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TikTok and the First Amendment: An Analysis of the Constitutional Debate Regarding a TikTok Ban

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**TIKTOK AND THE FIRST AMENDMENT:
AN ANALYSIS OF THE CONSTITUTIONAL DEBATE REGARDING A TIKTOK BAN**

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Abstract: Government efforts to restrict or ban TikTok have consistently raised constitutional challenges across multiple levels of the judicial system, ultimately reaching the United States Supreme Court. This paper will trace the constitutional debate surrounding TikTok by examining key cases at each stage. It will begin with the executive actions initiated under the Trump administration, then turn to state level cases in Montana and Texas, and finally analyze how these precedents ultimately led to the Supreme Court’s final decision at the federal level.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

— The First Amendment, United States Constitution

The word “security” is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.

— Supreme Court Justice Hugo Black, Concurrence in *New York Times Co. v. United States*

I. Introduction

Since 2020, few bills in Congress have received as much bipartisan support as a proposed ban on TikTok. Since its launch in 2016, TikTok—a social media app that allows users to create, share, and view short videos—has surged in popularity. In 2024, the app had over 170 million users in the United States and more than 1 billion monthly active users globally.² TikTok has become a vibrant platform for content creation and engagement, enabling small businesses to

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² “How many users on TikTok? Statistics & Facts (2024),” SEO, <https://seo.ai/blog/how-many-users-on-tiktok#:~:text=TikTok%20Key%20Statistics-,TikTok%20has%20over%201%20billion%20monthly%20active%20users%20globally%2C%20with,and%2024%20seconds%20in%202024>

promote themselves, allowing many individuals to build careers from their success and providing entertainment for millions. Despite the platform’s widespread popularity, the U.S. government has repeatedly attempted to ban the app, citing concerns that, because it is owned by the Chinese company, ByteDance, Americans’ data on the app may be at risk from the Chinese Communist Party.

Government efforts to restrict or ban TikTok have consistently raised questions about the limits of executive power and the protections guaranteed by the First Amendment. Each attempt to justify a ban has faced legal challenges across multiple levels of the judicial system, ultimately reaching even the highest level—the United States Supreme Court. In the Supreme Court’s final decision, it unanimously upheld a law that would force TikTok to divest or be banned in the United States.³ This paper will trace the constitutional debate surrounding TikTok by examining key cases at each stage of litigation. It will begin with the executive actions initiated under the Trump Administration, then turn to state-level challenges in Montana and Texas, and finally analyze how these disputes culminated in federal appellate and Supreme Court decisions.

II. Executive Actions Against TikTok

Towards the end of President Donald Trump’s first term, a series of executive actions were undertaken to ban TikTok. The administration first publicly announced its consideration of the ban in July 2020, when former Secretary of State Mike Pompeo revealed that they were evaluating the possibility of prohibiting the app.⁴ Later, on July 31, President Trump had made

³ Antonia I. Tzinova, Andrew K. McAllister, and Sophie Jin, “U.S. Supreme Court Upholds TikTok Sale-or-Ban Law,” *Holland & Knight*, January 17, 2025, <https://www.hklaw.com/en/insights/publications/2025/01/us-supreme-court-upholds-tiktok-sale-or-ban-law>.

⁴ Quint Forgey, “‘It’s something we’re looking at’: Pompeo floats ban on TikTok,” *Politico*, last modified July 7, 2020, <https://www.politico.com/news/2020/07/07/mike-pompeo-tiktok-ban-350384>.

broad claims to reporters regarding his intent to ban the app stating, “as far as TikTok is concerned we’re banning them from the United States.”⁵ Later that year, on August 6th, Trump followed through with this claim by enacting Executive Order 13942, titled “Addressing the Threat Posed by TikTok.” Executive Order 13942 essentially directed the Secretary of Commerce to prevent the app from being downloaded in mobile app stores and to prohibit all transactions between anyone under the jurisdiction of the United States and ByteDance—the parent company of TikTok.⁶ In the Executive Order, Trump cited both the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act as justification for this action. The order reads:

“The spread in the United States of mobile applications developed and owned by companies in the People’s Republic of China (China) continues to threaten the national security, foreign policy, and economy of the United States. At this time, action must be taken to address the threat posed by one mobile application in particular, TikTok.”⁷

The order goes on to explain the exact security concerns that the app has prompted, referencing both TikTok’s data collection process and the app’s alleged censorship of political information. The order states:

“TikTok automatically captures vast swaths of information from its users, including internet and other network activity information such as location data and browsing and search histories. This data collection threatens to allow the Chinese Communist Party access to Americans’ personal and proprietary

⁵ Ellen Nakashima, Rachel Lerman, and Jeanne Whalen, “Trump says he plans to bar TikTok from operating in the U.S.,” *The Washington Post*, last modified July 31, 2020, <https://www.washingtonpost.com/technology/2020/07/31/tiktok-trump-divestiture/>.

⁶ E.O 13942 of Aug 6, 2020.

⁷ E.O 13942 of Aug 6, 2020.

information—potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.”⁸

The order then explains how TikTok reportedly censors political content that is deemed sensitive by the Chinese Communist Party and references protests against China’s treatment of Uyghur Muslims as an example of content that has been censored on the platform. This censorship is problematic to the United States government because “[TikTok] may also be used for disinformation campaigns that benefit the Chinese Communist Party, such as when TikTok videos spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus.”⁹ The order concludes by reinforcing that the threats that TikTok poses are indeed real, noting that the Department of Homeland Security, Transportation Security Administration, and the United States Armed Forces have banned the application from federal government phones and highlighting how the Indian government has banned TikTok in their country as well.

This executive action was one part of a broader effort to mitigate perceived threats from Chinese technology companies. Soon after the order against TikTok was enacted, President Trump also issued Executive Order 13943 targeting another Chinese-owned app, WeChat, which had raised similar national security concerns.¹⁰ WeChat is an instant messaging mobile application with over 19 million users in the United States, predominantly among Chinese Americans who use it to stay in touch with family and friends in China.¹¹ Just like the Executive

⁸ E.O 13942 of Aug 6, 2020.

⁹ E.O 13942 of Aug 6, 2020.

¹⁰ E.O 13943 of Aug 6, 2020.

¹¹ Vivian McCall, “What is WeChat? Everything you need to know about the popular messaging app, including how to sign up,” *Business Insider*, last modified February 22, 2021, <https://www.businessinsider.com/guides/tech/what-is-wechat>.

Order targeting TikTok, the IEEPA and the National Emergencies Act were also cited to justify the President's ability to ban a mobile application.

Both Executive Orders were quickly challenged in court. In August 2020, TikTok filed a lawsuit, *TikTok v. Trump*, which was heard by the United States District Court for the District of Columbia. Likewise, another case, *U.S. WeChat Users Alliance v. Trump*, was brought before the United States District Court for the Northern District of California. In both cases, the plaintiffs won a preliminary injunction blocking the enforcement of the Executive Order as the courts found that the executive orders 1) showcased an overstep of authority under IEEPA and 2) created significant First Amendment implications on free speech.

Iia. International Emergency Economic Powers Act

To understand why the executive order oversteps its authority, it is important to understand what powers the IEEPA contains. The International Emergency Economic Powers Act is a U.S. federal law enacted in 1977 that grants the President broad authority to regulate and control economic transactions during national emergencies. This emergency statute falls under the umbrella of the National Emergencies Act.¹² Under IEEPA, the President can impose sanctions, block assets, and restrict trade with foreign entities or nations when there is a perceived threat to national security, foreign policy, or the economy. The act is designed to provide a flexible tool for responding to international crises, allowing the government to take swift action to protect U.S. interests.

In this case, the act was cited as justification to ban both TikTok and WeChat. To trigger the usage of IEEPA, there must first be a declaration of a national emergency or the situation must be linked to a previous national emergency declaration. Both orders were linked to a prior

¹² International Emergency Economic Powers Act, Public Law 223, U.S. Statutes at Large 91 (1977): 1625-1629.

Executive Order (EO 13873) titled “Securing the Information and Communications Technology and Services Supply Chain.”¹³ In this order, Trump claimed that a national emergency existed because:

“foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services, which store and communicate vast amounts of sensitive information, facilitate the digital economy, and support critical infrastructure and vital emergency services, in order to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its people.”¹⁴

Therefore, while a ban of an app is an extreme route, under IEEPA, it is possible to “deplatform” an application.

However, the federal district court in *TikTok v. Trump* found that the Executive Order was an overreach of executive power given the Personal Communication Limitation and the Informational Materials Amendment Limitation of the Act. The Personal Communication Limitation states that the IEEPA does not have the authority to “regulate or prohibit, directly or indirectly... any... personal communication, which does not involve the transfer of anything of value.”¹⁵ This provision is designed to safeguard the free flow of personal communication, which is considered crucial for maintaining personal relationships and ensuring the free exchange of ideas. In this case, because users on TikTok utilize the app as a platform to communicate with one another through its direct messaging feature, this limitation applies. However, arguments on

¹³ Gabrielle Supak, “Political Posturing or a Move towards ‘Net Nationalism?’: The Legality of a TikTok Ban and Why Foreign Companies Should Be Paying Attention,” *North Carolina Journal of Law and Technology*, NexisUni.

¹⁴ E.O 13943 of Aug 6, 2020.

¹⁵ Supak, “Political Posturing.”

the other side have raised the point that there is indeed a transfer of value since users exchange their data for the ability to use the application.

As for the Informational Materials Amendment Limitation, this provision pertains to the restriction of informational materials such as books, newspapers, and other printed or digital content. Under IEEPA, the President's powers cannot be used to restrict the dissemination of informational materials.¹⁶ This means that while economic sanctions and other measures may be imposed, they cannot target or obstruct the exchange of informational content. In this case, the US District court found that TikTok's content met the definition of informational materials because the central feature of the app is sharing information in the form of short videos, thereby invoking this limitation.

Therefore, due to both the Personal Communication Limitation and the Informational Materials Amendment Limitation, it is clear how Trump's use of the IEEPA to justify an all-out ban of both platforms with an executive order would not suffice.

Iib. Implications of First Amendment Rights

Both US District courts also recognized implications of First Amendment rights given a ban of the respective platforms. In *U.S. WeChat Users Alliance v. Trump*, the plaintiffs relied strongly on a First Amendment argument claiming that the executive order banning WeChat infringed upon their free speech rights by disrupting their ability to communicate freely, particularly within communities that rely heavily on the app for both personal and professional interactions. The District Court in this case determined that the First Amendment challenge was indeed valid because "evidence demonstrated that 'WeChat is effectively the only means of communication for many' in the Chinese-speaking and Chinese-American community, and

¹⁶ Ibid.

‘there are no viable substitute platforms or apps’” to communicate with other users of WeChat located in China.¹⁷

TikTok also made First Amendment challenges in its lawsuit as well claiming that it has First Amendment protections via the rights of content creators on the platform. While the rights of content creators on social media have not explicitly been identified by the Supreme Court, it is likely that their content would also be given First Amendment protections granted that the content is not part of an unprotected category of speech such as obscenity or “fighting words.” In litigation, however, the government expressed their belief that First Amendment rights are not at all implicated by a ban of the app. Nevertheless, both the US District Court in this case and lower state courts in subsequent cases have recognized the First Amendment arguments raised by TikTok’s lawyers.

After both lawsuits were granted a preliminary injunction, the suits were withdrawn when President Biden was elected into office and rescinded the executive orders targeting TikTok and WeChat. However, this transfer of power did not fully resolve the issue, as the Biden administration would also take further steps aimed at addressing the national security concerns that Chinese ownership of TikTok raises— moves which we shall examine in the next section.

III. PAFACA and Lower Court Rulings

During President Biden’s term, Congress passed the Protecting Americans From Foreign Adversary Controlled Applications Act (PAFACA). The bill was first passed by the House of Representatives on March 13, 2024, receiving bipartisan support with a vote of 352 to 65.

¹⁷ Ibid.

Amongst those who voted against the bill, 50 were Democrat and 15 were Republican.¹⁸ Then on April 23, 2024, the bill was passed by the Senate with a vote of 79–18. The bill was then signed by President Biden on April 24. This law would ban TikTok in the United States unless it fully divested from ByteDance (the Chinese-owned parent company) by January 19, 2025.¹⁹ Although this law is aimed to target TikTok, just as Trump’s executive order did, its approach differs in a significant way by calling for a divestiture rather than banning the app upfront. Nonetheless, even with this new approach, TikTok’s lawyers continue to challenge the constitutionality of such a law, claiming that a divestiture still infringes upon First Amendment rights and arguing that a sale would be implausible given the timeline provided in the law. Their argument relies on the fact that any company or investors looking to buy TikTok would have to receive confirmation by the Chinese government whose officials have made it clear that they are opposed to a forced sale.²⁰

Following the passing of the law, TikTok has filed for a petition for review of constitutionality in the United States Court of Appeals for the District of Columbia circuit. In their petition, TikTok argued that a “qualified divestiture” from ByteDance is not possible, and even if it was, a mandated divestment would not be constitutional anyway.²¹ The petition states:

“If upheld, it would allow the government to decide that a company may no longer own and publish the innovative and unique speech platform it created. If

¹⁸ “HR 7521 - Protecting Americans from Foreign Adversary Controlled Applications Act - National Key Vote,” Vote Smart, <https://justfacts.votesmart.org/bill/36703/98368/protecting-americans-from-foreign-adversary-controlled-applications-act>.

¹⁹ Cristiana Lima-Strong, “Biden signs bill that could ban TikTok, a strike years in the making,” *The Washington Post*, last modified 2024, <https://www.washingtonpost.com/technology/2024/04/23/tiktok-ban-senate-vote-sale-biden/>.

²⁰ Bobby Allyn, “President Biden signs law to ban TikTok nationwide unless it is sold,” *NPR*, last modified 2024, <https://www.npr.org/2024/04/24/1246663779/biden-ban-tiktok-us>.

²¹ Petition for Review of Constitutionality of the Protecting Americans from Foreign Adversary Controlled Applications Act, 2024, <https://fingfx.thomsonreuters.com/gfx/legaldocs/xmpjrzberpr/frankel-tiktokban--complaint.pdf>.

Congress can do this, it can circumvent the First Amendment by invoking national security and ordering the publisher of any individual newspaper or website to sell to avoid being shut down.”²²

TikTok argues that PAFACA is inconsistent with the First Amendment because it states, “Congress shall make no law... abridging the freedom of speech.”²³ In this case, the argument is that because Congress is attempting to dictate a private speech forum, as opposed to “broadcast television and radio stations, which require government licenses to operate because they use the public airwaves” it cannot be consistent with First Amendment protections.²⁴

Moreover, TikTok claims that not only do users on the platform enjoy First Amendment protections but the platform itself does as well. They note how this argument was accepted by the government in an amicus brief filed in the case *Moody v. NetChoice LLC* quoting, “[w]hen [social media] platforms decide which third-party content to present and how to present it, they engage in expressive activity protected by the First Amendment because they are creating expressive compilations of speech.”²⁵ They also cite the cases *Hurley v. IrishAm. Gay, Lesbian & Bisexual Grp. of Bos.* and *Miami Herald Pub. Co. v. Tornillo*, to highlight how TikTok’s editorial control (the app’s ability to decide what content to promote and the manner in which the content is promoted) makes the platform “more than a passive receptacle or conduit for news, comment, and advertising.”²⁶ Therefore, they argue that TikTok’s exercise of editorial control and judgment must be protected under the First Amendment and a law such as PAFACA which hinders TikTok’s ability to carry out such editorial control is incompatible with Free Speech protections.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

Furthermore, TikTok argues that even if the platform is not entirely banned but just forced to divest from its original ownership, this would still constitute an infringement of the First Amendment. They claim that under new ownership, the character of the app itself would be altered. This argument was noted by Supreme Court Justice Kagan during oral arguments in *Moody v. Netchoice LLC*, where she observed that the sale of the social media platform Twitter to Elon Musk had altered the character of the app. Kagan said, “Twitter users one day woke up and found themselves to be X users and the content rules had changed and their feeds changed, and all of a sudden they were getting a different online newspaper, so to speak, in a metaphorical sense every morning.”²⁷ Under TikTok’s argument they claim that by mandating the sale of TikTok to an entity with no connections to the Chinese Communist Party, Congress aims to alter the fundamental nature of the platform. They claim that this type of government action is exactly what the First Amendment was constructed to protect against.

The case *TikTok Inc. and ByteDance Ltd. v. Merrick* was heard by the D.C. Circuit Court of Appeals and then by the U.S. Supreme Court. Both courts ruled to uphold the law requiring ByteDance to divest or face a ban. Prior to the ruling, lower court decisions dealing with similar issues provided useful insight into how the case might be resolved. One such case took place in the United States District Court for the District of Montana, where Governor Gianforte signed legislation banning TikTok throughout the state. TikTok challenged the law and was granted a preliminary injunction by Judge Malloy.²⁸ Another relevant case emerged in Texas, where the U.S. District Court for the Western District of Texas dismissed a First Amendment challenge against Governor Abbott’s order which banned TikTok from government and University of North

²⁷ Will Oremus, “Supreme Court revives debate over social media as a ‘public square,’” *The Washington Post*, last modified February 28, 2024, <https://www.washingtonpost.com/politics/2024/02/28/supreme-court-revives-debate-over-social-media-public-square/>.

²⁸ Bobby Allyn, “Federal judge blocks Montana’s TikTok ban before it takes effect,” *NPR*, last modified 2023, <https://www.npr.org/2023/11/30/1205735647/montana-tiktok-ban-blocked-state>.

Texas (UNT) devices.²⁹ Examining these earlier cases helps clarify the legal landscape that informed the D.C. Circuit’s and the Supreme Court’s reasoning in *TikTok v. Merrick* and contextualizes its final decision to uphold PAFACA.

IIIa. Montana’s TikTok Ban

In May of 2023, Montana enacted Senate Bill 419 (SB 419) into law. This law was aimed to target the usage of TikTok within the State. This was significant as it was the first state in the US to impose this type of statewide ban on a social media platform.³⁰ The legislation mandates that app stores, like Google Play and Apple’s App Store, must not offer TikTok for download within the state of Montana. Furthermore, the law also bans the app from being used by individuals within the state who have already downloaded the app. The law is enforced by punishing app stores that fail to comply with the regulation and by imposing fines and penalties on TikTok itself if they continue to operate within the state. The preamble of the law states, “the People’s Republic of China is an adversary of the United States and Montana and has an interest in gathering information about Montanans... TikTok gathers significant information from its users, accessing their data against their will to share with the People’s Republic of China.”³¹ This demonstrates that Montana shares similar security interests with Congress in banning the app, as the justification closely resembles that cited for PAFACA. The bill then goes on to explain another issue that Montana has with TikTok, writing that:

“TikTok fails to remove, and may even promote, dangerous content that directs minors to engage in dangerous activities, including but not limited to throwing

²⁹ Adam Chan, “Why TikTok’s Victory in Montana Might be Bad News for the Platform,” *LawFare*, last modified 2024, <https://www.lawfaremedia.org/article/why-tiktok-s-victory-in-montana-might-be-bad-news-for-the-platform#:~:text=Judge%20Donald%20W.,a%20major%20win%20for%20TikTok>.

³⁰ Allyn, “Federal judge,” *NPR*.

³¹ An Act Banning TikTok in Montana, SB 419 (Mont. 2023), <https://leg.mt.gov/bills/2023/billpdf/SB0419.pdf>.

objects at moving automobiles, taking excessive amounts of medication, lighting a mirror on fire and then attempting to extinguish it using only one's body parts... licking doorknobs and toilet seats to place oneself at risk of contracting coronavirus, attempting to climb stacks of milk crates, shooting passersby with air rifles, loosening lug nuts on vehicles, and stealing utilities from public places.”³²

In contrast with national security concerns, these issues raised by Montana focus on a more public safety consideration. Finally, SB 419 asserts that the law would become effective on January 1, 2024 unless “TikTok [is] acquired by or sold to a company that is not incorporated in any other country designated as a foreign adversary” before that date.³³ Therefore, in that sense, it is once again similar to PAFACA as the law will lift the ban if TikTok divests from its Chinese ownership.

TikTok challenged the legality of the bill, and on November 30, 2023, the US District Court for the District of Montana preliminarily enjoined its enforcement, citing various constitutional concerns including First Amendment challenges, Supremacy Clause and preemption issues, and the Commerce Clause.³⁴

Firstly, TikTok asserts that SB 419 unconstitutionally violates its First Amendment rights by banning the platform on a content-based justification. TikTok contends that it has a right to exercise editorial judgment and its users have the right to convey speech on the platform as they wish. These challenges are similar to those raised against the Trump administration's Executive Orders against TikTok and WeChat. Secondly, TikTok's preemption argument rests on the Supremacy Clause of the Constitution which establishes that in the case where state law is in conflict with a specific federal law, federal law must preempt the conflicting law—this is known

³² Ibid.

³³ Ibid.

³⁴ Chan, “Why TikTok's,” *LawFare*.

as conflict preemption. In some areas, federal interests may entirely dominate the field, making state legislation invalid in those areas—this is known as field preemption. TikTok argues that the matter of regulating a foreign-owned app for national security reasons by a state is federally preempted because it interferes with the reserved powers for the federal government over foreign affairs. Lastly, TikTok’s final challenge includes the Commerce Clause. This clause of the Constitution allows for Congress to regulate interstate and foreign commerce—and restricts states from doing so. Therefore, TikTok argues that although the ban proposed in SB 419 is state specific, it “risks disrupting the flow of travel and commerce between states.”³⁵ On the basis of these claims, TikTok was granted a preliminary injunction against Montana’s argument that SB 419 was a valid exercise of Montana’s police powers. The District Court found TikTok’s arguments compelling enough to determine that their case would likely succeed on its merits, which justified the granting of the injunction.

With respect to the First Amendment argument that was brought up, the Court found that the law did indeed violate free speech protections from both a strict scrutiny and intermediate scrutiny analysis. Both strict scrutiny and intermediate scrutiny are standards of judicial review used to evaluate the constitutionality of laws. Strict scrutiny is the most rigorous level of judicial review and is applied when the law in question affects a fundamental constitutional right. Under strict scrutiny, a law must serve a compelling government interest and be narrowly tailored to achieve that interest using the least restrictive means possible. Intermediate scrutiny, on the other hand, is less rigorous. Under intermediate scrutiny the law only has to serve an important government purpose and be substantially related to that interest. While both standards are designed to ensure that laws do not unjustifiably infringe on individual rights, strict scrutiny sets a higher bar than intermediate scrutiny does. In this case, there is no question that free speech is a

³⁵ Ibid.

fundamental right, which is why TikTok asserted that the Court must review the case using strict scrutiny analysis. However, the Court chose to analyze the case from an intermediate level, finding that the law was not affecting TikTok in a content-based manner but was instead content-neutral. If the law against TikTok was content-based, it means the government is targeting the message or the substance of the speech itself and discriminating based on the specific viewpoint of the speech in question. On the contrary, content-neutral restrictions do not address the substance of the message but rather target something else and happen to restrict speech as a consequence. Because free speech is a fundamental right, laws that regulate speech based on their content are evaluated from a strict scrutiny perspective, while content-neutral regulations are evaluated using intermediate scrutiny. Although SB 419 does specify specific content on TikTok that Montana takes issue with, due to the fact that the law bans the entire app and not just that specific content, the Court decided that SB 419 is more of a content-neutral restriction and therefore should be analyzed under intermediate scrutiny. The District Court Judge Donald W. Molloy explained this decision, writing that neither TikTok’s argument for strict scrutiny because the law is content-based or Montana’s argument for intermediate scrutiny because the law is content-neutral “is completely accurate, but the State’s is closer to the legal mark.”³⁶

The test that is used for evaluating speech under intermediate scrutiny is the O’Brien test. *United States v. O’Brien* was a case decided by the Supreme Court that established a test to evaluate the constitutionality of content-neutral restrictions on speech, such as a law banning the burning of a draft card. In *O’Brien*, the Supreme Court determined that:

“a government regulation is sufficiently justified if: 1) it is within the constitutional power of the government, 2) it furthers an important or substantial

³⁶ Ibid.

governmental interest, 3) the governmental interest is unrelated to the suppression of free expression, and 4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”³⁷

Starting with the second criteria, Montana’s lawyers argued that the government did indeed have an important interest in protecting the data of their citizens from a “foreign adversary” and that this interest is indeed unrelated to the suppression of free speech. However, this interest was deemed invalid by Judge Malloy as he rejected the notion that national security was a legitimate state interest, writing that, “the State posits there is nothing precluding a state from legislating in the field of national security. The Founding Fathers may have viewed that proposition skeptically considering the Constitution’s particular provisions.”³⁸

Irrespective of whether Montana’s or Judge Malloy’s argument is more compelling, Judge Malloy also asserts that SB 419 fails the fourth criteria of the O’Brien test as he found that Montana had failed to demonstrate that it was not burdening more speech than necessary to achieve its interest. To this point, Montana’s lawyers had asserted that TikTok had not been compliant with a multistate investigation into the security of the platform but Malloy claimed that it was “unclear how this single investigation into TikTok warrants a complete ban on the application.”³⁹ Judge Malloy then further justified this conclusion by explaining that Montana offered no evidence to show that TikTok is similar enough to other social media platforms to demonstrate that SB 419 still leaves alternative channels of communication open for the public.

Lastly, in regards to the first criterion of the O’Brien test—that government regulation is within the constitutional power of the government—Judge Malloy held that SB 419 was not within the state government’s powers, upholding TikTok’s arguments that the law is

³⁷ *United States v. O’Brien*, 391 U.S. 367 (1968).

³⁸ Chan, “Why TikTok’s,” *LawFare*.

³⁹ *Ibid*.

unconstitutional for violating both the Supremacy Clause and the Commerce Clause of the Constitution. Therefore, following this logic, Judge Malloy granted the preliminary injunction which enjoined the law from taking effect.

IIIb. Texas' TikTok Ban

A case against TikTok also emerged in the state of Texas. Just like Montana, Texas wanted to impose restrictions on the platform in fear of user data being accessed by the Chinese government. This Texas law known as Senate Bill 1195 (SB 1195) was aimed at limiting the use of TikTok on state government devices and networks and from the University of North Texas (UNT) devices as opposed to an all-out ban like SB 419 in Montana. After SB 1195 was enacted on May 26, 2023, the Coalition for Independent Technology Research—a group of “academics, journalists, civil society researchers, and community scientists committed to advocating for and organizing in defense of research that is ethical, transparent, and privacy-preserving”⁴⁰—challenged the legality of the ban in the U.S. District Court for the Western District of Texas for “blocking TikTok-related teaching research and teaching in classrooms.”⁴¹ The judge overseeing this case, Robert L. Pitman, had been very sympathetic to First Amendment challenges in previous cases he had dealt with, but that did not stop him from dismissing the First Amendment challenges against Texas in this case.

In his analysis of the case, Judge Pitman recognized the importance of the First Amendment’s “extra protection” for public university faculty as their unique position makes them both academics as well as public employees.⁴² The plaintiffs in the case requested that a First Amendment test which is generally used for public employees be utilized in this case. This

⁴⁰ Coalition for Independent Technology Research, <https://independenttechresearch.org/about-us/>.

⁴¹ Chan, “Why TikTok’s,” *LawFare*.

⁴² *Ibid*.

test would limit speech restrictions to those “necessary for their employers to operate efficiently and effectively.”⁴³ Under this test, the plaintiffs would likely win because public university faculty would still be able to teach effectively with TikTok’s presence. However, Judge Pitman rejected this test and instead employed the more lenient “nonpublic forum” test.⁴⁴ This test requires that the regulation needs to only be “reasonable in light of the purpose which the forum serves.”⁴⁵ Under this test, Pitman found that a regulation of university-owned devices is reasonable because of Texas’ security concerns of data privacy. Moreover, Pitman distinguished this case from Montana’s ruling, arguing that the Montana law was more sweeping as it banned TikTok entirely in the state while the Texas law only regulated TikTok on its own governmental property. Therefore, while the Montana law needed to be inspected with intermediate scrutiny, Texas’ law did not.

IV. Applying Precedent Decisions to PAFACA

Although these lower court rulings offer crucial insights into the federal courts’ interpretations of the constitutionality of PAFACA, it is important to recognize that the federal law is distinguished from the state cases in Montana and Texas in significant ways. In Texas, the ruling was highly dependent on the fact that the TikTok ban only applied to government devices. In contrast, PAFACA aims to ban TikTok on all devices in the United States (similarly to the Montana statewide ban). Nevertheless, the federal case is also distinguished from Montana’s because many of TikTok’s strong arguments in that case no longer apply at the federal level. For example, both the Supremacy Clause argument and the Commerce Clause argument would no

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

longer apply. Furthermore, because Montana’s statute highlighted the concern that TikTok “fails to remove, and may even, promote, dangerous content that directs minors to engage in dangerous activity” and went on to list specific examples of this content, TikTok was also able to make the argument that the statute was in fact content-based and therefore would require a heightened level of scrutiny.⁴⁶ This argument would not apply at the federal level since the language of PAFACA does not mention targeting dangerous content on the platform but is rather more focused on the national security concern that the app poses due to its Chinese-based ownership. Moreover, in the Montana case, Judge Malloy was able to dismiss the argument that national security could be considered an important state interest.⁴⁷ However, at the federal level, national security is without a doubt a considerable interest which explains the Supreme Court’s decision to ultimately uphold PAFACA even if it means potentially limiting First Amendment protections for the sake of national security.

Yet, despite this outcome TikTok maintains a compelling argument. Even under the intermediate scrutiny standard (O’Brien test), the government must demonstrate that any incidental restriction on First Amendment freedoms is no greater than necessary to advance its interest. In this case, it could be argued that PAFACA represents an overreach by mandating that TikTok completely divest from its original ownership to continue operating in the United States. Instead of this drastic measure, an argument could be made that the government should focus on imposing regulations specifically targeting the data collection practices of TikTok rather than shutting down the platform entirely.

Furthermore, TikTok has shown that it is willing to cooperate to remedy the government’s security concerns. During TikTok CEO Shou Chew’s first appearance before Congress, he

⁴⁶ An Act Banning TikTok in Montana, SB 419.

⁴⁷ Chan, “Why TikTok’s,” *LawFare*.

explained Project Texas, the plan the company had developed through several discussions with CFIUS (Committee on Foreign Investment in the United States) to address the government’s concerns. CFIUS is an “interagency committee with authority to review, block, and where necessary compel investment of foreign acquisitions of US business.”⁴⁸ At the hearing, Chew told Congress members:

“our approach has never been to dismiss or trivialize any of [your] concerns. We have addressed them with real action now. That’s what we’ve been doing for the past two years, building what amounts to a firewall. The seals of protected US user data from unauthorized foreign access. The bottom line is this: American data stored on American soil by an American company overseen by American personnel. We call this initiative Project Texas.”⁴⁹

Since then, TikTok has implemented many of Project Texas’ features to show the company’s real dedication to this issue. For example, TikTok transferred US user data to the cloud infrastructure of Oracle, a US company.⁵⁰ Moreover, TikTok launched a campaign to educate their users about data security and Project Texas. On their website, TikTok writes:

“Project Texas puts the concepts of transparency and accountability into action by addressing national security concerns head-on with concrete, measurable solutions. The framework has five key pillars: Independent Governance, Data Protection and Access Control, Software Assurance, Content Assurance, and Monitoring and Compliance. This approach is designed to address concerns that have been raised in the U.S. about TikTok, while also allowing us to continue to

⁴⁸ Ibid.

⁴⁹ Christianna Silva, “What is Project Texas, TikTok’s best chance to avoid a ban?,” *Mashable*, last modified 2023, [https://mashable.com/article/project-texas-tiktok#:~:text=Project%20Texas%20would%20restructure%20much,city%20\(Austin%2C%20Texas\)](https://mashable.com/article/project-texas-tiktok#:~:text=Project%20Texas%20would%20restructure%20much,city%20(Austin%2C%20Texas).).

⁵⁰ Matt Perault, “What Happened to TikTok’s Project Texas?,” *LawFare*, last modified 2024, <https://www.lawfaremedia.org/article/what-happened-to-tiktok-s-project-texas>.

offer a globally interoperable service. We have already proactively implemented substantial portions of this framework, and we look forward to continuing our work to further ensure peace of mind for our community and our stakeholders.”⁵¹

Given the existence of this alternative route for TikTok to address the government’s security concerns, it can be argued that the Supreme Court’s ruling to uphold PAFACA was too deferential to the government without concrete evidence of legitimate national security concerns.

Ultimately, the United States Supreme Court upheld PAFACA, confirming that a divestiture from ByteDance was indeed a constitutional means of advancing national security concerns. Despite this legal defeat, TikTok was never completely banned in the United States. Although US users were temporarily unable to access the app for a few hours following the January 19 divestiture deadline, President Trump, upon assuming office the next day issued an Executive Order halting enforcement for 75 days⁵² to allow for alternate solutions to be explored.⁵³

Overall, the outcome of this long-standing legal battle involving TikTok carries implications that are significant for far more than one single social media platform. This decision impacts not only TikTok but sets an important precedent for future disputes involving foreign-owned technology companies and the ongoing effort to balance security interests with constitutional protections for speech. Furthermore, the fact that PAFACA was never fully enforced also reveals important implications regarding separation of powers. Despite the legislative and judicial branch demonstrating a need for regulation, the final outcome still

⁵¹ “TikTok’s Commitment to U.S. National Security,” TikTok U.S. Data Security, <https://usds.tiktok.com/usds-about/>.

⁵² Although the initial order was for 75 days, President Trump would later extend this even further. Currently, it has been extended until December 16, 2025.

⁵³ Jamali, Lily. 2025. “President Trump Signs Executive Order Delaying TikTok Ban.” *BBC News*, January 21, 2025. <https://www.bbc.co.uk/news/articles/cd0j24rj4ryo>.

depended on the political choices of the executive branch, underscoring how intertwined law and policy have become.