



Insight

TikTok, On the Clock

JEFFREY WESTLING | MAY 16, 2024

Executive Summary

- TikTok and its parent company ByteDance recently filed a petition for review challenging the constitutionality of the recently passed Protecting Americans from Foreign Adversary Controlled Applications Act (the “Act”), which requires the divestiture of applications controlled by a foreign adversary, of which the bill only specifically names TikTok and ByteDance, within 270 days of enactment.
- TikTok challenges the law primarily on First Amendment grounds, arguing that it unconstitutionally burdens the speech of both TikTok and its users, and also argues the Act unconstitutionally targets TikTok but not its competitors.
- This primer outlines the legal challenges in TikTok’s petition and lays out likely responses from the government as the Biden Administration defends the Act in court.

Introduction

On May 7, 2024, TikTok and its parent company ByteDance filed [a petition for review](#) in the Court of Appeals for the District of Columbia Circuit challenging the [Protecting Americans from Foreign Adversary Controlled Applications Act](#) (“the Act”). The Act, which President Biden signed in April 2024, requires the divestiture of applications controlled by a foreign adversary, though it also specifically designates any applications controlled by both TikTok and ByteDance as foreign-adversary-controlled applications due to the Chinese Communist Party’s (CCP) control over ByteDance.

TikTok primarily challenges the Act on First Amendment grounds, arguing the Act burdens both its and its users’ speech. It also argues that the Act unconstitutionally punishes TikTok for past actions through legislation, unequally targets TikTok and no other applications, and takes ByteDance’s property without just compensation.

This primer broadly outlines the legal challenges in TikTok’s petition and lays out likely responses from the federal government as the Biden Administration defends the Act in court.

The Protecting Americans from Foreign Adversary Controlled Applications Act

The Act has two components. First, it outlaws the distribution, maintenance, or update of a software application controlled by a foreign adversary within the United States, essentially banning such an application. Second, the Act allows for the divestiture of the application within 270 days so that it is no longer controlled by the foreign adversary.

In determining what constitutes an application under control of a foreign adversary, the Act largely leaves the determination up to the president, subject to specific criteria of control outlined in the Act. Yet the Act also specifically includes any applications operated by TikTok and ByteDance as already-qualifying foreign-controlled applications, meaning that no presidential determination is necessary and only a divestiture will allow the application to operate in the United States.

TikTok’s petition argues that this law is unconstitutional for four reasons.

Challenge 1: The First Amendment

The most serious challenge to the law comes from the [First Amendment](#), which states that Congress shall make no law abridging the freedom of speech. TikTok argues that the Act violates both its and its users’ First Amendment rights.

Is This a Speech Regulation?

The First Amendment protects Americans from government regulation of speech, and TikTok both acts as a speaker and a conduit for Americans to communicate with one another. Therefore, TikTok asserts a wide range of First Amendment arguments to challenge the constitutionality of the Act.

In response, the government may argue that the Act constitutes a [conduct-based regulation](#), and the First Amendment does not bar Congress from regulating the conduct in question. Indeed, the First Amendment does not prevent a legislature from regulating non-speech activity, even of businesses that act as a venue for speech. For example, the First Amendment does not protect bookstores from getting shut down for health violations. Similarly, to the extent that the regulation concerns non-expressive conduct such as the collection of data on U.S. citizens, the First Amendment may not even apply to the analysis. Bolstering the claims of TikTok and ByteDance, however, some [members of Congress](#)

argued that part of the justification for the Act was to limit the ability of the CCP to use the application to push propaganda on Americans.

Scrutiny Level

Assuming the court accepts TikTok's arguments that the Act does in fact regulate expressive activity, the critical question then becomes what level of scrutiny should apply. First Amendment jurisprudence distinguishes between [content and non-content based restrictions](#). Regulations that don't target specific viewpoints, such as a limitation on when people can hand out pamphlets at a public mall, are viewed under an intermediate scrutiny standard, rather than a strict scrutiny standard that would apply if the Act regulated what the pamphlets could say. If TikTok can convince the court that the Act should be reviewed under strict scrutiny, it will have a much better chance of also convincing the court that the Act violates its First Amendment rights. Under such a standard, the government would need to show that the Act was [narrowly tailored to achieving a compelling government interest](#), a particularly high bar.

To support its arguments, TikTok argues that the Act discriminates based on content - and should therefore be judged under the strict scrutiny standard - because it exempts platforms whose "primary purpose" is to host content such as product reviews, business reviews, or travel information and reviews. It also argues that the Act discriminates between types of speakers because TikTok is specifically mentioned in the regulation. Many members of Congress have explicitly expressed concerns about the type of content that TikTok could push onto American users, namely CCP propaganda. But while the court may determine that Congress has a compelling interest in stopping such communications, generally targeting a firm because of concerns regarding the content it delivers or promotes to users could give rise to strict scrutiny analysis.

The government will undoubtedly push for intermediate scrutiny to argue that the regulation does not in fact restrict specific content, but rather simply the time, place, and manner of speech on the service, highlighting that the Act is designed to prevent foreign adversaries from controlling venues for speech and not the content on those services.

Furthering a Government Interest

Under both strict and intermediate scrutiny, a law can survive a First Amendment challenge. Under [strict scrutiny](#), the law is presumed invalid unless the government can show that it is narrowly tailored to further a compelling governmental interest. Under [intermediate scrutiny](#), the law must further a government interest and must do so by means that are substantially related to that interest.

In this case, the government will argue that it has an interest in protecting national security, almost certainly a compelling interest even under strict scrutiny. TikTok, however, argues that the alleged harms to national security are just conjecture. Much of the congressional discussion regarding the security risks of TikTok occurred in confidential briefings, which will likely be key in the courts deliberations but could make forecasting an outcome, without access to those briefings, difficult. Therefore, the evidence of national security risks will play a key role in this analysis.

The question then becomes whether the Act furthers the interest of national security, and the amount of speech it would burden in doing so. TikTok argues that less restrictive measures could have been taken to address concerns, such as protecting Americans' data or TikTok entering into a compliance plan with the Committee on Foreign Investment in the United States, an inter-agency committee that reviews national security risks of foreign investment. It also argues that despite the bill giving TikTok the ability to divest and continue its operation, TikTok cannot separate from ByteDance and continue its operations. TikTok also indicates that the CCP will not allow the transfer of TikTok's proprietary algorithms to non-Chinese firms thus making the bill a de-facto ban, though the fact that the CCP would not allow divestment may suggest that China sees the application as a key component to its foreign policy objectives and harm TikTok's national security arguments.

Challenge 2: Bill of Attainder

TikTok's second argument is that the Act is unconstitutional because it is a "legislative punishment...of specifically designated persons or groups." The Supreme Court has ruled that for a law to be an [unconstitutional bill of attainder](#), it must target a specific named individual or group and inflict punishment without judicial protections they otherwise would have had. Undoubtedly the Act targets TikTok and ByteDance, something many members of Congress have made quite clear. And TikTok is the only application the president need not be designated a "significant threat" to U.S. national security. At the same time, the Act doesn't punish TikTok for what has occurred, but rather for potential illegal actions in the future, a [critical distinction for bill of attainder analysis](#).

Challenge 3: Equal Protection

TikTok's third argument is that the Act unfairly targets TikTok and not its competitors. The Constitution protects individuals from unequal treatment under the law. TikTok argues that subjecting TikTok specifically to the Act, while other applications must be designated as a foreign adversary controlled application by the President, unequally punishes TikTok in relation to these other applications. The government will likely argue that identifying specific companies as national security threats has been done before without violating the

equal protection clause.

Challenge 4: Unconstitutional Taking

The Constitution also provides that private property shall not be taken for public use without just compensation. TikTok argues that the Act would deprive ByteDance of its business interests in the United States. Even if divestiture were possible, it would come at [“an enormous discount to the U.S. businesses’ current market value, given the forced sale conditions.”](#)