argument to be made that national security will always be more important? At least in this sort of situation given the geopolitical context? Or that some level of deference should be given to the government's pursuance of some national security objective.

MS. RUANE: I think we're about to find. I don't have—I actually don't have a good answer to that question.

MR. JAFFER: I actually think to the contrary. If they're of equal weight, I actually—the First Amendment trumps, right? I think *The New York Times* suggests . . .

MS. RUANE & MR. NEWMAN: Yeah

MR. JAFFER: . . . that if they're of equal weight that the First Amendment is going to control. I just don't think they're equal weight. Right? My view is the national security arguments are significantly more impactful. And you can see it in what we know the TikTok influencers are doing. They're pivoting to other platforms because building your follower base on a Chinese owned and operated platform is probably (a) a bad idea but (b) particularly if the government's going to be concerned about it, right? And there are a million different outlets, right? The fact of the matter is that it's not like there's one or two or a handful of radio stations or a handful of broadcast channels or a handful of whatever. There are infinite ways you can get your story out to American users who want to receive your content that are not TikTok. You don't need to have access to a private, Chinese run platform.

MR. NEWMAN: You know, it's kind of interesting, there's a little bit of inconsistency though here, I think in the sense of here we are in this context saying no big deal, go find another platform. Of course, a lot of the same people who are pushing this legislation are the ones who are in the Moody legislation—the one about, you know, when Texas and Florida tried to regulate and impose political non-discrimination norms on social media platforms—all of a sudden there, they're like: "No, no, no, it's a, it's a de facto monopoly, it's a common carrier, it's irreplaceable, we have to be able to regulate"—you know so . . .

MR. JAFFER: They were wrong too, by the way.

MR. NEWMAN: OK [laughs]

MR. JAFFER: They were also wrong. I'm not on that side of that debate, but I will agree—I will grant you that the supporters who share those two points of view are at war internally. Yes, I agree with that.

MS. RUANE: I don't think I have anything else to add.

AUDIENCE MEMBER: On that—can you explain a little bit more of the legal basis for the argument that you either have or don't

have a right to be on TikTok as American?

MS. RUANE: So you don't have a right to be on TikTok . . .

AUDIENCE MEMBER: —or a right to access information on TikTok.

MS. RUANE: So you have a right not to be blocked by the government from accessing information you want to access. So you have a right as a receiver of information not to have the government tell you where you can and can't get your information. As with everything, all restrictions on the right to receive information or the right to speak itself must survive First Amendment scrutiny, some level of First Amendment scrutiny. So there are some that can survive, like the strict scrutiny that I think should be applied here. So for example, my organization argues that this is a prior restraint which receives the highest degree of First Amendment scrutiny. That being said the Court—the Supreme Court—has been very clear that there are circumstances in which specific information can be blocked from publication. It's in the Pentagon Papers Case itself where they say, you know, we can imagine there are—if a newspaper knew about troop locations and wanted to publish it, we can imagine the government coming in and saying "no, you can't do that" and that being enforceable. That being said, the Pentagon Papers got published. And the Court was very clear that even when asserting national security justifications to restrict speech, even when those concerns are legitimate and real, the government nonetheless needs to demonstrate that its method of addressing its concerns are narrowly tailored to do so. And I don't think we've done that here.

AUDIENCE MEMBER: So does it matter that in that case, *The New York Times*—or whatever the newspaper was—wasn't controlled by China?

MS. RUANE: I—possibly it does.

MR. NEWMAN: I mean, all we're talking about here is how much weight does a certain national security interest have in trying to satisfy whatever level of scrutiny you think applies. I think that's the point, right?

MS. RUANE: Yeah, and if the . . .

MR. NEWMAN: And so we don't have that. And I think the interesting thing about the Pentagon Papers Case as a data point is— so it was a prior restraint case. And there's arguments about whether this is a prior restraint. But I think you can say that it is because basically the government is saying "as a prerequisite to you being allowed to speak in this country, you have to do these fairly onerous things," right? Which arguably puts it in the realm of prior restraint.

MR. JAFFER: Wait, who's the speaker?

MR. NEWMAN: Huh?

MR. JAFFER: Who's the speaker that's being restrained?

MR. NEWMAN: TikTok

MS. RUANE: TikTok U.S.

MR. NEWMAN: TikTok U.S. Now you want to say that that's not a separate entity. And I, you know, that's an interesting argument. And I think for the, you know, the way that this case is charged right now, TikTok is a separate U.S. entity. You want to argue that it's literally not. That would be an interesting argument.

But then, you know, if you go back to the Pentagon Papers case, right, the people on the Court, it was a very fractured opinion. But, you know, Justice Brennan said, look, if you're talking about, you know, imminent destruction like "I'm broadcasting troop movements, I'm going to give away the plans for D-Day two days before it happens"—they were looking at that and they were asking for something of that level of immediate catastrophic harm that could be demonstrated. And you know everything that Jamil said, it's

disturbing but it seems much more nebulous and prospective and speculative than that. It's like, okay, maybe they'll put together all of this social media information about me that is available from a hundred other sources. But you know, it'll make it a little bit easier for the Chinese government to do that if they want to target me with PSYOPs or something or maybe find something to blackmail me on, as though I had any information of use to them. I mean, but then the question is all right, is it really necessary to shut down this whole platform for that purpose or can you have more tailored rules? For example, you know, we don't let people who work for the government and government contractors have TikTok on their phones for this reason. Investigative journalists find out and figure it out, "not going to have TikTok on my phone for this reason." So does anybody care about Chinese government mapping out my friendship network? I mean, maybe, but I have a hard time getting from there to this is like we're going to sink a troop transport because we gave away information. And that's sort of the level of harm that you need, or at least as far as we know now, that you need in order to do something like a prior restraint.

MS. RUANE: Yeah, I mean, I think the question of like is there a big difference in that, like TikTok is ultimately owned by a Chinese company that is subject to Chinese laws. That is definitely an interest that the government will consider. But as Professor Newman was saying, they're going to look at whether the response to addressing that interest is properly tailored to ensure that free expression rights and First Amendment rights are sufficiently protected and narrowly circumscribed. And in this circumstance, I am not sure that it is. It just doesn't strike me that an entire ban to a speech platform is narrowly tailored to address particularized and non-speculative harms.

MR. RAMAN: We're coming up on time. I don't know if there's any more questions in the audience.

MS. DEPOTO: We'll take one more in person, and we have one online.

AUDIENCE MEMBER: Hey, I'm Tate and I'm a 2L. I have a question regarding sort of the divide of speech here. Because it seems to me we're dealing with two types of speech, we're dealing with the, the algorithm itself and then we're dealing with the content which is largely generated by American users. And when we're talking about TikTok being a platform that promotes, "Chinese propaganda." One of my questions from a legal perspective and a national security perspective is how much does the algorithm, or getting rid of the algorithm, actually deal with the root cause here? Because it seems to me, like unless this algorithm involves people like hand picking and hand curating content with the pro-Chinese slant to be on the front page, what's actually happening is that we have a predominantly female audience on TikTok who's already magnetized largely towards the Left and that when their passions are in play, they react to content. And that leads to this sort of, whether rightly or wrongly, to call it such, but this sort of post-colonial anti-American sentiment content being propounded and propounded. How much of that is an aberration in TikTok's algorithm as compared to YouTube's algorithm, which has been accused of sending young men down right-wing rabbit holes. Or other algorithms like Tumblr's algorithm, which is another primarily female audience with similar left-leaning sort of neo-Marxist persuasions. I just struggle to see talking about the algorithm versus the content, how much of the algorithm itself, accepting that that is unprotected speech, is actually the threat here.

MR. JAFFER: I mean, there's so much to say to that. One, I don't know whether the premise is accurate factually, or normatively, but putting that aside, right, what we do know is that the platform regularly, the algorithm regularly suppresses content that is contrary to the Chinese Communist Party view. Content about what's happening with the Uyghurs in Xinjiang, what's happening in Tibet, what's happening in Taiwan. And that is not driven by, if we take your proposition at face value—which I don't think is actually accurate—about this audience that is liberal or whatever it is, or whatever gender balance it is, right. They want to get that content, but they don't get it because the algorithm doesn't allow them to because the algorithm is influenced by the Chinese Communist

Party. So I think that's number one. But number two is would that we knew what the algorithm did but that we can't and won't because the Chinese government won't put the algorithm in the United States, won't give TikTok U.S., "the independent U.S. entity that was incorporated in Texas," right, any authority of the algorithm because they don't want us to see it. They don't want that entity to have it; they don't want an independent American run entity to have that authority because they want to control that content. So it's not the audience that's driving it. The audience does drive a lot of content: drives Instagram content, drives YouTube content. It does not drive TikTok content. That is driven by one entity—the Chinese Communist Party.

MR. NEWMAN: I mean, I think you're right to some extent that the algorithm is a red herring. I mean the algorithm is what makes TikTok as valuable as it is because that's what gives people the feeds that keep them scrolling, okay. And I think you're probably right that much of the content that a lot of lawmakers are upset about probably is organically driven by, you know, dynamics similar to the ones that you're describing. But what Jamil is saying is also true. It's not that they're sitting there, hand managing everything the algorithm does. It's that whenever they want to, and this is true of all the social media platforms, right, they have an algorithm that is automated and is primarily geared towards keeping eyeballs and making revenue. That's its main function. But they also have this ability to take a certain video and either suppress it or promote it. And so, I think the fear is they will do that strategically when it's useful to them. And they probably know, you know, there may be circumstances when they have. Again, but that just leads you to the point that, well, if they were writing their own, I mean, they're allowed, or at least Americans are allowed, to choose to consume sources of news that are curated in the editorial voice of a foreign power if they want to.

I agree with you that it's not so much the algorithm as the control. Where the algorithm seems to be playing a big role in this is that there's this claim, "who controls the algorithm." Apparently, it is run on computers that are situated in China and the Chinese won't

let it be exported. So, the role that the algorithm plays seems to be mainly playing a role in this practical question of whether divestment is feasible. Practically, whether it's tantamount to shut down; it seems to be, in those debates. Because you're right, what we're really concerned about in propaganda is the hands-on choosing to promote things, which I think is sort of an intervention into the algorithm, it's not the algorithm itself.

MS. RUANE: One interesting thing to think about here is that, everything that Jamil just noted about suppression of content that the Chinese Communist Party doesn't like, that's in contradiction to international human rights law. And international human rights like principles of free expression, and . . . one of the instruments that could be used to address some of that globally is the Digital Services Act, for example. Which places international human rights obligations onto platforms. TikTok, for example, is a VLOP [Very Large Online Platform] under the DSA and so it has to engage in disclosures. It has to engage in impact assessments. It has to engage in audits. These are all going to be really interesting things from my perspective to see because we might get some answers to some of those questions. Like, the idea that the Chinese Communist Party is using TikTok to suppress content that it does not like. You know, Mark Zuckerberg does the same thing; Elon Musk is doing the same thing. Those are things that, like, you're not supposed to do if you are, as you might claim, comporting with international human rights law which requires censorship to be necessary, proportionate, and legal, under the platform's published standards. And I don't know that there is a TikTok standard, a published TikTok standard, which says "we suppress content that the CCP doesn't like."

MR. RAMAN: I know we're coming up on time. I hope that's okay, we'll wrap it up. I don't want to put . . .

MR. NEWMAN: We had an online question, right?

MR. RAMAN: Oh, we do actually.

MS. DEPOTO: Actually, this last question was very similar to the online question, so it worked out very well.

MR. RAMAN: Well done. I don't, certainly as a moderator, want to put a thumb on the scale. But I am going to read one last thing at the end. And this is a quote from Tim Wu who many of you know is a professor at Columbia, had a very influential role in the Biden Administration. So not, you know, not on Jamil's side of the house necessarily . . .

MR. JAFFER: I am on the side of freedom, and the American flag.

MR. RAMAN: Well, you and Professor Wu might end up on the same side on this one because it's really interesting . . .

MR. JAFFER: That would be unusual, for the record.

MR. RAMAN: I think it's a little bit of a response to the last point that was made. So Tim Wu, writing in 2020, during the Trump TikTok litigation: "For many years, laboring under the vain expectation that China succumbing to inexorable world-historical forces, would become more like us, Western democracies have allowed China to exploit the situation. We have accepted, with only muted complaints, Chinese censorship and blocking of content from abroad while allowing Chinese companies to explore and exploit whatever market it likes. Few foreign companies are allowed to reach Chinese citizens with ideas or services . . ."—quarry, how that comports with some of the international human rights issues you were talking about—" . . . but the world is fully open to China's online companies. From China's perspective, the asymmetry has been a bonanza that has served economic as well as political goals . . . Some think that it is a tragic mistake for the United States to violate the principles of internet openness that were pioneered in this country. But there is also such a thing as being a sucker. If China refuses to follow the rules of open internet, why continue to give it access to internet markets around the world?"

Not intended to be the final thought . . .

MR. JAFFER: But it is going to be.

MR. RAMAN: . . . but I leave each of you with that idea and we'll say thank you for attending today. And to all of our panelists, of course. Thank you very much.

[AUDIENCE APPLAUSE]