

## Meet The Attys Fighting Efforts To Ban TikTok

By **Allison Grande**

*Law360 (May 17, 2024, 11:07 PM EDT)* -- Facing a potential federal ban, TikTok and creators on the platform have tapped a bevy of BigLaw heavyweights, including attorneys who have successfully led challenges to prior moves to shut down the popular social media platform and limit children's online activities, as well as a pair of litigators who've argued dozens of cases before the U.S. Supreme Court.

Following the enactment last month of federal legislation that requires TikTok to cut ties with its Chinese parent company ByteDance Inc. within 270 days or face a nationwide ban, the companies petitioned the D.C. Circuit on May 7 to review the constitutionality of the law, which they've argued takes the "unprecedented" step "of expressly singling out and banning TikTok" and unconstitutionally barring its 170 million U.S. users "from participating in a unique online community with more than 1 billion people worldwide."

Eight TikTok creators followed up that move by filing their own petition on Tuesday urging the D.C. Circuit to strike down the law, known as the Protecting Americans from Foreign Adversary Controlled Applications Act, on the grounds that it undermines the First Amendment by blocking these users from the "unique and irreplaceable means to express themselves and form community" on the platform.

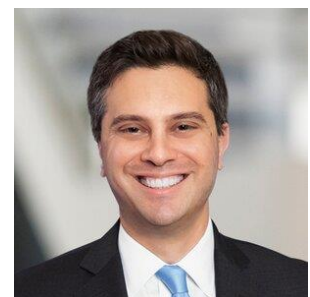
In pressing these challenges, TikTok and its users have retained attorneys from Covington & Burling LLP, Mayer Brown LLP, Davis Wright Tremaine LLP and O'Melveny & Myers LLP who are no strangers to showdowns over government efforts at both the federal and state levels to not only regulate TikTok but also more broadly limit access to certain online content and to obtain customer data held by service providers such as Microsoft Corp.

The petitioners have also signaled that they're primed for a fight that may ultimately need to be resolved by the Supreme Court, with the choices for counsel including two seasoned appellate litigators who have made dozens of appearances before the high court, including in disputes that have centered on pivotal data privacy issues.

Here, Law360 takes a look at the attorneys leading the latest round of challenges to the potential nationwide TikTok ban.

### For TikTok

**Alexander A. Berengaut**  
Covington



A co-chair of Covington's government litigation practice group, Berengaut over the past several years has successfully handled landmark disputes with the federal government over national security and data access issues on behalf of major tech companies, including Microsoft, Xiaomi Corp. and his current client, TikTok.

Berengaut led the Covington team that represented TikTok and its parent company after then-President Donald Trump issued an executive order in 2020 attempting to ban the TikTok app based on data privacy concerns. Trump's order alleged that TikTok "automatically captures vast swaths of information" from its U.S. users and shares that data with the Chinese government.

Hours before the ban was set to take effect, Covington won an injunction from a D.C. federal judge in September 2020 halting TikTok's removal from U.S. app stores, and again delivered the winning argument that led to a December 2020 ruling putting on hold the remaining proposed restrictions that would have effectively disabled the app. In June 2021, President Joe Biden revoked the order.

"It was a challenge, because the government gets a lot of deference when it acts in the national security realm," Berengaut said in September 2021, when he was named a Law360 Cybersecurity & Privacy MVP. "It was a particularly rewarding success."

Berengaut and his team have also helped TikTok fend off challenges at the state level, most recently securing an order temporarily halting a Montana law that would have banned the social media app in the state. That ruling is currently on appeal to the Ninth Circuit.

Additionally, in November, Berengaut and his colleagues obtained the dismissal of a lawsuit brought by the Indiana attorney general alleging TikTok misled users about the Chinese government's access to their personal data and the appropriateness of the content available to children.

In addition to his work for TikTok, Berengaut squared up against the federal government after the U.S. Department of Defense in January 2021 designated Chinese electronics company Xiaomi as a "communist Chinese military company," which barred Americans from transacting in its securities.

Covington argued that the designation violated the Administrative Procedure Act because the Trump administration provided no evidence of the electronics maker's alleged ties to the Chinese military, and the company was never given an opportunity to challenge the designation before it suddenly landed on the blacklist.

A federal judge agreed with this argument in March 2021, issuing a preliminary injunction blocking the designation, leading the company's stock to once again surge and market capitalization losses being restored. That May, the U.S. Department of Justice vacated the designation, ending the case.

In a January 2022 interview for a profile on his firm's selection as a Law360 Cybersecurity & Privacy Practice Group of the Year, Berengaut said the decisions in the TikTok and Xiaomi disputes "are going to be important as the government thinks about how to regulate data privacy issues using these particular laws going forward, as each decision has put limits on what the government's powers are, and ultimately the government is bound by the APA to act in a reasonable way when acting through agencies."

Berengaut, a partner in the firm's D.C. office, also helped spearhead the firm's work for Microsoft in its long-running fight with the federal government over the scope of prosecutors' power to access

Microsoft customers' electronic data. That includes multiple challenges to the government's ability to force service providers to keep customers in the dark about law enforcement demands to access user information, and a fight that went to the Supreme Court over whether the federal government can use warrants to force Microsoft to turn over data stored overseas. The high court dropped that case after Congress enacted legislation in 2018 that set standards for such international data grabs.

Also part of the Covington team representing TikTok in its newly filed challenge to the looming federal ban are Megan A. Crowley, a fellow co-chair of Covington's government litigation group; seasoned appellate litigator and partner David M. Zions; former federal prosecutor and chair of the firm's global litigation practice John E. Hall; and special counsel Anders Linderot.

### **Andrew J. Pincus**

Mayer Brown

TikTok also has in its corner Pincus, a Mayer Brown partner who has argued 30 cases at the Supreme Court and dozens in federal and state courts of appeals.



Pincus successfully led several cases protecting the enforceability of consumer and employment arbitration agreements, including the Supreme Court's landmark 2011 decision in *AT&T Mobility v. Concepcion*, which held that the Federal Arbitration Act preempts state laws that invalidate class action arbitration waivers.

Pincus also took the lead in arguing before the Supreme Court one of the most notable privacy litigation disputes from the past decade: *Spokeo v. Robins*. In that case, the high court in May 2016 ruled that plaintiffs must allege concrete harm to prop up statutory privacy claims.

Pincus wrote in a blog post at the time that the ruling was about to "make life much more difficult for plaintiffs' lawyers who want to bring statutory damages class actions." Four years later, he told Law360 that the decision has made "a dramatic difference" in whether statutory privacy cases on behalf of massive consumer classes can be brought and how the class certification process plays out.

Pincus also played a part in the Microsoft gag order challenges that Berengaut and Covington has helped handle for Microsoft, representing the U.S. Chamber of Commerce in its filing of a 2021 amicus **brief** backing the tech giant's bid to convince the Second Circuit to strike down a "secrecy order" barring it from telling a large corporate client that the U.S. government had issued a warrant for the client's data.

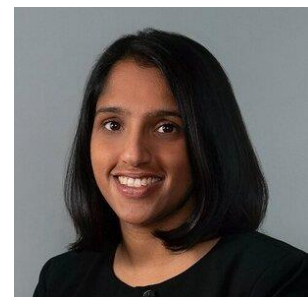
Avi M. Kupfer, a litigation and dispute resolution partner in Mayer Brown's Chicago office and member of the firm's Supreme Court and appellate practice, is also part of TikTok's legal team, according to court filings.

### **For the Creators**

**Ambika Kumar**

Davis Wright

A co-chair of the media law practice at Davis Wright Tremaine, Kumar and several of her colleagues are again representing TikTok users in their bid to keep the popular social media app from being excluded from the U.S. market.



Kumar, like TikTok's counsel at Covington, recently led another group of TikTok users in successfully blocking the Montana ban that had been set to take effect on Jan. 1, 2024. The state has appealed the ruling that its statute oversteps state power and could infringe on the First Amendment, and Kumar continues to represent to the TikTok users before the Ninth Circuit.

In a reply brief filed in the appellate court last month, the TikTok users echoed the company's assertion that Montana wasn't allowed to issue such a ban to address national security concerns or prevent the publication "of allegedly objectionable content." If the state truly wanted to protect consumers, the users argued, it could "achieve that goal without torching free expression, such as by enforcing or expanding its recently passed data privacy law."

In lodging the newest petition on behalf of the content creators this week, Kumar in a statement provided to Law360 called the potential federal ban "a pernicious attack on free speech that is contrary to the nation's founding principles," and said her firm's clients hoped "to vindicate not only their First Amendment rights, but the rights of the other approximately 170 million Americans who also use TikTok."

Kumar has also been involved in other recent high-profile efforts to regulate social media use, especially for users who are under 18. This work includes advising NetChoice in the tech industry group's bid to block a new California law that would require social media platforms to bolster their privacy protections for children.

A California district court in September granted NetChoice's preliminary injunction request, finding that the trade group had shown it was "likely to succeed" with its First Amendment challenge to the measure, which is known as the California Age-Appropriate Design Code Act and requires companies that provide online services or products "likely to be accessed by children" to adhere to heightened privacy and data protection standards. That state's attorney general has appealed the ruling to the Ninth Circuit, which has set oral arguments for July 17.

Kumar is also part of the team representing the Foundation for Individual Rights and Expression in a similar First Amendment dispute over a new social media age verification law in Utah, which requires that minors get permission from parents or guardians to use social media platforms.

In a January interview with Law360, Kumar said that while the batch of state laws aimed at protecting young people from the alleged dangers of social media are being billed as privacy laws, they're "treading on the First Amendment in a way that traditional privacy laws do not" by seeking to regulate "what content children can see online and how they interact with that content."

"There's a difference between regulating privacy and regulating conduct," Kumar said at the time. "There are ways to help kids be safe online, and that line has been drawn repeatedly as other forms of media and new technological advancements have come out, with the [U.S.] Supreme Court making it clear that it's not constitutional for the government to decide what content consumers see or don't see."

Additionally, also like Covington's Berengaut, Kumar has "participated in years-long, high-stakes litigation on behalf of Microsoft and other clients, seeking to end Justice Department gag orders that prevent these companies from informing their customers when the government has accessed their private data online," according to her law firm.

Along with Kumar, Davis Wright partners Tim Cunningham, Elizabeth A. McNamara, James R. Sigel and counsel Chelsea T. Kelly and Adam S. Sieff are part of the TikTok creators' legal team in their newly filed challenge. Sigel, who joined the firm earlier this month, is an expert on constitutional, statutory and regulatory issues and has filed well over 100 briefs in jurisdictions around the country, including the Supreme Court, according to the firm.

**Jeffrey L. Fisher**  
O'Melveny

Described by his firm as "one of the nation's leading Supreme Court practitioners and scholars," Fisher is also serving as co-counsel for the TikTok creators, according to their new petition.



Fisher, a special counsel in O'Melveny's Silicon Valley office, has argued four dozen cases before the high court, according to his law firm profile, which also points to a recent study that found Fisher "to have the highest rate of obtaining grants of certiorari of any member of the private bar." These matters have included the government surveillance and digital privacy case *Riley v. California*, in which the Supreme Court in 2014 applied the Fourth Amendment's protections against unreasonable searches to digital information on smartphones for the first time.

Fisher also served as co-counsel for the plaintiffs in the historic marriage equality case *Obergefell v. Hodges*, in which the high court held in 2015 that the 14th Amendment guarantees same-sex couples a right to marry, his law firm noted.

In an email Friday, Fisher added that, as a Supreme Court and appellate lawyer, he's "handled numerous First Amendment cases over the years," including through his work at O'Melveny, in his position as co-director of the Stanford University Law School's Supreme Court Litigation Clinic and dating "all the way back to my first 6.5 years of practice when I was an associate, then partner, at Davis Wright Tremaine in the communication media and information technologies group."

The new cases challenging the potential federal ban are *TikTok Inc. et al. v. Merrick B. Garland*, case number 24-1113, and *Brian Firebaugh et al. v. Merrick B. Garland*, case number 24-1130, both in the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Lauren Berg and Rose Krebs. Editing by Alanna Weissman and Emily Kokoll.