

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

SAMANTHA ALARIO ET AL.,

Plaintiffs-Appellees,

and

TIKTOK INC.,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court for the District of Montana
Case Nos. 9:23-cv-00056-DWM and 9:23-cv-00061-DWM
Hon. Donald W. Molloy

**BRIEF OF THE INTERNATIONAL JUSTICE CLINIC AT
THE UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW
AND OPEN NET ASSOCIATION, INC.,
AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES**

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Freedom House, <i>Freedom on the Net 2022: Countering an Authoritarian Overhaul of the Internet</i> , https://tinyurl.com/yzkxnp43	26
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Josh Birenbaum, <i>China is Trying to Change What Human Rights Mean</i> , The National Interest (Nov. 8, 2023), https://tinyurl.com/4hs6xm3d	30

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S. Rep. No. 102-23, S. Comm. on Foreign Relations Rep. on Ratification of the Int’l Covenant on Civ. & Pol. Rts. (Jan. 30, 1992), reprinted in 31 I.L.M. 645, 1992 WL 672408.....	6, 7
Shannon Tiezzi, <i>Can China Change the Definition of Human Rights?</i> , The Diplomat (Feb. 23, 2021), https://tinyurl.com/3v579ac7	30
Stephen Mulligan, Cong. Rsch. Serv., <i>International Law and Agreements: Their Effect upon U.S. Law</i> (July 13, 2023).....	9
TikTok, <i>About Project Texas</i> , https://usds.tiktok.com/usds-about/	18
U.S. Dep’t of State, Policy Issues, Human Rights and Democracy, https://tinyurl.com/y35ue2jz	8

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	<u>Page(s)</u>
U.S. Dep’t of State, <i>Press Statement on Nigeria’s Twitter Suspension</i> (June 10, 2021), https://tinyurl.com/57z5wr5v	27
UN Human Rights Committee, CCPR/C/GC/34, General Comment No. 34, Article 19: Freedoms of Opinion and Expression (Sept. 12, 2011), https://tinyurl.com/3yvx83sy	10, 12, 13, 14, 16, 18, 19, 20, 21, 22
UN Treaty Collection, <i>International Covenant on Civil and Political Rights</i> (Dec. 16, 1966), https://tinyurl.com/5n7494xm	7
White House, <i>United States Strategic Approach to the People’s Republic of China</i> (May 20, 2020), https://tinyurl.com/485rdb46	17

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Treaties

International Covenant on Civil and Political Rights, Article 19, https://tinyurl.com/38jpam9h	3, 9, 10, 13, 15, 16, 17, 19, 20, 21, 22, 23
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INTEREST OF *AMICI CURIAE*¹

Amici curiae are organizations that aim to protect and promote international human rights in the digital realm, in the United States and abroad. *Amici* thus have a strong interest in ensuring that U.S. law complies with America’s international human rights obligations, particularly its obligations under the International Covenant on Civil and Political Rights (ICCPR), one of the foundational treaties in international human rights law.

The International Justice Clinic at the University of California, Irvine School of Law (“IJC”) promotes international human rights law at the international, national, regional, and corporate levels, in the United States and abroad. IJC is directed by Professor David Kaye, the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Professor Kaye has written extensively on the protection of human rights in digital environments, and IJC has broad experience addressing threats to human rights in the digital realm, working alongside civil society organizations across the globe.

Open Net Association, Inc. (“Open Net”) is a non-profit organization based in South Korea that promotes free expression, privacy, network neutrality, and other

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity, other than amicus or their counsel, monetarily contributed to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

digital rights in South Korea, Asia, and globally. Open Net is directed by Kyung Sin Park, a professor at Korea University Law School who has extensive experience (both scholarly and advocacy) on digital human rights issues. Among other work, Professor Park led Open Net's successful opposition to a South Korean "data localization" bill in 2018 that would have effectively prevented American digital platform companies from operating in South Korea. The bill would have violated the ICCPR's right to freedom of expression by encroaching on individuals' access to information based on their location in a particular country.

Amici respectfully submit this brief to explain that Montana Senate Bill 419 (SB 419) runs counter to longtime U.S. policy supporting freedom of expression as a fundamental international human rights norm, and violates America's international legal obligations under Article 19 of the ICCPR, which protects all freedom of expression and opinion. SB 419 also undermines America's "international status," a key source of its influence in world affairs. By raising questions about America's commitment to human rights norms, SB 419, and laws like it, will make it more difficult for the United States to shore up the rules-based international order at a time when other powers—including China and Russia—seek to reshape that order in ways detrimental to U.S. interests.

TREATY PROVISION INVOLVED

Article 19 of the International Covenant on Civil and Political Rights provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

United Nations, International Covenant on Civil and Political Rights, Article 19 (Dec. 16, 1966), <https://tinyurl.com/38jpam9h>.

INTRODUCTION

In 1992, the United States ratified the International Covenant on Civil and Political Rights (“ICCPR” or “Covenant”), one of the foundational treaties in international human rights law. Article 19 of the ICCPR requires parties to the treaty to guarantee the right to freedom of expression, “including the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers.” Montana’s TikTok ban (SB 419) infringes directly on that right by prohibiting the “operation” of an entire medium of public expression used by over 300,000 Montanans and 150 million Americans. That wildly overbroad restriction cannot be squared with America’s position as a leader on international human rights, nor is it lawful under Article 19 of the ICCPR. The district court was correct to preliminarily enjoin the ban, and this Court should affirm.

First, the United States has long championed international human rights norms, including by ratifying the ICCPR, and SB 419 runs counter to that long-standing commitment. When President George H.W. Bush urged the Senate to ratify the ICCPR more than 30 years ago, he explained that doing so would underscore America’s “natural commitment” to advancing human rights principles through international law. And when the United States formally ratified the treaty, it obligated itself to protect the rights enumerated therein, including Article 19’s right

to freedom of expression. SB 419’s blanket ban on a popular social media platform used by several thousand Montanans flouts that commitment.

Second, SB 419 violates international law because it fails Article 19’s three-part test for determining the legality of restrictions on expression. Under Article 19, a restriction is lawful only when it is “provided by law,” and “necessary and proportionate” to a “legitimate” purpose. SB 419 fails on all three fronts—the law fails to define what it means to “operate” TikTok or explain how TikTok Inc. can comply with the statute; the law is not the least restrictive means of accomplishing its purported goals; and the goals themselves (national security and protection of minors) are either invalid or inadequately specified.

Third, SB 419 undermines America’s international status. In international affairs, “status” is an influence multiplier that the United States and other nations leverage to advance their national interests. SB 419—which on the surface resembles acts of “digital repression” that the United States has condemned abroad—weakens this important foreign policy tool by raising questions about America’s commitment to human rights norms. This diminution in status has real consequences—at a time when China seeks to undermine the universality of human rights as part of a broader effort to reshape the international system, SB 419’s apparent disregard for those norms aids that effort by suggesting America does not practice what it preaches.

The Court should affirm the district court’s order preliminarily enjoining SB 419.

ARGUMENT

I. SB 419 Runs Counter To The United States’ Long-Standing Commitment To International Human Rights

The United States has been a global leader in the creation and promotion of international human rights. Two of the most prominent examples of this commitment are the ICCPR, which the United States ratified in 1992, and the Universal Declaration of Human Rights, which was drafted by a UN sub-committee led by former First Lady Eleanor Roosevelt. SB 419 is a stark departure from that commitment. By depriving a significant portion of Montana’s population of their preferred means of expression, the law runs counter to the very human rights norms the United States has long promoted in the international community.

A. The United States Has Long Championed International Human Rights Norms And Is Obligated To Protect Those Rights Under The ICCPR

The ICCPR is “one of the central treaties in international human rights law.” David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. Irvine L. Rev. 95, 96 (2013). “[R]ooted in western legal and ethical values,” the ICCPR is part of the international community’s ongoing efforts “to give the full force of international law to the principles of human rights embodied in the Universal Declaration of Human Rights and the United Nations Charter.” S. Rep.

No. 102-23, S. Comm. on Foreign Relations Rep. on Ratification of the Int'l Covenant on Civ. & Pol. Rts. (Jan. 30, 1992), reprinted in 31 I.L.M. 645, 649, 1992 WL 672408. The United States ratified the ICCPR in 1992, and as of February 2024, 174 countries were a party to the treaty. *See* United Nations Treaty Collection, *International Covenant on Civil and Political Rights* (Dec. 16, 1966), <https://tinyurl.com/5n7494xm>.

In explaining why ratification was important, President George H.W. Bush emphasized that ratification “would underscore [America’s] natural commitment to fostering democratic values through international law” during a critical moment in international affairs. S. Rep. No. 102-23, 31 I.L.M. at 660. President Bush further explained that the ICCPR “codifies the essential freedoms people must enjoy in a democratic society,” such as “freedom of opinion and expression,” and that U.S. ratification would “strengthen America’s ability” to influence the development of human rights principles abroad. *Id.*

The Senate Foreign Relations Committee similarly assessed that ratification would bolster America’s international standing, particularly “[i]n view of the leading role that the United States plays in the international struggle for human rights.” *Id.* at 649. The ICCPR, then, both reflects U.S. values and bolsters U.S. influence—it signifies America’s commitment to universal human rights, while better enabling America to promote those rights.

Notably, America's commitment to the values enshrined in the ICCPR long preceded the country's formal ratification of the treaty. Since America's founding, "a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights." U.S. Dep't of State, Policy Issues, Human Rights and Democracy, <https://tinyurl.com/y35ue2jz>. Indeed, the United States played a critical role in *creating* international human rights norms. From 1946 to 1948, former First Lady Eleanor Roosevelt led the UN committee that drafted the Universal Declaration of Human Rights, which the UN adopted on December 10, 1948, and which served as the precursor to the ICCPR. See Public Policy Institute at Hunter College, *"My Most Important Task": Eleanor Roosevelt and the Universal Declaration of Human Rights* (2018), <https://tinyurl.com/5n6se3b2>. That early involvement in laying the foundation for human rights protections on a global scale helped cement America's role as the world's human rights leader.

In addition to championing international human rights, the United States also has obligations under international law to uphold those rights. As a treaty ratified by the United States, the ICCPR enjoys status under the U.S. Constitution as "supreme law of the land." Kaye, *supra* 6, at 95-96; see U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made ... shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the ... Laws of any State to the

Contrary notwithstanding.”). That means that state laws, including Montana’s SB 419, must be consistent with the ICCPR.

To be sure, the ICCPR was ratified subject to the condition that its substantive provisions, including Article 19, would not be “self-executing,” meaning that the law would not have automatic domestic effect. *See* Stephen Mulligan, Cong. Rsch. Serv., *International Law and Agreements: Their Effect upon U.S. Law* 20-21 (July 13, 2023). But that condition does not make the Covenant any less “binding” on the United States. *See* Restatement (Third) of Foreign Relations Law § 321 (1987) (“Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.”). “[L]ike all governments, the United States is legally bound to obey all international human rights obligations embedded in customary international law or treaties that the United States has ratified.” Harold Hongju Koh, *Why U.S. Leadership Matters for the Global Defense, Protection and Promotion of Human Rights*, 97 *Foreign Serv. J.* 5, 33-34 (2020), <https://tinyurl.com/mx952bpk>. And as the United States Supreme Court has acknowledged, “the Covenant does bind the United States as a matter of international law.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

B. Article 19 Protects Individuals’ Right To Freedom Of Expression Through The TikTok Platform

Article 19 of the ICCPR requires countries that have ratified the treaty to protect freedom of expression as a fundamental human right. The Article provides

that “the right to freedom of expression ... shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers,” through any medium. ICCPR, Article 19(2), <https://tinyurl.com/38jpam9h>.

The UN Human Rights Committee’s General Comment No. 34—widely considered the authoritative interpretation of Article 19—confirms that this right “protects all forms of expression and the means of their dissemination,” from “books, newspapers, [and] pamphlets” to “electronic and internet-based modes of expression.” UN Human Rights Committee, CCPR/C/GC/34, General Comment No. 34, Article 19: Freedoms of Opinion and Expression (Sept. 12, 2011) [“General Comment 34”] ¶ 12, <https://tinyurl.com/3yvx83sy>. This freedom of expression is intertwined with freedom of opinion because “freedom of expression provid[es] the vehicle for the exchange and development of opinions.” *Id.* ¶ 2. Together, the two freedoms are “indispensable conditions for the full development of the person” and “the foundation stone for every free and democratic society.” *Id.*

As a popular social media platform used by more than 300,000 Montanans and 150 million Americans, TikTok promotes these freedoms in a substantial way. Although TikTok is widely recognized for its entertainment value, the platform has also emerged as a uniquely effective medium for sharing information on a wide range of public affairs topics, from politics and government to national security.

Caitlin Vogus, *Crunch Time for TikTok and Americans' Freedom of Speech*, Ctr. for Democracy & Tech. (Mar. 22, 2023), <https://tinyurl.com/ye6dt2p2>.

For example, TikTok content creator Kelsey Russell uses the app's short-form media to read and contextualize print news articles for an audience that might not otherwise engage with the news with that level of depth. Jordan-Marie Smith, et al., *This 23-year-old Media Literacy Influencer Wants You to Read the Paper*, NPR (Mar. 18, 2024), <https://tinyurl.com/56m335vv>. Russell's efforts are indicative of a broader trend showing that an increasing number of Americans are relying on TikTok to stay up to date on current events.

According to the Pew Research Center, from 2020 to 2023 the share of U.S. adults who say they regularly get news from TikTok “more than quadrupled,” and among these adults, approximately one-third of 18- to 29-year-olds regularly get news on the app. Katerina Eva Matsa, *More Americans are Getting News on TikTok, Bucking the Trend Seen on Most Other Social Media Sites*, Pew Rsch. Ctr. (Nov. 15, 2023), <https://tinyurl.com/nhatrbfn>. A growing body of research also indicates that TikTok helps spur political engagement—one study found that TikTok users ages 18 to 25 were “significantly more likely” than young users of other social media platforms to engage in “offline” forms of political participation, such as “work[ing] on a campaign and donat[ing] money to a candidate.” Kiana Karimi & Richard L. Fox, *Scrolling, Simping, and Mobilizing: TikTok's Influence Over Generation Z's*

Political Behavior, 12 J. of Social Media in Society 181, 198 (2023). TikTok, then, is not only an important purveyor of social trends, but also an increasingly important medium for disseminating news, exchanging ideas, and promoting broader engagement in public affairs.

C. SB 419 Threatens TikTok Users’ Freedom of Expression, Both Within And Beyond Montana

As the district court correctly found, SB 419 “forecloses an entire medium of expression across the landscape of a particular community” (*Alario v. Knudsen*, 2023 WL 8270811, at *11 (D. Mont. Nov. 30, 2023)), and deprives over 300,000 Montanans from “communicating by their preferred means of speech” (*id.* at *6). Should the law go into effect, hundreds of thousands of Montanans would no longer be able to use the app to stay informed, express their opinions, or follow updates from their elected officials.

Given TikTok’s reach—more than 150 million Americans use TikTok every month (*id.* at *2)—this restriction on expression would extend well beyond Montana’s borders. SB 419 would not only prevent Montana residents from using TikTok to express themselves, it would also restrict the expression of the millions of *non*-Montana TikTok users who would no longer be able to hear from, or reach out to, Montana residents via the app. The net effect is a direct assault on the right “to seek, receive and impart information and ideas ... regardless of frontiers” that Article 19 is designed to protect. General Comment 34 ¶ 11.

II. SB 419 Violates International Law Because It Fails The Relevant Legal Test Under Article 19

Because SB 419 is a restriction on expression, it is valid under international law only if it satisfies Article 19’s three-part test. Specifically, a restriction on expression is lawful under Article 19 only if it is (1) “provided by law” (legality) and (2) necessary to protect (necessity and proportionality) (3) a legitimate government objective (legitimacy). General Comment 34 ¶¶ 22, 24, 28-29, 33-35.

These three prongs, in turn, have their own standards. A restriction on expression is “provided by law” when it is precise and transparent, and when it places meaningful limits on the discretion of government authorities charged with enforcement. *See id.* ¶¶ 24-25. A restriction is “necessary and proportionate” only when it is the “least intrusive instrument” to achieve a legitimate state interest. *Id.* ¶ 34. And a government interest is “legitimate” only if it falls within one of the categories provided in Article 19(3)—that is, (i) the rights or reputations of others, or (ii) national security, public order, or public health or morals. *Id.* ¶¶ 28-29. SB 419 fails each prong of Article 19’s three-part test.

A. SB 419 Lacks Sufficient Precision To Satisfy The “Legality” Prong

The Montana Legislature passed SB 419 on May 4, 2023, and the State’s Governor signed the bill into law the following month. *Alario*, 2023 WL 8270811, at *3. But Article 19’s legality test requires more than procedural validity—it requires also that the restriction in question “be formulated with sufficient precision

to enable an individual to regulate his or her conduct accordingly.” General Comment 34 ¶ 25; *see also id.* (“Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expressions are properly restricted and what sorts are not.”).

SB 419 lacks the required precision. In particular, the law fails to define what it means to “operate” in Montana (*see* SB 419 § 1), and it provides no guidance on what TikTok Inc. must do to satisfy its obligation to prevent Montanans from accessing the app (*see* SB 419 § 1(7)(a)).

The failure to define “operate” dooms SB 419 because that term has no obvious meaning in the context of the technical processes at issue here—namely, the use of social media applications over the internet. Communications over the internet generally occur via a “client-server” model whereby (i) an application provider (such as TikTok Inc.) maintains certain content on its “server” computer, (ii) a “client” computer requests a copy of the content from the “server” computer, and (iii) the “client” computer receives the content once it is sent through the internet. *See* IBM, *The Client/Server Model*, <https://tinyurl.com/e7rf3ue8>; *see also* HEAVY.AI, *Client-Server Definition*, <https://tinyurl.com/2fpykb4k>.

When this series of actions occurs, TikTok Inc. is not the entity “operat[ing]” in any particular jurisdiction in the normal sense of the word—instead, the *user* is initiating communication between TikTok’s “server” and the user’s “client”

computer. That is to say, a user’s act of accessing the TikTok server is not equivalent to *TikTok* “operating” the app because TikTok is doing nothing more than making the app available. To the extent the Montana Legislature meant for the term “operate” in SB 419 to prohibit TikTok from having its app be generally accessible over the internet, it certainly did not explain that non-obvious definition of “operate” with the precision Article 19 requires.

SB 419 also lacks sufficient precision regarding the actions TikTok must take to comply with the law. Under SB 419, TikTok Inc. is liable any time a user *in Montana* accesses the TikTok app, or is offered the ability to access the app. SB 419 §§ 1(7)(a), (d). To implement the ban, then, TikTok must be able to (i) accurately identify whether a user is physically located in Montana, and then (ii) “block” that user’s access to the app, a process known as “geofencing.”

Geofencing, however, can take a variety of forms and varies significantly in its accuracy. SER-175-85. The most accurate method is to use GPS data, but TikTok does not collect GPS data from U.S. users. SER-176. And while TikTok does collect users’ IP addresses, “IP addresses are a significantly less precise—and often inaccurate—means of attempting to identify a user’s geographic location.” SER-177.

SB 419 provides no guidance to TikTok on whether its limited geofencing capabilities—capabilities that TikTok’s expert concluded would not allow it to

“reliably determine whether a user is in Montana”—would be sufficient to satisfy its obligation to prevent access to the app. Perhaps TikTok need only do what it can. Or perhaps Montana expects TikTok to vastly increase the amount of user data it collects to allow for more accurate geofencing. The law simply is not clear. That lack of clarity on one of the statute’s core provisions means that SB 419 cannot satisfy Article 19’s “legality” criterion. General Comment 34 ¶ 25.

B. SB 419’s Purported Objectives Are Not “Legitimate” Grounds For Banning TikTok

SB 419 also fails Article 19’s “legitimacy” test. SB 419’s preamble emphasizes that the law serves two main purposes: (1) to prevent TikTok Inc. from gathering user data “to share with the People’s Republic of China,” and (2) to promote the “health and safety of Montanans” by protecting minors from dangerous content. SB 419, Preamble. On their face, these goals—counter-espionage against a foreign adversary and protecting minors from dangerous content—fall within the categories of “legitimate” restrictions on expression prescribed in Article 19(3)—namely, restrictions to protect “national security” and “public health or morals.” General Comment 34 ¶ 29. But a government ban on expression must do more than invoke a facially legitimate ground—it must substantiate that legitimacy by demonstrating “in specific and individualized fashion the precise nature of the threat.” *Id.* ¶ 35. Montana fails to do so.

First, as a threshold matter, SB 419’s foreign policy purpose is not a “legitimate” ground for banning TikTok because “Montana does not have constitutional authority in the field of foreign affairs.” *Alario*, 2023 WL 8270811, at *9. Instead, the U.S. Constitution vests exclusive responsibility for foreign affairs with the federal government; state laws that intrude on this exclusive federal authority are preempted. *Id.* at *12 (citation omitted). SB 419 does just that—the law aims to “stop a perceived national security threat” by cutting off China from a “valuable tool” of “international espionage.” *Id.* at *14; SB 419, Preamble. China policy, however, is the province of the federal government, not Montana. *See, e.g.*, The White House, *United States Strategic Approach to the People’s Republic of China* (May 20, 2020), <https://tinyurl.com/485rdb46>. Therefore, countering China is not a “legitimate” ground for restricting Montanans’ freedom of expression under Article 19(3).

Even if Montana had authority to establish its own foreign policy vis-à-vis China, SB 419 still fails the legitimacy test for failure to specify the precise nature of the threat. The law’s preamble states that China “has an interest in gathering information about Montanans [and] Montana companies” for purposes of “international espionage”; that China “can direct [TikTok Inc.] to share user information”; and that TikTok “steal[s]” user data “to share with the People’s Republic of China.” SB 419, Preamble. But nothing in the statute, or in the statute’s

legislative history, describes with any *specificity* what acts by China and TikTok are being targeted by the law.

To the contrary, “TikTok affirms it has ‘not received any requests for U.S. user data from the Chinese government’; has ‘not shared any U.S. user data with the Chinese government in response to such a request; and would not do so if [it] were to receive a request.’” *Alario*, 2023 WL 8270811, at *2. Additionally, TikTok since 2021 has spent approximately \$1.5 billion on efforts to strengthen data protections for U.S. users, including forming a special-purpose subsidiary, TikTok U.S. Data Security, for that very purpose. TikTok Ans. Br. 5; TikTok, *About Project Texas*, <https://usds.tiktok.com/usds-about/>.

In light of all this, Montana’s unsubstantiated allegations regarding data “stealing” and “international espionage” deserve no weight and cannot satisfy Montana’s burden to demonstrate the “precise nature of the threat” in “specific and individualized fashion.” General Comment 34 ¶ 35; *cf. Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1119 (9th Cir. 2023) (California could not justify intrusion on protected speech with “a chain of inferences” and “a web of speculation,” rather than “facts or evidence”).

Second, SB 419’s “protection of minors” justification is similarly unsubstantiated. Montana claims that SB 419 is intended to protect Montana’s youth from “dangerous content” on TikTok “that directs minors to engage in dangerous

activities,” such as “throwing objects at moving automobiles” and “taking excessive amounts of medication.” SB 419, Preamble. Certainly, as a general matter, Montana “possesses legitimate power to protect children from harm.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794 (2011). But Montana here makes no attempt to specify, as it must, “the precise nature of the threat” to Montana’s youth. General Comment 34 ¶ 35.

For example, Montana makes no effort to define the supposed threat with reference to how many youth in Montana are using the TikTok app; how much so-called “dangerous content” is on the TikTok app; how many youth view such content; and what youth may do in response to seeing such content. In other words, the State fails completely to define the circumstances through which dangerous content on the TikTok app is harming youth in Montana. In light of this failure, Montana’s stated aim of protecting children, while valid in the abstract, is not a “legitimate” ground for restricting freedom of expression under Article 19(3). *Id.*; see also *Sohn v. Republic of Korea*, Communication No. 518/1992, UN Doc. CCPR/C/54/D/518/1992, § 10.4 (1995) (allegation that trade union leader’s statement supporting labor strike threatened national security and public order “failed to specify the precise nature of the threat” to justify a restriction of expression under Article 19(3)), <https://tinyurl.com/3j2wf334>.

C. SB 419 Is Not “Necessary And Proportionate” To Accomplishing Its Stated Purposes

SB 419 also fails Article 19’s “necessary and proportionate” prong. A restriction on expression “violates the test of necessity if the [stated purpose] could be achieved in other ways that do not restrict freedom of expression.” General Comment 34 ¶ 33. And a restriction violates proportionality if it is not the “least intrusive instrument” for accomplishing a legitimate purpose. *Id.* ¶ 34. SB 419, which “completely bans TikTok in Montana” (*Alario*, 2023 WL 8270811, at *10), is neither necessary nor proportionate, even if the law’s stated goals were legitimate. General Comment 34 ¶ 43 (“[G]eneric bans on the operation of certain [web]sites and systems are not compatible with [Article 19] paragraph 3.”).

To begin, SB 419 is not “necessary” to its stated purposes because both goals—protecting against alleged Chinese data theft, and preventing Montana’s youth from viewing dangerous content—could be accomplished in ways that do not ban the TikTok app. As one example, the EU’s Digital Services Act regulates online intermediaries and social media platforms, including by mandating safeguards to prevent children from accessing harmful content. *See* European Commission, *The Digital Services Act*, <https://tinyurl.com/bdch27nj>.

To take another example, the EU’s General Data Protection Regulation requires “data controllers” like TikTok to implement “appropriate technical and organizational measures” to handle data securely, and imposes strict requirements

for processing personal data. See Ben Welford, *What is GDPR, the EU's New Data Protection Law?*, <https://gdpr.eu/what-is-gdpr/>. And Montana itself has enacted a law called the Montana Data Privacy Act—“a sweeping data privacy law ... that purports to protect Montanans against unsafe data collection practices from social media companies in the state.” *Alario*, 2023 WL 8270811, at *10. These few examples illuminate a broader point—in light of the multiple “other ways” that Montana can accomplish SB 419’s stated purposes, the law is not “necessary” under Article 19. General Comment 34 ¶ 33.

Nor is SB 419 “proportionate to the interest[s] to be protected.” *Id.* ¶ 34. All of the above-mentioned examples of laws regulating social media platforms’ data protection and/or content moderation policies do so *without banning the platforms outright*. By definition, then, these laws (and laws like them) are lesser intrusive means for achieving SB 419’s stated purposes. Given the availability of these more targeted regulatory approaches, SB 419’s blanket ban of the TikTok app is not “proportionate” to any of the law’s stated goals. *Id.*

Finally, SB 419’s lack of necessity and proportionality is evident from the fact that banning TikTok would not address the harms the law was purportedly enacted to address. For example, with respect to SB 419’s data protection purposes, “it is well-established that other social media companies, such as Meta, collect similar data as TikTok, and sell that data to undisclosed third parties.” *Alario*, 2023 WL

8270811, at *11. And as the district court emphasized, there are many ways China can gather data from Montanans besides TikTok, including “purchasing information from data brokers,” “conducting open-source intelligence gathering,” and “hacking [servers].” *Id.* In short, SB 419 does not meaningfully “protect[] Montanans from China’s purported evils” because the law does not meaningfully limit China’s access to Montanans’ data. *Id.*

Similarly, SB 419 would do little to protect Montana’s youth from dangerous online content. TikTok is one of a multitude of online digital platforms, which means that even if SB 419 could “protect” youth from so-called dangerous content on TikTok, minors could still view the same content on Instagram, Snapchat, YouTube, Facebook, or any other social media site.

As the district court aptly observed, “It is not hard to imagine how a minor may access dangerous content on the Internet, or on other social media platforms, even if TikTok is banned.” *Id.* In the absence of any showing that SB 419 would have a meaningful impact on Montana’s youth’s exposure to dangerous content, the law cannot be “actually necessary to the solution” (*Brown*, 564 U.S. at 799), and cannot satisfy Article 19(3)’s necessity and proportionality test. *See* General Comment No. 34 ¶ 35 (explaining that “necessity and proportionality” under Article 19(3) requires the government to establish “a direct and immediate connection between the expression and the threat”).

* * *

In sum, SB 419 fails Article 19’s three-part test. The law lacks “legality” because it is ambiguous on key terms, including what it means to “operate” in Montana. The law fails “legitimacy” because Montana did not demonstrate with specificity the precise nature of the threats SB 419 purports to address. And the law is not “necessary and proportionate” because its stated goals can be achieved by lesser intrusive means. Therefore, SB 419 violates America’s international human rights obligations under the ICCPR and should be enjoined, just as the district court held.

III. SB 419 Undermines America’s International Status

The fact that SB 419 violates international human rights law is reason enough to affirm the district court’s order. But SB 419’s disregard for human rights norms also has important policy implications—namely, it undermines America’s “status” in international relations, which can complicate America’s ability to advance its national interests on the world stage.

A. International Status Is An Important Component Of A Country’s Power And Influence In International Affairs

“Status” in international politics refers to a state’s standing, or prestige ranking, relative to other nations in the international system. *See* Elias Götz, *Status Matters in World Politics*, 23 Int’l Studies Rev. 228, 229-30 (2021). Although a number of attributes can contribute to a country’s international status, status is an

inherently “perceptual and social phenomenon”—that is, a claim to status depends on recognition from other countries. *Id.* at 230; Marina G. Duque, *Recognizing International Status: A Relational Approach*, 62 Int’l Studies Q. 577, 581 (2018) (“[A] successful claim to [international] status requires recognition.”).

The attributes that matter for status recognition are not limited to material resources. Although status attributes can be material—that is “things that [countries] have”—they can also be “ideational”—that is, “norms that [countries] follow.” Duque, *supra*, at 580. For example, regardless of their economic or military power, members of the international community are expected to conform to international human rights laws and democratic principles. *Id.*

These “fundamental values” confer status because the international community in general ascribes importance to respecting human rights. *See id.* at 589. And the United States itself has been at the forefront of efforts to promote respect for human rights as a sign of international status. For example, in a June 2007 speech at The Hague, then U.S. State Department Legal Adviser John Bellinger remarked that America’s “moral authority in international politics” stems from its “commitment to international law” and the “seriousness with which we approach our international obligations.” John B. Bellinger III, *The United States and International Law, Remarks at The Hague (June 6, 2007)*, <https://tinyurl.com/4p9jew8y>. In other words, for the United States, “the world’s

acknowledged human rights leader,” respecting international human rights is a key component of its international status. Harold Hongju Koh, *Repairing Our Human Rights Reputation*, 31 W. New Eng. L. Rev. 11, 11 (2009).

A high level of status is not an end to itself—rather, it provides practical benefits to its holder. “States seek status ... because it is a valuable resource for coordinating expectations of dominance and deference in strategic interactions.” Jonathan Renshon, *Fighting for Status: Hierarchy and Conflict in World Politics* 33 (Princeton Univ. Press, 2017).

More specifically, international relations scholars have identified “two ways in which status translates into power and influence.” Götz, *supra* 23, at 230. “First, high international rank often entails certain rights and benefits”—such as a privileged role in international organizations—that provide “high-status states with opportunities to shape political, economic, and security arrangements ... in accordance with their own interests.” *Id.* “Second, high international status can induce behavioral deference from lower ranked states,” which means that “higher ranked states have to rely less on coercion to achieve their goals.” *Id.* In this sense, status is an “influence multiplier”—a resource that states leverage to achieve broader foreign policy and national security objectives on the world stage. *Id.*

B. SB 419 Has Echoes Of “Digital Repression” And Calls Into Question America’s Commitment To International Human Rights

SB 419 undermines America’s international status in at least two ways.

First, by banning TikTok, SB 419 resembles acts of “digital repression” that the United States has condemned abroad. National Intelligence Council, *Digital Repression Growing Globally, Threatening Freedom* (Oct. 31, 2022), declassified Apr. 24, 2023, <https://tinyurl.com/2wy3p2rb>. For example, from June 2021 to January 2022, Nigeria banned Twitter from operating in the country after the company removed a post from the then president. Freedom House, *Freedom on the Net 2022: Countering an Authoritarian Overhaul of the Internet* 8, <https://tinyurl.com/yzkxnp43>. In Sudan, military leaders who seized power in a coup in October 2021 blocked access to Facebook, Twitter, Whatsapp, and Instagram to prevent anti-coup protesters from organizing. *Id.* at 7; Freedom House, *Sudan: Freedom on the Net 2022 Country Report*, <https://tinyurl.com/3893bnx2>. And in Iran, authorities shut down WhatsApp and Instagram in September 2022 in an effort to quell antigovernment protests. Freedom House, *Freedom on the Net 2023: The Repressive Power of Artificial Intelligence* 2-3, <https://tinyurl.com/2e452cr9>.

All of these measures share a core similarity with SB 419—they ban “an entire medium of public expression across the landscape of a particular community.” *Alario*, 2023 WL 8270811, at *11. That congruence should give the United States pause—a U.S. domestic law that resembles the censorship measures imposed by

coup leaders in Sudan is hard to defend as consistent with America’s role as a champion of human rights. As the U.S. State Department stated in a June 2021 press release condemning Nigeria’s suspension of Twitter, “Freedom of expression and access to information both online and offline are foundational to prosperous and secure democratic societies.” U.S. Dep’t of State, *Press Statement on Nigeria’s Twitter Suspension* (June 10, 2021), <https://tinyurl.com/57z5wr5v>. That statement is equally true for Montana’s ban of TikTok.

Second, SB 419 undermines America’s reputation for complying with its treaty obligations. A state’s reputation for compliance with international law is defined as “judgments about [a country’s] past response to international legal obligations used to predict future compliance with such obligations.” Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* 73 (Oxford 2008). A reputation for compliance is valuable because it “allows the state to make more credible promises to other states and to extract more gains from international [engagements].” *Id.* at 74. In this way, reputation contributes to international status—a state that enjoys a reputation for complying with international law is more likely to secure cooperation from other countries because those countries believe that the state’s commitment is credible. *See* Condoleezza Rice, *Remarks at the Annual Meeting of the American Society of International Law* (Apr. 1, 2005) (“When we observe our treaty and other international commitments, other countries are more

willing to cooperate with us and we have a better chance of persuading them to live up to their own commitments.”), <https://tinyurl.com/ubpa9m3t>.

SB 419 detracts from America’s reputation for compliance—by imposing a far-reaching restriction on expression in violation of Article 19, the law calls into question the credibility of America’s commitment to international human rights. Should SB 419 go into effect, other countries would rationally lower their estimates of America’s willingness to comply with international law, which, in turn, would limit America’s ability to influence others on human rights issues in the future. Guzman, *supra* 27, at 191 (noncompliance with an accepted norm “signals a willingness to ignore international legal obligations and thus makes future cooperation more difficult”). In other words, if America’s compliance with international human rights norms is an “influence multiplier” (Götz, *supra* 23, at 230), noncompliance with those norms can be an influence diminisher.

C. A Decline In America’s International Status Would Weaken Its Hand In World Affairs

Any decline in America’s international status resulting from SB 419 would have real implications for U.S. foreign policy.

Since 1945, America has been the leading power in what international relations scholars and U.S. policymakers call the “liberal international order”—the set of norms, rules, and institutions for global governance that emerged after World War II, and that includes, among other things (i) respect for territorial integrity, (ii)

commitment to the peaceful resolution of disputes, (iii) support for strong international institutions, and (iv) “respect for international law, global rules and norms, and universal values, including human rights.” Ronald O’Rourke & Michael Moodie, Cong. Rsch. Serv., *U.S. Role in the World: Background and Issues for Congress 2* (Apr. 6, 2020). America has leveraged its status as the leading state in this rules-based order to secure “significant security, political, and economic benefits, including the maintenance of a favorable balance of power on both a global and regional level, and a leading or dominant role in establishing and operating global institutions and rules for international finance and trade.” *Id.* at 3.

Put simply, the international rules, norms, and institutions that the United States has defended and promoted for the past 80 years—including respect for international human rights—has allowed America to shape the international system in line with its interests and preserve its role as the leading power in world affairs. *See id.* at 1-2.

SB 419, however, undercuts human rights norms, and by extension, the broader rules-based international order of which those norms are a part. And it does so at a time when rising powers that do not share America’s commitment to international human rights are actively trying to reshape the international order and promote new norms more conducive to their interests. *See* Joseph R. Biden,

National Security Strategy 2 (Oct. 2022), <https://tinyurl.com/56fhkwjy> (“We are in the midst of a strategic competition to shape the future of the international order.”).

China, for example, “has for years been chipping away at the pillars of the U.S. led global order—subverting its foundational institutions, international norms, and liberal ideals.” Michael Schuman, *How China Wants to Replace the U.S. Order*, *The Atlantic* (July 13, 2022), <https://tinyurl.com/yefth23r>. One of Beijing’s key aims in this “battle to establish the norms that govern global affairs” is to undercut the concept of universal human rights championed by the United States and its allies, and replace it with the principle that human rights are relative to individual countries. *Id.*; see also Shannon Tiezzi, *Can China Change the Definition of Human Rights?*, *The Diplomat* (Feb. 23, 2021), <https://tinyurl.com/3v579ac7>; Josh Birenbaum, *China Is Trying to Change What Human Rights Mean*, *The National Interest* (Nov. 8, 2023), <https://tinyurl.com/4hs6xm3d>. As Chinese Foreign Minister Wang Yi put it in a February 2021 speech to the UN Human Rights Council, “Human rights are not a monopoly by a small number of countries, still less should they be used as a tool to pressure other countries and meddle in their internal affairs.” Tiezzi, *supra*.

SB 419 plays right into China’s effort. If Montana is willing to violate its residents’ freedom of expression by banning an entire medium of public expression within its borders, then the United States will likely find it more difficult to credibly advocate for the universality of those freedoms abroad. That, in turn, would bolster

China’s position in the ongoing competition with America “for the moral high ground of human rights protection.” *Id.* Thus, for all of Montana’s protestations that SB 419 is needed to stand up to the China threat, the law, paradoxically, strengthens China’s hand—it cheapens human rights norms and thereby provides space for Beijing to promote the “relativism” of those rights as part of its vision for an alternative international order. U.S. foreign policy should be wary of such counterproductive legislation.

CONCLUSION

SB 419 runs counter to America’s long-standing commitment to international human rights law, violates the right to freedom of expression guaranteed by Article 19 of the ICCPR, and weakens America’s international status at a time of rising great power competition. The Court should affirm the district court’s preliminary injunction.

Dated: May 6, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

I certify that this amicus brief contains 6,999 words, excluding the items exempted by Fed. R. App. P. 32(f), and thereby complies with the word limit of Fed. R. App. P. 29(a)(5). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing amicus brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the ACMS electronic filing system on May 6, 2024.

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