



## Client Alerts

### The TikTok Ban: Why and What Now?

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Brace yourselves, the TikTok ban is coming. On the eve of the ban coming into effect on January 19, 2025, the Supreme Court has now upheld it.<sup>[1]</sup> Let us take a look at how it all started, why the ban is becoming a reality, and whether anybody should even care.

In case our readers are outside of the relevant age group, "TikTok is a social media platform that lets users create, upload, and watch short video clips overlaid with text, voice-overs, and music."<sup>[2]</sup> As recently explained by the Court of Appeals for the D.C. Circuit, "[f]or each individual viewer, the platform creates a continuous sequence of videos based upon that user's behavior and several other factors, with the aim of keeping that user engaged."<sup>[3]</sup> As the court further observed, "[t]he TikTok platform has approximately 170 million monthly users in the United States and more than one billion users worldwide."<sup>[4]</sup>

TikTok is ultimately owned by ByteDance Ltd., which is incorporated in the Cayman Islands, yet maintains "significant operations" in China.<sup>[5]</sup> The company was founded by Yiming Zhang, a Chinese national, who retains 21 percent ownership of the company.<sup>[6]</sup>

Given that TikTok has rapidly taken hold of the minds of our younger generation, the Chinese connection has become a problem. After a long history of various executive acts and actions, the problem culminated in a new law that is about to effectuate the aforementioned looming ban. "On April 24, 2024, the President signed the Protecting Americans from Foreign Adversary Controlled Applications Act into law.... The Act identifies the People's Republic of China ... as [a] foreign adversary of the United States and prohibits the distribution or maintenance of 'foreign adversary controlled applications.'"<sup>[7]</sup> The law essentially requires divestiture of the Chinese interest in the application and prohibits its distribution in the U.S. if this divestiture does not happen by January 19, 2025.

Court actions challenging the ban then followed. The Court of Appeals for the D.C. Circuit upheld the ban, reasoning that Congress was justified in perceiving a national security problem here.<sup>[8]</sup> Rejecting the First Amendment challenge to the law, which maintained that the law is unconstitutional because it restricts speech and other forms of expression, the court held that the Government satisfied the so-called "heightened scrutiny" test and thus could proceed with the ban. In other words, the Government has the right to restrict speech if the restriction: (1) has an important enough purpose, and (2) is narrowly tailored to that purpose.<sup>[9]</sup>

Unsurprisingly, the national security justifications at play here were compelling. Consider this evidence cited by the court: "[China] is the most active and persistent cyber espionage threat to U.S. government, private-sector, and critical infrastructure networks. Its hacking program 'spans the globe' and 'is larger than that of every other major nation, combined.' [China] has 'pre-positioned' itself 'for potential cyber-attacks against U.S. critical infrastructure by building out offensive weapons within that infrastructure.' Consistent with that assessment, the Government 'has found persistent [Chinese] access in U.S. critical telecommunications, energy, water, and other infrastructure.'"<sup>[10]</sup> Having counter-balanced this and other evidence with "[China]'s efforts to collect data of and about persons in the United States, and (2) the risk of the [China] covertly manipulating content on TikTok,"<sup>[11]</sup> what other choice did Congress have?

Those choices were explored in the "narrowly tailored" portion of the opinion. In the end, the court concluded that "the relevant provisions of the Act apply narrowly because they are limited to foreign adversary control of a substantial medium of communication and include a divestiture exemption. By structuring the Act in this way, Congress addressed precisely the harms it seeks to counter and only those harms. Moreover, as already explained, the Act's emphasis on ownership

and control follows a longstanding approach to counter foreign government control of communication media in the United States.”<sup>[12]</sup>

In the least surprising development of them all, on December 18, 2024, the Supreme Court granted review and swiftly heard arguments in the case on January 10, 2025. Yet the arguments themselves opened up a new problem altogether. Turns out, ByteDance, as a foreign company operating outside of the U.S., does not even have any First Amendment rights. In fact, “[i]t is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution.”<sup>[13]</sup> The reasoning is that “if the rule were otherwise, actions by American military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries would be constrained by the foreign citizens’ purported rights under the U. S. Constitution. That has never been the law.”<sup>[14]</sup>

Lo and behold, on January 17, 2025, the Supreme Court upheld the ban. In case anyone thought the Supreme Court did not care about the consequences, it started with this statement: “[W]e are conscious that the cases before us involve new technologies with transformative capabilities. This challenging new context counsels caution on our part. As Justice Frankfurter advised 80 years ago in considering the application of established legal rules to the ‘totally new problems’ raised by the airplane and radio, we should take care not to ‘embarrass the future.’”<sup>[15]</sup>

But the law is the law. Interestingly, the Supreme Court did not go as far as holding that ByteDance has no constitutional rights, most likely because that finding would have still left the users’ constitutional concerns unanswered. Rather, it found any constitutional burden to be “content-neutral” as applied to all data collection, which only warrants an “intermediate” scrutiny test to gauge whether the ends of national security justified the divestiture means at issue.<sup>[16]</sup> True, the ban is specific to TikTok but “TikTok has special characteristics—a foreign adversary’s ability to leverage its control over the platform to collect vast amounts of personal data from 170 million U. S. users—that justify this differential treatment. ‘Speaker distinctions of this nature are not presumed invalid under the First Amendment.’”<sup>[17]</sup> In the end, the “well-supported” national security concerns won the day.<sup>[18]</sup>

What does it all mean? While the ban only affects new purchases of the application, and the already-installed application may still continue operating, it will eventually die out without further updates. The kids, of course, will find another platform (aside from those that figure out how to stay on through various versions of private networks). In fact, there are reports of many of them already switching to another Chinese application, which is odd, given that the Chinese connection thus still remains a concern. Elon Musk might buy it, provided ByteDance is willing to sell, which has not been the case so far. Finally, the newly sworn-in President Trump come January 20, 2025, could take action and delay it. In any event, the world will somehow go on, and there will be a new tomorrow.

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[1] *TikTok Inc. v. Garland*, No. 24-656, \_\_ S.Ct. \_\_, 2025 WL 222571 (U.S. Jan. 17, 2025) (“*TikTok*”).

[2] *TikTok Inc. v. Garland*, 122 F.4th 930, 940 (D.C. Cir. 2024), *cert. granted*, No. (24A587), 2024 WL 5148087 (U.S. Dec. 18, 2024), and *cert. granted sub nom. Firebaugh v. Garland*, No. (24A588), 2024 WL 5148088 (U.S. Dec. 18, 2024).

[3] *Id.*

[4] *Id.*

[5] *See id.* at 941.

[6] *See id.*

[7] *Id.* at 939.

[8] *Id.* at 965.

[9] *See id.* at 952.

[10] *Id.* at 953.

[11] *Id.*

[12] *Id.* at 961.

[13] *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 433 (2020).

[14] *Id.*

[15] *TikTok*, 2025 WL 222571, at \*1.

[16] *Id.* at \*5-6. This less demanding test is satisfied “so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation’ and does not ‘burden substantially more speech than is necessary’ to further that interest.” *Id.* at \*8.

[17] *Id.* at \*6.

[18] *Id.* at \*10.

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