

# TikTok makes its First Amendment case



TikTok says that the government didn't adequately consider viable alternative options before charging ahead with a law that could ban the platform in the US. TikTok, whose parent company ByteDance is based in China, claims that it provided the US government with an extensive and detailed plan to mitigate national security risks and that this plan was largely ignored when Congress passed a law with a huge impact on speech.

In briefs filed at the DC Circuit Court on Thursday, both TikTok and a group of creators on the platform who've filed their own suit spelled out their case for why they believe the new law violates the First Amendment. The court is set to hear oral arguments in the case on September 16th, just a few months before the current divest-or-ban deadline of January 19th, 2025.

The Protecting Americans from Foreign Adversary Controlled Applications Act would effectively ban TikTok from operating in the US unless it divests from ByteDance by the deadline.

The president has the option to extend that deadline slightly if he sees progress toward a deal. But spinning out TikTok is not entirely simple, given the limited pool of possible buyers and the fact that Chinese export law would likely prevent a sale of its coveted recommendation algorithm.

But lawmakers who supported the legislation have said that divestiture is necessary to protect national security – both because they fear that the Chinese government could access US user information due to the company's China-based ownership and because they fear ByteDance could be pressured by the Chinese government to tip the scales on the algorithm to spread propaganda in the US. TikTok denies that either is happening or could happen in the future, saying its operations are separate from ByteDance's.

The broad strokes of TikTok's arguments have already been laid out in the complaints. But the new filings provide a more extensive look into how TikTok engaged the US government over several years with detailed plans of how it thought it could mitigate national security concerns while continuing its operations.

In an appendix, TikTok submitted hundreds of pages of communications with the US government, including presentations the company gave to the Committee on Foreign Investment in the US (CFIUS) when it was evaluating national security risks of its ownership setup. One deck explains the basics of how its algorithm figures out what to recommend to users to watch next, as well as a detailed plan to mitigate risk of US user data being improperly accessed. It goes as far as to include a floor plan of a "Dedicated Transparency Center," through its collaboration with Oracle, where a specific group of employees in TikTok's US data operations could access the source code in a secure computing environment. According to the slide deck, no ByteDance employees would be allowed in the space.

TikTok called the law "unprecedented," adding, "[n]ever before

has Congress expressly singled out and shut down a specific speech forum. Never before has Congress silenced so much speech in a single act.”

Courts usually apply a standard known as strict scrutiny in these kinds of speech cases – the government must have a compelling interest in restricting the speech, and the restriction must be narrowly tailored to achieve its aim.

TikTok claims that Congress has left the court “almost nothing to review” when scrutinizing “such an extraordinary speech restriction.” The company says Congress failed to produce findings to justify its reasoning behind the law, leaving only the statements of individual members of Congress for the court to go off of. (Many of those statements are included in an appendix filed by TikTok.)

“There is no indication Congress even considered TikTok Inc.’s exhaustive, multi-year efforts to address the government’s concerns that Chinese subsidiaries of its privately owned parent company, ByteDance Ltd., support the TikTok platform—concerns that would also apply to many other companies operating in China,” TikTok wrote in its brief. Lawmakers received classified briefings ahead of their votes, which some said impacted or solidified their final position on the bill. But the public still does not have access to the information in those briefings, although some lawmakers have pushed to declassify them.

The company also said that CFIUS, which was tasked with evaluating its risk mitigation plan in the first place, did not provide a substantive explanation for why it took such a hard line on divestment in March 2023. TikTok claims that when it explained why divestment wasn’t possible and asked to meet with government officials, it received “no meaningful responses.” CFIUS and the DOJ did not immediately respond to requests for comment.

TikTok has said it's already implemented much of its plans voluntarily through its \$2 billion Project Texas

The text of the draft National Security Agreement that TikTok presented to CFIUS was included in an appendix that was filed in court. The draft included proposed changes like the creation of TikTok US Data Security Inc., a subsidiary that would be tasked with managing operations involving US user data, as well as heavy oversight by the agencies that make up CFIUS. TikTok has said it's already implemented much of its plans voluntarily through its \$2 billion Project Texas. Still, recent reporting has raised questions about how effective that project really is for national security purposes. In a report in *Fortune* from April, former TikTok employees said the project was "largely cosmetic" and that workers still engage with China-based ByteDance executives.

Terrence Clark, a spokesperson for the Justice Department, said in an emailed statement to *The Verge* that the agency and intelligence officials have "consistently warned about the threat of autocratic nations that can weaponize technology – such as the apps and software that run on our phones – to use against us. This threat is compounded when those autocratic nations require companies under their control to turn over sensitive data to the government in secret."

Regardless, the court will have to consider whether the US government should have considered a less speech-restrictive route to achieving its national security aims, and TikTok says it should have. "In short, Congress reached for a sledgehammer without even considering if a scalpel would suffice," TikTok wrote in its brief. "It ordered the closure of one of the largest platforms for speech in the United States and left Petitioners – and the public – to guess at the reasons why a wide range of less speech-restrictive alternatives were disregarded. The First Amendment demands much more."

<https://www.theverge.com/2024/6/20/24182551/tiktok-v-garland-c>

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