

TEXAS TECH UNIVERSITY SCHOOL OF LAW
ADVANCED MOOT COURT COMPETITION
FALL 2023 PROBLEM

No. 01-2023

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2023

TECHTOK, INC.,

Petitioner,

v.

MICHAEL BRAXTON,
ATTORNEY GENERAL FOR THE STATE OF HUNT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

TECHTOK, INC.,

Petitioner,

v.

MICHAEL BRAXTON,
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Respondent.

ORDER GRANTING WRIT OF CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit is GRANTED. The issues before the Court are:

1. Under the First Amendment's Free Speech Clause, (1) are major social media companies common carriers, and (2) does this Court's decision in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* apply to the SPAAM Act's disclosure requirements?
2. Does a state violate the First Amendment's Free Speech Clause when it prohibits major social media companies from denying users nondiscriminatory access to its services?

Dated: October 4, 2023.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HUNT

TECHTOK, INC.,

Plaintiff,

v.

MICHAEL BRAXTON,
ATTORNEY GENERAL FOR THE
STATE OF HUNT,

Defendant.

Case No. 23-cv-010

MEMORANDUM OPINION AND ORDER

Before Roger Alison, District Judge:

This case comes before the Court on a motion for preliminary injunction arising out of plaintiff TechTok, Inc's First Amendment challenge to the State of Hunt's Speech Protection and Anti-Muzzling (SPAAM) Act. For the reasons set forth below, TechTok's motion is GRANTED.

I. The Parties and Background.¹

A. *TechTok, Inc.*

TechTok, Inc., founded and headquartered in Lanier, Hunt, has emerged as one of the most popular social media companies in America. Its mission is to "provide a space for anyone and everyone to express themselves to the world" and to "promote greater inclusion, diversity, and acceptance in a divided world." TechTok, like other social media companies, allows users to create

¹ The parties concede that the following facts are undisputed.

profiles, design and post content, and share other users' posts. But unlike other social media companies, TechTok's users interact in a virtual reality environment that they access through virtual reality headsets.

Further, TechTok provides its users options beyond simply posting content. It allows users to monetize their posts, solicit advertisers to sponsor their accounts, and receive donations from other users. Because of this, many people use TechTok to promote their businesses and create new revenue streams. And with over 75 million monthly users, TechTok has become more than just a social media company, it has become a hub of business in cyber space. Many of its users depend on TechTok's services to support their businesses and livelihoods.

TechTok curates this experience by using algorithms to categorize and order the content that users see. The algorithms prioritize information based on users' stated preferences while incorporating insights into users' interests derived from TechTok's data tracking systems. The algorithms also deprioritize information that TechTok's artificial intelligence has flagged as potentially violating TechTok's Community Standards.

TechTok's Community Standards—which users must agree to before joining TechTok's servers—lay out what conduct TechTok prohibits. The Community Standards “ensure a welcoming community” where “all are respected and welcome.” The Standards forbid users from creating, posting, or sharing content that either explicitly or implicitly promotes or communicates hate speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes.

Additionally, the Community Standards ban a range of information that TechTok deems to be “disinformation.” The Community Standards define disinformation as “intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups.” It further specifies that “disinformation can take the form of fabricated stories, manipulated facts, manipulated images or videos, and misleading narratives. Any such content is prohibited.”

Users who violate the Community Standards can face a variety of penalties. At the most basic level, TechTok will append commentary to a user’s post stating that the post runs a risk of violating the Community Standards and warning about possibly upsetting content. Content that TechTok believes violates its Community Standards will also be deprioritized by its algorithms. Additionally, TechTok may choose to demonetize the user’s account, suspend the account for a certain period, block others from accessing the user’s account, or outright remove the account and ban the user from TechTok.

B. Hunt Passes the SPAAM Act.

In 2022, prominent users of TechTok accused TechTok of discriminating against them for their viewpoints. In response to the accusations, Hunt’s governor called a special session of the Hunt Legislature to hold hearings on TechTok’s practices.² The legislature heard testimony from multiple individuals who accused TechTok of censorship. Alexander Stone, a popular TechTok user who posts ten-to-fifteen-minute monologues on hot-button political and social topics, accused TechTok of deprioritizing his content. He alleged that his viewership declined dramatically after his viral “They’re Coming for You” monologue. He also alleged that TechTok frequently adds warnings to his posts that say his posts contain “bullying and harassment,” “promotion of violence against

² Transcript of legislative hearing on the SPAAM Act is marked as Appendix I, contained on pages 23–27 of the Record. (R. 23–7).

protected classes,” and “sexist and racist language.” Similarly, Braelynn Hope—an entrepreneur who runs the start-up fashion company WhimsiWear—testified that purchases from her virtual store and engagement with her ads declined by 34 % after she criticized a controversial presidential candidate. Finally, Elliot Clifton, who runs the wildly popular movie review site Rancid Potatoes, alleged that TechTok banned his account for spreading “disinformation” and “hate speech” after she spoke out in favor of a controversial documentary about immigration to Europe.

Based on this testimony, Hunt State Representatives Mary Theresa Brown and Tex Jackson introduced the SPAAM Act. Representative Brown stated that “social media giants like TechTok have become virtual dictators, suppressing free speech, and ruining hardworking peoples’ livelihoods under the guise of moderation. This bill will hold them accountable and ensure the protection of our democratic values.” Similarly, Representative Jackson stated that “excessive censorship by tech behemoths is a clear violation of our fundamental rights. We need robust legislation to curb their power and restore the voice of the people.” Hunt’s Governor, Megan “Meg” Babbitt, also weighed in, stating that the Act “will establish a system of oversight that guarantees the protection of civil liberties while curbing the spread of harmful content.” The Speaker of Hunt’s House of Representatives, Nancy Thornberry, concluded that “speech is increasingly being centralized in unaccountable companies that threaten individuals’ livelihoods. Our very ability to challenge political orthodoxy is under siege.”

The SPAAM Act applies to any “social media platform.” HUNT CODE § 528.491(a)(1). The Act defines a “social media platform” as “any information service, system, search engine, or software provider that: (i) provides or enables computer access by multiple users to its servers and site; (ii) operates as a corporation, association, or other legal entity; (iii) does business in and/or is

headquartered in Hunt; and (iv) has at least twenty-five million monthly individual platform users globally.” *Id.* § 528.491(a)(2)(i)-(iv).

The Act has two main requirements that work in tandem. First, the Act restricts social media platforms’ ability to alter or remove users’ content. Noting that “social media platforms are the public square of the twenty-first century and common carriers of public speech,” the Act prohibits any social media platform from “censoring, deplatforming, or shadow banning” any “individual, business, or journalistic enterprise” because of “viewpoint.” *Id.* § 528.491(b)(1). The Act defines “censorship” or “censoring” as “editing, deleting, altering, or adding any commentary” to a user’s content. *Id.* § 528.491(b)(1)(i). The Act further defines “deplatforming” as “permanently or temporarily deleting or banning a user.” *Id.* § 528.491(b)(1)(ii). Finally, “shadow banning” is defined as “any action limiting or eliminating either the user’s or their content’s exposure on the platform or deprioritizing their content to a less prominent position on the platform.” *Id.* § 528.491(b)(1)(iii). The Act exempts “obscene, pornographic or otherwise illegal or patently offensive” content from the section’s requirement. *Id.* § 528.491(b)(2).

Second, the Act requires social media platforms to publish “community standards” with “detailed definitions and explanations for how they will be used, interpreted, and enforced.” *Id.* § 528.491(c)(1). Further, when a social media platform enforces its community standards, the Act requires the platform to “provide a detailed and thorough explanation of what standards were violated, how the user’s content violated the platform’s community standards, and why the specific action (e.g., suspension, banning, etc.) was chosen.” *Id.* § 528.491(c)(2).

Enforcement of the Act is vested in Hunt’s Attorney General. *Id.* § 528.491(d)(1). Users who have been harmed by a platform’s violation of the Act may either file a complaint with the Attorney

General or sue on their own. *Id.* § 528.491(d)(2). Courts may grant relief either in the form of injunctions or fines totaling \$10,000 a day per infraction. *Id.* § 528.491(d)(3).

C. Procedural History.

The Hunt Legislature passed the SPAAM Act on February 7, 2023. The Act went into effect on March 1, 2023.

In response, TechTok filed a pre-enforcement challenge against Hunt's Attorney General, Michael Braxton, in the United States District Court for the District of Hunt on March 2, 2023, alleging that the Act's provisions violate the First Amendment. In relief, TechTok requested a permanent injunction enjoining Attorney General Braxton from enforcing the Act. *See Ex Parte Young*, 209 U.S. 123, 155–56 (1908) (holding that courts may enjoin state actors vested with enforcement powers from enforcing an unconstitutional law). Additionally, TechTok moved for a preliminary injunction to stop the SPAAM Act from moving forward for the duration of the lawsuit.

TechTok makes two primary arguments for why this Court should grant a preliminary injunction in its favor. First, TechTok argues that it is likely to succeed on the merits because the SPAAM Act violates its First Amendment rights by requiring it to provide detailed explanations of its Community Standards and its enforcement decisions. In doing so, Hunt impermissibly compels TechTok to speak. Further, TechTok argues that the explanation requirement imposes an undue burden on TechTok's speech. Second, TechTok argues that the SPAAM Act violates TechTok's First Amendment rights by requiring it to host third-party content that violates its Community Standards. As a result, TechTok argues, the Act infringes on TechTok's constitutionally protected editorial judgment.

Further, TechTok argues that it can satisfy the rest of the preliminary injunction criteria. First, it argues that irreparable injury is satisfied because even a simple infraction under SPAAM can cost \$10,000 a day. Moreover, it argues that the balance of equities tips in TechTok's favor because Hunt will face no injury while the litigation is pending, unlike itself. Finally, TechTok argues that a preliminary injunction is in the public interest—satisfying companies' need to protect their free speech rights from the Act's speech-chilling provisions.

Hunt argues that a preliminary injunction is inappropriate. First, Hunt argues that TechTok is unlikely to succeed on the merits because the Act is constitutional and does not violate the First Amendment. Hunt argues that the Act's enforcement explanation provisions do not implicate the First Amendment, as TechTok is a common carrier. And even if TechTok is not a common carrier, Hunt argues that the enforcement explanation requirement does not violate the First Amendment as it involves purely factual disclosures that do not affect TechTok's speech. Next, Hunt argues that the First Amendment does not apply because TechTok does not exercise any form of protected editorial judgment. Thus, Hunt reasons that it can prevent TechTok from discriminating against disfavored viewpoints.

Also, Hunt argues that the remaining preliminary injunction factors weigh in its favor. Hunt argues that TechTok suffers no irreparable injury because the Act does not impair its right to speak its own message. Further, Hunt argues that the balance of equities favors its position because injunctive relief would frustrate the legislature's role in carefully considering and implementing public policy choices for the state of Hunt. Lastly, Hunt argues that injunctive relief is against the public interest because it would prevent enforcement of the SPAAM Act, allowing TechTok to continue to silence freedom of speech on its platform.

II. Discussion.

A. Standard of Review

A preliminary injunction is appropriate where four prongs are met. A court may grant a preliminary injunction where the plaintiff shows: (1) a likelihood of success on the merits; (2) immediate irreparable injury absent injunctive relief; (3) the balance of equities weighs in their favor; and (4) that the preliminary injunction serves the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

B. Analysis

For the following reasons, the Court rejects Hunt's arguments; holding that TechTok satisfies the requirements for a preliminary injunction and, more importantly, is likely to succeed on the merits of its claim because the SPAAM Act violates the First Amendment.

The Free Speech Clause of the First Amendment of the United States Constitution "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Known as the "state action doctrine," the First Amendment only applies to censorship by the government. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Even where First Amendment interests are implicated, social media platforms are not state actors and thus are not subject to the Amendment's restrictions. See *Green v. Am. Online*, 318 F.3d 465, 472 (3d Cir. 2003).

As a result, the First Amendment protects an individual's (or a company's) right to speak irrespective of whether the government thinks the speech sensible or misguided. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974). That protection extends to government actions that would "chill" free expression, thereby preventing "threat[s] to censure comments on matters of

public concern.” *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Such “overbreadth” challenges allow “law[s] [to] be invalidated as overbroad if a substantial number of [their] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021). Overbreadth challenges, then, empower private property owners—even those in cyber space—to exercise editorial control over speech within the bounds of their property without fear of government intervention. See *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1931.

Neither party challenges that social media platforms, like any other individual or company, are protected by the First Amendment. The question is then whether the SPAAM Act triggers First Amendment protections and, if so, does it survive intermediate scrutiny.

Enforcement Explanation Requirement

This Court first considers TechTok’s challenge to § 528.491(c). TechTok argues that § 528.491(c) burdens its editorial judgment by requiring TechTok to “provide a detailed and thorough explanation” every time it acts against content that violates its Community Standards. TechTok argues that this requirement impermissibly burdens its exercise of editorial judgment.

Hunt counters by arguing that TechTok is a common carrier. Hunt argues that TechTok is a common carrier because it holds itself out to the public as willing to serve “everyone.” As a result, Hunt reasons, TechTok meets “[t]he basic characteristic of common carriage [which] is the requirement to hold oneself out to serve the public indiscriminately.” *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). Further, Hunt points to the legislature’s findings that TechTok is “a common carrier” and the “modern public square.” Because TechTok is a common carrier, Hunt

concludes, it can regulate how TechTok creates and implements its content moderation enforcement policies.

Hunt further argues that even if TechTok is not a common carrier, Hunt can still require commercial speakers to disclose factually true information. See *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). Here, Hunt argues that § 528.491(c)'s disclosure requirements do not infringe TechTok's editorial judgment as they merely require TechTok to provide sufficient information for users to understand how and why they violated the Community Standard.

Hunt's arguments are unavailing. First, even if common carriers receive fewer First Amendment protections than other communicators, the First Amendment still applies. See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984). Moreover, TechTok is not a common carrier. A common carrier holds itself out to the public without making "individualized decisions" about whom it serves or restricting users' freedom to use its services. See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). TechTok, by contrast, requires all users—as a precondition of joining its servers—to agree to its Community Standards. Users then are not free to use TechTok's services as they see fit. This constitutes TechTok making an individualized decision about who may use its platform and under what conditions. Hence, TechTok is not a common carrier.

Section § 528.491(c)'s "detailed explanation" requirement imposes an "undu[e] burden[]" that "chills . . . [TechTok's] protected speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018). TechTok has millions of users, and it makes countless editorial judgments to remove and restrict content. But the Act requires TechTok to provide a "detailed and thorough explanation" every time it enforces its Community Standards. HUNT CODE § 528.491(c)(3). This imposes both significant implementation costs and substantial liability for failure to comply. This

requirement’s chilling effect on TechTok’s editorial judgments is an “unjustified or unduly burdensome” commercial disclosure requirement. *Cf. Zauderer*, 471 U.S. at 651–52 (holding that government regulations of commercial speech are valid when they impose non-burdensome, factual disclosure requirements to cure otherwise misleading advertisements). Thus, the Act infringes on TechTok’s First Amendment rights and § 528.491(c) must survive intermediate scrutiny.

Section 528.491(c) fails intermediate scrutiny. Intermediate scrutiny applies because the Act is content-neutral and its provisions apply equally to social media companies irrespective of ideological or political viewpoint. *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022). To survive intermediate scrutiny, Hunt must show that the Act is narrowly tailored to forward an important state interest. *Id.* at 1475. Hunt has failed to articulate what important state interest justifies the Act’s burdensome explanation requirement. Even if Hunt had an important state interest, § 528.491(c) is not narrowly tailored as it exposes TechTok to untold liability if its enforcement explanations are not detailed enough. As § 528.491(c) violates the First Amendment, TechTok is likely to succeed on the merits of this claim.

Restrictions on Content Moderation

Next, this Court addresses the Act’s restrictions on “censoring, deplatforming, or shadow banning” users because of their “viewpoint.” HUNT CODE § 528.491(b)(1)–(2).

Three main cases guide this Court’s analysis. First, in *Miami Herald Publishing Co. v. Tornillo*, a state law required newspapers that criticized a political candidate to provide equal space in the paper for the candidate’s reply. *Miami Herald*, 418 U.S. at 244. The Court held that the law violated the First Amendment. *Id.* at 258. The Court recognized that “[t]he choice of material to go into a newspaper, and the decisions made as to . . . [the] content of the paper, and treatment of public

issues and public officials . . . constitute the exercise of editorial control and judgment.” *Id.* By interfering with the newspaper’s ability to control its product’s content, the law impermissibly infringed the newspaper’s speech by intruding “into the function of editors” and compelling it to “publish that which reason tells them should not be published.” *Id.* at 250–51, 256. In effect, *Miami Herald* recognized that the government violates the First Amendment when it interferes with a private company’s editorial judgment.

The Court expounded upon *Miami Herald* in *Pacific Gas & Electric Co. v. Public Utilities Commission*. *Pacific Gas* included a monthly newsletter in its billing envelopes. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 5 (1986). The newsletter included editorials and stories on political issues, energy conservation, and utility services. *Id.* State law required *Pacific Gas* to include a third-party group’s opposing messages in the billing envelopes. *Id.* at 5–6. The Supreme Court struck down the law, a plurality holding that the regulation impermissibly required the company “to use its property as a vehicle for spreading a message with which it disagree[d]” and to “associate with speech with which [it] may disagree.” *Id.* at 15, 17–21. The law thus forced *Pacific Gas* to “either to appear to agree . . . or to respond.” *Id.* at 15. Because of that, the Court held that the law impermissibly interfered with *Pacific Gas*’s speech by requiring it to include speech that it objected to in its billing envelopes. *Id.* at 12.

On the other hand, the Supreme Court has recognized situations when the government may require private companies to host third-party speech. For example, *PruneYard Shopping Center v. Robins* upheld a state law that required a mall to allow high school students to solicit anti-war signatures and distribute pamphlets on the mall’s property. 447 U.S. 74, 86–88 (1980). The Court reasoned that even though the mall had a policy against pamphleteering, the law did not penalize the mall’s

speech nor did it prevent the mall from “expressly disavow[ing] any connection with the [students’] message.” *Id.* at 87–88. Further, because the mall was open to the public, any “views expressed by members of the public in passing out pamphlets or seeking signatures . . . will not likely be identified with those of the owner.” *Id.* at 87.

Here, TechTok’s content moderation policies are expressive speech within the meaning of the First Amendment. Like the editorial judgments in *Miami Herald* and *Pacific Gas*, TechTok delivers curated compilations of speech created by others to its users. Such activity is inherently expressive, as it involves blending others’ speech to present a unified whole that reflects TechTok’s values. This is no different than a newspaper that exercises editorial judgment to refuse to include messages with which it disagrees. Thus, when TechTok chooses to remove users’ posts, deprioritize their content, or ban their accounts, it is engaging in First Amendment protected activity. And Hunt cannot infringe on that activity.

Hunt’s argument that *PruneYard* dictates a different outcome is unpersuasive. *Pacific Gas* cabined *PruneYard*, noting that the mall did not object to the pamphleteers’ message. *Pacific Gas*, 475 U.S. at 12. And unlike the laws in *PruneYard*, § 528.491(b) forces TechTok to host speech that undermines its expressive message that “all are respected and welcome.” In short, TechTok’s speech will be altered by speech it is forced to accommodate.

Section 528.491(b) also fails intermediate scrutiny. As noted, intermediate scrutiny applies because the Act is content-neutral, its provisions applying equally to social media companies irrespective of ideological or political viewpoint. *Reagan Nat’l Advert.*, 142 S. Ct. at 1472. To survive intermediate scrutiny, Hunt must show that the Act is narrowly tailored to forward an important government interest. *Id.* at 1475. Hunt has identified no important state interest that justifies

coercing a private company to host speech it finds repulsive. Correcting allegedly unfair moderation policies is insufficient. And even if Hunt had an important state interest, § 528.491(b) is not narrowly tailored as it forces TechTok to host speech by racist hate groups or risk violating § 528.491(b). Thus, because § 528.491(b) violates the First Amendment, TechTok is likely to succeed on the merits of its claim.

Finally, the other preliminary injunction factors favor TechTok. TechTok stares down irreparable injury, risking the occurrence of numerous, \$10,000/day fines—effectively ruining its business. More importantly, any loss of First Amendment freedom, even for minimal periods of time, constitute an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Additionally, the balance of equities and public interest warrant a preliminary injunction. Allowing Hunt to enforce the SPAAM would have a chilling effect on the free speech rights of private parties, favoring a preliminary injunction.

In sum, the SPAAM Act violates the First Amendment by burdening TechTok’s editorial judgment with disclosure requirements and by forcing TechTok to host content that contradicts its values. Further, both restrictions fail intermediate scrutiny. As such, TechTok is likely to succeed on the merits in its claim against both § 528.491(c) and § 528.491(b). The public interest is clearly served when First Amendment freedoms are safeguarded. The remaining preliminary injunction factors favor TechTok as well. Thus, TechTok’s motion for preliminary injunction is GRANTED.

Filed: May 1, 2023.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 23-10823

MICHAEL BRAXTON,
ATTORNEY GENERAL FOR THE STATE OF HUNT,

Appellant,

v.

TECHTOK, INC.,

Appellee.

Argued July 5, 2023
Decided August 1, 2023

Appeal from the United States District Court for the District of Hunt
Roger Alison, District Judge, Presiding

Before BRAY, Chief Judge, and MCCLURE, and SHAFFER, Circuit Judges.

MCCLURE, Circuit Judge, delivered the opinion of the Court.

OPINION

MCCLURE, Circuit Judge:

In response to TechTok, Inc.’s controversial content moderation decisions, the Hunt Legislature passed the Speech Protection and Anti-Muzzling (SPAAM) Act. The Act requires two main things of social media platforms. First, it requires social media platforms to respect free speech by not censoring or banning user content based on the user’s viewpoint. Second, it requires transparency. Social media platforms must explain their content moderation decisions in detail. TechTok—the largest social media company in Hunt—sued, arguing that the SPAAM Act violates the First Amendment. The district court preliminarily enjoined Hunt Attorney General Michael Braxton from enforcing the Act. The Attorney General appealed, and we reverse.

I. STANDARD OF REVIEW.

We review the grant of a preliminary injunction for abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). A district court abuses its discretion if it grants an injunction based on clearly erroneous factual findings or erroneous conclusions of law. *Id.*

II. DISCUSSION.

The district court held that TechTok is likely to succeed on the merits because the SPAAM Act’s various provisions violate the First Amendment. The court held that the SPAAM Act’s detailed explanation requirement violates the First Amendment. It also held that the Act’s requirement that social media companies apply their policies in a neutral manner violates the First Amendment as it infringes on TechTok’s “editorial judgment.” It further found that TechTok faces irreparable injury, that the balance of the equities favors it, and that a preliminary injunction would serve the public interest.

We disagree on all counts. First, the SPAAM Act’s requirement that TechTok provide a detailed explanation for censoring, shadow banning, or banning an account does not violate the First Amendment. The First Amendment does not protect TechTok’s decisions to censor, shadow ban, and ban users because TechTok is a common carrier. Social media platforms are “the modern public square.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). “Unlike newspapers,” they “hold themselves out as organizations that focus on distributing the speech of the broader public.” *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring). And when companies—including social media platforms—possess substantial market power, “our legal system” has “long subjected [those] businesses . . . to special regulations.” *Id.* at 1222. Although social media platforms enjoy First Amendment protections, they are not exempt from regulations that do not compel or prohibit them from speaking. *Id.* at 1224.

Just as a traditional telephone company creates networks of wires to connect people, TechTok creates “information infrastructure” that connects people from across the world. *Id.* And unlike newspapers, social media platforms like TechTok “hold themselves out as organizations that focus on distributing speech of the broader public.” *Id.* Moreover, TechTok’s dominant market share in Hunt and across the nation gives it “substantial market share[s]” with almost uninhibited power to exclude disfavored speech. *See id.* at 1225. Faced with such a challenge, Hunt took the only option it had for protecting its citizens’ speech and livelihoods from TechTok’s vice-grip on speech: a law “restrict[ing] the platform’s right to exclude.” *Id.* Perhaps most importantly, TechTok holds itself out to the public as providing a platform for “everyone to express themselves to the world.” As with any common carrier, Hunt can regulate TechTok to protect users’ free speech. Thus, given these considerations, we join our sister circuit in holding that TechTok, like other large social media

platforms are common carriers under the Court’s common-carrier precedent. See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 493–94 n.42 (5th Cir. 2022).

Moreover, these disclosures of “purely factual and uncontroversial information” about TechTok’s services are not compelled speech, nor do they interfere with TechTok’s editorial judgment. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). To be sure, “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.” *Id.* And the disclosure requirement must be reasonably related to a legitimate state interest. *Id.* But as we noted before, Hunt possesses an important interest in ensuring the free flow of information and protecting citizens’ free speech rights from undue censorship. See *Meyer v. Gant*, 486 U.S. 414, 421 (1988 (“The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”)); *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 663 (1994) (“[A]ssuring; that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.”). Moreover, like any other form of consumer disclosure law, the SPAAM Act’s disclosure requirement furthers Hunt’s legitimate interest in providing users with sufficient information to make informed choices. The Act’s disclosure requirement also does not “unjustifi[ably] or unduly burden[]” TechTok’s speech. *Id.*

Second, Hunt is not powerless to require social media companies to host third-party speech. See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (upholding a state law protecting pamphleteers’ right to disseminate pamphlets in privately owned shopping malls). The SPAAM Act does not penalize TechTok’s speech nor does it prevent TechTok from “expressly disavow[ing] any connection with [its users’] message[s].” *Id.* at 87–88. Nor does the SPAAM Act compel TechTok to

speak. As an open forum for the public, public views expressed therein will not be identified with the private owner. *Id.* at 87; *see also Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 61–62, 64 (2006) (holding that protecting military recruiters’ speech incidentally burdened the law schools’ speech and did not violate the First Amendment “because the schools [were] not speaking when they host[ed] interviews and recruiting receptions”). TechTok likewise does not “speak” when it censors, shadow bans, or eliminates users’ accounts. Instead, it suppresses speech, which it has no First Amendment right to do. *See* Christian Shaffer, *Deplatforming Censorship: How Texas Constitutionally Barred Social Media Platform Censorship*, 55 TEX. TECH L. REV. 893 (2023).

Even if the SPAAM Act’s prohibition on censorship infringes TechTok’s constitutional rights, it may still be upheld as it survives intermediate scrutiny. Intermediate scrutiny requires that a statute be “substantially related” to “an important government objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The SPAAM Act’s restriction of TechTok’s censorship is substantially related to Hunt’s important objective of preserving the free flow information and protecting citizens’ free speech from unfair viewpoint discrimination. *See Packingham*, 137 S. Ct. at 1735 (“While in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today the answer is clear. It is cyberspace—the vast ‘democratic forums of the internet’ . . . social media in particular.”). As a result, the SPAAM Act’s requirement that TechTok treat third-party speech in a consistent, neutral manner does not violate the First Amendment. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Finally, the remaining preliminary injunction factors favor Hunt. First, TechTok does not face irreparable injury. No users have commenced or threatened lawsuits; therefore, TechTok’s fear of incurring fines for noncompliance are currently unfounded. Additionally, the balance of the

equities favors Hunt as TechTok wishes to simultaneously wrap itself in the First Amendment while strangling others' speech. Finally, a preliminary injunction would harm the public interest by allowing a powerful social media company to continue to throttle free discourse.

For the foregoing reasons, we REVERSE the District Court and VACATE the preliminary injunction issued by the District Court.

Filed: August 30, 2023

Appendix I.

SPEECH PROTECTION AND ANTI-MUZZLING (SPAAM) ACT

State of Hunt - 2022 Special Legislative Session

TRANSCRIPT OF PROCEEDINGS

NANCY THORNBERRY (Speaker of the Hunt House of Representatives): Good morning, everyone. Thank you for being here for this Special Session of the Hunt House of Representatives for consideration of the SPAAM Act. At this time, we are officially in Session, and I call State Representatives Mary Theresa Brown and Tex Jackson, co-sponsors of this Bill, to the floor.

MARY THERESA BROWN (Co-sponsor of the SPAAM Act):
Good morning everyo-

TEX JACKSON (Co-sponsor of the SPAAM Act):
Good morning.

MARY THERESA BROWN:
You may be wondering why we have called this Special Session today and we are here to enlighten you. Hunt is in immediate danger.

TEX JACKSON:
That's right ladies and gentlemen. It's not (air-quotes) "global warming", or World War III, or even aliens. It's worse.

MARY THERESA BROWN:
Right now, all around us, hard-working, red-blooded citizens of Hunt are being silenced from spreading their opinions on the internet.

TEX JACKSON:
Big tech has gone too far this time. Too far!

MARY THERESA BROWN:
You may have heard of a little app called Techtok. All the kids are on it. And they're being brainwashed!

TEX JACKSON:
Techtok is censoring and shadowbanning users from spreading TRUTH and FACTS. And we will not stand for it.

MARY THERESA BROWN:
You will hear from four Hunt-ians who will tell you how they have been affected by this egregious and targeted censorship.

TEX JACKSON:
First, you will hear from Alexander Stone. You might be familiar with his wildly popular podcast, "The Hard Truth."

MARY THERESA BROWN:
Next, you will hear from Braelynn Hope. She owns a fashion startup, WhimsiWear. A single mom who works two jobs, whose livelihood now hangs in the balance.

TEX JACKSON:
Then, you will hear from Elliot Clifton. Elliot runs Rancid Potatoes, an online movie review website, who has been silenced on Techtok.

MARY THERESA BROWN:

Finally, you will hear from Meg Babbitt, Governor of the Great State of Hunt, who will speak to you about her concerns for regular Hunt-ians like you and me.

(TESTIMONY OF ALEXANDER STONE)

ALEXANDER STONE ("The Hard Truth" Podcaster):

Well, it's just like I say on my podcast. Some people just can't handle the truth. Techtok doesn't want you to be empowered with the truth. I'm a podcaster, but I've also been given the gift of a looooot of money. Money gets you into rooms most regular people can't get into. And I tell my followers the things I've learned in those rooms. Things big tech companies don't want you to know about. Like, guess what? Techtok doesn't even have human employees! They're all cyborgs. Wanna know how Mr. Techtok got them? He made a blood sacrifice to the Illuminati. And that's all I said, you know? I told all the Techtok users "They're Coming for You." You might have seen the clip. Everybody did. I warned them! But then all of a sudden, I stop getting views? That seems fishy to me, I don't know about you. Oh yeah, and Mr. Techtok has been attaching (air quotes) "warnings" to my posts saying they have "bullying and harassment," "promotion of violence against protected classes," and "sexist and racist language." I mean, this is ridiculous. And that's "The Hard Truth." (wink) Tune in on Tuesdays.

(TESTIMONY OF BRAELYNN HOPE)

BRAELYNN HOPE (Owner of WhimsiWear virtual store):

Well, I'm just a single mom. I started a little side hustle— #GirlBoss if you know what I mean—just to make a little extra cash on the side so I could afford to get my hair highlighted! Well, I sell my designs on Techtok. They're super cute, I sell sarongs, muu-muus, infinity scarves, you name it, I have it in about 14 different shades and paisleys! Anyways, I try to keep my page strictly business, but I have opinions just like everyone else! And after that last election, I mean, did you really expect me to shut my mouth? That man was literally six feet under and then resurrected to run for President! I like my Presidents young and handsome, I don't know about you. Anyways, I just made one silly little video saying old people shouldn't be President! And then BOOM— my ad engagement went down 34%. That can't be a coincidence, everyone needs a good infinity scarf! Get real, it's about to be fall, y'all! Now, I haven't been able to get my hair done in months and my roots are absolutely dreadful. Y'all need to do something about this, and quick, before I start reaching for the box dye.

(TESTIMONY OF ELLIOT CLIFTON)

ELLIOT CLIFTON (Operator of Rancid Potatoes):

(sighs) I run a movie review website, okay? I can't help it if someone makes a mildly controversial documentary. It's just my job to review it. Well, I'm sure you've all heard of that documentary, "Go Back to Your Country." All I said was (REDACTED) and all of a sudden that's "disinformation" and "hate

speech"? I'm a patron of the arts for God's sake! Art isn't supposed to make you feel good, it's supposed to be, like, well, you get it. Anyways, my TechTok account got banned. Honestly, I'm not really sure why I'm here today. After I got booted from TechTok I just started making long-form content on my website. Y'all should check it out! Rancid Potatoes dot com. Can I go now?

(TESTIMONY OF MEG BABBITT)

MEG BABBITT (Governor of Hunt):

Folks, this Act is all but necessary. We should be able to say whatever the hell we want online, no matter how crazy! I've been out there on the campaign trail, kissing babies and talking to men and women just like you. And guess what they've been saying. "Governor Babbitt, I just want to tell the news on TechTok." Now is that too much to ask? The SPAAM Act will establish a system of oversight that guarantees the protection of civil liberties while curbing the spread of harmful content. This Act will not allow shadowbanning, or censoring, or deplatforming anyone for any reason. Secondly, this Act will require big tech companies like TechTok to detail their community standards and tell users how those standards will be enforced. And if and when they are enforced, the user must receive a detailed explanation of their violation and the reason for the punishment.

(CONCLUSION OF WITNESS TESTIMONY)

MARY THERESA BROWN:

And there you have it folks.

TEX JACKSON:

Are you scared? Because I sure am.

MARY THERESA BROWN:

Social media giants like TechTok have become virtual dictators, suppressing free speech, and ruining hardworking peoples' livelihoods under the guise of moderation. This bill will hold them accountable and ensure the protection of our democratic values.

TEX JACKSON:

Excessive censorship by tech behemoths is a clear violation of our fundamental rights. We need robust legislation to curb their power and restore the voice of the people.

MARY THERESA BROWN:

Let's give the power back to the people.

TEX JACKSON:

(clears throat, beginning to sing) Oh beautiful, for spacio-

MARY THERESA BROWN:

Not now, Tex.

(ACT GOES TO A VOTE AND IS PASSED)

NANCY THORNBERRY:

And The SPAAM Act has passed the House vote in this Special Legislative Session. Today, ladies and gentlemen of the House, we have made Hunt a better place. Speech is increasingly being centralized in unaccountable companies that threaten individuals' livelihoods. Our very ability to challenge political orthodoxy is under siege. Today, we showed TechTok that all speech is good speech. And I, for one, am proud of that. And before we close this Special Legislative Session, a quick word from our Attorney General.

MICHAEL BRAXTON (Attorney General of the State of Hunt):

Today is a great day for democracy. Today, consequently, might also be the day I open a TechTok account. My daughter's been showing me all the dances, it looks like a hoot and a holler. I digress. TechTok is not only for dancing. It is a place to share hard-hitting facts and opinions. It is a place to connect, to find meaning, to try those filters where you rank celebrities. But most of all, after today, it is a place where speech is free. God bless these United States and God bless the State of Hunt.