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First Amendment Rights vs. National Security: The Case Against TikTok

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Abstract

TikTok, a rapidly growing social media giant, has faced severe congressional and legal scrutiny in the United States due to its connections with the Chinese government. This scrutiny led to the implementation of The Protecting Americans From Foreign Adversary Controlled Applications Act, which initiated complex legal debates over the balance of national security justifications and the First Amendment interests of Americans. Analyzing previous arguments presented to and provided by the Supreme Court in their decision to uphold the Act's constitutionality, I argue that the national security justifications utilized by the Court provided inadequate consideration of the impact on American users' First Amendment rights. This legal analysis and its findings exemplify the potential future restrictions on foreign-based social media and communications platforms within the United States in the name of national security. The future of TikTok in the US remains uncertain, and this pivotal decision highlights the Supreme Court's readiness to prioritize national security concerns over constitutional freedoms, signaling a new era of digital governance and opening the doors to potential future global censorship.

First Amendment Rights vs. National Security: The Case Against TikTok

Introduction

On the evening of January 18, a startling message greeted 170 million Americans as they attempted to access TikTok, a popular social media platform: “**Sorry, TikTok isn’t available right now.** A law banning TikTok has been enacted in the U.S. Unfortunately, that means you can’t use TikTok for now.” For days prior, screens across the nation flickered with farewell messages as content creators and users, many in tears, filmed goodbye videos, expressing gratitude to their followers for their support over the years. While some mourned, others were convinced it wouldn’t truly come to fruition. In a dramatic yet not wholly unexpected turn of events, TikTok was restored approximately 14 hours later, accompanied by the cheery message:

Welcome back! Thank you for your patience and support. As a result of President Trump’s efforts, TikTok is back in the U.S.! You can continue to create, share, and discover all the things you love on TikTok.

The short-lived nationwide blackout of the app, with its rapid reversal, brought relief and confusion alike, yet a sense of uncertainty remained. Amid this unprecedented whirlwind of events, the very fabric of digital engagement and governmental oversight is now being questioned.

In this paper, I examine whether the Protecting Americans From Foreign Adversary Controlled Applications Act violates the First Amendment rights of TikTok Inc. and its American users or if the Act serves as a constitutionally backed legislation protecting the guaranteed rights of the American people, not merely government interests. By evaluating previous arguments presented to and provided by the Supreme Court in their decision to uphold the Act’s constitutionality, I will dissect the legal arguments by both the challengers and champions of the Act. I investigate whether the legal actions taken against TikTok Inc. and

ByteDance Ltd. are harbingers of a new era of digital governance in the interest of national security or a one-time exception driven by geopolitical tensions. Through this analysis, I argue that the Supreme Court, in this precarious decision to uphold the Act without deciding to review the case under strict scrutiny, failed to adequately address and fully consider the First Amendment violations American users have faced and potentially continue to face. In addressing the key legal questions, I aim to provide a detailed analysis of the constitutional dimensions of this regulation in our society, which is dominated by digital interactions and data exchange. Ultimately, I will explore the tensions between safeguarding national security and defending the constitutional rights of individuals in the digital age, shedding light on the broader ramifications for privacy, freedom of expression, and global operations.

Background

Since exploding onto the digital scene in 2019, TikTok has quickly transcended generational divides, becoming a household name across the United States. Teenagers, young adults, parents, and even grandparents have grown to love the addictive, user-friendly platform. The widespread adoption can be primarily attributed to its sophisticated machine-learning algorithm that meticulously analyzes user activity to tailor content, making it highly engaging for individuals with diverse interests. The details and data behind this algorithm are closely guarded by its parent company ByteDance Ltd., adding to its allure and high value. Today, TikTok's U.S. operations are estimated to be valued at \$50 billion, underscoring the company's significant economic and cultural impact.¹ Its parent company, ByteDance Ltd., received a recent valuation

¹ Jonathan Vanian, "TikTok's U.S. operations could be worth as much as \$50 billion if ByteDance decides to sell," *CNBC*, January 15, 2025, <https://www.cnbc.com/2025/01/15/tiktoks-us-unit-could-be-worth-as-much-as-50-billion-in-a-sale.html>.

of over \$400 billion, further emphasizing the exponential growth and influence of the company.² Despite its success, the platform faces ongoing challenges and investigations regarding data collection methods and connection to the Chinese government. This growing apprehension has prompted legislative action, resulting in the fleeting backout experienced on January 18th.

The Protecting Foreign Adversary Controlled Applications Act passed in 2024 mandates that ByteDance, TikTok’s parent company, must either divest the application to a U.S. entity or shut down its operation within the United States by January 19th, 2024.³ The legislation emerged from ongoing concerns expressed by Congress that ByteDance Ltd., under the Chinese Government's jurisdiction, is compelled to comply with China’s laws concerning their “intelligence work.” Lawmakers argue that this affiliation poses a significant national security risk because of the potential for ByteDance to gather and potentially share vast amounts of personal data collected from the American user base with the Chinese government.

The Act incited a national uproar from the app’s users, many of whom have developed their lives, businesses, and careers around the social media application. TikTok, its content creators, and users have all raised objections to the Act, claiming that the law infringes upon their First Amendment rights. They argue that the Act restricts their expressive freedom and unfairly targets TikTok, potentially setting a precedent for other foreign-owned apps and platforms. The debate has sparked a nationwide discussion on the balance between national security and individual rights, emphasizing the complexities of regulating international tech companies operating in the global digital ecosystem. These complexities highlight the ongoing

² Bloomberg News, “TikTok Owner ByteDance is Tech Darling Again With \$400 Billion-Plus Valuation,” *Bloomberg*, February 21, 2025, <https://www.bloomberg.com/news/articles/2025-02-21/softbank-fidelity-t-rowe-value-bytedance-at-above-400-billion?embedded-checkout=true>.

³ U.S. Congress, *Protecting Americans From Foreign Adversary Controlled Applications Act*, 118th Cong., 2d sess., H. R. 815, Pub. L. No. 118-50, <https://www.congress.gov/118/plaws/publ50/PLAW-118publ50.pdf>.

challenges that arise at the intersections of an increasingly heated political landscape tasked with managing the American future of technology, privacy, and governmental oversight.

[Protecting Americans From Foreign Adversary Controlled Applications Act](#)

Signed into law on April 24, 2024, the Protecting Americans From Foreign Adversary Controlled Applications Act regulates foreign-owned applications, specifically naming TikTok Inc., its parent company ByteDance, Ltd., and any of its subsidiaries. The Act identifies the People's Republic of China as a primary foreign adversary. The bipartisan congressional action requires that the China-based company ByteDance, Ltd. divest from TikTok Ltd. within nine months or face a ban from all U.S. app stores and web hosting services. Subsection (a) of the bill outlines the prohibition of foreign adversary-controlled applications, while subsection (b) requires that such applications provide users with all relevant data to that user's accounts upon request. The penalty for violating subsection (a) and thus continuing its services demands a civil penalty of an amount not exceeding the multiplied estimate of \$5,000 by the number of users within United States borders. Subsection (b) Violations stipulate a similar penalty of \$500 multiplied by the number of users within U.S. borders affected by the violation. Enforcement of the Act falls to the Attorney General of the United States to conduct investigations of potential breaches and bring forth any legal action to court for injunctive or declaratory relief. The bill's provisions allow for an extension of up to 90 days if the President certifies to Congress that ByteDance, Ltd. is making progress in divesting its subsidiary TikTok to a domestic owner. Additionally, the bill allows for future presidential action against other foreign adversary-

controlled applications if they pose a national security threat and are used by over one million active users.⁴

Levels of Judicial Review

In constitutional law cases, three levels of judicial review are used: rational review, intermediate scrutiny, and strict scrutiny. Understanding these distinctions is crucial for the analysis that follows, as they help explain the methods the courts employed to evaluate the Act and the criteria it must meet under each level of review.

Rational Review

“Rational Basis Review” is the lowest level of judicial review used by courts to determine the constitutionality of a statute. Review under a rational basis is typically used in cases where there are no fundamental or constitutional rights in question.⁵

Intermediate Scrutiny

Intermediate scrutiny is the next level of judicial review only utilized when the state or federal government has passed legislation or a statute that discriminates, negatively affects a classification of protected classes, such as gender. Intermediate scrutiny is also commonly referred to as “heightened scrutiny”. According to the guidelines provided by the Legal Information Institute, in order for a challenged law to pass intermediate scrutiny, it must

“1. Further an important government interest (lower burden than compelling state interest required by strict scrutiny test)

⁴ U.S. Congress, *Protecting Americans From Foreign Adversary Controlled Applications Act*, 118th Cong., 2d sess., H. R. 815, Pub. L. No. 118-50, div. H, <https://www.congress.gov/118/plaws/publ50/PLAW-118publ50.pdf>

⁵ “rational basis test,” Legal Information Institute, Cornell Law School, accessed February 28, 2025, https://www.law.cornell.edu/wex/rational_basis_test.

2. and must do so by means that are substantially related to that interest.”⁶

Strict Scrutiny

Strict scrutiny is the most stringent and highest standard of judicial review used in Constitutional Law. Strict scrutiny is invoked

“to determine the constitutionality of a government action that burdens a fundamental right or involves a suspect classification (include race, religion, national origin, and alienage).”⁷

When a court decides to apply strict scrutiny, it begins with the assumption that the statute or action in question is unconstitutional, therefore, transferring the burden of proof to the government. The government is then required to demonstrate that its actions were constitutionally justified. Specifically, it must establish and prove that its actions were carefully and narrowly designed to serve a necessary interest, and that its actions represented the least restrictive methods to achieve that interest.

TikTok, Inc. v. Garland, D.C. Circuit

Following the Act’s signing into law on April 24, 2024, three petitions filed by ByteDance, Ltd. and TikTok Inc., Based Politics, Inc., and a group of individual TikTok “Creators” challenge the Act’s constitutionality seeking a declaratory judgment from the court and an injunction order preventing the Attorney General from enforcing the Act. The Government advocated for review under rational basis and, alternatively, intermediate scrutiny. They further maintained that even under strict scrutiny, the highest standard of judicial review,

⁶ “intermediate scrutiny,” Legal Information Institute, Cornell Law School, accessed February 28, 2025, https://www.law.cornell.edu/wex/intermediate_scrutiny.

⁷ “strict scrutiny,” Legal Information Institute, Cornell Law School, accessed February 28, 2025, https://www.law.cornell.edu/wex/strict_scrutiny.

the Act would satisfy all provisions. The court, in their published decision, stated the Act complied under intermediate scrutiny; however, under strict scrutiny, “the Act violates the First Amendment unless the Government can ‘provide that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest’”.⁸ The court argued that in the particular situation, heightened scrutiny applies, stating that “No Supreme Court case directly addresses whether such a justification renders a law content-based, thereby triggering strict scrutiny”.⁹ Heightened scrutiny is applied when an Act potentially infringes upon constitutional rights rather than explicitly violating them, thus requiring the government to justify the law’s necessity. They concluded the law as content-neutral rather than content-based as its regulations, as explained by the governments, are unrelated to the content of speech on the platform. On December 6, 2024, the D.C. Circuit Court of Appeals, assuming but not deciding to utilize strict scrutiny, upheld the Act, concluding it served compelling governmental interests in national security and was narrowly designed to achieve those objectives through divestiture. The D.C. court, in their decision, cited the Government’s two strong national security justifications: the People’s Republic of China’s efforts to collect data on American citizens and the risk of the PRC manipulating content on TikTok. Overall, the court held that the Act did not violate the petitioner’s First Amendment Rights. Judge Srinivasan concurred in part and in judgment, stating that, in his view, intermediate scrutiny ought to be applied, and the Act maintained its constitutionality under those standards.¹⁰

⁸ TikTok Inc. and ByteDance Ltd. v. Merrick B. Garland, No. 24-1113, (D.C. Cir., 2024), 25.

⁹ TikTok Inc. and ByteDance Ltd. v. Merrick B. Garland, No. 24-1113, (D.C. Cir., 2024), 25.

¹⁰ TikTok Inc. and ByteDance Ltd. v. Merrick B. Garland, No. 24-1113, (D.C. Cir., 2024).

TikTok v. Garland, Supreme Court

On December 16th, 2024, 10 days following the D.C. District Court of Appeals decision to uphold the Protecting Americans From Foreign Adversary Controlled Applications Act, the Petitioners in the previous case submitted an [emergency application](#) for injunction to Chief Justice Roberts. The Supreme Court granted the petition for writ of certiorari on December 18th, 2024. After hearing oral arguments on January 10, 2025, the Supreme Court unanimously decided on January 17th to affirm the judgment of the United States D.C. Court of Appeals Circuit. Justice Sotomayor issued an opinion concurring in part and concurring in judgment along with Justice Gorsuch, who concurred in the judgment.¹¹

Executive Order “Application of Protecting Americans From Foreign Adversary Controlled Applications Act to TikTok”

On January 20, 2025, newly inducted President Donald J. Trump issued an executive order titled, “Application of Protecting Americans From Foreign Adversary Controlled Applications Act to TikTok”. The presidential action acknowledges the January 19th ban of TikTok as untimely to his inauguration as President and claims to interfere with his “ability to assess the national security and foreign policy implications of the Act’s prohibitions before they take effect”. Additionally, he cites that the prohibition has encroached on his ability to negotiate possible resolutions and alternatives to the prohibitions of the social media platform. Within the order, President Trump calls on the Attorney General to halt any action to enforce the Act for a

¹¹ *TikTok Inc. v. Garland*, 604 U.S. 4-656 (2025).

period of 75 days in order to allow the President and his Administration an opportunity to determine an appropriate course of action.¹²

Legal Frameworks

I. First Amendment Rights

As acknowledged by the Supreme Court, TikTok is a social media platform in which over 170 million users in the United States create, share, interact, publish, and view a variety of short-form content, from local and national news to viral dance clips to beauty and lifestyle tutorials. Many of these users who publish content, formally known as content creators, have amassed millions of followers and even secured stable incomes with the help of brand deals and sponsorships. Opponents' primary argument is that the Act is a direct violation of Americans' First Amendment rights. Attorney Noel J. Francisco, representing TikTok Inc. along with fellow petitioners, argued before the Supreme Court that not only is the law content-based, but it places an unfair burden on TikTok's speech. Therefore, the First Amendment applies. He further points to what he believes is the Government's true target: speech.¹³ Which, as per his reasoning, is out of fear that Americans will be influenced by Chinese influence and manipulation of content.¹⁴

There are a number of arguments and concerns when considering how and if First Amendment protections apply to the case of TikTok Inc. The argument put forth by the American Civil Liberties Union (ACLU) and various other civil rights organizations emphasizes that TikTok is an expressive and communicative platform whose activity falls under First

¹² Donald Trump, "Application of Protecting Americans From Foreign Adversary Controlled Applications Act To TikTok," Exec. Order No. 14166, January 20, 2025.

¹³ TikTok v. Garland, oral argument transcript, Docket No. 24-656, (U.S. Supreme Court, January 10, 2025), 4-6.

¹⁴ TikTok v. Garland, oral argument transcript, Docket No. 24-656, (U.S. Supreme Court, January 10, 2025), 4-6.

Amendment protections. Citing the Supreme Court Decision in *Packingham v. North Carolina*, the ACLU highlights the court's previous acknowledgment that access to social media is integral to the exercise of free speech.¹⁵ The Court has long acknowledged that digital social media platforms serve as contemporary public forums where individuals can exercise their right to expressive speech. This precedent supports the claim that legislations that restrict access to these platforms can effectively stifle free speech and silence the voices of their users. In this section, I will consider the key legal questions, tensions, and arguments that appear throughout this case. I will pull from briefs submitted to the Supreme Court, oral arguments, legal precedents, and court decisions to dissect the complexities of this legal battle, exploring how the principles of free speech intersect with concerns over national security and digital rights.

II. Are Foreign-Owned Companies Protected Under the First Amendment?

Both court decisions maintained the right to free speech through social media, yet one of the concerns that arises here, as brought forth by challengers of the ban, is that corporations owned by foreign entities are not entitled to protections under the First Amendment. Francisco argues against this claim citing that TikTok Inc. is a company incorporated in the U.S. and is therefore entitled to First Amendment Rights irrespective of its parent company's origin, ownership, and ties to a foreign government.¹⁶ Francisco later mentions that even if the Court decides that neither TikTok Inc. or ByteDance Ltd. have protections under the First Amendment, then surely the American creators on the app do. This argument, as pointed out by the ACLU's brief, was improperly considered respective to the First Amendment interests of TikTok users.

¹⁵ American Civil Liberties Union et al., "Amicus Brief in Support of Petitioners," in *TikTok Inc., et al. v. Merrick B. Garland*, no. 24-656, 24-657 (U.S. Supreme Court, December 27, 2025), 6.

¹⁶ *TikTok v. Garland*, oral argument transcript, Docket No. 24-656, (U.S. Supreme Court, January 10, 2025), 9.

By potentially overlooking the free expression rights involved, the D.C. Court may have inadequately assessed the breadth of the impact that banning such a platform has on free speech. The Supreme Court Decision denied the potential infringement of the app’s American creators, stating the Act directly regulates ByteDance. Ltd and TikTok Inc. through divestiture, not its American creators.

III. Content-Based or Content-Neutral?

A pivotal issue in the debate over whether the Act unduly limits expressive speech rests on determining if the law is content-based or content-neutral. A content-based law is distinct from a content-neutral law as it regulates speech in a discriminatory manner based on the content, message, or viewpoints expressed. Conversely, a content-neutral law regulates expression, disregarding any form of content expressed.¹⁷ Advocates of the ban, along with the government, maintain that the legislation is content-neutral, stating the Act merely mandates divestiture to an entity not considered to be a foreign adversary, purely in the interest of national security, not the content of speech. The Act itself does not include any reasoning or verbiage regarding the manipulation of content. In deciding how to distinguish the law, the Court first recognized two forms of content-based speech regulation.

“First, a law is content based on its face if it “applies to particular speech because of the topic discussed or the idea or message expressed.” Reed, 576 U. S., at 163; see id., at 163–164 (explaining that some facial distinctions define regulated speech by subject matter, others by the speech’s function or purpose). Second, a facially content-neutral law is nonetheless treated as a content-based regulation of speech if it “cannot be ‘justified without

¹⁷ “Overview of Content-Based and Content-Neutral Regulation of Speech”, Constitution Annotated, accessed February 22, 2025, https://constitution.congress.gov/browse/essay/amdt1-7-3-1/ALDE_00013695/.

reference to the content of the regulated speech” or was “adopted by the government ‘because of disagreement with the message the speech conveys.’” *Id.*, at 164 (quoting *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989))”.¹⁸

Applying this framework, the Court found the law to be facially content-neutral, as it imposes specific provisions to TikTok Inc. due to its owner ByteDance Ltd., a company under the jurisdiction of a foreign adversary. The Court emphasized that the Act does not aim to target speech based on its content or functional purpose.¹⁹ Rather, they argue the Act regulates “actors” rather than content. Furthermore, they argued that implementing the Act would not necessitate changes to the content on TikTok, nor would it impose any burden, penalty, or restriction based on the content itself. However, this has been argued against, particularly in current media and business discussions concerning the ownership of the TikTok’s algorithm, ByteDance Ltd.’s unwillingness to part ways with its most lucrative trade secret, and a potential approval needed by the Chinese Government due to a Chinese export control law. All of this brings attention to the complexity of the Act’s implications on the nature and future of TikTok, which, without its core algorithm, would inevitably become a fundamentally different content platform.

IV. National Security Justifications

The crux of the D.C. Court’s decision hinged on the Act’s narrowly tailored provisions designed to safeguard the government’s compelling national security interests. The core contention in this case emerges from balancing these national security interests against potential infringement on First Amendment rights. In addressing the national security justifications for the

¹⁸ *TikTok Inc. v. Garland*, 604 U.S. 4-656 (2025), 10.

¹⁹ *TikTok Inc. v. Garland*, 604 U.S. 4-656 (2025), 10.

Act, I'd like to focus on the two grounds the D.C. court based its decision on. The D.C. court's decision reads,

“The Act’s divestment mandate is narrowly tailored to achieve Congress’ important national-security interests in preventing the PRC from accessing U.S. TikTok users’ data and covertly manipulating content on the platform.”²⁰

First, the Act’s primary justification is that it prevents the People’s Republic of China from accessing data from American TikTok users. A group of former national security officials who submitted an amicus curiae brief strongly supported the view that the Act’s enforcement is a necessary measure to sever these potentially harmful ties, thereby eliminating a significant national security threat.²¹ Both the officials and Solicitor General Elizabeth Prelogar, who argued on behalf of the respondent before the Supreme Court, refer to the app as a highly valuable surveillance tool and highlight past instances, such as the Anthem Healthcare and Equifax hacks, which they argue exemplify the risks associated with foreign control over vast American data.²² The essence of their concern hinges on the direct relationship between ByteDance, TikTok’s parent company, and the Chinese Communist Party, suggesting that China’s National Intelligence Law could potentially mandate the turnover of American user data to the Chinese government. The strength of this argument lies in the very real threat and danger of a data leak containing personal and private information, as proven in past cases where China has presented threats to breach American data.

²⁰ TikTok Inc. and ByteDance Ltd. v. Merrick B. Garland, No. 24-1113, (D.C. Cir. Dec. 6, 2024), 23-24.

²¹ Former National Security Officials, “Amicus Brief in Support of Respondent,” *TikTok, Inc., et al. v. Merrick B. Garland*, no. 24-656, 24-657 (Supreme Court of the United States, filed December 27, 2024).;

²² Former National Security Officials, “Amicus Brief in Support of Respondent,” *TikTok, Inc., et al. v. Merrick B. Garland*, no. 24-656, 24-657 (Supreme Court of the United States, filed December 27, 2024), 8.;

TikTok v. Garland, oral argument transcript, Docket No. 24-656, (U.S. Supreme Court, January 10, 2025), 129.

However, in the specific case of TikTok, I would like to point out that General Prelogar and the officials presented TikTok as a potential threat, not one that has been proven, as per the public record. Along the same line of reasoning, the ALCU and other civil rights organizations assert that the government has not satisfactorily proven that the threats posed by TikTok are imminent or unavoidable, nor have they demonstrated that less restrictive measures would fail to mitigate these threats effectively.²³ Justice Gorsuch even declared during the oral argument hearing before the Court that, “The government admits that it has no evidence that TikTok has engaged in content manipulation in this country ...”.²⁴ As such, opposers of the ban contended that the Court failed to hold the government to its burden of proof when arguing for national security interests. The Court even went so far as to decline to review classified documents submitted by the government, which may have offered evidentiary support but would remain concealed from the public due to their classified nature.

Attorney Jeffrey Fisher, alongside attorney Francisco on behalf of TikTok Inc. and its fellow petitioners, argued before the Court that under the justification of private data collection concerns lies the problem of under-inclusiveness. Specifically, Fisher argued other China-based companies also have access to millions of American data, such as Temu and Shein, both large e-commerce websites that have mobile applications, which have an estimated 70 million and 40 million active American users, respectively.²⁵ His point raises the valid question that if national security through protecting American data were Congress’ primary interest, why only target TikTok? Why not target or expand the act to include other Chinese-based companies that have

²³ American Civil Liberties Union et al., "Amicus Brief in Support of Petitioners," in *TikTok Inc., et al. v. Merrick B. Garland*, no. 24-656, 24-657 (Supreme Court of the United States, December 27, 2025), 4.

²⁴ *TikTok v. Garland*, oral argument transcript, Docket No. 24-656, (U.S. Supreme Court, January 10, 2025), 24.

²⁵ “Statistics report on Shein,” 2024, Statista, <https://www.statista.com/study/132229/shein/>.

access to millions of Americans' private data? Is this simply because TikTok is one of the most popular social media platforms? If so, then this directly incites the First Amendment because, as referenced, social media activity is protected under the First Amendment.

Segueing to the second argued point of concern regarding national security: covert manipulation of content. General Prelogar emphasized that the covert manipulation of data refers to the threat of weaponizing and suppressing of speech by China before the Court.²⁶ She elaborated on this argument, explaining that Americans who use the app may believe that certain content they view is organically provided for them by the learning model when, in reality, there's a potential for the content to be customized and the "strings pulled by China."²⁷

Whether this means that Americans would be subjected to targeted propaganda or misinformation is unknown. In the case that this is known, The Cato Institute brought forth a strong argument against this in their amicus brief submitted to the Court, arguing that both "propaganda" and "misinformation and disinformation" are protected by the First Amendment.²⁸ While General Prelogar did not use the words propaganda or misinformation, various members of Congress, Republican and Democrat alike, cited these as one of their main concerns regarding the app throughout the infamous House Hearing on March 23, 2023, when TikTok CEO Shou Zi Chew appeared before Congress. The CEO fervently denied any form of content manipulation mandated by the Chinese Communist Party on the app and even detailed measures to block or provide users with warnings on potential misinformation and propaganda.²⁹ Despite the

²⁶ TikTok v. Garland, oral argument transcript, Docket No. 24-656, (U.S. Supreme Court, January 10, 2025), 116.

²⁷ TikTok v. Garland, oral argument transcript, Docket No. 24-656, (U.S. Supreme Court, January 10, 2025), 119.

²⁸ Cato Institute, as Amicus Brief in Support of Petitioners, "*TikTok, Inc., et al. v. Merrick B. Garland*", no. 24-656, 24-657 (Supreme Court of the United States, filed December 27, 2024).

²⁹ U.S. Congress, House, Committee on Energy and Commerce, Committee Meeting Transcript, "TikTok: How Congress Can Safeguard American Data Privacy and Protect Children From Online Harms", March 23, 2024, 234.

exclusion of these specific reasons in the oral arguments and Court decision, it would be negligent to assume this is not a driving factor behind the Act. If properly acknowledged within the Courts, this argument would not stand as the First Amendment does not hold exceptions to restricting misinformation, disinformation, or propaganda.

Revisiting the Court’s classification of the Act as content-neutral, the justifications provided by the government and upheld by the Supreme Court are primarily founded on concerns over the collection of American data and China’s potential access to it. Interestingly, the national security interest in covert content manipulation was left unacknowledged in the Supreme Court’s Decision. In fact, only in reference to the D.C. Court’s Decision and in Justice Gorsuch’s concurrence do the words “covert manipulation of content” appear in the *per curiam* decision. In his concurrence, he acknowledged this omission, stating,

“First, the Court rightly refrains from endorsing the governments asserted interest in preventing “the covert manipulation of content” as a justification for the law before use. Brief for Respondent 37. One man’s “covert content manipulation” is another’s editorial discretion.”³⁰

The covert manipulation of data, while heavily relied upon to support the government’s claim of national security, was indirectly struck down by the Supreme Court. Otherwise, they would have presumably referenced it, had it provided solid and undisputable reasoning. Including the contentious argument, covert manipulation as reasoning for their decision would have opened the doors to potential counterarguments and weaknesses in the distinction of the Act as content-neutral.

³⁰ *TikTok Inc. v. Garland*, 604 U.S. 4-656 (2025).

V. *Intermediate Scrutiny vs Strict Scrutiny*

Arguably, one of the most critical determinations made in this case was the Supreme Court’s decision to assume but not decide that strict, rather than intermediate scrutiny, applied. The Supreme Court reasoned that the TikTok-specific provisions of a divestiture within the Act classify it as a content-neutral law, thereby not triggering strict scrutiny. To supplement this, they add that while similarly themed cases involving government regulation of expressive conduct have triggered First Amendment Scrutiny, none entailed the court ruling on corporate control restrictions as a direct First Amendment restriction of expressive activities. They recognized that while regulations targeting certain speakers—TikTok Inc., in this case—are frequently subjected to review under strict scrutiny, the particular features of the speaker in question (i.e., its 170 million American users, its parent company ByteDance Ltd.’s ties to the Chinese government, which is classified as a foreign adversary) justify the differential treatments, thus negating the need for strict scrutiny. Following this, they wrote, “We hesitate to break that new ground in this unique case”.³¹

Justice Sotomayor’s opinion expressed her dissatisfaction with the Court’s legal reasoning, stating, “I see no reason to assume without deciding that the Act implicates the First Amendment because our precedent leaves no doubt that it does”.³² She further argues that the Act does indeed implicate First Amendment scrutiny as

“The Act, moreover, effectively prohibits TikTok from collaborating with certain entities regarding its “content recommendation algorithm” even following a qualified divestiture

³¹ *TikTok Inc. v. Garland*, 604 U.S. 4-656 (2025),7.

³² Opinion of Sotomayor, J., *TikTok Inc. v. Garland*, 604 U.S. 4-656 (2025), 1.

And the Act implicates content creators’ “right to associate” with their preferred publisher” for the purpose of speaking”.³³

Regardless, under the Court’s compounded rationale and expressed hesitation, the Court reviewed the case under intermediate scrutiny. This necessitated the Court to consider whether the specification and design of the law would resolve and facilitate government interests unrelated to the potential infringement upon and suppression of First Amendment activities and “does not burden substantially more speech than necessary to further those interests.”³⁴

It is unclear what type of law burdens speech more than necessary and how much of the speech is allowed to be burdened in the name of furthering government interests. Still, perhaps this was purposeful to provide the Courts with the responsibility of determining such. In the case of *TikTok v. Garland*, it is clear the Court felt strongly that the government’s interest in national security was compelling enough to fulfill this requirement.

VI. *First Amendment Concerns vs National Security Interests: Which takes precedent?*

Both opponents and proponents of the Act argue that their reasoning, either First Amendment violations or national security interests, take precedence over the other. The Court, in its decision, agreed with the argument by proponents of the ban that the Act is narrowly tailored to TikTok and the government interests of national security. They state, “But TikTok’s scale and susceptibility to foreign adversary control, together with the vast swaths of sensitive data the platform collects, justify differential treatment to address the Government’s national security concerns.”³⁵ Conversely, the ACLU argues in its brief that “Claims of national security

³³ Opinion of Sotomayor, J., *TikTok Inc. v. Garland*, 604 U.S. 4-656 (2025), 1-2.

³⁴ *TikTok Inc. v. Garland*, 604 U.S. 4-656 (2025), 9.

³⁵ *TikTok Inc. v. Garland*, 604 U.S. 4-656 (2025), 3.

do not diminish the government's burden under the First Amendment".³⁶ In fact, they highlight that historically, the Supreme Court has maintained that claims of national security do not exempt the government from its burden to respect First Amendment rights, citing *United States v. Robel* as a foundational precedent that emphasized that constitutional rights cannot be overridden merely by invoking national security.³⁷

The question of which takes precedent is both complex and heavy. It is undeniable that personal data breaches are a constant danger. However, it seems as though a large consideration for the American users has been brushed to the side in this case. The focus of the Court was primarily on the Act's regulation of TikTok as an entity owned by a foreign company rather than the Act's provisions' impact on American users and content creators. Only Justice Sotomayor considered TikTok's American content creators' expressive rights in her opinion. In agreement with Justice Sotomayor, I find the lack of definitive scrutiny under the First Amendment inadequate in providing solid legal reasoning that the Act does not violate the creators' First Amendment rights. Had the Court decided to review the Act under strict scrutiny of the First Amendment, I believe the Court would have found ample evidence that the Act's purpose was subject to content-based rationale.

The previous discussions in Congress and oral arguments before both the D.C. Court and Supreme Court point to a primary justification of national security—covert manipulation of content, including possible promotion of propaganda and misinformation—which was neglected in the Supreme Court's Decision presumably due to its disputability as content-based reasoning. Following the illogic of the Court, Congress's ostensibly legitimate foundation of data security

³⁶ American Civil Liberties Union et al., "Amicus Brief in Support of Petitioners," in *TikTok Inc., et al. v. Merrick B. Garland*, no. 24-656, 24-657 (Supreme Court of the United States, December 27, 2025), 25-28.

³⁷ American Civil Liberties Union et al., "Amicus Brief in Support of Petitioners," in *TikTok Inc., et al. v. Merrick B. Garland*, no. 24-656, 24-657 (Supreme Court of the United States, December 27, 2025), 25-28.

shielded its speech-based rationale from any constitutional scrutiny. I contend that through this reason alone, the Supreme Court failed to provide a complete, fair, and judicious review of the Act respective to the rights of the American people.

Additionally, I believe the Act's lack of regulation for other companies with ties to the Chinese government that also have access to vast amounts of Americans private data indicates the Act's unfair burden on TikTok, Inc. Had Congress truly prioritized the protection of American data, it would have enacted a law that provided protections under all foreign-owned companies (or all foreign adversary-controlled companies). Congress focused itself on a highly popular communications platform in fear of Chinese propaganda and misinformation spreading across the American populace, along with the supplementary argument of data security to justify restricting such a widely used communications platform.

The First Amendment does not and has never had national security exceptions. All things considered, the Supreme Court's decision to both acknowledge the gap in case law yet refuse to adequately address it by deferring to intermediate scrutiny but outlining the inherent narrowness of their opinion does not prevent further parties from using the guise of national security to further their interests. Although the decision was characterized as a unique, one-time instance of digital governance for the sake of national security, the implications of the case suggest otherwise.

Conclusion: Future Implications of *TikTok v. Garland*

The Supreme Court's decision to uphold the Protecting Americans From Foreign Adversary Controlled Applications Act sets a significant precedent for the potential convergence of national security concerns and digital communications platforms. This ruling will likely

embolden legislative and executive actions aimed at regulating or restricting foreign-owned technology companies on the grounds of national security. It underscores the Court's willingness to defer to the government on matters where national security is involved, even when such actions intersect with First Amendment Rights. As a precedent, the decision could lead to more aggressive scrutiny of foreign digital entities operating in the United States, potentially affecting a wide range of platforms beyond TikTok. Moreover, it may influence how future cases concerning the balance between free expression and national security are adjudicated, especially in scenarios involving digital platforms that use data from user interactions in their performance. Arguably, the ruling constitutes a precarious decision that allows for future decisions to justify government control over other communications mediums under the guise of national security.

Additionally, the decision raises profound social and cultural implications, particularly regarding public trust in the Court's capacity and willingness to safeguard First Amendment rights. This ruling may contribute to a growing perception among the American populace that the judicial system may not always act as a robust defender of free speech, especially when government claims of national security interests arise. This perception has the potential to exacerbate current societal and political divides over the issues of national security versus First Amendment Rights. To go further, the decision may set a precedent that affects how other foreign-owned platforms operate within the United States, thereby impacting the variety and diversity of digital content available to Americans. In this rushed decision, the Supreme Court has opened the doors to a potential new era of global censorship and reverence for government interests over American citizens' guaranteed rights.

Bibliography

- Bloomberg News. "TikTok Owner ByteDance is Tech Darling Again With \$400 Billion-Plus Valuation," Bloomberg, February 21, 2025. <https://www.bloomberg.com/news/articles/2025-02-21/softbank-fidelity-t-rowe-value-bytedance-at-above-400-billion?embedded-checkout=true>.
- Cornell Law School. "intermediate scrutiny." Legal Information Institute. Accessed February 28, 2025. https://www.law.cornell.edu/wex/intermediate_scrutiny.
- Cornell Law School. "rational basis test." Legal Information Institute. Accessed February 28, 2025. https://www.law.cornell.edu/wex/rational_basis_test.
- Cornell Law School. "Strict Scrutiny." Legal Information Institute. Accessed February 28, 2025 https://www.law.cornell.edu/wex/strict_scrutiny
- "Overview of Content-Based and Content-Neutral Regulation of Speech." Constitution Annotated. Accessed February 22, 2025. https://constitution.congress.gov/browse/essay/amdt1-7-3-1/ALDE_00013695/.
- SCOTUSblog. "TikTok, Inc. V. Garland." Case Files. Accessed January 24, 2025. <https://www.scotusblog.com/case-files/cases/tiktok-inc-v-garland/>.
- "Statistics Report on Shein." 2024. Statista. Accessed February 23, 2025. <https://www.statista.com/study/132229/shein/>.
- Trump, Donald. "Application of Protecting Americans From Foreign Adversary Controlled Applications Act To TikTok." Exec. Order No. 14166, January 20, 2025. <https://www.whitehouse.gov/presidential-actions/2025/01/application-of-protecting-americans-from-foreign-adversary-controlled-applications-act-to-tiktok/>

U.S. Congress. Protecting Foreign Adversary Controlled Applications Act. 118th Cong., 2d sess., Public Law No. 118-50., div. H.

<https://www.congress.gov/118/plaws/publ50/PLAW-118publ50.pdf>

U.S. Congress. House of Representatives. Committee on Energy and Commerce. Committee

Meeting Transcript. TikTok: How Congress Can Safeguard American Data Privacy and Protect Children From Online Harms. March 23, 2024, 234.

<https://www.congress.gov/118/meeting/house/115519/documents/HHRG-118-IF00-Transcript-20230323.pdf>

Vanian, Jonathan. “TikTok’s U.S. operations could be worth as much as \$50 billion if ByteDance decides to sell,” CNBC, January 15, 2025.

<https://www.cnbc.com/2025/01/15/tiktoks-us-unit-could-be-worth-as-much-as-50-billion-in-a-sale.html>.