



# *TikTok v. Garland*: Constitutional Challenges to the Protecting Americans from Foreign Adversary Controlled Applications Act

December 19, 2024

In April 2024, Congress enacted the [Protecting Americans from Foreign Adversary Controlled Applications Act](#) (PAFACAA) as part of a supplemental [appropriations act](#) (P.L. 118-50). The PAFACAA makes it unlawful to provide certain services to “distribute, maintain, or update . . . a foreign adversary controlled application” in the United States unless the covered application’s owners execute a “[qualified divestiture](#),” that is, a transaction that deprives the foreign adversary of both control over and any operational relationship with the application. The Act expressly defines a “foreign adversary controlled application” to include [TikTok](#), a popular social media platform that allows users to post and view short-form videos displayed through a sophisticated content recommendation algorithm. The prohibitions established by the PAFACAA are to take effect against TikTok on [January 19, 2025](#), absent a qualified divestiture. TikTok claims that such a divestiture is not feasible, so “the Act will force a shutdown of TikTok.”

After Congress enacted the PAFACAA, TikTok, ByteDance (TikTok’s parent company), and an organization and individuals who use TikTok petitioned the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to enjoin enforcement of the Act. All petitioners argued that the Act violates their First Amendment rights. TikTok also alleged that the Act violates the Constitution’s [Bill of Attainder Clause](#) and the Fifth Amendment’s [Takings](#) and [Due Process](#) Clauses.

On December 6, 2024, the D.C. Circuit [rejected](#) the constitutional challenges. The U.S. Supreme Court then [agreed](#) to hear the case and set oral argument for January 10, 2025. This Sidebar analyzes the D.C. Circuit’s resolution of the petitioners’ challenges, including issues the Supreme Court may consider, and some related considerations for Congress. Other CRS products address [frequently asked questions](#) about regulating TikTok and provide [additional background](#) about some of the legal issues underlying the petitioners’ challenges.

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## Statutory Background

The PAFACAA regulates “foreign adversary controlled” applications as well as the app stores and internet hosting services allowing users to access them. The Act expressly defines “foreign adversary controlled application” to include apps operated by TikTok and any other subsidiary of ByteDance, Ltd. It also includes more generally applicable definitions of the term that encompass, among others, certain websites, apps, and related technology if at least 20% of the company that operates the technology is owned by a person or entity located in the People’s Republic of China (PRC) or another country listed in 10 U.S.C. § 4872(d)(2). For apps other than TikTok to qualify under this generally applicable definition, the President has to determine that the app presents a significant national security threat.

When an app qualifies as a foreign adversary controlled application, the PAFACAA imposes several prohibitions on the app and companies that provide services to the app. Most relevant here, the PAFACAA prohibits app stores and internet hosting services from enabling the distribution, maintenance, or updating of the app unless the app’s owners execute a “qualified divestiture.” A sale or transfer of the company counts as a qualified divestiture only if the President determines that, after the transaction is executed, the foreign adversary will neither control nor have any operational relationship with the app.

The prohibition on app stores and internet hosting services distributing, maintaining, or updating TikTok is scheduled to take effect on January 19, 2025, although the President can grant a one-time extension of up to 90 days after making certain certifications to Congress. If TikTok completes a qualified divestiture prior to the deadline, the prohibition will not take effect. If the prohibition does take effect, app stores and internet hosting services could face enforcement actions and civil penalties for failure to comply. If TikTok later completes a qualified divestiture, the prohibition will cease to apply.

## Procedural Background

Three groups—(1) TikTok and ByteDance (collectively, TikTok), (2) eight individual content creators, and (3) BASED Politics, Inc., a non-profit entity that publishes content on TikTok—filed petitions in the D.C. Circuit contending that the PAFACAA is unconstitutional. Section 3 of the PAFACAA gives the D.C. Circuit “exclusive jurisdiction” over challenges to the statute, requiring the parties to present their claims and evidence to this federal appellate court in the first instance, rather than to a federal trial court. All petitioners argued that the Act violates the First Amendment’s Free Speech Clause. TikTok raised additional challenges under Article I’s Bill of Attainder Clause, the Fifth Amendment’s Takings Clause, and the equal protection component of the Fifth Amendment’s Due Process Clause. The D.C. Circuit consolidated the three petitions under the case caption *TikTok v. Garland*.

On the merits, the court rejected each of the petitioners’ constitutional challenges. All three judges on the panel concurred in the judgment. Chief Judge Srinivasan wrote separately because he disagreed with part of the majority’s First Amendment reasoning.

## First Amendment

TikTok and its users claimed the law unconstitutionally infringes TikTok’s right to publish others’ speech and both TikTok and the users’ rights to share their own speech. Although the D.C. Circuit ultimately held that the PAFACAA does not violate the First Amendment, the court agreed that the law triggered heightened constitutional scrutiny because it “singles out TikTok, which engages in expressive activity, for disfavored treatment.”

The majority opinion did not decide exactly which level of constitutional scrutiny should apply. Laws that regulate speech based on its subject matter, topic, or viewpoint are considered content based. Courts usually evaluate content-based laws using the strict scrutiny standard, which requires the government to

prove the law is the **least restrictive means** to further a compelling government interest. Content-neutral laws are evaluated using the **intermediate scrutiny standard**, which requires the restriction on speech to be “no greater than is essential” to advance an “important or substantial” government interest unrelated to the suppression of speech. Intermediate scrutiny is still a relatively robust standard, but it is easier for the government to satisfy than strict scrutiny. The D.C. Circuit **held** that the text of the PAFACAA does not target speech based on its communicative content, and thus is content neutral on its face. Nonetheless, the court **believed** the law might still trigger strict scrutiny because the government referenced the content of TikTok’s speech in justifying the law. The court **concluded** that it did not need to determine which standard applied, however, because it held that the law could survive even strict scrutiny.

The government **argued** that there are two national security justifications for the PAFACAA: “(1) to counter the PRC’s efforts to collect great quantities of data about tens of millions of Americans, and (2) to limit the PRC’s ability to manipulate content covertly on the TikTok platform.” The court **agreed** that both interests are compelling, deferring in part to the government’s evaluation of the underlying factual circumstances. The D.C. Circuit **credited** evidence of past data collection efforts by the PRC and ByteDance, as well as the government’s prediction that TikTok would likely comply with any future PRC requests to manipulate content. TikTok objected to the government’s content manipulation justification, **saying** the government cannot have a “legitimate interest” in preventing Americans from hearing certain speech. The Supreme Court has **held** that the government “may not interfere with private actors’ speech to advance its own vision of ideological balance.” Responding to TikTok’s argument, the D.C. Circuit **characterized** the PAFACAA as preventing a foreign government from “covertly manipulating content on the platform,” not suppressing content. The court **remarked** that a new owner of TikTok “could circulate the same mix of content as before without running afoul of the Act.” Thus, in the court’s **view**, the PAFACAA did not reflect a motive to suppress TikTok’s speech or censor content. Rather, the content manipulation justification was aimed at ending foreign adversary control of TikTok, which the court **deemed** a legitimate objective.

The D.C. Circuit further **held** that the PAFACAA’s TikTok-specific provisions were narrowly tailored to these national security interests. TikTok argued that the National Security Agreement (NSA) it offered to the executive branch provided an alternative approach that would have been less restrictive of its speech. The NSA purportedly would have **created** operational independence for TikTok and limited ByteDance’s ability to access some U.S. user data, among other measures. The executive branch declined this proposal. The D.C. Circuit **said** it would be inappropriate for the court to “reject the Government’s risk assessment and override its ultimate judgment” that the NSA was not as effective as the PAFACAA.

Chief Judge Srinivasan’s concurrence outlined a different First Amendment analysis. He would have held that the PAFACAA was constitutional under an intermediate scrutiny analysis. He **cited** two reasons the court should have applied this lower level of scrutiny: (1) the history of restrictions on foreign control of broadcast media (even as he **recognized** that TikTok is not part of the broadcast medium), and (2) his view that the law is content neutral because it “does not target communication of any specific message, viewpoint, or content.” On this second point, he **explained** that Congress was concerned with covert content manipulation regardless of the specific content the PRC might be manipulating.

## Equal Protection

TikTok next contended that the PAFACAA violates its “rights under the equal protection component of the Fifth Amendment’s Due Process Clause because it singles [TikTok] out for adverse treatment without any reason for doing so.” The D.C. Circuit disagreed.

When laws single out particular speakers, First Amendment interests are sometimes “**intertwined** with interests arising under the Equal Protection Clause.” The Supreme Court has held that “the Equal Protection Clause **requires** that statutes affecting First Amendment interests be narrowly tailored to their

legitimate objectives.” The D.C. Circuit has [described](#) this equal protection standard as “closely related” to the First Amendment intermediate scrutiny standard—but focused on the objectives and tailoring of “the challenged classification.”

In resolving TikTok’s challenge to the PAFACAA, the D.C. Circuit similarly suggested its equal protection and First Amendment inquiries were related. The court [wrote](#): “Having concluded the relevant parts of the Act do not violate the First Amendment even when subjected to heightened scrutiny, we readily reach the same conclusion when analyzing the Act in equal protection terms.” TikTok’s equal protection challenge, in the court’s [view](#), “boil[ed] down to pointing out that TikTok alone is singled out by name in the Act.” That sort of legislative targeting can raise equal protection concerns when First Amendment interests are at stake and the targeting “[bears](#) only the most strained relationship to the [statute’s] purpose.” With the PAFACAA, however, the court [determined](#) that the differential treatment of TikTok “bears directly on the TikTok-specific national security harms identified and substantiated by the Government.” The challenged classification—singling out TikTok—was therefore [justified](#) by the legitimate national security objectives the government seeks to address through the PAFACAA.

## Bill of Attainder

TikTok also challenged the PAFACAA as a bill of attainder. [Article I, Section 9, clause 3](#), of the Constitution prohibits Congress from enacting [bills of attainder](#)—legislation that directly imposes punishment on an identifiable person or class of persons. The Supreme Court has [held](#) that legislation constitutes a bill of attainder if it applies with specificity and imposes punishment without a judicial trial. TikTok argued that the Act singles it out by name for legislative punishment and inflicts penalties on it historically associated with bills of attainder. The government contended that the Bill of Attainder Clause does not protect corporations and, even if the clause does apply to TikTok, the PAFACAA is not a bill of attainder. The D.C. Circuit rejected the bill of attainder challenge.

Because provisions in the PAFACAA apply to TikTok by name, the court [concluded](#) that the law applies with the requisite specificity to satisfy the first requirement for a bill of attainder. On the question of whether the Bill of Attainder Clause protects corporations, the court [followed its practice](#) in previous cases and “assumed without deciding that the clause applies to corporations but emphasized that differences between commercial entities and persons need to be considered.”

Turning to the question of whether the Act imposes punishment, the court [applied the three-part test](#) for whether challenged legislation is punitive: (1) whether the statute falls within the historical meaning of legislative punishment (known as the *historical test*); (2) whether the statute reasonably can be said to further nonpunitive legislative purposes (the *functional test*); and (3) whether the legislative record evinces a congressional intent to punish (the *motivational test*). TikTok focused on the historical test, contending that the PAFACAA was similar to past legislation that confiscated property or barred disfavored individuals from working in certain professions. The court rejected that argument, [holding](#) that the divestiture required under the Act is “a sale, not a confiscation,” and is more like a permissible line-of-business restriction than an unlawful employment ban. The court further held that the Act is [not punitive under the functional test](#) because it serves non-punitive, prophylactic national security purposes. With respect to the motivational test, the court [held](#) that “TikTok does not come close to satisfying that requirement.” Having found that the law is not punitive under any of the three tests, the court concluded that the PAFACAA is not an unconstitutional bill of attainder.

## The Takings Clause

Finally, TikTok argued the PAFACAA “effects an unlawful taking of private property without just compensation, in violation of the Fifth Amendment’s Takings Clause.” The D.C. Circuit [rejected](#) this challenge as well.

The Fifth Amendment's [Takings Clause](#) prohibits the government from taking private property for public use without providing just compensation. In many cases, takings challenges are evaluated using a multifactor, fact-dependent [test](#). The Supreme Court has, however, recognized [two categories](#) of regulatory action that are considered *per se* takings: (1) a permanent physical invasion of property; and (2) a regulation that "[completely](#) deprives an owner of *all* economically beneficial use of [its] property." TikTok argued that the PAFACAA qualifies as a *per se* taking because the law renders TikTok's platform "defunct in the United States." In doing so, TikTok argues, the law deprives TikTok, Inc.—the business that operates the platform in the United States—of all economically beneficial use of its property and nullifies the investments made in TikTok, Inc. by its owners.

The D.C. Circuit [determined](#) that, because TikTok can pursue a qualified divestiture, the PAFACAA does not effect a "total economic deprivation." TikTok had [argued](#) that a qualified divestiture is not feasible, but the infeasibility of completing a qualified transaction is [caused](#), according to the court, by export prohibitions imposed by the PRC, not the PAFACAA itself. In addition, the court [found](#) that, notwithstanding the PRC's restrictions, TikTok has assets that can be legally sold. As a result, TikTok's owners have not been deprived of all economically beneficial use of their property, and the PAFACAA does not constitute a *per se* taking.

## Congressional Considerations

*TikTok v. Garland* is still being litigated. After the D.C. Circuit issued its opinion, the petitioners asked the court to grant an emergency injunction that would prevent the law from going into effect while they appeal to the U.S. Supreme Court. When the D.C. Circuit denied that request, the petitioners [sought](#) similar [relief](#) from the Supreme Court. The Supreme Court [treated](#) the petitioners' requests as petitions for certiorari seeking to review the merits of the D.C. Circuit's decision and granted the petitions. The Court directed the parties to file briefs addressing the First Amendment challenge and [scheduled](#) oral argument in the case for January 10, 2025, nine days before the PAFACAA's prohibition on distributing, maintaining, or updating TikTok is to take effect. When the Supreme Court resolves the case, it could agree or disagree with the D.C. Circuit's disposition. Because *TikTok v. Garland* was filed in the D.C. Circuit, rather than a federal trial court, the parties [submitted](#) evidence to support their arguments. Evidentiary submissions are unusual when litigating before an appellate court, and the petitioners [raised](#) certain objections to the government's submission. The petitioners may also [ask](#) the Supreme Court to review the D.C. Circuit's [resolution](#) of its objections to the government's submission. In addition, as analyzed in another [Legal Sidebar](#), the U.S. Court of Appeals for the Ninth Circuit is considering TikTok's challenge to a Montana law restricting its operations. That court may weigh in on similar or related issues.

If the PAFACAA's prohibition on distributing, maintaining, or updating TikTok does take effect, Congress could conduct oversight of the Act's enforcement. The PAFACAA [provides](#) that the Attorney General "shall conduct investigations related to potential violations" and "may bring an action in" a federal district court "for appropriate relief."

The D.C. Circuit's ruling in *TikTok v. Garland*—and any possible ruling from the Supreme Court—is also relevant to Congress's ability to adopt other laws restricting social media operations. The majority and concurring opinions highlighted some uncertainty about when a law should be considered content based and subject to strict scrutiny. Both opinions emphasize the importance of Congress's justifications for a law. If Congress is regulating a particular platform or set of platforms because of concerns about the content they host, this could trigger strict scrutiny. For example, under the *TikTok* majority's reasoning, a [law](#) requiring platforms to limit design features such as autoplay might be considered content neutral on its face. That same law, however, might nonetheless be deemed content based if a court determines that the restriction is motivated by concerns about the content communicated in the videos supplied via autoplay. In those circumstances, the law could receive strict scrutiny. Under the concurring opinion, by comparison, such a justification might be content neutral as long as Congress is not singling out a specific

subject matter or viewpoint. That is, even if Congress cites concerns that autoplayed content conveys harmful messages, if a law limits *all* autoplayed content regardless of its *specific* message, Chief Judge Srinivasan might only apply intermediate scrutiny. Either standard requires the government to prove that its particular approach is appropriately tailored to a sufficiently important interest. The majority emphasized that its deference to the government's judgments on the PAFACAA was due in part to the national security concerns about foreign government interference. If a different law is not as closely tied to national security justifications, a court might be more skeptical of the government's evidence. Application of either strict or intermediate scrutiny will be highly fact dependent.

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