

TIKTOK, TIKTOK, IS TIME UP FOR TIKTOK? NATIONAL SECURITY VERSUS FREEDOM OF EXPRESSION WEIGHED IN COURT JUDGMENT

Category: Infrastructure and Telecommunications, IT Law, Media and OTT, Privacy Law, Infosec, and POPIA, Technology Law

written by Lucien Pierce | January 18, 2025



TikTok has run out of options to challenge a United States national security law that requires its owner to divest (dispose of its ownership interest) or shut down operations in the U.S. After Friday's freedom of expression related U.S. [Supreme Court judgment](#), TikTok says that it may have to stop operations in the U.S. by the Sunday, 19 January 2025 deadline.

The Protecting Americans from Foreign Adversary Controlled Applications Act ("PAFACA") "*makes it unlawful for any entity to provide certain services to "distribute, maintain, or update" a "foreign adversary controlled application" in the United States.*" The definition of a "*foreign adversary-controlled application*" is clear: it focuses specifically on TikTok and is aimed at any application operated directly by "ByteDance Ltd or TikTok; and, more generally, any application that is both operated by a "covered company" that is controlled by a foreign adversary and determined by the U.S. President to be a significant threat to the National Security of the U.S..

All of the Judges deciding the matter ruled that PAFACA is lawful, although Judges Sotomayor and Gorsuch penned separate, but concurring judgments. It is evident that the Judges were under extreme time pressure, something they expressed upfront concern on, saying that in giving their judgment they are "*conscious that the cases before us involve new technologies with transformative capabilities. This challenging new context counsels caution on our part. As Justice Frankfurter advised 80 years ago in considering the application of established legal rules to the "totally new*

problems” raised by the airplane and radio, we should take care not to “embarrass the future.”

The Judges weighed up the right of expressive conduct (freedom of expression) against laws protecting national security. They discussed whether PAFACA *“directly regulates protected expressive activity, or conduct with an expressive component”* saying that PAFACA *“does not regulate [people who create TikTok content] at all.”* The Judges discussed two types of content related laws: “content-based laws” and “content-neutral” laws.

They reiterated that content-based laws *“that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”* With regard to content-neutral laws, they took the view that they are, *“in contrast, “subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”* Further saying that *“Under that standard, we will sustain a content-neutral law “if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”*

In dismissing TikTok’s appeal, it appears that national security and the content-neutral law argument formed the gist of the Judges’ decision to uphold PAFACA. Judge Gorsuch’s separate judgment does however leave one with a sense of foreboding as it is evident that, as much as he agrees with the decision, he has some reservations, saying *“Given just a handful of days after oral argument to issue an opinion, I cannot profess the kind of certainty I would like to have about the arguments and record before us. All I can say is that, at this time and under these constraints, the problem appears real and the response to it not unconstitutional.”*

In essence, all of the Judges took the view that the U.S. government’s concerns about national security trumped (apologies, I could not resist it) TikTok’s, content creators’ and [interest groups’](#) concerns about freedom of expression infringements.

The judgment, short as it is (for a lawyer), is relevant to recent judgments in South Africa. In the recent Information Regulator v Department of Basic Education dispute related to the privacy of [final high school examination \(matric\) results](#) and the Protection of Personal Information Act (“POPIA”) the Judge, [who received some criticism](#), lamented having to deal with complex technical matters with very short timelines. In [the AmaBhungane case](#), challenging the constitutionality of the Regulation of Interception of Communications and Communications-Related Information Act (“RICA”), the Constitutional Court ruled sections of the Act unconstitutional, based on privacy infringements and the ability of journalists to do their work.

Whether TikTok switches off in the U.S. at midnight on 19 January 2025, is [still up for debate](#). However, the issues the Judges dealt with in the matter, are likely to arise time and again.

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