

# Justices' TikTok Ruling Sets Stage For 1st Amendment Battle

By **Christopher Sakaue, James Azadian and Chantel Febus** (March 28, 2025)

It has now been over two months since the U.S. Supreme Court's landmark ruling in the coordinated cases of TikTok v. Garland and Firebaugh v. Garland, unanimously upholding the Protecting Americans from Foreign Adversary Controlled Applications Act.

Yet, TikTok, the social media platform at the heart of this controversy, remains active — at least until President Donald Trump's executive order granting a 75-day extension expires on April 5.

Some may view the ruling as merely a push for ByteDance Ltd. to divest its ownership of TikTok Inc. However, its greater significance lies in the stage it sets for an impending First Amendment battle — the regulation of nonexpressive activity related to social media.

## TikTok in Limbo

The bipartisan act bans TikTok in the U.S. if TikTok's Chinese parent company, ByteDance, does not sell the popular web-based, video-sharing platform to a non-Chinese owner.

In an unsigned opinion, the court rejected TikTok's First Amendment challenge to the new divest-or-be-banned law and ruled that it was justified by the threat of China collecting sensitive data from TikTok's U.S. users to influence U.S. public opinion by manipulating their personalized video feeds.

Despite the court's decision, the Biden administration stated that it would not enforce the TikTok ban. TikTok is reportedly used by over 170 million Americans. In light of the court's decision, however, the social media platform briefly went dark in the U.S. days before Trump reentered office. He then signed the executive order extending the deadline to comply with the ban if the platform is not sold.

TikTok came back online in the U.S. with a short message thanking Trump for his efforts. To be clear, Trump's executive order does not overturn the law or the court's decision — a president could do neither of those things. Instead, the executive order instructs the attorney general not to enforce the law for now, which is within the president's power. That buys time for the administration to, as the order explains, "determine the appropriate course of action."

TikTok is currently operational, but the clock is winding down on its future in the U.S. It has been reported in the press that ByteDance is actively seeking a buyer.

## Supreme Court Sidesteps Major First Amendment Issue

In its opinion, the court addresses but ultimately avoids a key First Amendment question: Whether a regulation of nonexpressive activity that disproportionately burdens expressive



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activity warrants heightened scrutiny under the First Amendment.[1] Rather than resolving this issue, the court assumed without deciding that the act triggers intermediate scrutiny — the middle standard of judicial review that lies between the more lenient rational-basis standard and the more restrictive strict-scrutiny standard.[2]

The court's reasoning hinges on two main points. First, the act does not directly regulate speech; it solely restricts ownership of TikTok.[3] However, by effectively banning the platform in the U.S., the act inevitably curtails users' ability to create, associate with others and receive information through the platform — thus indirectly burdening free speech.[4]

Second, the act differs from previous regulations of nonexpressive activity subject to First Amendment scrutiny.[5] Its focus on China, a designated adversary of the U.S., provides a compelling justification for upholding the law.[6] The court repeatedly emphasizes the Chinese government's ability to access U.S. user data through Chinese-owned ByteDance as the primary rationale for its decision.[7]

Although sidestepped in the court's per curiam opinion, Justice Sonia Sotomayor's concurring opinion directly confronts the First Amendment issue, asserting that the act undoubtedly implicates free speech. She argues that TikTok itself engages in expressive activity by "compiling and curating" content and that the act effectively suppresses TikTok's speech.[8] Her divergence from the majority centers on TikTok's curation of content as an expressive activity rather than the burden imposed on its users.

### **Clues for Future Ruling on Regulation of Nonexpressive Activity**

The court's opinion raises an inevitable question: What other nonexpressive activities might be considered burdens on free speech, triggering First Amendment scrutiny? Numerous laws could potentially face challenges if they limit access to social media.

Consider, for example, school policies banning cellphone use during school hours. As many students frequently engage with social media, such time-and-place restrictions could limit their ability to post and communicate. However, unlike the act's outright ban on TikTok, a school phone ban would not entirely prevent access to social media, as students could still use their devices outside school hours.

The court's opinion suggests two key factors in determining whether a burden on speech warrants scrutiny. First, the certainty of the burden: The act effectively ensures TikTok's prohibition, whereas a phone ban does not entirely foreclose access to social media. Second, the government's regulatory interest: The act targets national security concerns tied to foreign adversaries, whereas a school phone ban primarily aims to maintain focus in the classroom.

A lingering question remains: Is the foreign ownership of a social media platform truly nonexpressive? Justice Sotomayor and the U.S. Court of Appeals for the D.C. Circuit suggest otherwise, taking the position that TikTok's content moderation constitutes expressive activity.[9] The Supreme Court's opinion, however, focuses on the burden to users rather than to TikTok itself — an important distinction that will likely shape future cases.[10]

### **The Ultimate Effect of Regulating Nonexpressive Activity**

The court's reluctance to issue a definitive ruling on the restriction of nonexpressive activity underscores the profound implications of its decision.

Endorsing the regulation of nonexpressive activity could invite challenges to laws affecting social media access, potentially subjecting regulations on the use of phones, computers and the internet to a First Amendment scrutiny. Conversely, rejecting such regulation could enable government actions that indirectly suppress speech, such as banning platforms for the stated purpose of regulating ownership or infrastructure.

## **Final Thoughts**

By sidestepping the First Amendment issue, the court sets the stage for an inevitable clash between free speech and government interests. Its opinion signals that future cases will turn on whether a regulation poses a substantial burden on speech, and whether the government's justification is compelling enough to survive intermediate scrutiny.

For now, lower courts will bear the responsibility of refining this standard, with broader questions — such as whether content algorithms or artificial intelligence possess free speech rights — awaiting future litigation.

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[1] TikTok Inc. v. Garland, 145 S. Ct. 57, 66 (2025).

[2] Id. The intermediate scrutiny standard requires the government to demonstrate that the Act furthers an important government interest by means that are substantially related to that interest, but not necessarily the least restrictive means.

[3] Id. at 65. The hearing was quite telling as to the direction the Court was headed. During the oral argument, Chief Justice Roberts made the declarative statement that Congress "doesn't care what's on TikTok" but that Congress isn't okay with a "foreign adversary" gathering information from the millions of Americans using the app. Tr. Of Oral Arg. 81. Likewise, Justice Thomas asked ByteDance's attorney how a restriction on its ownership of TikTok created any limitations on TikTok's speech. Id. at 6. Justice Kagan echoed that skepticism, reasoning that if the law only targets ByteDance, which does not have any First Amendment rights because it is a foreign corporation, "how are those First Amendment rights really being implicated here?" Id. at 32.

[4] TikTok Inc. v. Garland, 145 S. Ct. at 66.

[5] Id.

[6] Id.

[7] Id. at 69-70, 72.

[8] Id.

[9] TikTok Inc. & ByteDance Ltd. v. Garland, 122 F.4th 930, 949 (D.C. Cir. 2024).

[10] TikTok Inc. v. Garland, 145 S. Ct. at 66.