

No. 24-34

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

SAMANTHA ALARIO, HEATHER DIROCCO, CARLY ANN GODDARD,
ALICE HELD, and DALE STOUT,

Plaintiffs-Appellees,

and

TIKTOK INC.,

Consolidated Plaintiff-Appellee,

v.

AUSTIN KNUDSEN, in his official capacity as Attorney General
of the State of Montana,

Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Montana
Case Nos. 9:23-CV-00056-DWM, 9:23-CV-00061-DWM
The Honorable Donald W. Molloy

**BRIEF OF AMICI CURIAE COMMONWEALTH OF VIRGINIA
AND 18 OTHER STATES SUPPORTING
DEFENDANT-APPELLANT AND REVERSAL**

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INTRODUCTION AND INTERESTS OF AMICI CURIAE

Amici curiae are the Commonwealth of Virginia and Eighteen Other States (collectively, *Amici States*). *Amici States* have a compelling interest in this case. The States' police power has always included the power to protect their citizens from deceptive and harmful business practices. Montana's SB419 is an ordinary exercise of that power. SB419 is justified because Montana justly concluded that TikTok engages in deceptive business practices which induce individuals to share sensitive personal information that can be easily accessed by the Chinese Communist Party, and because TikTok's platform harms children in Montana. Federal law does not bar the States from protecting their citizens from such conduct. The district court's erroneous decision should be reversed because it misapprehends the nature of the problem Montana (and other States, including *amici*) face, and misapplies the First Amendment. Accordingly, *Amici States* file this brief in support of Defendant-Appellant under Federal Rule of Appellate Procedure 29(a)(2).

BACKGROUND

TikTok—a social media platform that hosts and promotes short videos created and uploaded by users—has changed the social media landscape. Last year, TikTok was the second most downloaded mobile application worldwide, generating 654 million downloads over the course of the year.¹ As of January, the United States had the world’s largest TikTok audience, with approximately 150 million users on the platform.² Significantly, TikTok has established itself as one of the top online platforms for U.S. teens aged thirteen to seventeen.³ About 63% of U.S. teens in that age range use the app, with 17% describing their TikTok use as “almost constant.”⁴ TikTok’s hold on users—particularly children—is palpable.

¹ D. Curry, *Most Popular Apps (2024)*, Business of Apps (Jan. 30, 2024), <http://tinyurl.com/yrbmb6v4>.

² *Countries with the largest TikTok audience as of January 2024*, statista (Feb. 1, 2024), <http://tinyurl.com/2ufbzerr>.

³ M. Anderson, M. Faverio, & J. Gottfried, *Teens, Social Media and Technology 2023*, Pew Research Center (Dec. 11, 2023), <http://tinyurl.com/4y86xjzn>.

⁴ *Ibid.*

TikTok aggressively acquires the personal data of its users. Like other social media sites, TikTok’s service depends on learning users’ preferences and using that information to serve targeted content to further engage users.⁵ To do so, TikTok collects sensitive information on each user; as each user scrolls through TikTok, the app gathers that user’s interests, locations, type of phone used, apps downloaded, contacts, content created, facial features, voice prints, and even “where [their] eyes are looking on [their] phone[s].”⁶

Moreover, like other social media sites, TikTok is addictive. Public health studies have revealed the addictive nature of TikTok and outlined consequences of that addiction, “particularly in transitional-age youths

⁵ *E.g.*, D. Nield, *All the Ways Facebook Tracks You—and How to Limit it*, Wired (Jan. 12, 2020), <https://tinyurl.com/yc7jfccb>.

⁶ A. Thomas, *Cotton issues TikTok warning, cites national security concerns*, N.W. Ark. Democrat Gazette (Nov. 22, 2022), <https://tinyurl.com/2kdhxejc>; see also S. Perez, *TikTok just gave itself permission to collect biometric data on US users, including “faceprints and voiceprints,”* TechCrunch (June 3, 2021), <https://tinyurl.com/5n7y2mrw>.

and adolescents.”⁷ Frequent social media site visits, for example, “have been associated with higher odds of depression among U.S. individuals between the ages of 19 and 32.”⁸ A relationship exists “between increased use of social media and heightened levels of anxiety” as well as “[a]ssociations between social media use and poor sleep and unhealthy eating habits.”⁹ Indeed, “it appears that structural and contextual aspects of TikTok ... are greater contributors to addiction” than are the “dispositional attributes of users.”¹⁰

But TikTok does more than merely acquire user data in order to hook its users. As the Montana legislature found, “TikTok gathers significant information from its users, accessing data against their will to share with the People’s Republic of China.” See ER-63. This “stealing of information and data from users and [TikTok’s] ability to share that data with the Chinese Communist Party unacceptably infringes on”

⁷ BUJPH, *What Makes TikTok so Addictive?: An Analysis of the Mechanisms Underlying the World’s Latest Social Media Craze*, Brown Undergraduate J. of Pub. Health (Dec. 13, 2021), <https://tinyurl.com/4fp3ymkb>.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

citizens' right to privacy. ER-63, 64. TikTok's continued operation, therefore, "serves as a valuable tool to the People's Republic of China to conduct corporate and international espionage [] and may allow the People's Republic of China to track the real-time locations of public officials, journalists, and other individuals adverse to the Chinese Communist Party's interests." ER-64.

Further, TikTok "may even promote[] dangerous content that directs minors to engage in dangerous activities." ER-63. These dangerous activities include, among others, "throwing objects at moving automobiles," "pouring hot wax on a user's face," and "smearing human feces on toddlers." ER-63. TikTok's "promotion of dangerous challenges threatens the health and safety" of Americans. ER-64.

Confronted with these grave privacy and public safety concerns, Montana enacted SB419 to prohibit the use of a dangerous product unless that product were altered to remedy the concerns underlying the legislation. Plaintiffs—users of TikTok and the company itself—asked the district court to disregard TikTok's grave conduct and preliminarily enjoin SB419. The district court obliged, holding that the plaintiffs had shown a likelihood of success on, among others, their free speech and

foreign affairs field preemption claims, and that they had demonstrated irreparable harm and the balance of the equities weighed in their favor. See ER-33, 41, 49–50. Because those conclusions were erroneous, this Court should reverse.

ARGUMENT

I. SB419 fits comfortably within the States’ historic police powers

It is a principle of federalism that “each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Thus, consumer-protection laws “fall in an area that is traditionally within the state’s police powers to protect its own citizens.” *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011); see also *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (describing unfair business practices as “an area traditionally regulated by the States”); *Sukumar v. Nautilus, Inc.*, 829 F. Supp. 2d 386, 392 (W.D. Va. 2011) (consumer protection laws “have historically fallen into the purview of the states’ broad police powers, to which the courts have afforded special solemnity” (collecting cases)).

SB419 fits comfortably within this tradition. It is a law that, among other things, regulates TikTok’s operations in Montana to protect Montanans’ privacy from a foreign power and their health from a potentially dangerous product. Nothing in the district court’s flawed analysis undermines this crucial reality.

A. Montana is appropriately protecting its citizens’ privacy from TikTok and its troubling relationship with the Chinese government

TikTok is no ordinary social media company. Its parent company—ByteDance Ltd.—is a Chinese company subject to Chinese law that has admitted to using data gathered through TikTok to surveil Americans. The Chinese Communist Party (CCP), the political party with unchallenged control of the government of the People’s Republic of China, exercises significant influence over ByteDance. Allowing TikTok to operate in Montana without severing its ties to the CCP exposes Montana consumers to the risk of the CCP accessing and exploiting their data.

According to the United States Department of State, the CCP “poses *the* central threat of our times, undermining the stability of the

world to serve its own hegemonic ambitions.”¹¹ It “expand[s] its power and influence at the expense of others” in numerous ways, including “weaken[ing] the global order by ignoring its commitments and manipulating international organizations to advance its own unilateral strategic goals.”¹² And it uses its “CCP-controlled media [to] spread propaganda globally while manipulating foreign news and entertainment media to advance its orthodoxy.”¹³

TikTok is owned by ByteDance Ltd., a Chinese company subject to Chinese law, including laws that mandate secret cooperation with intelligence activities of the CCP.¹⁴ From that corporate relationship

¹¹ *The Chinese Communist Party: Threatening Global Peace and Security*, U.S. Dep’t of State (last visited Mar. 8, 2024), <https://tinyurl.com/2j3avzr7> (emphasis added).

¹² *Ibid.*

¹³ *Ibid.*; see, e.g., N. Gan & S. George, *Chinese tennis star Peng Shuai has finally appeared in public. But here’s why the worries aren’t going away*, CNN (Nov. 23, 2021), <https://tinyurl.com/3aj7dhnw>; Y. Talmazan, *Actor John Cena apologizes to Chinese audience after calling Taiwan a country*, NBC News (May 26, 2021), <https://tinyurl.com/2p95jnkx>; R. Stoltzfoos, *‘Top Gun’ Remake Edits Out Taiwanese, Japanese Flags In Apparent Concession To China*, Daily Caller (July 19, 2019), <https://tinyurl.com/yckdm68r>.

¹⁴ M. Rubio, *ICYMI: Rubio and Gallagher Call for National TikTok Ban* (Nov. 10, 2022), <https://tinyurl.com/2rzhyuc>.

alone, the CCP can use TikTok user data to spy on, blackmail, and coerce TikTok users, serve them propaganda, further develop China's artificial intelligence capabilities, or for any number of other purposes that serve its national security and economic interests, at the expense of Montanan consumers.¹⁵ Under Chinese national security, cybersecurity, and data security laws and regulations, there are “no secrets”: “Any and all data will be available and open to the Chinese government.”¹⁶

Indeed, experts across a variety of fields agree that China's law requires individuals or entities in China, as well as those abroad subject to Chinese law, to cooperate with the CCP, and that there is no meaningful way to resist these requirements or the concomitant pressure from the CCP.¹⁷ U.S. officials from both sides of the aisle in Congress and the executive branch have expressed alarm that if the CCP asks for

¹⁵ *Ibid.*; see also Lee, *et al.*, *TikTok, ByteDance, and their ties to the Chinese Communist Party*, at 23, Senate Select Committee on Foreign Interference Through Social Media (Mar. 14, 2023).

¹⁶ The China Law Blog, *China Cybersecurity: No Place to Hide*, Harris Bricken (Oct. 11, 2020), <https://tinyurl.com/kcvffhwb>.

¹⁷ See, e.g., K. Kitchen, *The Chinese Threat to Privacy*, Am. Foreign Pol'y Council, Issue 30, at 23 (May 2021), <https://tinyurl.com/3ydkc74j>; K. Frederick, *et al.*, *Beyond TikTok: Preparing for Future of Digital Threats*, War on the Rocks (Aug. 20, 2020), <https://tinyurl.com/yrnfvvhk>.

Americans' private data, companies subject to Chinese law will have no choice but to comply with that demand.¹⁸

This risk is not hypothetical for TikTok. The CCP has *already* exercised significant influence over ByteDance, including forcing ByteDance to shut down one of its platforms for “having violated ‘social morality.’”¹⁹ A study by the Network Contagion Research Institute and Rutgers University concludes that there is “a strong possibility that TikTok systematically promotes or demotes content on the basis of whether it is aligned with . . . the interests of the Chinese Government.”²⁰ ByteDance has admitted to using data gathered through TikTok to

¹⁸ Letter from The Hons. Tom Cotton and Charles Schumer, U.S. Senate to J. Maguire, Acting Director of National Intelligence, Office of the Director of National Intelligence (Oct. 23, 2019), <https://tinyurl.com/jrx27vnb>; L. Feiner, *FBI is ‘extremely concerned’ about China’s influence through TikTok on U.S. users*, CNBC (Nov. 15, 2022), <https://tinyurl.com/56xtzjx3>.

¹⁹ Mem. from John K. Costello to the Sec’y, U.S. Dep’t of Commerce, Proposed Prohibited Transactions Related to TikTok Pursuant to Executive Order 13942, at 9 (Sept. 17, 2020), <https://tinyurl.com/53vv5adz>.

²⁰ Network Contagion Res. Inst. and Rutgers Univ. Miller Ctr. on Policing and Community Resilience, *A Tik-Tok-ing Timebomb: How TikTok’s Global Platform Anomalies Align with the Chinese Communist Party’s Geostrategic Objectives 1* (2023), *available at* <https://tinyurl.com/3v7fr7zk>.

surveil Americans.²¹ And recently, the former head of engineering for ByteDance in the United States publicly stated that ByteDance’s Beijing offices have a special unit of CCP members which maintained supreme access to all the company data, even data stored in the United States, through a “‘superuser’ credential—also known as a god credential.”²² When asked about this special unit of CCP members under oath, TikTok’s CEO did not deny its existence, responding instead that “all businesses that operate in China have to follow the law.”²³

TikTok’s touted solution to these problems is to store in the United States the TikTok data of American users through what it calls “Project Texas.”²⁴ But, as a then-Director of the Stanford Internet Observatory and former chief security officer at Facebook explained to the *Washington*

²¹ C. Duffy, *TikTok confirms that journalists’ data was accessed by employees of its parent company*, CNN (Dec. 22, 2022), <https://tinyurl.com/4h7b8w5c>.

²² Z. Soo, *Former exec at TikTok’s parent company says Communist Party members had a ‘god credential’ that let them access Americans’ data*, Business Insider (June 7, 2023), <https://tinyurl.com/yc6smsxa>.

²³ D. Wallace, *TikTok CEO grilled on Chinese Communist Party influence, searches of Taylor Swift vs. Tiananmen Square*, Fox Business (Jan. 31, 2024), <http://tinyurl.com/ds56kcxz>.

²⁴ *Ibid.*

Post, where TikTok stores data is “irrelevant.”²⁵ Instead, what matters is what kind of “leverage the [Chinese] government has over the people who have *access* to that data.”²⁶ That dynamic renders Project Texas more façade than fortress; indeed, TikTok executives have repeatedly instructed Project Texas employees to take actions which have exposed U.S. data to ByteDance.²⁷

But TikTok does not inform its many millions of American users about any of this. It does not disclose to consumers that its parent company is located in China and is subject to Chinese laws. Indeed, it has done quite the opposite. In 2019, TikTok eliminated *every* reference to China from its U.S. privacy policy,²⁸ and told its U.S. users that “none of

²⁵ D. Harwell & T. Room, *Inside TikTok: A culture class where U.S. views about censorship often were overridden by the Chinese bosses*, Washington Post (Nov. 5, 2019), <http://tinyurl.com/mr28su7n>.

²⁶ *Ibid.* (emphasis added).

²⁷ G. Wells, *TikTok Struggles to Protect U.S. Data from its China Parent*, Wall Street Journal (Jan. 30, 2024), <http://tinyurl.com/y4eev9ym>; see also C. Hutton, *Chinese parent company still accessing US TikTok user data and tweaking algorithm: Report*, Washington Examiner (Jan. 30, 2024), <http://tinyurl.com/2692r8s5>.

²⁸ D. Carroll, *Is TikTok a Chinese Cambridge Analytica data bomb waiting to explode?*, Quartz (May 7, 2019), <https://tinyurl.com/297vx72n>.

[its] data [sic] is subject to Chinese law.”²⁹ These representations conflicted with later disclosures to TikTok’s *European* users, in which TikTok revealed that “certain employees” in China have “remote access to TikTok European user data.”³⁰

In short, TikTok user data are exposed to individuals subject to Chinese law, which, in turn, means that data are available to the Chinese government and CCP. Nevertheless, TikTok attempts to hide that from Montana users. If TikTok is unwilling to disclose necessary information for prospective users to assess these data-privacy risks themselves and is not willing to protect its users from the CCP, Montana certainly can.

B. SB419 is a lawful consumer protection statute

The district court erroneously held that SB419’s “actual purpose” is to “stop a perceived national security threat,” and thus it could not “be fairly categorized as a garden variety consumer protection regulation.” ER-35, 39 (quotation marks omitted). In so doing, the district court became the first court to adopt an argument that TikTok has repeatedly

²⁹ TikTok, *Statement on TikTok’s content moderation and data security practices* (Oct. 24, 2019), <http://tinyurl.com/2j5cw26v>.

³⁰ E. Fox, *Sharing an Update to our Privacy Policy*, TikTok (Nov. 2, 2022), <http://tinyurl.com/yc3yr66e>.

made and courts have repeatedly rejected—that federal law necessarily precludes state efforts to regulate TikTok in light of its relationship with the CCP. See *Indiana v. TikTok, Inc.*, 2023 WL 3596360 (N.D. Ind. May 23, 2023); *Arkansas ex rel. Griffin v. TikTok, Inc.*, 2023 WL 4744903 (W.D. Ark. July 25, 2023). In reality, SB419’s purpose is clearly to protect Montanan consumers from the unique threat TikTok poses to their privacy.

Data harvesting is one of the most acute modern threats to citizens’ privacy. It has become nearly ubiquitous, and with its ubiquity have also come corresponding risks of the misuse of data.³¹ The more that any user’s data get “passed around between countless third parties” the more possibilities there are for that user’s data to be “leaked or breached in a way that causes real harm” or to be “used in surprising ways . . . such as in targeting ads or adjusting interest rates based on race.”³² Over eight billion accounts were targeted in data breaches in 2023, with over 2,800

³¹ T. Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, N.Y. Times (Sept. 6, 2021), <https://tinyurl.com/ms6cv842>.

³² *Ibid.*

data breaches and cyber attacks recorded.³³ The flood has not stopped in 2024, with 26 billion account records having been stolen just a few weeks ago in what was dubbed the “mother of all breaches.”³⁴ Large, sophisticated businesses are not immune. For instance, in October 2023, hackers stole the ancestry data of almost seven million of 23andMe’s customers, apparently targeting users of Ashkenazi Jewish descent.³⁵

In the absence of action by Congress, States have stepped in to safeguard their citizens’ personal data from these harms. More than a dozen States have enacted comprehensive privacy laws³⁶ and almost

³³ N. Ford, *List of Data Breaches and Cyber Attacks in 2023 – 8,214,886,660 records breached*, IT Governance Blog (Jan. 5, 2024), <http://tinyurl.com/43wv66ah>.

³⁴ B. Kato, *‘Mother of all breaches’ data leak reveals 26 billion account records stolen from Twitter, LinkedIn, more*, N.Y. Post (Jan. 23, 2024), <http://tinyurl.com/dk97hj2m>.

³⁵ L. Franceschi-Bicchierai, *23andMe confirms hackers stole ancestry data on 6.9 million users*, TechCrunch (Dec. 4, 2023), <http://tinyurl.com/2thwyhy5>.

³⁶ See Cal. Civ. Code § 1798.100 *et seq.*; Colo. St. § 6-1-1301 *et seq.*; Conn. Gen. Stat. Ann. § 42-515 *et seq.*; Del. Personal Data Privacy Act H.B. 154 (effective Jan. 1, 2025); Ind. Code § 24-15 *et seq.* (effective Jan. 1, 2026); Iowa Code Ann. § 715D.1 *et seq.* (effective Jan. 1, 2025); Montana Laws Ch. 681 (S.B. 384) (effective Oct. 1, 2024); N.J. Senate Bill 332 (effective Jan. 15, 2025); Or. Senate Bill No. 619 (effective July 1,

twenty other States have pending privacy bills which would similarly protect citizens' personal data privacy.³⁷ These privacy laws typically prohibit businesses from “process[ing] personal data for purposes that are neither reasonably necessary to nor compatible with the disclosed purposes for which such personal data are processed, as disclosed to the consumer, unless the controller obtains the consumer’s consent.” Va. Code § 59.1-578(A)(2).

Montana is one of these States. As the district court recognized, in 2023 the Montana Legislature passed the Montana Data Privacy Act, “a sweeping data privacy law” that protects Montanans “against unsafe data collection practices from social media companies in the state.” ER-30. Curiously, however, the district court viewed the Data Privacy Act as proof that Montana was “more interested in targeting China’s ostensible role in TikTok than with protecting Montana consumers” when it passed SB419. ER-5; see also ER-5 (“This is especially apparent in that the same

2024); Tenn. Information Protection Act, S.B. 73/ H.B. 1181 (effective July 1, 2024); Texas Data Privacy & Security Act, H.B. 4 (effective July 1, 2024); Utah Consumer Privacy Act, S.B. 227; Va. Code § 59.1-575.

³⁷ See A. Folks, *US State Privacy Legislation Tracker*, IAPP (last updated Mar. 1, 2024), <https://tinyurl.com/4z55dss4>.

legislature enacted an entirely separate law that purports to broadly protect consumers' digital data and privacy.”). What the district court failed to recognize is the need for more targeted legislative action due to the unique danger that TikTok's relationship to the CCP poses to Montana consumers.

TikTok not only collects large amounts of its users' personal data like a run-of-the-mill social media company, but also retains close ties with the CCP and indeed *must* share data with the CCP given that its parent company is a Chinese company subject to Chinese laws. *Supra* 8–10. Accordingly, it is unsurprising that SB419 functions the way it does, specifically providing that TikTok could operate in Montana if it were altered to remedy the legislature's unique privacy concerns. *Supra* 5. If TikTok were to sever its dangerous ties to the CCP, it could operate in Montana like any other social media company, subject to its general data privacy laws. Rather than “demonstrat[ing] a foreign affairs purpose,” ER-37, the interplay between SB419 and the Montana Data Privacy Act shows that the unique problem of TikTok requires a unique remedy.

Indeed, this Court should not adopt the district court's misreading of SB419 as aimed at preventing foreign espionage rather than protecting

consumers from attempts to obtain their data in a misleading manner. The district court erred in concluding that SB419’s “real purpose” is “to prevent and prohibit the ‘international espionage’ of one of the United States’ few enumerated foreign adversaries, not to merely protect Montana consumers.”³⁸ ER-38. SB419 speaks to the uniqueness of data vulnerability on TikTok, not an interest in addressing foreign affairs concerns. Montana is not attempting to regulate its citizens’ affairs with China; it is merely attempting to protect its citizens from the unique threat of having their data mined *by the Chinese Communist Party*.

Finally, that the federal government also possesses the power to regulate TikTok’s dangerous practices is of no moment. State and federal consumer protection legislation and regulation co-exist “to cope with perceived injustices in the marketplace.” D. Pridgen & R. Alderman,

³⁸ Indeed, the court arrived at its conclusion by finding “instructive” a comment by one representative who criticized the bill because it did not address all social media companies. ER-38. Of course, courts should be reluctant to rely on statements of a bill’s opponents in analyzing legislative history, see, *e.g.*, *Fieger v. United States Atty. Gen.*, 542 F.3d 1111, 1119 (6th Cir. 2008) (“[I]solated statements made by opponents of a bill are to be accorded little weight.”), if they consider legislative history at all, but see *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (judicial investigation into legislative history often devolves into “looking over a crowd and picking out your friends”).

Introduction to Consumer Protection and the Law, 2022-2023 Edition §1:7 (2022). Courts are therefore appropriately hesitant to preempt state privacy protections, given that consumer protection is “a field which the States have traditionally occupied.” *Jones v. Google LLC*, 73 F.4th 636, 642 (9th Cir. 2023) (en banc) (quotation marks omitted). The district court’s conclusion that SB419 is preempted under theories of foreign affairs field preemption and conflict preemption, see, e.g., ER-34, failed to account for the fact that a preemption analysis “start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Plaintiffs failed to provide the sort of “compelling evidence of an intention to preempt is required in this area,” *General Motors Corp. v. Abrams*, 897 F.2d 34, 42–43 (2d Cir. 1990), and the district court erred in finding one.

C. The district court’s narrow-tailoring analysis contradicts black-letter First Amendment law and hamstring state police power

The district court compounded its error by holding that, even if the State “may have at least an important state interest in SB 419,” the law

violated the First Amendment by failing to be narrowly tailored. ER-24. In holding that SB419 “burdens more speech than is necessary,” the district court evinced its misunderstanding of the relationship between China, ByteDance, and TikTok. ER-30. The district court’s holding is based on three principal reasons, none of which holds water.

First, the court opined that SB419’s remedy is an “axe” when a “scalpel” would do. ER-29. But that misapprehends the nature of the problem. The Montana legislature has concluded, as have others, that *all* data that TikTok gathers is subject to access by the Chinese government by the very nature of TikTok’s relationship with ByteDance and the operation of Chinese law. And even under *strict* scrutiny, when the government determines that an entire class of activity poses a problem, a law banning that class of activity can be narrowly tailored. See *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454 (2015) (upholding blanket ban on “personal solicitations by judicial candidates”). Here, Montana banned TikTok because all TikTok activity gathers data which the Chinese government may access. In so doing, it mirrored concerns

expressed by the Biden Administration,³⁹ state governments,⁴⁰ major universities,⁴¹ and the City of New York,⁴² all of whom have similarly limited access to TikTok.

Indeed, just days ago, a bipartisan coalition of Congress introduced a bill that would, like SB419, prohibit the availability or operation of TikTok “unless the application severs ties to entities like ByteDance that are subject to the control of a foreign adversary,”⁴³ and the U.S. House Energy and Commerce committee unanimously approved the legislation

³⁹ D. Ingram, *Biden signs TikTok ban for government devices, setting up a chaotic 2023 for the app*, NBC News (Dec. 30, 2022), <http://tinyurl.com/5398n76k>.

⁴⁰ See, e.g., Press Release, *Governor Glenn Youngkin Bans TikTok and WeChat on State Devices and State-Run Wireless Networks*, Governor of Virginia (Dec. 16, 2022), <http://tinyurl.com/w9w22ky8>.

⁴¹ E. Castillo, *These Colleges Just Banned TikTok*, Best Colleges (Aug. 17, 2023), <http://tinyurl.com/27kt38jb>.

⁴² K. Singh, *New York City bans TikTok on government-owned devices over security concerns*, Reuters (Aug. 17, 2023), <http://tinyurl.com/mu2m4zhf>.

⁴³ Select Committee on the Chinese Communist Party, Gallagher, Bipartisan Coalition Introduce Legislation to Protect Americans From Foreign Adversary Controlled Applications, Including TikTok (Mar. 5, 2024), <https://tinyurl.com/mryf455k>.

yesterday.⁴⁴ TikTok immediately proved how dangerous it is by whipping its users into political action through plastering a notification on its platform that “Congress is planning a total ban of TikTok” and urging its users to call their lawmakers.⁴⁵ Congressional offices were inundated with calls from young TikTok users, including dozens of calls from teenagers who threatened to commit suicide if TikTok were shut down.⁴⁶

Second, the district court asserted that because the Montana Data Privacy Act protects against unsafe data collection generally, “a substantial portion of [SB419’s] burden on speech does not serve to advance its goals.” ER-30 (quotation marks omitted). The Data Privacy Act and SB419 are aimed at different problems, see *supra* 16–17, but even if they were not, the fact that two laws have some overlap does not render one unconstitutional. “A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing

⁴⁴ D. Shepardson, *TikTok crackdown bill unanimously approved by U.S. House panel*, Reuters (Mar. 7, 2024), <https://tinyurl.com/2mzruc3f>.

⁴⁵ K. McGhee White, *TikTok just proved to lawmakers how dangerous it really is*, Washington Examiner (Mar. 7, 2024), <https://tinyurl.com/2s97aaw6>.

⁴⁶ *Ibid.*

concerns.” *Williams-Yulee*, 575 U.S. at 449. And, even if the district court were unconvinced by Montana’s judgment that a TikTok-specific ban is necessary, it is improper for a court to find a First Amendment violation by “sifting through all the available or imagined alternative means . . . to determine whether [Montana’s] solution” is optimal. *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989). Indeed, the Supreme Court has consistently rejected such reasoning. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (“We are unmoved by the Court of Appeals’ view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest.”).

Third, the court held that Montana did not provide any evidence that the ban would alleviate the purported harms because “there are many ways in which a foreign adversary, like China, could gather data from Montanans”—for instance by purchasing it from data brokers or via hacking. ER-31. But that conclusion proceeds from the false premise that the prohibition in SB419 is unlikely to “alleviate” a particular harm simply because different avenues for that harm to occur exist. ER-31. A law does not become unconstitutional simply because targeted conduct

may be pursued by other illicit means, and a court may not simply assume, as the district court did here, that efforts to reduce the stated harm will be ineffective. Instead, States “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (quotation marks omitted). It is not the judiciary’s role to enjoin such experiments simply because “it is not clear” to a court whether such efforts will succeed. ER-31.

The district court’s reasoning, if upheld, could affect ordinary consumer protection laws. These laws often address expressive conduct and thus would be subject to intermediate scrutiny. They may work in tandem with other statutes,⁴⁷ may not cover the whole field of potentially objectionable conduct, and may put forward solutions that bad actors can circumvent by employing other means to inflict similar harms. But that does not render them unconstitutional for lack of narrow tailoring.

⁴⁷ For example, California’s Unfair Competition Law, Bus. And Prof. Code § 17200, False Advertising Act, Bus. And Prof. Code § 17500, and Consumer Legal Remedies Act, Civ. Code §§ 1750–1784, are all consumer protection statutes.

II. The balance of the equities weighs in favor of Montana

A plaintiff seeking a preliminary injunction must establish, among other things, “that the balance of equities tips in his favor.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The district court erroneously held that the equities weighed in favor of a preliminary injunction because the statute was, in the court’s view, unconstitutional. ER-49, 50. In so doing, the court held that “[w]hile there may be a public interest in protecting Montana consumers, the State has not shown how this TikTok bill does that.” ER-50. Make no mistake: TikTok harms American citizens everywhere—including in Montana. In particular, children have *lost their lives* to TikTok’s promotion of harmful content on its platform.⁴⁸ TikTok’s continued resistance to reasonable regulation will almost certainly harm more children. The “balance of hardships between the parties” in this case thus “tips sharply in favor of” Montana. *Cottrell*, 632 F.3d at 1139.

⁴⁸ See, e.g., O. Carville, *TikTok’s Viral Challenges Keep Luring Young Kids to Their Deaths*, Bloomberg (Nov. 30, 2022), <https://tinyurl.com/yvxhany5>.

TikTok, like other social media sites, has negative psychological effects on its users. *Supra* 3–4. But TikTok poses unique danger to its users, especially the adolescent users with which it is so popular. For instance, TikTok is the origin of numerous extremely harmful trends and challenges in which adolescent users have engaged in a quest to “go viral.”⁴⁹ These challenges or trends “are found using hashtag searches” and “challenge . . . the viewer to take some action and record it for sharing on TikTok.”⁵⁰

In March of 2020, for example, the Coronavirus Challenge—which encouraged users to “lick items in public” either to catch COVID-19 or to mock the pandemic—spread widely among teens on TikTok.⁵¹ As SB419 notes, other viral challenges included “lighting a mirror on fire and then attempting to extinguish it using only one’s body parts,” “inducing

⁴⁹ *E.g.*, S. Morris, *21 Dangerous TikTok Trends Every Parent Should Be Aware Of*, Newsweek (Mar. 6, 2021), <https://tinyurl.com/mmjkd234>.

⁵⁰ P. Rutledge Ph.D, *Why Kids Love TikTok Challenges*, Psychology Today (Feb. 12, 2021), <https://tinyurl.com/54dubysx>.

⁵¹ B. Tierney, *Social media challenge has teens trying to get COVID-19*, WSAZ (Mar. 25, 2020), <https://tinyurl.com/3hf3c5da>.

unconsciousness through oxygen deprivation,” and “cooking chicken in NyQuil.” ER-63.⁵²

In the process of completing these challenges, children as young as nine years old have harmed themselves, harmed others, faced criminal penalties, and even died. For instance, a nine-year-old child died in February of 2021 after participating in TikTok’s “blackout challenge” in which children attempt to induce unconsciousness by holding their breath.⁵³ At least one teenager has died from the “Benadryl challenge,” a trend that calls for “the excessive consumption of Benadryl to induce a hallucinogenic high,” and more than twenty children have been hospitalized due to “skin burns, stomach aches and food poisoning” for “eating candy coated in liquid nitrogen—a snack that became popular on

⁵² See also, *e.g.*, L. Veljanovski, *What is the TikTok ‘Fire Challenge’? Teen Hospitalized in New Online Craze*, Newsweek (June 1, 2021), <https://tinyurl.com/22bh4zsf>; S. Felbin, S. Talbert, & A. Aloian, *The ‘Blackout Challenge’ Has Resurfaced On TikTok, And It’s Still Just As Dangerous As It Was 17 Years Ago*, Women’s Health (Jan. 17, 2023), <https://tinyurl.com/3u3e7vh4>; B.A. Mayer, *How to Handle Risky Internet Trends Like TikTok’s NyQuil Chicken Challenge*, healthline (Sept. 30, 2022), <https://tinyurl.com/mvbuunun>.

⁵³ Felbin, *et al.*, *supra* n.52.

TikTok due to the vapor fumes it emits when eaten.”⁵⁴ A thirteen-year-old girl landed in the intensive care unit with third-degree burns while filming a video in the bathroom “to recreate a viral TikTok challenge that involves setting fire to symbols drawn on a mirror using flammable liquid.”⁵⁵ And six adolescent boys in New York were ticketed for criminal mischief after taking part in the “Kool-Aid Man” challenge, in which children “run[] into and destroy[] random walls and fences like the drink mascot.”⁵⁶

Adolescents are particularly drawn to TikTok challenges and are thus susceptible to the associated harms. “Tween[s] and teens are more susceptible to social pressures, which makes it harder to assess risk, in such life-threatening challenges.”⁵⁷ Adolescent brains are “vulnerable to

⁵⁴ K. Colah, *7 dangerous TikTok challenges for kids that parents must know about: ‘Extreme and risky’*, Fox10 Phoenix (Mar. 19, 2023), <https://tinyurl.com/ycks5urb>.

⁵⁵ S. Sharma, *‘TikTok fire challenge’ video lands teenage girl in intensive care with severe burns*, Independent (May 31, 2021), <https://tinyurl.com/yt7v6892>.

⁵⁶ P-S Cheng & J. Millman, *‘Kool-Aid Man’ Challenge Hits Long Island Fences as Part of Supposed TikTok Trend*, NBC New York (Feb. 22, 2023), <https://tinyurl.com/yad2bt4d>.

⁵⁷ Colah, *supra* n.54 (quotation marks omitted).

. . . pitfalls of social influence” such as “[a]ttention, likes, and shares” as well as “[p]opularity [which] tells our primitive brains that something is of value unless we stop and question it.”⁵⁸

TikTok has failed utterly to regulate its users and reduce the harm it imposes on adolescent users. Despite the lengthy public record on TikTok’s negative effects on adolescent users, TikTok only recently put in place safeguards for child users. For those younger than thirteen years old, TikTok requires parents to enter a passcode every thirty minutes to give their child additional screen time, but for children between the ages of thirteen to seventeen, the age range in which the app is most used, TikTok gives each child-user the option to continue scrolling by entering their own passcode after the default sixty-minute time limit passes.⁵⁹

TikTok in fact demonstrates its *willingness* to continue harming American children; TikTok continues to, for example, represent that the app is safe for teenagers and children. Its CEO Shou Chew testified before Congress that TikTok “automatically remove[s] or escalate[s] for

⁵⁸ Rutledge, *supra* n.50.

⁵⁹ S. Morrison, *TikTok isn’t really limiting kids’ time on its app*, Vox (Mar. 2, 2023), <https://tinyurl.com/3rkfbn6t>.

human review” *all* content that “potentially” “violates our Youth Safety and Wellbeing Policy.”⁶⁰ Whether true or not, whatever TikTok is doing is not working. The challenges and trends most harmful to adolescents remain on TikTok even after multiple teens have died from attempting to complete them.⁶¹ Indeed, TikTok operates special content moderation queues for users with more than five million followers—if a lucrative influencer engages in one of these challenges, their content will likely not be removed.⁶² Tellingly, however, the CCP imposes safeguards for its teenage users on the parallel application which ByteDance operates in China that are not imposed on American users.⁶³

⁶⁰ *Written Testimony of Shou Chew, Chief Executive Officer, TikTok, Inc., Before the U.S. House Committee on Energy and Commerce, 118th Cong., 1st session (Mar. 23, 2023), available at <https://tinyurl.com/52whp84z>.*

⁶¹ See, e.g., A. Gomez, *Experts warn parents, children of lethal ‘Benadryl Challenge’ on TikTok that killed Ohio teen*, abc7 (Apr. 19, 2023), <https://tinyurl.com/22usbnv4> (13-year-old boy died from participating in Benadryl Challenge three years after the challenge had resulted in a 15-year-old girl dying).

⁶² E. Baker-White, *How TikTok Has Bent Its Rules for Its Top Creators*, Forbes (Sept. 20, 2022), <https://tinyurl.com/3cz3wyrx>.

⁶³ A. Nash, *Is TikTok different in China compared to the U.S.? A social media analyst compares it to opium and spinach*, DeseretNews (Jul. 14, 2023), <https://tinyurl.com/474mwyh6>.

TikTok's content does not just harm children; it often shows children *being* harmed. Recent reporting by Forbes Magazine demonstrates that child sexual abuse material is available and promoted on TikTok.⁶⁴ An investigation by the Wall Street Journal further found that TikTok's algorithm force fed to certain users videos sexualizing minors.⁶⁵

TikTok harms children in Montana, and the balance of equities weighs against granting a preliminary injunction.⁶⁶ This Court should reverse.

CONCLUSION

This Court should reverse the district court.

⁶⁴ A. S. Levine, *These TikTok Accounts Are Hiding Child Sexual Abuse Material In Plain Sight*, Forbes (Nov. 14, 2022), <https://tinyurl.com/yc265ay5>.

⁶⁵ WSJ Staff, *Inside TikTok's Algorithm: A WSJ Video Investigation*, Wall Street Journal (July 21, 2021), <https://tinyurl.com/5texfvsh>.

⁶⁶ Montana, of course, has shown another harm to Montanans: TikTok is known for flouting existing state laws with its unauthorized sharing of personal user data with the CCP. *Supra* 15–16. By misrepresenting the manner in which it shares personal user data and by using that data in an unauthorized manner, TikTok increases the chance that bad actors, not just the CCP, will access and misuse sensitive user data. *Supra* 14–15.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Circuit Case No.: 24-34

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March 8, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing/attached documents on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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/s/ Andrew N. Ferguson

March 8, 2024

Andrew N. Ferguson