

Appeals Court Upholds TikTok Ban; Impact on Chinese Social Media Going Abroad

By Xun Yang

The U.S. Court of Appeals for the District of Columbia Circuit issued a decision (the “**Decision**”) on December 6, 2024, upheld the Protecting Americans from Foreign Adversary Controlled Applications Act (“**PAFACA**”). The court ruled that PAFACA was constitutional and necessary to protect national security. TikTok announced that it would appeal the case to Supreme Court. The Decision deepens the concerns of Chinese social medias which plan to go abroad.

1. Overview of Case

TikTok, along with its parent company ByteDance, challenged PAFACA, which was signed into law on April 24, 2024. It prohibits distributing, maintaining, or providing internet hosting services for applications controlled by foreign adversaries, unless they undergo a qualified divestiture.

The Act was introduced by Representative Mike Gallagher and passed by Congress in response to growing concerns over national security risks posed by foreign-controlled applications, particularly TikTok. US congressmen argued that TikTok's Chinese ownership could allow the Chinese government to access sensitive data on American users. The Act was passed to mitigate these risks by requiring ByteDance to sell TikTok or face a ban from U.S. app stores and internet hosting services.

In response to the adoption of PAFACA, TikTok, along with its parent company ByteDance, filed a lawsuit against U.S. Attorney General Merrick Garland in the Court of Appeals for the District of Columbia Circuit. TikTok claimed that PAFACA was unconstitutional, primarily by arguing that PAFACA violated the First Amendment by imposing an unfeasible

.....
如果您需要本出版物的中文本,
请联系:

Publication@llinkslaw.com

.....
For more Llinks publications,
please contact:

Publication@llinkslaw.com

deadline for divestiture, effectively removing the app and restricting free speech. TikTok also contended that the U.S. government had not adequately demonstrated a credible national security threat posed by the platform¹. Additionally, TikTok argued that the Chinese government would not permit the inclusion of the algorithm crucial to its success in the U.S. into any transaction, making divestiture impractical.

2. Court Decision and Reasoning

The U.S. Court of Appeals for the District of Columbia Circuit issued the Decision on December 6, 2024 upholding PAFACA. All three judges on this case ruled on favor of the US congress that PAFACA was constitutional and necessary to protect national security. The Decision emphasized that PAFACA was not about restricting free speech but rather about severing ties between TikTok and the Chinese government.

Wherein, the majority opinion in the case was written by Senior Circuit Judge Douglas Ginsburg and joined by Judge Neomi Rao. Here are the key points:

- (1) **National Security Justifications:** The court accepted the government's national security justifications for the Act, which included concerns about the Chinese government's efforts to collect data on U.S. persons and the risk of covert content manipulation on TikTok.
- (2) **Strict Scrutiny:** The court assumed, without deciding, that the Act was subject to strict scrutiny under the First Amendment. It concluded that the Act was the least restrictive means of advancing the government's compelling national security interests.
- (3) **Government's Evaluation of Facts:** The court gave great weight to the government's evaluation of the facts, recognizing the government's informed judgment in matters of national security and foreign affairs.
- (4) **Evidence of Data Collection:** The court cited evidence of attempts by the Chinese government to collect data on U.S. persons through Chinese-company investments and partnerships with U.S. organizations.
- (5) **Rejection of Speculative Concerns:** The court rejected TikTok's argument that the government's data-related concerns were speculative, stating that the government need not wait for a risk to materialize before acting.

Chief Judge Sri Srinivasan wrote a concurring opinion in part and concurring in the judgment. Judge Srinivasan agreed with the majority's conclusion that the Act was constitutional but had reservations about certain aspects of the majority's reasoning. He further opined:

- (1) **National Security Interests:** While concurring with the majority on the importance of national security interests, Judge Srinivasan emphasized the need for a careful balance between security concerns and constitutional rights.
- (2) **First Amendment Analysis:** Judge Srinivasan concurred with the majority's application of strict scrutiny but highlighted the importance of ensuring that any restrictions on speech are narrowly tailored and do not unnecessarily infringe on First Amendment rights.

3. Split between Policy Discretion and Judicial Authority

The Case underscores the importance of the separation of powers and the distinct roles of the judiciary and the legislature. The court's decision to uphold the Act reaffirms the judiciary's role in interpreting the Constitution, while the legislative action highlights the legislature's authority to make policy decisions within constitutional limits.

(1) Judicial Authority in Ruling Constitutional Matters

The court's role in the Case was to determine the constitutionality of the legislations (being, PAFACA). This involved interpreting the Constitution and assessing whether PAFACA violated any constitutional provisions, such as the First Amendment. The court's decision to uphold the Act demonstrates its authority to review and rule on legislative actions to ensure they comply with constitutional principles.

(2) Legislative Authority in Exercising Policy Discretion

Meanwhile, the court respected the Congress' vires and discretion to make laws and policies and would not interference into discretion which the Congress may have to determine on policy matters, including to address national security concerns related to TikTok's Chinese ownership. This involved making policy decisions about how to protect national security and regulate foreign-controlled applications. The Decision affirmed that Congress had the authority to enact such legislation within the bounds of the Constitution.

(3) Interaction Between Judicial and Legislative Authority

The case illustrates the interaction between judicial and legislative authority. While the legislature has the discretion to create laws based on policy considerations, the judiciary has the authority to review those laws to ensure they are constitutional. This balance of power is essential to maintaining the rule of law and preventing any branch of government from overstepping its bounds.

4. TikTok's Response to Decision

Upon the unsatisfactory Decision, TikTok announced that it would appeal the case to the US Supreme Court. It appeared that it was confident that the Supreme Court will side with them, citing the court's historical record of protecting free speech. TikTok also called for support, claiming that "the TikTok ban was conceived and pushed through based upon inaccurate, flawed and hypothetical information, resulting in outright censorship of the American people. The TikTok ban, unless stopped, will silence the voices of over 170 million Americans here in the US and around the world on January 19th, 2025."

Meanwhile, TikTok would likely seek an injunction to halt the enforcement of PAFACA pending the Supreme Court's review. This would prevent the ban from taking effect on January 19, 2025.

5. Potential Impact on Chinese Social Medias Going Abroad

The Decision deepened the concerns of Chinese social medias which plan going abroad. They will need to navigate increased regulatory scrutiny, potential bans, and user trust issues while adapting their strategies to remain competitive.

(1) Increased Regulatory Scrutiny

The Decision sets a precedent that could lead to increased regulatory scrutiny for other Chinese social media platforms. Governments around the world may become more vigilant about data privacy and national security concerns, leading to stricter regulations and oversight.

(2) Potential Bans and Restrictions

Other Chinese social media platforms may face similar bans or restrictions if they are perceived to pose a national security threat. This could limit their ability to operate in certain markets and hinder their growth.

(3) Impact on User Trust and Adoption

The Decision may affect user trust and adoption of Chinese social media platforms abroad. Users may become more cautious about using these platforms due to concerns about data privacy and national security, leading to a decline in user base and engagement.

(4) Competitive Disadvantage

Chinese social media platforms may face a competitive disadvantage compared to non-Chinese platforms. The increased scrutiny and potential bans could make it harder for them to compete in international markets, giving an edge to their competitors.

(5) Legal and Financial Challenges

Chinese social media companies may need to invest more in legal and compliance efforts to navigate the regulatory landscape. This could increase their operational costs and impact their profitability.

(6) Strategic Shifts

Chinese social media platforms may need to consider strategic shifts to adapt to the new regulatory environment. This could include diversifying their user base, enhancing data privacy measures, and exploring new markets with less stringent regulations.

If you would like to know more information about the subjects covered in this publication, please contact:



Xun Yang

+86 21 3135 8799

xun.yang@llinkslaw.com

SHANGHAI

19F, ONE LUJIAZUI
68 Yin Cheng Road Middle
Shanghai 200120 P.R.China
T: +86 21 3135 8666
F: +86 21 3135 8600

BEIJING

30F, Central Tower, China Overseas
Plaza, 8 Guanghuadongli,
Chaoyang District
Beijing 100020 P.R.China
T: +86 10 5081 3888
F: +86 10 5081 3866

SHENZHEN

18F, China Resources Tower
2666 Keyuan South Road,
Nanshan District
Shenzhen 518063 P.R.China
T: +86 755 3391 7666
F: +86 755 3391 7668

HONG KONG

Room 3201, 32/F, Alexandra House
18 Chater Road
Central, Hong Kong
T: +852 2592 1978
F: +852 2868 0883

LONDON

1/F, 3 More London Riverside
London SE1 2RE
United Kingdom
T: +44 (0)20 3283 4337
D: +44 (0)20 3283 4323



www.llinkslaw.com



Wechat: LlinksLaw

WE LINK LOCAL LEGAL INTELLIGENCE WITH THE WORLD

This publication represents only the opinions of the authors and should not in any way be considered as legal opinions or advice given by Llinks. We expressly disclaim any liability for the consequences of action or non-action based on this publication. All rights reserved.

© Llinks Law Offices 2024