



TikTok Inc. v. Garland: Supreme Court Rejects Challenge to TikTok Divestiture Law

January 22, 2025

On Friday, January 17, 2025, the Supreme Court [rejected](#) a First Amendment challenge to the [Protecting Americans from Foreign Adversary Controlled Applications Act](#) (“PAFACAA” or “the act”). The decision raised immediate questions about whether [TikTok](#), a popular social media platform that allows users to post and view short-form videos displayed through a sophisticated content recommendation algorithm, would be able to continue its U.S. operations. PAFACAA effectively requires TikTok to undergo a “[qualified divestiture](#)” to continue distributing its application (“[app](#)”) to U.S. users. Specifically, 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 complete a transaction that deprives the foreign adversary of both control over and any operational relationship with the application. The act expressly defines “foreign adversary controlled application” to include TikTok. This Legal Sidebar discusses the background of PAFACAA, explains the Supreme Court’s decision in *TikTok v. Garland*, and briefly explores subsequent developments and considerations for Congress.

Background and Overview of PAFACAA

In August 2020, during his first term in office, President Trump took two executive actions that regulated ByteDance Ltd., the ultimate owner of TikTok, and its ability to operate TikTok in the United States. (Both actions are discussed in a [prior Legal Sidebar](#).) First, President Trump issued [Executive Order No. 13942](#), which exercised authority provided by the [International Emergency Economic Powers Act](#) to restrict TikTok’s U.S. operations. Second, acting under [Section 721 of the Defense Production Act](#), the President ordered ByteDance to divest (1) assets and property used to support the operation of TikTok in the United States and (2) data obtained from TikTok users in the United States. Both executive actions were challenged in court. As a result, E.O. 13942 was [preliminarily enjoined](#) before it [took effect](#). TikTok’s challenge to President Trump’s divestment order was held in abeyance at the parties’ request to allow them to negotiate a resolution.

In April 2024, Congress stepped in. Congress enacted [PAFACAA](#) to regulate “foreign adversary controlled” applications as well as the app stores and internet hosting services that allow users to access those apps. PAFACAA [authorizes](#) the President to determine that applications qualify as “foreign adversary controlled” applications when they meet certain requirements, but the act was also directed at

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TikTok specifically. The law expressly **defines** “foreign adversary controlled application” to include apps operated by TikTok and any other subsidiary of ByteDance, Ltd.

PAFACAA imposes several **prohibitions** on foreign adversary controlled applications and companies that provide services to them. Most relevant here, PAFACAA **prohibits** app stores and internet hosting services from enabling the distribution, maintenance, or updating of a covered app unless the app’s owners execute a “**qualified divestiture**.” A sale or transfer of a 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.

PAFACAA provides that the prohibition on app stores and internet hosting services distributing, maintaining, or updating a foreign adversary controlled application **takes effect** 270 days after an app is determined to be foreign adversary controlled. The President can **extend** that date up to 90 days upon certification to Congress that (1) a path to a qualified divestiture has been identified; (2) evidence of significant progress toward the divestiture has been produced; and (3) binding legal agreements are in place to enable execution of the divestiture within the extended time period. For TikTok, PAFACAA’s enactment **started** the 270-day clock, and the prohibition on app stores and internet hosting services supporting TikTok took effect on **January 19, 2025**.

PAFACAA **authorizes** the Attorney General to bring enforcement actions in federal district court against app stores or internet hosting services that violate the act. In such enforcement actions, the Attorney General can seek **civil penalties** of up to \$5,000 multiplied by the number of U.S. users who accessed, maintained, or updated TikTok as a result of the store’s or service’s violation. If TikTok completes a qualified divestiture in the future, PAFACAA’s prohibitions will **cease to apply**.

Procedural History

After Congress enacted PAFACAA, TikTok, ByteDance, 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. TikTok alleged that the act violates the Constitution’s **Bill of Attainder Clause** and the Fifth Amendment’s **Takings** and **Due Process** Clauses. In addition, all petitioners argued that the act violates their **First Amendment** rights. Specifically, they claimed the law unconstitutionally infringes TikTok’s right to publish others’ speech—known as editorial discretion—and both TikTok and the users’ rights to share their own speech. A recent **Supreme Court case** elaborated on the concept of editorial discretion by **holding** that when social media platforms choose what user content to display, they are at least sometimes engaged in constitutionally protected expressive activity.

As explained in **a prior Sidebar**, the D.C. Circuit rejected all of the petitioners’ constitutional challenges. On the First Amendment claim, the court ruled that although PAFACAA targeted expressive activity, triggering heightened constitutional scrutiny (discussed in more detail below), the government was able to satisfy that review and justify the law’s constitutionality. In response to the D.C. Circuit’s decision, the petitioners asked the Supreme Court to issue an emergency injunction preventing PAFACAA from taking effect. The Court treated the request as a petition for certiorari, **granted** the petition, directed the parties to focus on the First Amendment question, and heard oral arguments on January 10, 2025.

Supreme Court Opinion

The Supreme Court affirmed the D.C. Circuit’s judgment in a per curiam—meaning unsigned—opinion, **concluding** that PAFACAA does not violate the First Amendment. Two critical preliminary questions for the Court were (1) whether the law regulated expressive activity, and (2) if so, what level of constitutional scrutiny it should apply to analyze the law’s constitutionality.

On the first question, the Supreme Court [said](#) it was “not clear” that PAFACAA “itself directly regulates” expression, rather than indirectly burdening First Amendment activities. A law can [implicate](#) the First Amendment if it is directed at non-expressive activity but “impose[s] a disproportionate burden upon those engaged in protected First Amendment activities.” At the same time, the Court has [held](#) that a law that only *incidentally* burdens expression is usually subject to a lower level of constitutional scrutiny. Ultimately, the per curiam opinion [acknowledged](#) that (at minimum) an effective ban on TikTok burdened its users’ expressive activity and “assume[d] without deciding” that PAFACAA was “subject to First Amendment scrutiny.”

On the second question, First Amendment jurisprudence outlines a variety of [different tests](#) for courts to apply depending on what type of speech a law regulates and how. In *TikTok v. Garland*, the Supreme Court considered whether PAFACAA is [content based](#), meaning it applies to speech based on its communicative content. A law can be content based in [two ways](#): (1) on its face—if the text applies based on the speech’s subject matter, topic, or viewpoint, or (2) in its purpose—if the law “cannot be justified without reference to the content of the regulated speech” or was “adopted by the government because of disagreement with the message” conveyed. Courts usually analyze content-based laws under [strict scrutiny](#). Under strict scrutiny, a law is “[presumptively unconstitutional](#)” unless the government shows the law is the “least restrictive means” of advancing a “compelling” governmental interest. In contrast, courts usually evaluate content-neutral laws using the [intermediate scrutiny standard](#), which requires restrictions 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 Supreme Court in *TikTok v. Garland* [held](#) first that PAFACAA is “facially content neutral” because the law’s text does not target speech based on its content, function, or purpose. The [petitioners](#) had [argued](#) that an exclusion for companies that host product, business, or travel reviews singled out information on a certain subject matter, creating a content-based exclusion that triggered strict scrutiny. In the Court’s [view](#), though, the exclusion was not relevant in this lawsuit specifically challenging PAFACAA’s application to TikTok, given that TikTok was included by name and not by reference to the definition of other covered companies. Looking to the law’s purpose, the Court further [concluded](#) that PAFACAA is supported by the content-neutral justification of “preventing China from collecting vast amounts of sensitive data.” The government had also [cited](#) a justification that was possibly content-based: the need to prevent a foreign adversary from controlling TikTok’s algorithm to covertly alter the platform’s content. Nonetheless, the Court [stated](#) that Congress likely would have passed PAFACAA based on the data justification alone. Thus, the presence of this alternate justification did not alter the Court’s ultimate analysis. Finally, the Court addressed arguments that the law triggered strict scrutiny because it targeted a specific speaker—TikTok. The Court [ruled](#) that although speaker-based distinctions can be problematic if they reflect disfavor for the speaker’s content, PAFACAA regulates TikTok “based on a content-neutral data collection interest.” The opinion [cautioned](#), however, that the targeting here was justified by special characteristics of the app: “TikTok’s scale and susceptibility to foreign adversary control, together with the vast swaths of sensitive data the platform collects.” A law targeting a different speaker could warrant a different analysis, in the Court’s view.

After concluding PAFACAA is content neutral, the Supreme Court [applied](#) intermediate scrutiny to review the law’s constitutionality. In this inquiry, the Court [stated](#) that due to the national security and foreign policy context, it would give “substantial respect” to the government’s judgments. Ultimately, the Court [held](#) that as applied to the petitioners, the law did “not burden substantially more speech than necessary to further” the important government interest of “preventing China from collecting the personal data of tens of millions of U.S. TikTok users.” The Court [ruled](#) that PAFACAA’s conditional ban serves this data protection interest directly and effectively. The Court also [said](#) it would not “displace” the government’s judgment that alternatives such as disclosure requirements or data sharing restrictions were inappropriate to achieve its goal.

Concurring Opinions

Two Justices authored concurring opinions in *TikTok v. Garland*. Justice Sotomayor [wrote](#) that there was “no doubt” PAFACAA implicates the First Amendment by burdening TikTok’s ability to distribute material through its platform and to collaborate with certain entities on its content recommendation algorithm. She also wrote that she [believed](#) PAFACAA burdened content creators’ right to associate with TikTok, but she agreed with the per curiam opinion that the act survived the First Amendment challenge.

Justice Gorsuch [articulated](#) a few “tentative” conclusions that differed from the majority opinion. Among other issues, he expressed concern about the government’s alternate interest in preventing the covert manipulation of content, [stating](#) that the First Amendment prevents the government from “[censor\[ing\]](#) disfavored speech online.” He also [voiced](#) “serious reservations” about whether the law was, in fact, content neutral. Like the D.C. Circuit, however, he would have [ruled](#) that “whatever the appropriate tier of scrutiny,” the law satisfied constitutional review.

Considerations for Congress

As discussed in a longer [CRS report on TikTok](#), PAFACAA’s prohibitions went into effect on January 19, 2025. TikTok blocked services for U.S. users the evening of January 18, but on January 19, it [stated](#) that it was “in the process of restoring service.” Users were [reportedly](#) able to access their accounts again that day, although Google Play and the Apple App Store did not make TikTok available for download again. Apple, for instance, published a [notice](#) on January 19 stating, “TikTok and ByteDance Ltd. apps are no longer available in the United States.” These service providers could be concerned about liability under the act, which one Senator [asserted](#) could amount to “hundreds of billions of dollars of ruinous liability.”

After taking office on January 20, President Trump [ordered](#) “the Attorney General not to take any action on behalf of the United States to enforce [PAFACAA] for 75 days.” He additionally ordered “the Attorney General to issue a letter to each provider stating that there has been no violation of the statute and that there is no liability for any conduct” between the effective date of the act and the end of the 75-day period. As discussed above, PAFACAA allows the President to grant up to a 90-day extension if he certifies to Congress that a path to a qualified divestiture exists and significant progress toward divestment has been made. President’s Trump January 20 order did not, however, make representations about progress toward a divestiture or cite this PAFACAA provision. The order could [face](#) legal questions. As a general rule, courts have recognized that the executive branch has [significant discretion](#) to decide not to prosecute or enforce a law. At the same time, there are limits to this discretion, and lower [courts](#) have in some instances [reviewed](#) and even [vacated](#) broad agency enforcement policies. A court, however, would only weigh in on this issue if a party with [standing](#)—that is, someone injured by or facing imminent injury based on the executive order—were to sue.

Future litigation over PAFACAA itself could also be possible. Because *TikTok v. Garland* addressed PAFACAA as it applied to TikTok, ByteDance, and certain users, entities that were not involved in the lawsuit could conceivably raise additional challenges to the law. While the January 20 executive order instructs the Attorney General not to enforce PAFACAA for 75 days, if the Attorney General brings a lawsuit after that time alleging that an app store or internet hosting service violated the act, the store or service could potentially defend itself by arguing enforcement violates its own First Amendment rights. It is also possible a service provider potentially subject to the act might seek a [declaratory judgment](#) in advance of any enforcement action to clarify its liability. At Supreme Court oral argument, the United States [stated](#) that the statute of limitations for this law is five years, meaning the Attorney General could seek to enforce the law against an entity that violates PAFACAA for up to five years after the violation.

The Supreme Court’s ruling in *TikTok v. Garland* may also have implications for First Amendment jurisprudence. Most directly, there is [ongoing litigation](#) over a Montana law barring TikTok’s operations

in the state. That litigation was stayed pending the Supreme Court proceedings and may resume now that *TikTok v. Garland* has been resolved. Although the Montana litigation raises some distinct questions related to *state* governments' ability to regulate TikTok, the Supreme Court's ruling will nonetheless guide lower courts as they consider the First Amendment implications of various state laws regulating social media companies.

TikTok v. Garland can also guide Congress as it weighs whether various proposals satisfy constitutional muster, though the Court left some issues for further development. One key question the Supreme Court weighed in on was when a law is considered content based versus content neutral. *TikTok v. Garland* suggests that even if certain Members of Congress cite a content-based justification for a law, the law may still be considered content neutral if it is also justified by a content-neutral purpose and neutral on its face. The Supreme Court declined to rule on whether PAFACAA's exception for certain websites that host reviews rendered the law content based. This issue has arisen in litigation over state laws regulating social media, and so far, trial courts have disagreed about whether such exceptions are content based. These cases will be relevant for Congress if it considers future bills regulating social media platforms. *TikTok v. Garland* also confirms that, consistent with prior precedent, courts may give greater deference to the political branches when they act in the areas of national security and foreign affairs. Courts may engage in more rigorous scrutiny of laws that restrict expression if Congress cannot cite such justifications.

Although the Supreme Court upheld PAFACAA, Congress could seek to amend the law in response to *TikTok v. Garland*, subsequent presidential actions, or other developments. A bill to repeal PAFACAA has been introduced in the Senate. Congress could also consider further action to address the scope of the law, including which providers are covered or the available routes for enforcement. An amended version of PAFACAA could be subject to additional legal challenges. Alternatively, Congress can choose not to change the statute. In either case, Congress has power to conduct oversight of the Attorney General's exercise of the investigatory and enforcement authorities provided in PAFACAA.

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