

FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

ROBBINS: All right, good afternoon, and thank you for joining us for today's call. My name is Elizabeth Robbins, Vice President of Communications for the Foundation for Defense of Democracies, a nonpartisan research institute focusing on national security and foreign policy. As a point of principle, we do not accept funding from foreign governments. Joining us for today's call are Rear Admiral (Retired) Mark Montgomery, Senior Director of FDD's Center on Cyber and Technology Innovation (CCTI) and FDD Senior Fellow, and Peter Choharis, founder of the Choharis Law Group, PLLC, specializing in international law and dispute resolution. Today's conversation is on the record, and we'll post the recording and a transcript to FDD.org. Our panelists will each provide opening remarks, then we'll open up to questions. At any time, you're welcome to submit questions via chat or raise your hand to be recognized after initial comments. So let's get underway. Peter, over to you to set the stage on the things FDD's amicus brief contributes in response to some of the claims that TikTok and other petitioners are making.

CHOHARIS: Thanks very much, Beth. So why are we here before the Supreme Court and why was this also rushed over the Christmas holiday, and a few weeks before that, before the DC Circuit? Well, it's sort of the culmination of a multi-year process over the course of two different administrations, the first Trump administration, and then, much of the Biden administration. Multiple congresses through those administrations and years of efforts by government officials, technical officials, experts, to try to come up amicably, with TikTok and ByteDance, with a solution to some of the national security problems and threats posed by TikTok and ByteDance in terms of how they collect data and what they do with that data, and other national security threats posed by those two entities.

And despite years of efforts by the parties to try to come to a reconciliation, Congress determined that it wasn't going to happen, that the national security was in danger, and that it needed to act. And the result was a series of some hearings both in the House and the Senate, some of them were not public, they were confidential. I don't have access to that confidential information, I don't think Admiral Montgomery did, but – and Mark will talk more about this – we did bring to light, I think, some information which isn't generally known by the public, but is in the public space, that are important with respect to how does TikTok operate, and how does ByteDance operate, and how does ByteDance control TikTok. So Congress passed overwhelmingly – bipartisan support, Republican and Democrat – two acts that are part of the same series of statutes, one having to do with divestiture of TikTok if, by a date certain, which happens to be January 19, the day before the next administration, to a U.S.-owned group of owners, and secondly, restrictions on data collection.

And I want to talk more about that later, because there's an aspect of that act that nobody's reporting about, which I think is really interesting and powerful, so let's talk about that later. But the bipartisan act passed, and then, TikTok brought an appeal, along with other petitioners, ByteDance and some others, including some users, to the DC Circuit, which was the exclusive court of jurisdiction. And that was an expedited briefing schedule, and the court ruled overwhelmingly in favor of the government in upholding the constitutionality of the act against TikTok and the other petitioners' First Amendment challenges. And as you'll recall, there were two judges who wrote the majority opinion, and then there was a concurrence by the chief judge of the DC Circuit, but they all agreed that the act was constitutional and survived First Amendment challenge.

They also all agreed that ByteDance doesn't have First Amendment rights because it's a foreign company, and there was a disagreement about whether and to what degree the First Amendment even applied in this case. And then, there was a discussion about what level of scrutiny and things like that, we don't want to get into the legal details just yet, but the bottom line is that the DC Circuit overwhelmingly supported the constitutionality of the act. TikTok then went up, along with other petitioners, to the Supreme Court, and filed not a petition for review but an application for preliminary injunction.



FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

And what is that? That basically says, "Court, please stop anything that's going to happen, let's keep the status quo, let's keep things as they are." Because they knew they have this impending January 19 deadline approaching. The court denied that application ... or actually said, "well, we're going to wait to hear that and consider that after January 10, after the oral argument." It had an expedited briefing schedule, gave us all a week over Christmas holiday, and the opening briefs were filed on December 27, and then, only the parties got to reply on January 3. A week later, which is Friday the 10th, oral argument will take place, and then, presumably, they'll issue an opinion before the 19th.

Another interesting thing happened, on December 27, President-elect Trump filed a brief asking for a stay of sorts, like a preliminary injunction, saying that this is an extraordinary case, and that he should have the opportunity to see if he can work out a deal. The court hasn't ruled on that. Did deny another amicus's request to participate out of time and for oral argument and things like that, so the court did rule on another motion in this interim. And so, that's the origin of this case. And I think the government this time around in the Supreme Court, the headline in terms of the briefing is, the government is saying two big things: one is, data collection is not protected by First Amendment protection, so data collection survives and this act survives. And secondly, which institution is best suited for purposes of evaluating the national security threat, potentially, and we maintain in our brief, and Mark can talk more about that, actually posed by ByteDance and TikTok and its activities. Is it the federal government and all of the expertise that that branch can bring to bear, coupled with the Congress and all of their expertise and all of their considered judgment, or is it the judiciary? And I think historically, the answer has been clearly the executive and legislative branches, not the judiciary, but that's, I think, the nub of what the court will be looking at during Friday, and ultimately deciding. Mark?

MONTGOMERY: I thank you, and we'll be able to expand on some of these ideas in the question and answer. But I'll just start by saying, the theory of the case for national security is that more than 170 million Americans use TikTok, and like other social media apps, TikTok collects massive amounts of personal data on those users. However, unlike other personal apps, TikTok is subject to the direction and control of the Chinese Communist Party. On top of that, TikTok runs an algorithm that analyzes what each user sees on the app. Congress recognized this national security threat and they proposed legislation that was eventually passed in both chambers and signed by the president, arguing for divestment. The theory goes that TikTok is owned by a Chinese company, ByteDance, which is itself beholden to the Chinese Communist Party, and the Chinese government control over TikTok gives the Chinese Communist Party direct access to the data of these 170 million Americans, but more importantly, gives them the ability to manipulate the algorithm to drive the national security interests of China into the social media drive reading of the 170 million Americans.

And separately, you could look at research that shows you that a disproportionate amount of Americans under the age of 35 get their primary news source from these social media applications. Look, I think it's important here to recognize, FDD has been working this for about four years, we've been supporting legislation working it, but the key organization in this is the Network Contagion Research Institute, NCRI, at Rutgers University. It's the one that, when TikTok was transparent, which is no longer the case, and that should worry you, that TikTok's immediate reaction to criticism was to reduce transparency, but when they were transparent and you were able to understand the relative availability of messaging on TikTok versus a similar sized grouping of Instagram accounts on certain issues that matter to China a lot, the available feed was significantly biased towards a Chinese interpretation, which is to say, questions about Uyghur genocide and Uyghur freedom were 11 times more likely on non-TikTok applications than on TikTok.

FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

Questions about Tibetan independence were 40 times more likely on non-TikTok applications than on TikTok. Questions about Taiwan independence were 16 times more likely. These are not coincidences, they're not anomalies, they're the impact of someone directly driving the device's algorithm to give an output that is biased towards Chinese national security druthers. That's bad. What's worse is that when you take other non-China issues, like, say, Russia's invasion of Ukraine, support for Ukraine, eight times more likely on a non-TikTok application than on TikTok, and support for Israel in its fight with Hamas, and this is in the immediate aftermath of October 7, in the month aftermath, six times more likely on a non-TikTok application to TikTok. So now what we're talking about is, the United States and its allies and partners are being ... The national security narrative is being manipulated by TikTok for the use, the utility of its readers.

That's completely unacceptable. And so, the national security issues here are both a data protection issue, the data associated with 170 million Americans, and a data delivery issue, which is that a foreign entity is driving the national security narrative in the United States. We can go into more detail on both of these as we go through it, but that's the core national security argument. This isn't about the First Amendment, this is about the manipulation of the system. And if we're confused about this, the Chinese have spent the last year reminding the United States the degree to which they will use cyber-enabled information operations to go after us.

The Typhoon series of Volt Typhoon, Salt Typhoon, and Flax Typhoon demonstrate a persistent Chinese effort to use cyber manipulation to steal intellectual property, operationally prepare the battlefield, and conduct espionage. So this should not surprise us that using the existing laws – and by the way, they used some of the existing laws in order to force Chinese state-owned enterprises to participate in those Typhoon series. In fact, the flax typhoon actions done by the Treasury Department last week were about the manipulation of a Chinese company to support Chinese intelligence services in conducting Flax Typhoon. So to be clear, there's a proven trail of the Chinese Communist Party, particularly its intelligence services, manipulating Chinese companies to drive national security outcomes,

And what we're pointing out is TikTok is one more opportunity, and no one wants to ban TikTok. I have teenage kids, I don't want to ban TikTok. I want it to be divested from ownership by a country that is a country of concern, an adversary like China, and in the case of China, the one most routinely proven to use cyber-enabled information operations to manipulate the United States. So that, I think, is the core of the argument, that's the content portion. I think Peter's done a great job describing the process. Beth, I'll pass it back to you.

ROBBINS: Okay, thanks. We'll now move into Q&A. As a reminder, journalists can ask a question by either typing it into chat or utilizing the raised hand feature. We have two questions in from Xiaoshan Xue of VOA's China Division. I read, "A new study conducted by Rutgers University's Network Contagion Research Institute tracks how TikTok minimizes negative stories on China and the CCP, it is now the first peer-reviewed data-driven study," and there's quite a bit of information that I think you spoke to. "A major conclusion of the report found that the more time users spend on TikTok, the more positively they view China's human rights record and its desirability as a travel destination. Do you have any comments on the study, and is it fair to say that TikTok is a vehicle for CCP propaganda, cognitive combat, psychological warfare, or do you need more evidence to confirm that?"

CHOHARIS: Mark, do you want to go, and then I'll go, or...?

FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

MONTGOMERY: Yeah, I'll just take it. So the first is you're absolutely right. In fact, NCRI has done several, their initial reporting and follow-on reporting, although I don't know that they have access to much new data because of TikTok's actions. But it's absolutely right, there is a conclusion in the reporting, I didn't discuss it, but liking China, our favorable view of China, is a natural outcome of this algorithmic, now I call it a rheostat, but this algorithmic adjustment done by China, and it's differentiated from how other people perceive China who are not perceiving TikTok. So definitely that is yet one more layer to the argument.

Do I think China practices cognitive warfare against the United States and its allies and partners? 100%. I refer you to a FDD policy memo or monograph called Cognitive Combat, it has four chapters. The chapter on China, written by Craig Singleton, our China program director, brilliantly lays out China's cognitive warfare plan, and this is part and parcel of it. I would even say it's just an element of it. China will fight hard to not divest from TikTok, I believe, and they are working it. But he lays out pretty clearly that there are many other elements of this cognitive warfare campaign being fought by the Chinese against us.

One other thing I want to tell you is the last time... Just in case we weren't sure they would manipulate the system, in preparation for the first circuit court process ruling, TikTok provided false data to its 170 million users to get them to push back against the argument. Here we are accusing them of using an application to manipulate US public opinion, and in response to that, say, "No, we're not. We're going to use the application to manipulate US public opinion to get that argument across." I have to tell you, George Orwell would give them a hat tip for their ability to believe that they continue to manipulate the US system, and, as I think Churchill, no, I guess it was either Marx or Engels said, "the capitalist will give you the rope to hang them with." We're really that country, because they actually used the application to push back against the argument that the application is being used to manipulate public opinion.

CHOHARIS: Yeah. Just very briefly, we talk pretty extensively about that Rutgers study beginning on page 22 of our brief, and that counters TikTok's insistence in several filings that there is no evidence of manipulation. And it's a jaw-dropping statement, because even in their PI app, the preliminary injunction application before the Supreme Court, they cite very quickly and briefly to remarks of Senator Warner, who on the floor of the Senate said, among other things, mentioned that Rutgers study, where, as Mark summarized in his opening comments, it was devastating in terms of the skewing of information. So it's not the possibility, it's the reality, and for TikTok to maintain otherwise is odd, to say the least.

Secondly, with respect to cognitive warfare, we also go into that subject and some of the citations that Mark mentioned and others on page 26 of the brief, and this is a key point in terms of First Amendment law that some of you may cover. TikTok wants to frame this as speech, as talking, as speech, and the way that's far less intrusive for the federal government to have responded, and the Congress to respond, is what we do maybe with FARA, the Foreign Agent Registration Act, which is a disclosure saying that this content may have been manipulated. It's not about speech, it's not about just counter speech to combat false speech and disinformation, it's about a sophisticated... And they're still developing this capacity, and I've got to tell you, I got contacted by people and scholars from around the world in different countries, Western countries, saying, "You folks need to go do more on this, because it is far more intrusive and far more extensive than you can imagine."

FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

But it's about the Chinese government using this kind of data, plus AI, plus various instruments of information dispersal, including social media, but not exclusively, to try to influence how people think cognitively, not rationally alone, but often how they feel, what their gut reaction is. And we've not encountered that, and I think some of our First Amendment law hasn't really encountered this kind of sophisticated mass manipulation of public opinion and feeling. We actually have a squib, it's a throwaway line in our brief, but we say, "Look, to the extent that there might be some concern here about past precedent," and I don't think there should be, but to the extent there should be, "we need a 21st century jurisprudence to confront 21st century technology and 21st century threats," and that's what we're talking about here.

ROBBINS: Okay. A follow-on question from Xiaoshan Xue, "Do you allow your children to use TikTok? What are the biggest risks and threats that TikTok poses to American users, especially American youth?"

MONTGOMERY: So I'll go first. I have two kids just in college, and now I've discouraged them from using it. Neither one claims to use it, I don't look at their apps when they're not watching their phone, which is never, so I'm never going to get that chance anyway. But I'll just say I was able to, I think, educate my children on a completely separate issue, which is the brain mush effect of applications like TikTok. And by then, I would throw in the US-owned version, Instagram and others, into the same category.

But that's an issue of what's interesting is the TikTok available in China and the TikTok available in the United States are very different TikToks, and there is very little academic value to the TikTok available to our children, and there's a disproportionate amount of time spent on that for a product that has very little academic value. So I don't value TikTok, I recommend to my friends who have teenage and young adult children to discourage TikTok. But that's a family problem, not a national security problem. The national security problem is the manipulation of the newsfeed that our youths are seeing in a way that is done by a foreign-owned entity to the advantage of the country that owns the foreign-owned entity.

CHOHARIS: Briefly, my kids are too young to use any social media, so I don't. But this is maybe an opportunity to raise in the act something that I think has gotten remarkably little press, or any press, and I've been following it pretty carefully, which is Section 2B, which allows data users, those people who do use TikTok, and if any of you use TikTok, you can do this experiment, we can do it together, I can help you, it allows data users to contact the company and get the copy of all of the data they have on users.

And I think if people, including teenagers, understood the vast amount of information that TikTok and ByteDance... And they claim that it's not held or controlled in the PRC, and our brief goes into great detail about how that is simply not correct, and that we have reports from whistleblowers about how people who look at gay-oriented sites, that information has been shared in chat groups called Lark, and that thousands of ByteDance employees have access to those chat groups, that information about people's credit cards or driver's licenses and other things are all shared and stored on servers available to ByteDance, I think people would be shocked. And I urge you to do this experiment if you are on TikTok, or to find some people who are, and again, I'll do it with you. I've not done it because I'm not a TikTok user, nor is anyone in my family. But I think people would be really shocked at the degree to which the intrusion and the data collection has taken place that is stored outside the United States.

ROBBINS: Got it. I see we have a question from Didi Tang of AP. Didi, we're going to unmute you. Go ahead and ask your question, please.



FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

DIDI TANG: Hello, hey. Thank you so much for doing this, really appreciate it. So my question is regarding the possible role or the influence from President-elect Donald Trump. So he has said something that he will do something, what he can do, to prevent TikTok from being forced to sell, and then also, he has met with the TikTok CEO in Florida, I think it was last month. My question is, what kind of influence do you see that Trump may have on the Supreme Court that may affect the outcome of the ruling January 19th? How much power does he have over the court? So that's my question. How would that be affecting the outcome? Thank you.

CHOHARIS: Yeah, maybe I should take that. I think there are a couple of levels to your question, and maybe I'll just try to hit some of them briefly, and we can go into detail later if you'd like.

Briefly, a lot of people really expressed disdain in some of the articles I read about the filing. I went back over it again last night, and I think it's not an irrational filing that President-elect Trump made, obviously some of the rhetorical flourishes at the beginning. But this court has been, I think, sympathetic to some of President Trump's former, during his first term, his arguments. Do I think he's going to get five justices to stay this? I don't know, Past January 19th, I don't know, if I had to, and I hate to guess, I think his best chances are Alito, Gorsuch, maybe Kavanaugh, though I'm not sure he gets them, I don't think he gets Barrett. So then it's the chief, Chief Justice Roberts, and I just don't know. But there's a possibility. This is a very challenging case, it's a novel case in some ways, and so there's a possibility.

Do I think President Trump would ultimately prevail? No, I do not. I think President Trump in his first administration undertook, as did the Biden administration, sincere extended efforts to come up with a decent deal, a national security agreement, an NSA, to try to resolve outstanding issues. I think the problem with any kind of negotiations, and I do a lot of international negotiations as part of my practice, you can't negotiate if the other side is adamant about not negotiating, and TikTok maintains this is a ban, this is a ban. It is not a ban, the act is clearly not a ban, the only entity that is making it a ban right now is ByteDance. ByteDance has the option. Just think about that for a minute. Why is ByteDance the decision-maker? Because it controls TikTok. Wait, what about TikTok shareholders? What about TikTok's board of directors? Why aren't they making the decision to divest? Because they're not in control.

And so, that alone tells you the reality of who's in control and who's going to influence decision-making. And ByteDance simply is not going to allow some of the things that the United States requires in terms of its national security in which the Congress has already identified. So could a future president, whether it's President Trump or somebody else, come up with a terrible deal? Of course. But I don't think a future President Trump would do that, and I don't think others in his administration would want to see him do that. So I think in reality, if you don't have a negotiating partner who's really interested in a good faith negotiations, and I think the government in its brief did an excellent job at describing, at the end of the day, it could not verify some of the proposals that were bottom line proposals after years of negotiating that TikTok and especially ByteDance took, it could not verify them. It had to simply take their word for it. And this is after, as Mark pointed out, they've already been shown to have not agreed to prior restraints and prior voluntary restraints. So why would they agree to this? And we also mentioned the Child Privacy Act violations, including a recent case filed while the case was pending before the DC Circuit, which is just an allegation. But nonetheless, another case filed against ByteDance and TikTok for violation of that act. So I don't see any president, including future President Trump, being able to resolve this in a way that's satisfactory for US National Security because I don't think ByteDance will agree to it. Period.

ROBBINS: Okay. Here's a question from Kat Tenbarge of NBC News.



FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring *RADM (Ret.) Mark Montgomery and Peter Choharis*

Moderated by *Elizabeth Robbins*

"Is there any evidence that TikTok has intentionally favored or disfavored any narratives regarding US politics or ideological issues?"

MONTGOMERY: So I'll go first and say they are not. China does do cyber enabled information operations against the election system, and we've studied that pretty extensively at FDD. We have three different monographs on that that you can look at on election affairs. I would say ironically, China, I mean, just real quick background, Iran worked pretty hard this election cycle to help Harris. Russia worked very hard to try to help Trump. Neither one of them was effective. The Russian one was much larger. China, on the other hand, we saw working both sides of the aisle because all they cared about was that American citizens lose confidence in their democratic processes. But I want to set that aside and say that was not done through TikTok. TikTok has been used to favor and disfavor narratives about US politics to the way I said, very specifically, on Russia-Ukraine.

It has tried hard to support the position of Russia, which isn't surprising. China is actively engaged in the war against Ukraine. We've said before here at FDD, Ukraine is fighting Russia, North Korea, Iran, and China. And while China may only be providing logistics support, weapons systems, parts, and economic backstopping of the Russian economy, there's still a critical element of the Russian war machine. So it's not surprising that TikTok would be biased towards Russia and against Ukraine. The other obvious area is in Israel-Hamas, where TikTok, even in the immediate aftermath of October 7th, the narrative on TikTok was, "Stand with Hamas, not stand with Israel," by a ratio of about six to one.

Now, that was a low ratio for TikTok, and my guess is in the immediate aftermath of October 7th, that was a hard sell. So the answer is they do try to do that on ideological issues. But in terms of US politics, that study hasn't been done. And I'm not sure the degree to which a research institute like NCRI is going to be able to do that in the reasonable future because of the lack of transparency from TikTok now.

CHOHARIS: Well, let me just quote though, Mark, from our brief page 21, and this is from the Office of the Director of National Intelligence Annual Threat Assessment and top of page 21 in our brief. It's stated point-blank, "China is demonstrating a higher degree of sophistication in its influence activity, including experimenting with generative AI. TikTok accounts run by a PRC propaganda arm, reportedly targeted candidates from both political parties during the US midterm election cycle in 2022."

Now, if Mark's right, that we don't have that data for 2024 yet, and we may not be able to get it, but it's clear that TikTok has been an arm of PRC propaganda in order to try to influence US elections during the midterm and targeting candidates on both sides who were seen as hostile to China's interests. I think that's pretty powerful and pretty stunning in terms of, and it neuters TikTok's disclaimers to the contrary. And this is a public statement, remember, both houses of Congress, both chambers, and the administration, had access to a lot more confidential information that we don't have access to.

ROBBINS: Here's a question from Lora Kolodny of CNBC who writes, "Sorry to be so high level here, but why is divestment the remedy for these problems? After all, we see US-based users on platforms like YouTube, Facebook, Twitter, X, et cetera, subject to manipulation by foreign influence as well."

CHOHARIS: Mark, you want me to go or do you want to go?

FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

MONTGOMERY: Peter, you go first.

CHOHARIS: Because two things. First, and this gets to the heart of the matter, and what the government says, I think, very well, both in its opening brief and in its reply brief. This isn't about speech. It's not about content. It's about control and how the Chinese Communist Party specifically, and the Chinese government more generally, pursue strategic aims using many internet firms and especially social media companies specifically including TikTok.

And we go through a lot of detail in our brief about how that happens and how they're able to exercise that control. So it's not just about throwing up content and saying there's manipulation here. That's very, very different from the kind of manipulation of throwing up by ratio of 10 to 1, 40 to 1 content. And TikTok itself brags that 50% of its users rely primarily on TikTok for "news," right? So 50% of 170 million people are relying upon this medium that is, as Mark continues to hammer, rightfully so, is manipulating what they see in a way that YouTube doesn't do, Facebook doesn't do, Instagram doesn't do, and no other social media app that I'm aware of comes close to doing. And so that's I think the issue here is that it's not, "Oh, other apps do basically the same thing." That's nonsense. It's not even close in terms of what TikTok does and who is controlling them: a foreign adversary. And those I think are two key distinctions. Mark.

MONTGOMERY: No, I agree. And I don't know how we could get around... From my perspective, I don't think that we can get around, I'm sorry, I lost my train-

CHOHARIS: Divestiture. Yeah.

MONTGOMERY: A divestiture. Because look, we would like divestiture, but I believe that we see very clearly that ByteDance is the decision maker here. And I think Peter laid that out pretty clearly. So every time I come up against this, that the problem has to be proven really, right? This has to all play out and then ByteDance is not allowed it to be sold. That would be the final proof that TikTok was completely... They were willing to sacrifice a hundred plus billion dollars worth of value rather than give up state media control of that. So from my perspective, we're going to have to see what happens after the divestiture is ordered, when the court says the divestiture is the way forward. We'll see what ByteDance does. But I have a suspicion that, and that's why President Trump is worried, is because there may be no opportunity for him to orchestrate the art of the deal if the time expires and it goes into a ban.

ROBBINS: Okay, here's a question from Halleluya Hadero of the AP.

"A lot of the government's claims and potential evidence about algorithmic manipulation has been redacted in court documents. If the government wants Americans to decide with them on this issue, do you believe it should disclose additional evidence? So far, the closest they've come to a smoking gun is an allegation they made at the appeals court that TikTok has taken down content outside of China at the request of the PRC, but they have given no additional details on what videos were taken down, where they were taken down, or why they were taken down."

FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

MONTGOMERY: I'll start with one part and turn it over to Peter. I just want to take a small part of this and say I think I've shown pretty clearly that there is, and it is part of the government's claim, the algorithmic manipulation being done, being documented by the NCRI at Rutgers. These numbers are pretty clear that I have not seen TikTok challenge these numbers in an effective way. And I would just say gently that their decision to make it very hard to replicate Rutgers research by blocking access is a concession that Rutgers research is accurate.

I'm sorry, that lack of transparency, you cannot simultaneously argue that the facts are wrong and then limit transparency to investigate the facts. So I recognize that the government's classified claims are not easily visible, and the press doesn't appreciate that. I don't appreciate that. But I also recognize there's significant unclassified evidence out there about the algorithmic manipulation, and I'm sure what the government shows in a classified network only enhances what is available in the unclassified realm.

CHOHARIS: Yeah, and that's an excellent question. And that's one of the big reasons why we tackled this brief in so little time, both before the DC Circuit and the Supreme Court. One was to really tackle the notion of control that I think TikTok has not been forthcoming with, to put it gently. The other was to talk about data collection and what they do with that data. And the third was the national security implications. And by saying there is evidence of manipulation, and it's not just a manipulation of what you're showed, but how you're shown it, right? So it's not just the subject matter that the Rutgers study was able to document with respect to numbers, actual numbers, in terms of likelihood that a neutral platform like an Instagram, which is the same, by the way, methodology that TikTok itself used to rebut allegations or try to rebut allegations about being pro-Hamas and anti-Israel.

Rutgers used their same methodology in its study, but with respect to classified information, this gets to the nub, and we put this in our brief, which is, which institutions in our government, are best suited to address these kinds of information and national security threats, and the classified information upon which those assessments are made? Is that the courts and filings before, by various parties, some of which may have to be classified? Or is it our national security agencies, coupled with Congress, including bipartisan support, overwhelming support, and including both the House controlled at the time by the Republicans, and the Senate controlled at the time by the Democrats in two different administrations. One Republican, one a Democrat. Remember, President Trump in his first term, tried to do this by executive order, and that was struck down because he didn't have the statutory authority, and he didn't have the authority implicit under the Constitution the court held.

So then they went back and they redid this statute. So I think from an institutional or constitutional big picture perspective, the answer from my mind is, the national security apparatus, which I don't distrust, I don't accept everything blindly. I'm not a fool. I'm old enough, and I've lived in Washington, and I'm a lawyer, enough not to accept anything that anybody says at face value. But I think here there's enough checks and balances within the legislative event and executive branches on multiple levels over an extended period of time, we're talking years, on a bipartisan effort that I'm not as worried about this, especially when we did point out in our brief a lot of public information that maybe hasn't gotten a lot of publicity, but is nonetheless public, that reinforces the government's position at every turn. And that's the best I can do.

ROBBINS: Here's another question from Xiaoshan Xue.

"Do you personally support US to completely ban or divest TikTok? What do you think of Donald Trump's request to delay the sale date so the president-elect can pursue 'a political resolution?' Will this hurt US national security?"

FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

MONTGOMERY: Look, I'm fine with a, I've made that clear. You don't have to like the TikTok product as something for your children to watch without a political narrative being spun for them. So it's all right. If TikTok is not owned by a country of concern, then I think it's acceptable. And that would make it on par with many other social media applications in the United States that I can equally not like but recognize need to exist. Look, President Trump, I think Peter correctly put it out there. President Trump in a previous presidency argued through an executive order for the ban on TikTok.

What I think we're hearing right now is businessman Trump thinking that he's in a better position and he's better equipped than President Biden to orchestrate a deal for the sale of TikTok. Unfortunately, the time will have run out for that. And if he wanted to do that, he needed to start doing it several months ago, maybe in November when he was first elected, in order to orchestrate this kind of deal, because I think it is highly likely that there will be a ruling within nine days of January 10th in other words prior to or before January 19th, that allows the divestiture to shift into a ban or requires the divestiture opportunity to shift into a ban.

At no point did Mike Gallagher or the other sponsors of this bill argue for a ban. They argued for a divestiture. The reason we're at this point is TikTok's failure to take any reasonable action to prepare for a sale. And so I don't believe that we should delay, this issue should be delayed so that President Trump can negotiate a good deal. I think we're at that point where either they go into an agreement to sell the company or the application becomes banned on US systems.

CHOHARIS: Yeah. Let me just add two quick points. I think it's conceivable that the court would stay it, but I don't think it's likely. It would be disappointing if they did, because I don't think there's... consistent with current legal authority to do something like that under the act. But let me get to the divestiture issue. And TikTok is flat wrong when they say, "This act bans TikTok." No. ByteDance is banning TikTok because ByteDance is refusing to even explore a sale. And people often, you see in the press, respectfully say, "Well, but the value is the algorithm." I strongly disagree with that.

I'm not an investment banker, and certainly not an investment banker that specializes in social media, but don't tell me 170 million viewers plus the platform, plus AI, is remarkably good. You could build something pretty darn passable pretty darn quickly. There is enormous value in that company. And it can be sold even with ByteDance retaining exclusively its algorithm.

It's not doing so for reasons that have nothing to do with the First Amendment, have nothing to do... and I mean that... and have nothing to do with value added for shareholders, which is how most, in fact virtually all American companies work, but not social media companies or internet companies in China. And we go through, by the way, some of the laws passed in China over the last 20 years that require, require Chinese-controlled companies, including TikTok, to do certain things. And that's why the Chinese don't want to sell. It's not the First Amendment.

ROBBINS: All right. Before I ask for closing comments from our speakers, I'll ask a final question. Peter, how do you expect that this case will play out in coming weeks and months? There are two hours of oral arguments on Friday, and then what do you expect to see, and on what timeline?

CHOHARIS: Well, this court has shown itself, after last term, that it is quite willing to depart from established precedent and order. I think obviously the Dobbs case with Roe V. Wade, the case – Lupine, I can't remember, Lucas, something like that – involving the Administrative Procedure Act and Chevron. And then the presidential immunity case, which most people, including I, were blindsided by. I did not expect that ruling, especially coming off the heels of the District of Columbia.

FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

So I don't know. I really hesitate to answer. If I really believed, had strong opinions about what the court is going to rule, I would go short on TikTok and long on Instagram, but I haven't put any money down because I really don't know. But my suspicion is that the court will rule within the next nine days, though it may not, as we discussed. And that I think it's an aversion to treading too much on an area that really has been traditionally in the realm of the executive and legislative branches, which is national security.

And I say that because in an area that we haven't talked about, Beth, which is sovereign immunity and the Foreign Sovereign Immunities Act, this court has actually taken some of those cases, unlike a major national security case and a challenge under the First Amendment, where this really is a first for these nine justices. You see an aversion to getting US courts involved in cases involving foreign policy generally, and I think the case is even stronger for US courts not getting involved or not interrupting on national security matters. That's my hope, that's my expectation, but who knows?

ROBBINS: Okay. I'm going to ask each of our panelists to offer a brief wrap-up. And before we do that, thanks to Peter, Mark, and the questions from our reporters on the call. Thanks also to FDD's Joe Dougherty and Ellie Bufkin for their support. Feel free to shoot us an email at press@FDD.org at any time. We'll be glad to connect you with our experts and follow up with additional conversations. We'll start with Peter and then we'll have Mark bring us home.

CHOHARIS: Well, thank you all. And I'm quite serious. You can contact me through FDD. Our brief I believe is available or was attached to this invitation. But I do encourage you to try to get some TikTok users and request from TikTok information about their data. I think it would make a wonderful follow-up story that so far hasn't gotten any attention that I'm aware of. But I also think that at play here is fundamentally whether the United States can protect itself as judged by both the House and the Senate and the President of the United States against a foreign adversary as defined in the act that has been doing all sorts of things. We talked about in our brief. Its campaign against the Uyghurs. Its campaign against the democracy movement in Hong Kong. Its efforts to ignore freedom of navigation in the South China Seas and its extended hacking, which we didn't put in the brief.

And Mark, I blame you for not making me do that. But this is a foreign adversary in all senses of the word. And I would just caution us as a country. And this case exposes we cannot normalize abnormal conduct. Mark talked about the Typhoon series that they've unleashed, and spy balloons, and industrial espionage. And we cannot normalize and say that this behavior is simply acceptable. And by the way, we know that you can use this technology. You are using these technologies to develop cognitive warfare, to attack the United States, to pursue your strategic goals against the United States and the West. And we can do nothing about it because of our First Amendment.

We concluded our brief by quoting a famous passage, that the Constitution and the Bill of Rights is not a suicide pact. And I think that's true. They're not. And we have the ability constitutionally to take reasonable measures to protect ourselves and our citizens from the kind of threats, not just hypothetical or theoretical threats that TikTok maintains, but actual current threats including using TikTok to interfere in midterm elections that the government and that hopefully our brief have highlighted. And I would just leave you with that. And thank you again.

FDD Media Call: Previewing TikTok Case Oral Arguments Before the Supreme Court

January 8, 2025

Featuring RADM (Ret.) Mark Montgomery and Peter Choharis

Moderated by Elizabeth Robbins

MONTGOMERY: Thanks, Peter. And I associate myself with what Peter said. And I'm glad he corrected me on the elections. I was trying to make the point that we have not seen that Chinese has used TikTok to push for one party over the other, but in fact they work both sides of the coin to most benefit the Chinese outcome. If there's one area we forgot to touch on here and I want to bring it back to is, on page three of our brief we lay out a really good, detailed accounting of Chinese laws passed since 2015: The National Security Law in 2015. The National Intelligence Law in 2017 that obligates citizens and corporations to cooperate with the Chinese intelligence operations. The 2017 National Cybersecurity Law compels companies to make their data and communications available. The 2021 Data Security Law, which expanded it to include data processed overseas, which is what TikTok is. And finally the 2023 Counter-Espionage Law, which strengthened the state's ability to run oversight on technological developments. These are a series of six laws that are almost unfathomable in the United States, passed that effectively, the cumulative effect of these laws is to require companies and their innovations, so that's ByteDance and TikTok, to serve the Chinese state much more so than their own customers.

So when somebody asks, why are we concerned about a country of concern like China? And you have to be a special country to get on our list of countries of concern, like Russia, China, North Korea, Iran, Venezuela, I think South Sudan. Sudan, not South Sudan. You got to be a special country to get on this list. If you're that kind of country and you've passed this spate of laws, why would we allow you to operate a social media platform that delivers news to 170 million Americans?

It's completely inappropriate. And I think Peter makes a great argument in that paragraph. That's pages three, four, and five I would read. And finally I would have you read all of his, The Constitution Is Not a Suicide Pact section on page 32. From my perspective, if you look at what China is able to do with TikTok and what we're allowed to do to protect ourselves, that's those two areas, you'll really understand our argument. Peter, thank you very much for working this and writing the amicus. I know Craig and I both felt it really went well. And Beth, thanks a lot for hosting it today.

ROBBINS: Thanks. I got it. Data collection and manipulation by foreign adversaries are not protected First Amendment rights. I hear you. A link to FDD's amicus brief was included in the invite to this call and will be available on the webpage for this call on FDD.org. We'll end it there. Thanks again to our panelists. And this concludes the call.