

[NOT YET SCHEDULED FOR ORAL ARGUMENT]**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

TIKTOK INC., et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official
capacity as President of the United
States, et al.,*Defendants-
Appellants.*

No. 20-5302

Civil Action No. 20-cv-02658 (CJN)

**PLAINTIFFS-APPELLEES' OPPOSITION TO EMERGENCY MOTION
TO EXPEDITE BRIEFING SCHEDULE**

Plaintiffs-Appellees TikTok, Inc. and ByteDance Ltd. respectfully oppose the government's Emergency Motion to Expedite Briefing Schedule. The government's Motion does not establish that "time is a critical consideration" to warrant the abbreviated briefing schedule it seeks. *See* D.C. Circuit Handbook of Practice and Internal Procedure § VIII.B (addressing grounds for abbreviated briefing schedules for appeals expedited under 28 U.S.C. § 1657, D.C. Cir. R. 47.2). The government expresses a general interest in having the case proceed quickly but identifies no reason why the entire briefing must be concluded within approximately one month, by November 12, 2020, in this appeal from an order enjoining a prohibition that had an effective date of September 27, which the government initially delayed

promulgating for 43 days, and then further delayed another week. The Court should deny the government's Motion.

On August 6, 2020, President Trump issued an order that invoked the International Emergency Economic Powers Act ("IEEPA") and purported to ban any transactions with TikTok, a mobile software application and online communication forum, as identified by the Department of Commerce. The Department of Commerce waited 43 days—until September 18—before identifying the transactions that would be prohibited ("Prohibitions"). The Commerce Department then further delayed the implementation of the Prohibitions so that they would take effect in two phases: (i) the first Prohibition—the subject of this appeal—prohibits TikTok from being available for download or updates in the United States in mobile application stores, effective as of September 20, 2020 (which the Department of Commerce later changed to September 27, 2020); and (ii) the other Prohibitions prohibit various transactions necessary to maintain and support TikTok's core functionality, such that once implemented, they would force the complete shut-down of the TikTok application in the United States, effective as of November 12, 2020.

On September 18, 2020, the same day the Prohibitions were initially issued, Plaintiffs filed this action to challenge the Prohibitions based on their violation of IEEPA, the Administrative Procedure Act, the First Amendment, Due Process, the

non-delegation doctrine, and the Takings Clause.¹ In a press release issued on September 19, 2020, the Commerce Department announced that it was delaying implementation of the first Prohibition by seven days, from September 20, 2020 to September 27, 2020. Then, on September 21, 2020, the Prohibitions were withdrawn and then were republished on September 22, 2020. The next day, September 23, 2020, Plaintiffs moved for a preliminary injunction of the Prohibitions. The government opposed the motion on September 25, Plaintiffs filed their reply brief on September 26, and the district court heard argument on September 27. The district court issued its opinion and order on the same day the first Prohibition was to go into effect, September 27, 2020.

As Plaintiffs explained to the district court, and as remains true and relevant here, the timeline of the government's actions—the Commerce Department's 43-day delay in issuing the Prohibitions after the President identified the purported national security threat, as well as the additional one-week delay in implementing

¹ As the government notes, Plaintiffs first filed an action challenging the President's August 6 executive order in the U.S. District Court for the Central District of California. In their complaint in that action, Plaintiffs made clear that they would amend their complaint and move for preliminary injunctive relief as soon as the Commerce Department issued the list of prohibited transactions—which is what Plaintiffs did. Given Defendants' decision to withdraw the September 18 prohibitions, there was nothing for Plaintiffs to seek to enjoin until they were reissued on September 22. The following day Plaintiffs filed their preliminary injunction motion. The government argued to the district court that this procedural history suggested that Plaintiffs delayed in seeking relief, and that the district court therefore should not consider Plaintiffs' preliminary injunction motion until after the first Prohibition went into effect, *see* ECF No. 16—an assertion that the district court did not adopt, *see* Sept. 24, 2020 Minute Order.

the first Prohibition, and the further seven-week delay in fully implementing the remaining Prohibitions—demonstrate that there is no urgent concern to justify the government’s precipitous actions. *See* ECF No. 15-1 (“Prelim. Inj. Mem.”) at 26, 37. And there is no plausible reason to insist the Prohibitions be enforced immediately. This is particularly true for the first Prohibition—the only one at issue in this appeal—which was scheduled to go into effect on September 27. That Prohibition effectively prevents new users from joining the TikTok platform in the United States, while permitting existing U.S. users to continue to access the app but denying them updates (including security updates) which are issued approximately 1-2 times per week. The inability to obtain these security updates would increase data security risks, undermining the very reason the Prohibitions were purportedly issued.

On September 27, 2020, the district court granted Plaintiffs’ motion for a preliminary injunction enjoining the first Prohibition from going into effect, and reserving judgment on the other Prohibitions, with further briefing and argument to proceed regarding them. ECF No. 29; ECF No. 30 (“Mem. Opn.”). The district court ruled that Plaintiffs are likely to succeed on the claim that the first Prohibition violates IEEPA by, at a minimum, regulating “personal communication[s]” or the exchange of “information or informational materials,” in violation of the express textual limitations of 50 U.S.C. § 1702(b)(1) and (3). Mem. Opn. at 14; *see id.* at 8-

14. The district court also noted that “Plaintiffs appear to have presented at least serious questions on their other claims” as well, but did not reach them because of its ruling that Plaintiffs demonstrated they will likely succeed on their IEEPA claim. *Id.* at 14 n.3. The district court concluded that the Commerce Prohibitions “will inflict irreparable economic and reputational harm on Plaintiffs” if allowed to go into effect, and that “the government cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required.” *Id.* at 17.

The district court instructed that the other Prohibitions “should appropriately be the subject of separate proceedings, which can be briefed and decided (potentially through cross-motions for summary judgment, and on a full administrative record), prior to those restrictions’ effective date of November 12.” *Id.* at 18. The parties met and conferred and negotiated a joint status report that they submitted to the district court on September 30, 2020. ECF No. 32 (“Joint Status Rep.”).

As detailed in that report, Plaintiffs’ preference was to file cross-motions for summary judgment in time to have the case resolved by the district court prior to November 12, but the government requested that the parties defer summary judgment briefing to resolve the case. Joint Status Rep. at 1. The government proposed, instead, that the parties file briefs on a second preliminary injunction as to the remaining Prohibitions. Plaintiffs acceded to that request and, based on the government’s representation during the negotiations—which did not indicate that it

was considering an appeal of the already-entered preliminary injunction as to the first Prohibition—Plaintiffs did “not oppose entry of a briefing schedule allowing them to file another motion for preliminary injunction as to the remaining prohibitions.” *Id.* at 2. Under the parties’ agreed-upon briefing schedule, which was entered by the district court, Plaintiffs are to file a motion for a preliminary injunction as to the remaining Prohibitions on October 14, 2020; Defendants are to file an opposition to Plaintiffs’ motion for preliminary injunction on October 23, 2020; and Plaintiffs are to file their reply brief on October 30, 2020. The district court has scheduled oral argument on Plaintiffs’ forthcoming preliminary injunction motion for November 4, 2020.

The government’s actions in the district court are plainly at odds with its demand for expedition in this appeal. After the government proposed and secured that schedule to slow down the proceedings on the other Prohibitions, ensuring there would be no final judgment issued in the near future by the district court as to the validity of any of the Prohibitions, the government now asks this Court to *speed up* appellate proceedings on the preliminary injunction that was entered as to the first Prohibition. The government’s delay in filing a notice of appeal on the preliminary injunction of the first Prohibition and its unwillingness to advance expeditiously the proceedings toward final judgment in the district court on the remaining Prohibitions demonstrate that there is no urgency to the government’s appeal, and certainly no

need to conclude briefing of this appeal by November 12—a date that was not imposed for the single Prohibition and injunction at issue in this appeal.

The government’s invocation of the general importance of national security does not support its abbreviated scheduled of approximately one month for the entire briefing, in light of its own delay in proceeding to judgment. Moreover, the district court did not second-guess the government’s assessment of national security as the government contends. Rather, the district court’s opinion turned on its textual analysis on the limitations imposed by IEEPA, and the court explained in its irreparable harm analysis that “the government cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required.” Mem. Opn. at 17. In addition, Plaintiffs demonstrated, *see* Prelim. Inj. Mem. at 26-27, that the Prohibition itself would cause security concerns because it precludes updates, including security updates, to current U.S. users thereby increasing data security risks and undermining the very reason the Prohibitions were purportedly issued.

In order to avoid this Court being called upon to resolve this scheduling dispute, Plaintiffs informed the government that they would agree to an abbreviated briefing schedule under which the government’s opening brief would be due on the date it proposed of **October 16, 2020**, with Plaintiffs’ response brief due on

November 16, 2020, and the government's reply brief due on **November 23, 2020**.

The government rejected Plaintiffs' proposal.

Because the government cannot establish that "time is a critical consideration" to warrant the abbreviated briefing it seeks, as this Court's standards require, *see* D.C. Circuit Handbook of Practice and Internal Procedure § VIII.B, Plaintiffs respectfully request that the Court deny the government's request. If this Court is nonetheless inclined to grant the requested motion, Plaintiffs respectfully request the following alternative schedule:

Government's opening brief:	October 16, 2020
Plaintiffs' response brief:	November 16, 2020
Government's reply brief:	November 23, 2020

This schedule still will allow this Court to consider the appeal on an accelerated timeline.

DATED: October 9, 2020

Respectfully submitted,

/s/ Beth S. Brinkmann

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Plaintiffs-Appellees state as follows:

ByteDance Ltd. (“ByteDance”) is a private company incorporated in the Cayman Islands. ByteDance owns and operates a variety of mobile software applications that enable people around the world to connect with, consume, and create content, including TikTok.

TikTok Inc. (“TikTok Inc.”) is an indirect wholly owned subsidiary of ByteDance that operates TikTok. All of the outstanding shares of capital stock of TikTok Inc. are held by TikTok LLC, a Delaware limited liability company, which in turn is wholly owned by TikTok Ltd., a Cayman entity, which in turn is wholly owned by ByteDance.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this response complies with Fed. R. App. P. 27(d)(2)(A) because it contains 1,738 words, according to the count of Microsoft Word, and complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-pt Times New Roman using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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