

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

-----	X	
	:	
DOUGLAS MARLAND, COSETTE	:	
RINAB, and ALEC CHAMBERS,	:	Civil Action No. 2:20-cv-04597 WB
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
DONALD J. TRUMP, in his official	:	
capacity as President of the United States;	:	
WILBUR L. ROSS, JR., in his official	:	
capacity as Secretary of Commerce; and	:	
U.S. DEPARTMENT OF COMMERCE,	:	
	:	
Defendants.	:	
	:	
	:	
	:	
	:	
-----	X	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’  
MOTION FOR PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. BACKGROUND .....	3
A. TikTok Facilitates Communication Among Millions of Users. ....	3
B. Plaintiffs Use TikTok to Create, Consume, and Share Content. ....	5
C. President Trump’s Executive Order and Department of Commerce Regulations Threaten to Shutter TikTok.....	7
III. ARGUMENT .....	10
A. Standard for a Preliminary Injunction.....	10
B. Plaintiffs Have a Strong Likelihood of Success on the Merits. ....	11
1. The Executive Order and Regulations Implicate the First Amendment.....	11
2. Plaintiffs Are Likely to Succeed on the Merits of Their Claim That the Executive Order Is <i>Ultra Vires</i> . ....	20
3. The Executive Order and Regulations Infringe Plaintiffs’ Due Process Rights. ....	22
4. The Regulations Violate the APA.....	27
C. Plaintiffs and the Public Will Suffer Irreparable Harm if the Executive Order or Implementing Regulations Are Not Immediately Enjoined.....	28
D. The Public Interest and Balance of Equities Favor Injunctive Relief.....	29
IV. CONCLUSION.....	30

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Abbott v. Latshaw</i> , 164 F.3d 141 (3d Cir. 1998).....	26
<i>ACLU v. Ashcroft</i> , 322 F.3d 240, 250-51 (3d Cir. 2003), <i>aff'd and remanded</i> , 542 U.S. 656 (2004).....	11
<i>ACLU v. Ashcroft</i> , 322 F.3d 240 (3d Cir. 2003), <i>aff'd and remanded</i> , 542 U.S. 656 (2004) .....	13
<i>ACLU v. City of Pittsburgh</i> , 586 F. Supp. 417 (W.D. Pa. 1984).....	15, 16
<i>Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury</i> , 686 F.3d 965 (9th Cir. 2012) .....	27
<i>Arce v. Douglas</i> , 793 F.3d 968 (9th Cir. 2015) .....	24, 25
<i>Ashcroft v. ACLU</i> , 535 U.S. 564 (2002).....	11
<i>Ashcroft v. Free Speech Coal.</i> , 535 U.S. 234 (2002).....	13
<i>Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico</i> , 457 U.S. 853 (1982).....	18
<i>Bd. of Regents v. Roth</i> , 408 U.S. 564 (1972).....	23
<i>Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.</i> , 482 U.S. 569 (1987).....	13, 14
<i>Burns v. Pa. Dep't of Correction</i> , 544 F.3d 279 (3d Cir. 2008).....	22
<i>Chamber of Commerce v. Reich</i> , 74 F.3d 1322 (D.C. Cir. 1996).....	20

*City of Cincinnati v. Discovery Network, Inc.*,  
507 U.S. 410 (1993).....14

*City of Lakewood v. Plain Dealer Publ’g. Co.*,  
486 U.S. 750 (1988).....17

*Clover Farms Dairy v. Brumbaugh*,  
586 F. Supp. 1227 (M.D. Pa. 1984).....29

*Comm. Fin. Servs. Ass’n of Am., Ltd. v. FDIC*,  
132 F. Supp. 3d 98, 122 (D.D.C. 2015).....23

*Dep’t of Commerce v. New York*,  
139 S. Ct. 2551 (2019).....28

*Doe #1 v. Trump*,  
957 F.3d 1050 (9th Cir. 2020) .....20

*Elrod v. Burns*,  
427 U.S. 347 (1976).....28

*EUSA Pharma (US), Inc. v. Innocoll Pharm. Ltd.*,  
594 F. Supp. 2d 570 (E.D. Pa. 2009) .....10

*EXL Labs., LLC v. Egolf*,  
2010 WL 5000835 (E.D. Pa. Dec. 7, 2010).....11

*Fitzgerald v. Mountain Laurel Racing, Inc.*,  
607 F.2d 589 (3d Cir. 1979).....29

*Greene v. McElroy*,  
360 U.S. 474 (1959).....25, 26

*Hoxworth v. Blinder, Robinson & Co.*,  
903 F.2d 186 (3d Cir. 1990).....30

*In re CTLI, LLC*,  
528 B.R. 359 (Bankr. S.D. TEx. 2015).....24

*Inc. v. Johnson*,  
2019 WL 1795945 (W.D. Mo. Apr. 24, 2019).....23

*K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*,  
710 F.3d 99 (3d Cir. 2013).....29, 30

*Kalantari v. NITV, Inc.*,  
352 F.3d 1202, 1205 (9th Cir. 2003) .....21

*Klein v. Califano*,  
685 F.2d 250 (3d Cir. 1978).....22, 23

*Kreimer v. Bureau of Police*,  
958 F.2d 1242 (3d Cir. 1992).....18, 19

*Krug v. Lutz*,  
329 F.3d 692 (9th Cir. 2003) .....24

*Lamont v. Postmaster Gen.*,  
381 U.S. 301 (1965).....19

*LCN Enters., Inc. v. City of Asbury Park*,  
197 F. Supp. 2d 141 (D.N.J. 2002) .....11

*Linmark Assocs., Inc. v. Twp. of Willingboro*,  
431 U.S. 85 (1977).....19

*Martin v. City of Struthers, Ohio*,  
319 U.S. 141 (1943).....18

*Mathews v. Eldridge*,  
424 U.S. 319 (1976).....22

*Miller v. Mitchell*,  
598 F.3d 139 (3d Cir. 2010).....10

*Minn. Star & Tribune Co. v. Minn. Comm’r of Revenue*,  
460 U.S. 575 (1983).....12

*Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*,  
463 U.S. 29 (1983).....28

*N.Y. Times Co. v. United States (“Pentagon Papers”)*,  
403 U.S. 713 (1971).....15, 16

*Ne. Coal. on Nuclear Pollution v. NRC*,  
727 F.2d 1127 (D.C. Cir. 1984).....28

*Near v. State of Minnesota ex rel. Olson*,  
283 U.S. 697 (1931).....15

*Neb. Press Ass’n v. Stuart*,  
427 U.S. 539 (1976).....15

*O’Bannon v. Town Ct. Nursing Ctr.*,  
447 U.S. 773 (1980).....23

*Org. for a Better Austin v. Keefe*,  
402 U.S. 415 (1971).....15

*Packingham v. North Carolina*,  
137 S. Ct. 1730 (2017).....14, 18, 30

*Piecknick v. Com. of Pa.*,  
36 F.3d 1250 (3d Cir. 1994).....26

*Ramsey v. City of Pittsburgh*,  
764 F. Supp. 2d 728 (W.D. Pa. 2011).....29

*Rittenhouse Entm’t, Inc. v. City of Wilkes-Barre*,  
861 F. Supp. 2d 470 (M.D. Pa. 2012).....25

*Runco Transp., Inc. v. Mid Valley Sch. Dist.*,  
2015 WL 672260 (M.D. Pa. Feb. 17, 2015) .....26

*Salonclick LLC v. SuperEgo Mgmt. LLC*,  
2017 WL 239379 (S.D.N.Y. Jan. 18, 2017) .....23

*Se. Promotions, Ltd. v. Conrad*,  
420 U.S. 546 (1975).....15

*Sierra Club v. Trump*,  
963 F.3d 874 (9th Cir. 2020), *petition for cert. filed*, No. 20-138 .....20

*Sorrell v. IMS Health Inc.*,  
564 U.S. 552 (2011).....12, 15

*Stana v. Sch. Dist. of Pittsburgh*,  
775 F.2d 122 (3d Cir. 1985).....25

*Stanley v. Georgia*,  
394 U.S. 557 (1969).....18

*Temple Univ. v. White*,  
941 F.2d 201 (3d Cir. 1991).....30

*Thomas v. Collins*,  
323 U.S. 516 (1945).....19

*Thomas v. Indep. Tp.*,  
463 F.3d 285 (3d Cir. 2006).....25

*TikTok Inc. et al. v. Trump, et al.*,  
No. 1:20-CV-2658-CJN (D.D.C. Sept. 18, 2020), Dkt. 15-4 .....17

*TikTok Inc. v. Trump*,  
No. 1:20-CV-02658 (CJN), 2020 WL 5763634 (D.D.C. Sept. 27,  
2020) .....2, 9, 12, 22, 27, 30

*U.S. WeChat Users All. v. Trump*,  
2020 WL 5592848 (N.D. Cal. Sept. 19, 2020) .....12, 14, 19, 20

*Umberhauer v. Woog*,  
1993 WL 134761 (E.D. Pa. Apr. 28, 1993) .....24

*Yakima Valley Cablevision, Inc. v. FCC*,  
794 F.2d 737 (D.C. Cir. 1986).....27

*Youngstown Sheet & Tube Co. v. Sawyer*,  
343 U.S. 579 (1952).....20

**Federal Statutes**

5 U.S.C. § 706(2)(A).....1, 2, 11, 27

5 U.S.C. § 706(2)(C).....28

50 U.S.C. § 1701(a) .....21

50 U.S.C. § 1702.....22

50 U.S.C. § 1702(b)(1), (3).....2, 21

50 U.S.C. §§ 1702(b)(1)-(b)(3).....22

**Regulations**

85 Fed. Reg. 48637 .....8, 17

85 Fed. Reg. 51297 .....14

85 Fed. Reg. 60061-60063.....9, 10

Executive Order 13873 .....7, 8

Executive Order 13942 ..... *passim*

**Constitutional Provisions**

United States Constitution

    First Amendment ..... *passim*

United States Constitution

    Fifth Amendment .....1, 2, 11, 22, 23, 24, 27

United States Constitution

    Fourteenth Amendment .....22, 25

**Other Authorities**

Alex Sherman, *TikTok reveals detailed user numbers for the first time*,  
CNBC (Aug. 24, 2020) .....4, 5

Dillon Thompson, *Internet users stunned by ‘life-changing’ tooth  
brushing video: ‘This is the first I’m hearing of this?’*, Yahoo! Sports  
(May 4, 2020).....4

Executive Order 13942 .....8

I E. Greenspan, *Math teachers are getting millions of views on TikTok by  
sharing SAT tips and data visualizations*, Business Insider (Apr. 2,  
2020) .....4

Olivia Gavoyannis, *TikTok is transforming the influence rulebook – we  
spoke to the viral video-maker about mastering its elusive algorithm  
and why they prefer it to Instagram*, Business Insider (July 30, 2020) .....5

Stephanie Osmanski, *Bored This Summer? These 30 DIY Summer Projects  
Are Trending on TikTok*, Parade (July 27, 2020).....4

Sushmita Pathak, *‘TikTok Changed My Life’: India’s Ban On Chinese App  
Leaves Video Makers Stunned*, NPR (July 16, 2020) .....5

*TikTok*, U.S. Department of Commerce (Sept. 19, 2020),  
[https://www.commerce.gov/news/press-releases/2020/09/statement-  
delayed-prohibitions-related-tiktok](https://www.commerce.gov/news/press-releases/2020/09/statement-delayed-prohibitions-related-tiktok).....8

[www.tiktok.com/about?lang=e](http://www.tiktok.com/about?lang=e) .....3, 4

## I. INTRODUCTION

Plaintiffs are a comedian, fashion creator, and musician, each of whom has developed a significant following by creating and posting content on TikTok, a popular mobile application that permits users to create, post, view, and comment on short-form videos. Plaintiffs are among millions of TikTok creators hoping to reach a large audience and build a career. Plaintiffs have achieved these goals and rely exclusively or principally on TikTok endeavors to make a living. Under the President's Executive Order 13942 and implementing regulations, however, the TikTok application will be banned in the United States on November 12, 2020 at 11:59 pm. Purportedly designed to address national security, the Executive Order and regulations violate Plaintiffs' rights under the First Amendment to the U.S. Constitution, exceed the President's authority under the International Emergency Economic Powers Act ("IEEPA"), and deprive Plaintiffs of protected liberty and property interests in violation of the Fifth Amendment. The regulations also violate the Administrative Procedure Act because they are arbitrary and capricious. Plaintiffs' challenge to the November 12 ban is now unquestionably ripe, and the Court should preliminarily enjoin enforcement of the Order and regulations.

Plaintiffs are likely to prevail on their arguments that the Executive Order and regulations are invalid.

*First*, the Executive Order and regulations will shut down a forum whose entire purpose is to facilitate protected speech, in violation of Plaintiffs' First Amendment rights. The Executive Order and regulations are impermissibly overbroad, in that they burden substantially more speech than necessary to serve the government's asserted

national security interests. This is evident alone from the fact that the President has separately ordered the divestment of TikTok’s U.S. assets—a measure that does not burden as much speech. Further, the Executive Order and regulations effect an impermissible prior restraint on speech, infringe Plaintiffs’ rights to receive information, and are not tailored to serve the government’s asserted interest in national security.

**Second**, the Executive Order and regulations are *ultra vires*. Under IEEPA, the President may not prohibit or regulate directly or indirectly personal communications or the international flow of “information or informational materials” such as film, photographs, and artwork, regardless of the “format or medium of transmission.” 50 U.S.C. § 1702(b)(1), (3). By banning an entire forum for speech, he has done just that, causing one court to temporarily enjoin enforcement of regulations that banned downloads and updates of the TikTok application. *TikTok Inc. v. Trump*, No. 1:20-CV-02658 (CJN), 2020 WL 5763634, at \*7 (D.D.C. Sept. 27, 2020).

**Third**, the Executive Order and regulations violate Plaintiffs’ due process rights. Plaintiffs have property interests in their TikTok accounts, the value of which derives from their creative efforts, and liberty interests in their rights to receive information and pursue their chosen line of work. Effective November 12, Plaintiffs will be unable to access information on TikTok or post their creative content on TikTok, the latter of which provides needed income. Because there was no notice of the Executive Order or regulations, there was no process at all, much less sufficient process.

**Finally**, the regulations are unlawful under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), which prohibits agency action that is “arbitrary,

capricious, or otherwise not in accordance with law.” The Commerce Department failed to consider reasonable alternatives to the regulations that would have addressed its purported national security concerns, there is no rational relationship between the regulations and the facts the government allegedly found, and the regulations exceed Defendants’ authority under IEEPA.

The remaining injunctive relief factors are present here. Absent relief, Plaintiffs will suffer irreparable injury in the form of lost First Amendment rights. Granting relief will not cause greater harm to the government, since the government itself allowed the Department of Commerce forty-five days to issue implementing regulations, which regulations did not take effect immediately, belying any assertion of urgency. Finally, the public interest favors such relief given the weighty constitutional concerns.

For these reasons, Plaintiffs respectfully ask the Court to preliminarily enjoin enforcement of the Executive Order and implementing regulations.

## **II. BACKGROUND**

### **A. TikTok Facilitates Communication Among Millions of Users.**

TikTok is a global video-sharing application that allows users to create, share, and watch short-form videos. TikTok’s stated mission is to inspire creativity and bring joy. *See* [www.tiktok.com/about?lang=en](http://www.tiktok.com/about?lang=en) (visited September 18, 2020).

TikTok allows users to create and upload videos ranging from 15 to 60 seconds long. Declaration of Cosette Rinab (“Rinab Decl.”) (Dkt. 7-3) ¶ 3.<sup>1</sup> TikTok offers

---

<sup>1</sup> This brief refers to users who create videos and share them on TikTok as “creators,” and to users who both create and consume content as “users.”

creators background music, augmented reality effects, and other features to edit videos.

*Id.* Creators control the content of their videos. *Id.* TikTok permits users to “like” videos, comment on them, share videos, message the creator, and more. *Id.*

Creators post videos on topics ranging from the light-hearted to serious, including comedy, cooking, music and music performances, travel and tourism, politics, domestic and international current events, social issues, and the environmental. *See id.* ¶ 10.

Through creators’ engaging and short videos, TikTok users have learned the “right way” to brush their teeth; picked up math, SAT, and finance tips; and accessed a “trove of do-it-yourself projects and creative ideas.” *See* Declaration of Ambika K. Doran, (“Doran Decl.”) (Dkt. 7-5) Ex. C (Dillon Thompson, *Internet users stunned by ‘life-changing’ tooth brushing video: ‘This is the first I’m hearing of this?’*, Yahoo! Sports (May 4, 2020)); Ex. D (Rachel E. Greenspan, *Math teachers are getting millions of views on TikTok by sharing SAT tips and data visualizations*, Business Insider (Apr. 2, 2020); Ex. E (Stephanie Osmanski, *Bored This Summer? These 30 DIY Summer Projects Are Trending on TikTok*, Parade (July 27, 2020)). Even former President Barack Obama recently featured several TikTok videos, including one on baking bread in a voter drive video, stating that “[o]ver the past few months, I’ve learned a thing or two from young people about how to quarantine successfully. You’ve taught me how to make a mean sourdough starter.” Doran Decl. Ex. F (Barack Obama, Twitter (Sept. 16, 2020)).

TikTok allows creators to reach a global audience. TikTok has a community of about 700 million active monthly users globally. *Id.* Ex. G (Alex Sherman, *TikTok reveals detailed user numbers for the first time*, CNBC (Aug. 24, 2020). In the United

States alone, TikTok has more than 90 million active monthly users and 50 million active daily users. *Id.* TikTok has been downloaded more than 2 billion times. *Id.* These numbers continue to grow: For example, between June and August 2020, TikTok’s user base increased by more than 8 million, from 91.2 million to more than 100 million. *Id.*

Creators also use TikTok because of its “organic reach”—a metric that measures the number of people who have seen a post. Creators attribute TikTok’s organic reach to the fact TikTok is designed to inspire users to find new content with minimal effort, continuously providing users a curated stream of new videos on its “For You” page. Rinab Decl. ¶ 9; Declaration of Douglas Marland (Dkt. 7-2) ¶ 10. As a result, any user’s video can go “viral.” Doran Decl. Ex. H (Olivia Gavoyannis, *TikTok is transforming the influence rulebook – we spoke to the viral video-makers about mastering its elusive algorithm and why they prefer it to Instagram*, Business Insider (July 30, 2020)); *see also id.* Ex. I (*How Quickly Can a Girl Go Viral on TikTok?*, The Atlantic (Sept. 16, 2020)).

TikTok is an economic lifeline for many creators, giving rise to new, non-traditional social media celebrities—“many of them working-class folks . . . in villages far from [] cosmopolitan megacities”—and has become “a livelihood for some people,” providing “fame, empowerment and even a path out of poverty.” Doran Decl. Ex. J (Sushmita Pathak, *‘TikTok Changed My Life’: India’s Ban On Chinese App Leaves Video Makers Stunned*, NPR (July 16, 2020)).

**B. Plaintiffs Use TikTok to Create, Consume, and Share Content.**

Plaintiffs are TikTok users who have made a career creating and posting content, and who use TikTok to consume content.

Plaintiff Douglas Marland, a Yardley, Pennsylvania resident, is a comedian who has been creating and posting videos on TikTok since January 2019. Marland Decl. ¶ 5. He developed a significant TikTok following after posting a comedic sketch featuring himself and his girlfriend. *Id.* Mr. Marland has about 2.7 million “followers” on TikTok, meaning about 2.7 million people have subscribed to his video feed. *Id.* ¶ 8. He earns about \$5,000 to \$7,000 each month from promotional and branding work he has attracted from his TikTok videos. *Id.* He relies entirely on this income to pay for his living expenses, such as food and rent. *Id.* Mr. Marland hopes to use his TikTok experiences to continue his entertainment career, as an actor or a podcast producer. *Id.* ¶ 11. Since the issuance of the Executive Order, he has seen a drop in his business. Suppl. Marland Decl. (Dkt. 18-1) ¶ 2.

Plaintiff Cosette Rinab is a fashion creator and student at the University of Southern California. Ms. Rinab began posting on TikTok during her sophomore year in December 2018. Rinab Decl. ¶ 3. Her TikTok posts quickly became popular after she posted a video of herself lip-synching a popular song. *Id.* ¶ 4. Ms. Rinab is passionate about creating videos, which gives her a creative outlet and a way to connect with other people directly. *Id.* ¶ 8. Ms. Rinab earns about \$7,000 to \$10,000 per month from TikTok-related work and relies solely on that income to pay her living expenses while she is a student. *Id.* Because of TikTok, Ms. Rinab is able to focus on creating content, rather than working several jobs. *Id.* ¶¶ 2, 8. Ms. Rinab also watches educational videos on TikTok. *Id.* ¶ 10. For example, she learned what a Roth IRA is from a TikTok video and opened her own Roth IRA. *Id.* She also viewed a video about presidential candidate Joe Biden, which made her more informed about Biden’s proposed policies. *Id.*

Plaintiff Alec Chambers is a musician who has created and posted videos on TikTok since November 2018. Declaration of Alec Chambers (Dkt. 7-4) ¶ 3. Mr. Chambers, who has always wanted to be a musician, had a hard time starting his career. *Id.* ¶ 2. But one video he created and posted on TikTok—a cover of the song “Without Me” by the singer Halsey—changed all of that. *Id.* ¶ 3. Immediately upon posting the video to TikTok, Mr. Chambers saw a dramatic increase in revenue from streams of this song on the music-streaming service Spotify. *Id.* Mr. Chambers was able to quit his job driving passengers for ridesharing service Uber, as he had the financial freedom to pursue his passion. *Id.* He earns about \$4,500 per month from his TikTok-related work. *Id.*

**C. President Trump’s Executive Order and Department of Commerce Regulations Threaten to Shutter TikTok.**

On May 15, 2019, President Trump issued Executive Order 13873, titled “Securing the Information and Communications Technology Services Supply Chain.” 84 Fed. Reg. 22689. The Order declares a national emergency because of “vulnerabilities in information and communications technology and services” and provides that “the unrestricted acquisition or use in the United States of information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments the ability of foreign adversaries to create and exploit vulnerabilities in information and communications technology or services.” *Id.* Executive Order 13873 does not identify any countries or companies that pose a national security threat.

On August 6, 2020, without notice to TikTok’s creators or users, President Trump issued Executive Order 13942 (“Executive Order”). Entitled “Addressing the Threat

Posed by TikTok,” the Executive Order states that “additional steps must be taken to deal with the national emergency with respect to the information and communications technology and services supply chain” declared in Executive Order 13873. The Executive Order provides that beginning forty-five days later, “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. (a.k.a. Zìjié Tiàodòng), Beijing, China, or its subsidiaries, in which any such company has any interest, as identified by the Secretary of Commerce” will be prohibited. 85 Fed. Reg. 48637-38.

Although the Executive Order states it is necessary to “address the threat posed by... TikTok,” it does not identify any actual threats posed by TikTok or individual creators’ and users’ transactions on the TikTok application. Instead, it relies on a list of possible threats, including that TikTok Inc. uses data collection practices that “*potentially* allow[] China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage,” “*reportedly* censors content that the Chinese Communist Party deems politically sensitive,” and “*may* be used for disinformation campaigns.” 85 Fed. Reg. 48637 (emphasis added).

On September 18, 2020, the Department of Commerce published regulations, scheduled to take effect in phases: the first was to become effective September 20, the second November 12. The same day, Plaintiffs filed this action and a motion for temporary restraining order, and the Court heard argument the next morning. Dkt. 1-7. The next evening, the Department of Commerce delayed the September 20 regulations to September 27. Wilbur Ross, *Statement on Delayed Prohibitions Related to TikTok*, U.S.

Department of Commerce (Sept. 19, 2020), <https://www.commerce.gov/news/press-releases/2020/09/statement-delayed-prohibitions-related-tiktok>.

On September 24, 2020, the Department of Commerce published regulations reflecting this delay. Scheduled to take effect September 27, 2020 at 11:59 p.m., the regulations (which were enjoined by a different court) would have stopped users from downloading or updating TikTok September 27, 2020. 85 Fed. Reg. 60061-60063.

On September 25, 2020, Defendants filed a memorandum that purports to justify their decision to limit and shutter the TikTok application (the “Memo”). Dkt. 17. The Memo repeatedly confirms Defendants’ concerns relate to content, not “transactions”; concedes there are less restrictive alternatives to an outright ban already underway; and confirms Defendants’ “national security concerns” are based on speculation and facts not unique to TikTok. *See* Dkt. 19-1 at 2.

On September 26, 2020, this Court denied Plaintiffs’ motion for temporary restraining order. Dkt. 21. The Court found Plaintiffs’ challenge to the November ban was not ripe, and Plaintiffs had failed to show irreparable harm from the September 27 ban on new downloads and updates. *Id.* The following day, a D.C. federal court preliminarily enjoined enforcement of the September 27 regulations, holding that they violated IEEPA. *TikTok Inc. v. Trump*, No. 1:20-CV-02658 (CJN), 2020 WL 5763634, at \*7 (D.D.C. Sept. 27, 2020).

Effective November 12, 2020 at 11:59 p.m., the regulations prohibit actions that would “enable the functioning or optimization of the TikTok mobile application within the land and maritime borders of the United States and its territories.” 85 Fed. Reg.

60061-60063. The regulations contain exceptions, including for “[t]he exchange between or among TikTok mobile application users of personal or business information using the TikTok mobile application.” *Id.* Effectively, however, TikTok will be banned in the United States as of November 12. *Id.*

The consequences of the Executive Order and regulations are dire. Mr. Marland, Ms. Rinab, and Mr. Chambers, like myriad other creators, rely on TikTok as a creative outlet as well as a method of earning income. Marland Decl. ¶ 8; Rinab Decl. ¶ 8; Chambers Decl. ¶ 3. All of them have tried but failed to develop large followings on platforms other than TikTok. Marland Decl. ¶ 10; Rinab Decl. ¶ 9; Chambers Decl. ¶ 2. And the Executive Order is already having an effect. Even before the regulations were promulgated, Mr. Marland received offers for videos that made clear the ban would reduce his revenue, and received far fewer offers than he had in the past. Marland Decl. ¶ 9; Suppl. Marland Decl. ¶ 2. This harm will only worsen.

### **III. ARGUMENT**

#### **A. Standard for a Preliminary Injunction**

The primary purpose of a preliminary injunction is the “is maintenance of the status quo until a decision on the merits of a case.” *EUSA Pharma (US), Inc. v. Innocoll Pharm. Ltd.*, 594 F. Supp. 2d 570, 578 (E.D. Pa. 2009) (citation omitted). A preliminary injunction requires “(1) a likelihood of success on the merits; (2) [the plaintiff] will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief.” *Miller v. Mitchell*, 598 F.3d 139, 147 (3d Cir. 2010) (preliminary injunction).

“In a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights.” *ACLU v. Reno*, 217 F.3d 162, 180 (3d Cir. 2000) (citation omitted), *vacated on other grounds sub nom Ashcroft v. ACLU*, 535 U.S. 564 (2002); *accord ACLU v. Ashcroft*, 322 F.3d 240, 250-51 (3d Cir. 2003), *aff’d and remanded*, 542 U.S. 656 (2004) (in a First Amendment challenge, “[t]he most significant and, indeed, the dispositive prong of the preliminary injunction analysis is ... reasonable probability of succeeding on the merits”); *LCN Enters., Inc. v. City of Asbury Park*, 197 F. Supp. 2d 141, 153 (D.N.J. 2002). “[W]hen the Government is the opposing party, the assessment of harm to the opposing party, in the context of balancing the equities, and whether public interest favors injunctive relief merge.” Dkt. 21 at 12 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

**B. Plaintiffs Have a Strong Likelihood of Success on the Merits.**

The Executive Order and regulations will shutter TikTok. Without it, Plaintiffs cannot create, publish, consume, or share content, and will lose their source of income. Issued without any notice or opportunity to be heard, the Executive Order and regulations infringe Plaintiffs’ First Amendment and Fifth Amendment rights, and exceed the President’s authority under IEEPA. Further, the regulations are invalid under the APA.

**1. The Executive Order and Regulations Implicate the First Amendment.**

In opposing a temporary restraining order, Defendants took the position that their actions do not even implicate the First Amendment because the regulations concern “transactions,” not speech. The Court should not entertain this superficial argument.

*Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), is directly on point. In *Sorrell*, the Supreme Court struck down a Vermont statute that restricted the sale, disclosure, and use of pharmacy records (*i.e.*, “transactions”) that reveal individual doctors’ prescribing practices. Although Vermont adopted the statute not to suppress speech but to safeguard privacy and objectivity of prescription decisions, the Court held the regulation was subject to heightened scrutiny. *Id.* at 557. The Court rejected the state’s claim that “sales, transfer, and use of prescriber-identifying information are conduct, not speech,” and that the effect on speech was merely “incidental.” *Id.* at 567, 570. Similarly, in *Minn. Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983), the Court struck down a tax on newsprint and ink: The tax “place[d]... a burden on the interests protected by the First Amendment.” Accordingly, both courts to consider the President’s recent attacks on Chinese-owned social media platforms have found they violate the First Amendment. *TikTok*, 2020 WL 5763634, at \*6; *U.S. WeChat Users All. v. Trump*, 2020 WL 5592848, at \*12 (N.D. Cal. Sept. 19, 2020).

In fact, the Memo demonstrates that the Executive Order and regulations are meant to restrict content. According to the Memo, a “critical concern” for Defendants is that “the [People’s Republic of China (“PRC”)] government and the [Chinese Communist Party (“CCP”)] can exert influence on ByteDance and, through the TikTok app,  ***censor and shape content available to U.S. users in ways that can influence their opinions and views of China.***” Memo at 20 (emphasis added); *see also id.* (“content moderators located in Beijing have censored anti-China content deemed to be critical of the PRC”); *id.* at 21 (“there is significant evidence that content on TikTok must be acceptable to the

CCP”); *id.* (“TikTok may offer an effective platform for the PRC to distribute pro-CCP propaganda and content to millions of U.S. users.”). These statements leave no room for the claim that the Executive Order and regulations are targeting transactions, not content.

**a. The Executive Order and Regulations Are Unconstitutionally Overbroad.**

The Constitution “gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). A law is “unconstitutional on its face if it prohibits a substantial amount of protected expression.” *Id.* The overbreadth analysis is “akin to the portion of the strict scrutiny analysis” measuring whether statutes are narrowly tailored. *ACLU v. Ashcroft*, 322 F.3d at 266 (3d Cir. 2003). “Overbreadth analysis—like the question whether a statute is narrowly tailored to serve a compelling governmental interest—examines whether a statute encroaches upon speech in a constitutionally overinclusive manner.” *Id.*

For example, in *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987), the Supreme Court invalidated a regulation prohibiting “First Amendment activities” in the Central Terminal Area of Los Angeles International Airport. *Id.* In striking down the rule, the Court noted that “[t]he resolution does not merely regulate expressive activity . . . that might create problems such as congestion or the disruption of the activities of those who use LAX[;] . . . it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing.” *Id.* at 574-75. “We think it obvious that such a [sweeping] ban cannot be justified . . . because no conceivable governmental interest would justify such an absolute prohibition

of speech.” *Id.* at 575. Relying on *Jews for Jesus*, the Supreme Court in *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017), held that “[i]f a law prohibiting ‘all protected expression’ at a single airport is not constitutional,... it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.”

Here, as in *Jews for Jesus*, the Executive Order and regulations are overbroad on their face—shuttering TikTok starting November 12—and contain no saving or narrowing construction limiting their reach to protected First Amendment activities. Although obvious, this conclusion is demonstrated by the President’s August 14, 2020, Executive Order, “Regarding the Acquisition of Musical.ly by ByteDance Ltd.,” which ordered TikTok’s parent company, ByteDance, to divest its interest in its U.S. operations. 85 Fed. Reg. 51297-99. Although legally flawed for other reasons, this represents a less-restrictive alternative to the Executive Order. Further, the Memo that purportedly justifies the Executive Order reflects no consideration of less restrictive alternatives.<sup>2</sup>

Accordingly, the Executive Order and regulations burden far more speech than necessary and are unconstitutionally overbroad.

---

<sup>2</sup> Even if intermediate scrutiny applies, the government cannot satisfy it, as there is no “reasonable fit” between Defendants’ asserted interests and “the means chosen to serve those interests” and because they do not leave open ample alternative channels for communication. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 440 (1993) (citation omitted). For example, Defendants cannot explain why the risk of Chinese censorship of some content for some users justifies suppressing *all* users’ speech, or why prohibiting federal workers from using TikTok would not address surveillance concerns. *WeChat Users*, 2020 WL 5592848, at \*10. With respect to alternative channels, while other social media platforms exist, those alternatives are insufficient. Rinab Decl. ¶ 7; Marland Decl. ¶¶ 7-8; Chambers Decl. ¶¶ 3-4.

**b. The Executive Order and Regulations Are an Unconstitutional Prior Restraint.**

Rigorous constitutional scrutiny also applies because the restriction is an impermissible prior restraint—“the most serious and the least tolerable infringement on First Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); *see also N.Y. Times Co. v. United States* (“*Pentagon Papers*”), 403 U.S. 713, 714 (1971). As the Supreme Court has held, “it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.” *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). Thus, “[a]ny prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citations omitted).

Here, the Executive Order and regulations ban the TikTok app in the United States altogether. This action necessarily stops a wide range of protected speech and expression. The Executive Order and regulations prohibit Plaintiffs from obtaining and disseminating information on TikTok, including posting, viewing, and/or commenting on content. And they preemptively close down a major online speech platform used by Plaintiffs and millions of other users. Under the First Amendment, prohibiting a platform for speech is a ban on speech itself. *Sorrell*, 564 U.S. at 570.

Prior restraints are permissible only in “the most exigent circumstances,” *ACLU v. City of Pittsburgh*, 586 F. Supp. 417, 423 (W.D. Pa. 1984) (citing *Near*, 283 U.S. at 697), if they (1) “fit within one of the narrowly defined exceptions to the prohibition against prior restraints,” *and* (2) the government provides requisite “procedural safeguards that reduce the danger of suppressing constitutionally-protected speech,” *Se. Promotions, Ltd.*

v. *Conrad*, 420 U.S. 546, 559 (1975). The Executive Order and regulations flunk this test.

**First**, the Executive Order does not fit within any of the exceptions for prior restraints. Defendants are not seeking “to reasonably regulate the time, place or manner of a facility,” “[n]or is there a need to balance competing equities because the rights of others may be infringed,” “[t]his is not a captive audience case,” and this is not a “case of a mere temporary bar of one’s First Amendment rights pending necessary judicial proceedings.” *ACLU v. Pittsburgh*, 586 F. Supp. at 423. Further, this is not a case where disclosure of the protected speech would pose a national security threat. In *Pentagon Papers*, 403 U.S. at 714, for example, the Supreme Court held that the United States could not enjoin publication of classified material in the interests of national security. In a concurring opinion, Justice Stewart, joined by Justice White, explained that the government may restrict speech only when it can demonstrate “disclosure... will surely result in direct, immediate, and irreparable damage to our Nation or its people.” 403 U.S. at 730 (Stewart, J., joined by White, J., concurring).<sup>3</sup> *Pentagon Papers* thus makes clear that prior restraints on speech are subject to rigorous judicial scrutiny, regardless whether the government claims that the prior restraint is necessary for national security.

**Second**, the Executive Order and regulations contain no procedural safeguards. In fact, the Executive Order defers **all** authority to the Secretary of Commerce to

---

<sup>3</sup> This was the most government-friendly standard any member of the majority proposed to determine the constitutionality of designating material “classified” and not subject to disclosure. *See also* 403 U.S. at 714–19 (Black, J., concurring) (prior restraints on core speech are never constitutional); *id.* at 719–24 (Douglas, J., concurring) (same); *id.* at 726 (Brennan, J., concurring) (prior restraints might be permissible in wartime).

“identify the transactions subject” to it. Placing this “unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.” *City of Lakewood v. Plain Dealer Publ’g. Co.*, 486 U.S. 750, 757 (1988).

Accordingly, the government’s attempt to restrict Plaintiffs’ speech on TikTok can be upheld only on a showing that the interest is the prevention of “direct, immediate and irreparable damage” to national security and there are proper procedural safeguards. The government has not and cannot make this showing. Instead, the Executive Order identifies “potential” or “reported” risks. 85 Fed. Reg. 48637. The Memo underscores the speculative nature of the government’s interests. It describes general concerns about China—concerns that apply to any company with Chinese ownership, not just TikTok. Memo. at 14 & n.115 (citation omitted); *see also id.* at 15 (“what ‘TikTok is doing isn’t fundamentally different’ from similarly situated social media platforms.”). Experts agree. *See* Declaration of Steven Weber ¶ 4, *TikTok Inc. et al. v. Trump, et al.*, No. 1:20-CV-2658-CJN (D.D.C. Sept. 18, 2020), Dkt. 15-4 (data collection, security issues “are not unique... to TikTok”); *id.* ¶ 11 (security risks “not limited to companies... owned by Chinese nationals or headquartered in China”; “multinationals have... software and other... operations” that “present... the same risk”). Further, the Memo relies on press reports, not evidence the government itself has collected. The government cannot meet its heavy burden to show that its prior restraint is valid.

**c. The Executive Order and Regulations Infringe Plaintiffs' Right to Express Ideas and Receive Information under the First Amendment.**

The right to receive information is a “necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). The “right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society.” *Stanley v. Georgia*, 394 U.S. 557, 563 (1969) (citations omitted); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992) (First Amendment “prohibit[s] the government from enacting laws that censor information” and “additionally encompasses the positive right of public access to information and ideas.”).

The Supreme Court recently recognized this right extends to social media platforms, stating that “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.” *Packingham*, 137 S. Ct. at 1735 (citation omitted). Social media sites are “for many the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.” *Id.* at 1737. “To foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” *Id.* at 1737.

Accordingly, any statute that restricts the receipt of information on TikTok targets core First Amendment activity and must survive strict scrutiny. *See United States v. Am.*

*Library Ass'n, Inc.*, 539 U.S. 194, 216 (2003) (Breyer, J., concurring); *see also Martin v. City of Struthers, Ohio*, 319 U.S. 141, 149 (1943) (striking down ordinance prohibiting door-to-door solicitation and distribution of literature because ordinance did not “safeguard” “the constitutional rights of those desiring to *distribute* literature *and those desiring to receive it*” (emphasis added)).

The Executive Order and regulations infringe Plaintiffs’ constitutional right to distribute or receive information. After November 12, 2020, TikTok will not be allowed to operate in the United States, prohibiting everyone, including Plaintiffs, from using it to distribute or obtain information. Such a prohibition cannot be squared with the First Amendment, *Stanley*, 394 U.S. at 564, and courts have routinely held similar bans invalid. *See Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (holding invalid statute permitting government to hold communist political propaganda arriving in the mails from abroad unless the addressee requested in writing that it be delivered to him); *Thomas v. Collins*, 323 U.S. 516 (1945) (holding that a worker has the right to listen to a union organizer’s speech). This is particularly true where the government has not identified a “significant countervailing interest[.]” *Kreimer*, 958 F.2d at 1255. Here, Defendants rely on speculation about “possible” or “potential” risks. Moreover, the purported national security concern is unrelated to the prohibited speech. *See Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 95 (1977) (holding that there was no connection between the purported interest and ban on “for sale” signs, which restricted the flow of information).

Applying these principles, the court in *WeChat*, 2020 WL 5592848, at \*10, preliminarily enjoined an executive order and regulations similar to the one here, finding

they “effectively eliminate the plaintiffs’ key platform for communication, slow or eliminate discourse, and are the equivalent of censorship of speech or a prior restraint on it.” The court observed that while “the government ha[d] established that China's activities raise significant national-security concerns,” it had “put in scant little evidence that its effective ban of WeChat for all U.S. users addresses those concerns. And ...there are obvious alternatives to a complete ban, such as barring WeChat from government devices.” 2020 WL 5592848, at \*10.

So too, here, Defendants cannot explain why the order requiring divestiture of TikTok’s assets is not a less restrictive way or more narrowly tailored relief to address their concerns instead of prohibiting broad swaths of information.

**2. Plaintiffs Are Likely to Succeed on the Merits of Their Claim That the Executive Order Is *Ultra Vires*.**

The President’s authority to issue an executive order “must stem either from an act of Congress or from the Constitution itself.” *Doe #1 v. Trump*, 957 F.3d 1050, 1062 (9th Cir. 2020) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). Where neither a congressional statute nor the U.S. Constitution authorizes the President’s action, an injured plaintiff may bring an equitable *ultra vires* action to enjoin the President’s unlawful conduct. *See, e.g., Sierra Club v. Trump*, 963 F.3d 874, 890-92 (9th Cir. 2020), *petition for cert. filed*, No. 20-138; *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996). Here, the President’s Executive Order exceeds the scope of his authority under IEEPA.

Under IEEPA, the President’s powers “may be exercised to deal with an[] unusual and extraordinary threat, which has its source in whole or substantial part outside the

United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.” 50 U.S.C. § 1701(a). In 1988 and in 1994, Congress amended IEEPA to address concerns that IEEPA regulations infringed First Amendment rights. Now, “[t]he authority granted to the President . . . does not include the authority to regulate or prohibit, directly or indirectly . . . any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value” or “the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds,” except for export controls not present here. 50 U.S.C. §§ 1702(b)(1), 1702(b)(3).

The purpose of these provisions is to protect against the President’s infringement of First Amendment rights under the guise of national security. *See Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003) (exceptions added “to prevent the executive branch from restricting the international flow of materials protected by the First Amendment”). As the legislative history to the 1994 amendment states, “[t]hese provisions . . . established that no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment to the U.S. Constitution” and “[t]he language was explicitly intended, by including the words ‘directly or indirectly,’ to have a broad scope.” H.R. CONF. REP. 103-482, 239-40. Congress intended these provisions to “facilitate transactions and activities incident to the

flow of information and informational materials without regard to the type of information, its format, or means of transmission, and electronically transmitted information, transactions for which must normally be entered into in advance of the information's creation.” *Id.*

Here, the content created and shared on TikTok by Plaintiffs—short-form expressive videos—constitutes personal communications and informational materials within IEEPA’s meaning. *See* 50 U.S.C. §§ 1702(b)(1)-(b)(3); *see also Kalantari*, 352 F.3d at 1207 (IEEPA exemption applied to purchase of Iranian movies despite Iranian embargo). At least one court has already reached this conclusion, enjoining the September 27 regulations. *TikTok Inc.*, 2020 WL 5763634, at \*6-\*7 (citation omitted). The same is true with regard to the November 12, 2020 ban on TikTok itself.

### **3. The Executive Order and Regulations Infringe Plaintiffs’ Due Process Rights.**

“The due process clause mandates procedural safeguards against Government deprivation of an individual’s property interests” or liberty interests. *Klein v. Califano*, 685 F.2d 250, 257 (3d Cir. 1978); *accord Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”). Thus, to establish a claim under the Due Process Clause, a plaintiff must show (1) the deprivation of a protected liberty or property interest; (2) without the process due under the Fifth Amendment. *See Burns v. Pa. Dep’t of Correction*, 544 F.3d 279, 285 (3d Cir. 2008). Here, the Executive Order and regulations deprive three protected liberty and property interests—the property rights

in their TikTok accounts, their right to receive information, and their right to pursue their chosen occupation—without any process whatsoever.<sup>4</sup> Plaintiffs are therefore likely to succeed on the merits of their due process claims.

**a. Plaintiffs Will Be Deprived of the Property Interests in Their TikTok Accounts**

“The due process clause does not create protected property interests. Rather, the Constitution protects property interests that are ‘created and . . . defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.’” *Klein*, 586 F.2d at 257 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972)). In other words, federal courts look to state law and other sources independent of the Due Process Clause to determine whether a plaintiff holds a “property interest” subject to the Fifth Amendment’s protections. *Id.*

Plaintiffs’ TikTok accounts constitute “property interests” within the meaning of the Fifth Amendment. In particular, courts have recognized that a social media account is a property interest for purpose of state-law conversion claims, *Farm Journal, Inc. v. Johnson*, 2019 WL 1795945, at \*5-6 & n.1 (W.D. Mo. Apr. 24, 2019) (conversion claim stated based on misappropriation of Twitter account); *Salonclick LLC v. SuperEgo Mgmt. LLC*, 2017 WL 239379, at \*2-4 (S.D.N.Y. Jan. 18, 2017) (conversion claims stated based

---

<sup>4</sup> Although the government has claimed there are no due process violations because the effect on Plaintiffs is indirect, the restrictions directly affect Plaintiffs, and even indirect effects can trigger due process. *O’Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 789 n.22 (1980); *Comm. Fin. Servs. Ass’n of Am., Ltd. v. FDIC*, 132 F. Supp. 3d 98, 122 (D.D.C. 2015) (payday lenders had due process claim where government action directed at banks was intended to end bank relationships with lenders).

on misappropriation of Twitter account, Facebook page, and domain names), and for administering bankruptcy estates, *e.g.*, *In re CTLI, LLC*, 528 B.R. 359, 366-367 (Bankr. S.D. TEx. 2015) (recognizing social media accounts are property of the bankruptcy estate). Similarly, courts have held that customer lists are also protected property interests. *See In re CTLI*, 528 B.R. at 367 (“business social media accounts provide valuable access to customers and potential customers”); *Umbenhauer v. Woog*, 1993 WL 134761, at \*3 (E.D. Pa. Apr. 28, 1993) (“customer lists . . . , although intangible, are clearly within the purview of recognized property interests in Pennsylvania”).

Developed through Plaintiffs’ significant time and effort, Plaintiffs have protected property interests in their TikTok accounts.

**b. Plaintiffs Will Be Deprived of Their Liberty Interests in Their Right to Information**

For the reasons stated above, the Executive Order and regulations affect Plaintiffs’ rights to receive information. This right is a protected liberty interest, the deprivation of which triggers Fifth Amendment procedural due process protections. *See Arce v. Douglas*, 793 F.3d 968, 988 (9th Cir. 2015) (“plaintiffs have a liberty interest grounded in their First Amendment right to receive information”) (citation omitted); *Krug v. Lutz*, 329 F.3d 692, 696-97 (9th Cir. 2003) (inmate, challenging the review of incoming materials excluded as obscene, had liberty interest in receiving subscription mailings sufficient to trigger procedural due process guarantees).

Plaintiffs use TikTok as a source of information on a vast array of topics—ranging from financial advice to political content to self-help videos. Rinab Decl. ¶ 10; Chambers Decl. ¶ 5. The Executive Order and regulations, by effectively barring TikTok

in the United States, will deprive Plaintiffs of their protected liberty interests in the right to information through this social media platform. *See Arce*, 793 F.3d at 988.

**c. Plaintiffs Will Be Deprived of Their Liberty Interest in Their Right to Their Chosen Occupation**

“[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment[.]” *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (citing cases); *see Thomas v. Indep. Tp.*, 463 F.3d 285, 297 (3d Cir. 2006) (“[T]he liberty to pursue a calling or occupation . . . is secured by the Fourteenth Amendment”). Accordingly, before the government deprives an individual of his or her right to a chosen occupation, the individual is entitled to procedural due process. *See Greene*, 360 U.S. at 492; *see also Stana v. Sch. Dist. of Pittsburgh*, 775 F.2d 122, 125 n.1 (3d Cir. 1985) (“[T]he Supreme Court has repeatedly held [that the “liberty interest in following a chosen profession”] can be denied only after the individual has been afforded the core content of procedural due process”).

Such deprivation occurs when the government substantially interferes with an individual’s ability to work in his or her chosen profession. *See, e.g., Greene*, 360 U.S. at 492-508 (denial of security clearance, which “severely limited” plaintiff’s “work opportunities,” deprived plaintiff of liberty interest in occupation); *Thomas*, 463 F.3d at 297 (defendants’ “campaign of defamation, harassment, and intimidation” interfered with plaintiff’s ability to run business, thereby depriving plaintiff of liberty interest in pursuing occupation without due process); *Rittenhouse Entm’t, Inc. v. City of Wilkes-Barre*, 861 F. Supp. 2d 470, 486-87 (M.D. Pa. 2012) (nightclub owner deprived of “liberty right in

pursuing his occupation” because government actors’ “harassment made it financially impossible [] to operate the nightclub more than sporadically”); *Runco Transp., Inc. v. Mid Valley Sch. Dist.*, 2015 WL 672260, at \*10-11 (M.D. Pa. Feb. 17, 2015) (finding deprivation of right to pursue occupation where government actors’ harassing conduct ultimately forced plaintiff’s transportation company out of business).

That is precisely the deprivation Plaintiffs will suffer here. Ms. Rinab, for example, works as a fashion and lifestyle influencer on TikTok. Rinab Decl. ¶ 8. She earns a living through these endeavors, and could not pay her living expenses without that income, nor is there an adequate substitute platform. *Id.* Mr. Marland is a comedian who also relies on TikTok as his sole source of income, which he uses to pay his living expenses. Marland Decl. ¶ 8. Although they have tried, none of them has found a suitable alternative to TikTok. Rinab Decl. ¶ 9; Marland Decl. ¶ 10; Chambers Decl. ¶ 3.

Accordingly, the Executive Order and regulations, by closing down TikTok, will deprive Plaintiffs from pursuing their chosen occupations as TikTok influencers, entitling them to procedural due process protections. *See Greene*, 360 U.S. at 492; *Piecknick v. Com. of Pa.*, 36 F.3d 1250, 1259 (3d Cir. 1994).

**d. Plaintiffs Were Provided No Process Before the Executive Order and Regulations**

Because the Executive Order and regulations will deprive Plaintiffs of their constitutionally protected liberty and property interests, each is entitled sufficient due process before the deprivation—at the very least, notice and an opportunity to be heard. *Mathews*, 424 U.S. at 333; *Klein*, 685 F.2d at 260; *Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir. 1998) (“At the core of procedural due process jurisprudence is the right to

advance notice of significant deprivations of liberty or property and to a meaningful opportunity to be heard.”). Yet Defendants provided Plaintiffs no process at all, not even an adequate statement of its reasoning. *See Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 988, 1001 (9th Cir. 2012) (OFAC violated plaintiff’s due process rights by, among other things, “failing to provide an adequate statement of reasons for its investigation” and failing to afford the plaintiff a meaningful opportunity to respond). This unquestionably constitutes inadequate process under the Fifth Amendment. *See Klein*, 586 F.2d at 260-61 (process insufficient where plaintiffs had no “opportunity to be heard” prior to deprivation; affirming order enjoining government action).

Consequently Plaintiffs have a strong likelihood of success on each of their due process claims—any of which alone is sufficient to grant preliminary injunctive relief.

#### **4. The Regulations Violate the APA.**

Finally, Plaintiffs are likely to prevail on the merits of their APA claim. Under the APA, a court must set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Here, the regulations are arbitrary and capricious for several reasons.

First, “the failure of an agency to consider obvious alternatives has led uniformly to reversal.” *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) (collecting cases). Here, Defendants have provided no evidence they considered alternatives, much less the reasons for rejecting them. In fact, based on the information provided in *TikTok*, TikTok Inc. proposed several alternatives, No. 1:20-cv-02658, Dkt.

15-4 (Weber Decl.) ¶¶ 11, 17, 18, and Defendants provided no explanation why they rejected these alternatives. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.”).

Second, the regulations lack a “rational connection between the facts found and the choice made.” *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quotations omitted). Even assuming there is a valid national security concern, Defendants have no rational explanation for effectively delaying the ban of the TikTok application by almost two full months, a choice that undercuts their purported concerns. *See Dep't of Commerce*, 139 S. Ct. at 2575 (“Altogether, the evidence tells a story that does not match the Secretary’s explanation for his decision.”); *Ne. Coal. on Nuclear Pollution v. NRC*, 727 F.2d 1127, 1130-31 (D.C. Cir. 1984) (agency action is arbitrary and capricious where agency’s stated reason is inconsistent with action taken).

Finally, the regulations are arbitrary and capricious because they attempt to implement an Executive Order that is otherwise unlawful. Again, the regulations violate IEEPA and are therefore “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(C).

**C. Plaintiffs and the Public Will Suffer Irreparable Harm if the Executive Order or Implementing Regulations Are Not Immediately Enjoined.**

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976);

*accord K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013) (same). Thus, the Court may presume Plaintiffs will suffer irreparable harm absent an injunction. Indeed, they have already suffered such injury—with Mr. Marland receiving offers for less revenue than ordinarily, and receiving far less offers altogether. Marland Decl. ¶ 9; Suppl. Marland Decl. ¶ 2.

In any event, Plaintiffs also face irreparable harm from the due process violations that they will suffer, which cannot be sufficiently remedied by monetary damages. *See Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 601 (3d Cir. 1979) (irreparable injury where horse trainer and driver was evicted from a track without procedural due process, where racer obtained “large part” of his income from track and eviction “had the effect of denying him the right to pursue his license to drive and train horses”); *Clover Farms Dairy v. Brumbaugh*, 586 F. Supp. 1227, 1229 (M.D. Pa. 1984) (milk seller suffered irreparable injury from deprivation of property interest in statutory milk pricing structure without due process, as structure could not “be reinstated without much dislocation in the [ ] industry,” there are “no parties from whom damages might be collected,” and damages “would not be subject to simple calculation”).

**D. The Public Interest and Balance of Equities Favor Injunctive Relief.**

“The Court of Appeals for the Third Circuit has determined that ‘[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.’” *Ramsey v. City of Pittsburgh*, 764 F. Supp. 2d 728, 734–35 (W.D. Pa. 2011) (citation omitted). That is the case here. Moreover, the public interest lies in imposing

injunctive relief because the “enforcement of an unconstitutional law vindicates no public interest.” *K.A. ex rel. Ayers*, 710 F.3d at 114 (citation omitted).

Further, the balance of equities tilts sharply in favor of injunctive relief. On one hand, the government cannot possibly show the status quo will be inequitable. Although the Executive Order and regulations are purportedly justified by national security concerns, the Executive Order permitted 45 days to elapse before taking effect, mitigating the allegedly urgent nature. On the other hand, the Executive Order and regulations will prohibit the protected speech of Plaintiffs and millions of TikTok users nationwide, and deny many others access to a vital source of information on a far-reaching range of topics—a social media platform “integral to the fabric of our modern society and culture.” *See Packingham*, 137 S. Ct. at 1738.<sup>5</sup>

#### IV. CONCLUSION

For these reasons, Plaintiffs respectfully ask the Court to preliminarily enjoin enforcement of the Executive Order and its implementing regulations.

Dated: October 13, 2020

HANGLEY ARONCHICK SEGAL  
PUDLIN & SCHILLER

/s/ Bonnie M. Hoffman

Bonnie M. Hoffman (PA Bar # 201140)  
Jason A. Levine (PA Bar # 306446)  
One Logan Square, 27th Floor  
Philadelphia, PA 19103  
Phone: (215) 568-6200  
Fax: (215) 568-0300

---

<sup>5</sup> The Court should decline to impose a bond, as that would impose a hardship on Plaintiffs, Plaintiffs’ seek to enforce important constitutional rights, and there is no risk of monetary harm to Defendants. *See Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 209-10 (3d Cir. 1990); *see also TikTok*, 2020 WL 5763634, at \*9 n.4. Alternatively, any bond should be nominal.

Email: bhoffman@hangley.com  
jlevine@hangley.com

DAVIS WRIGHT TREMAINE LLP  
Ambika K. Doran (admitted *pro hac vice*)  
920 5th Avenue, Suite 3300  
Seattle, WA 98104  
Phone: (206) 622-3150  
Fax: (206) 757-7700  
Email: ambikadoran@dwt.com

Diana Palacios (admitted *pro hac vice*)  
Heather F. Canner (admitted *pro hac vice*)  
865 South Figueroa Street, Suite 2400  
Los Angeles, CA 90017  
Phone: (213) 633-6800  
Fax: (213) 633-6899  
Email: dianapalacios@dwt.com  
heathercanner@dwt.com

Robert Corn-Revere (admitted *pro hac vice*)  
1301 K Street NW, Suite 500 East  
Washington D.C. 20005  
202-973-4200  
Email: bobcornrevere@dwt.com

*Counsel for Plaintiffs Douglas Marland,  
Cosette Rinab, and Alec Chamber*