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AM LAW LITIGATION DAILY

## Litigators of the Week: Covington and DWT Push Back Against States' Legal Challenges to TikTok

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**A**fter former President Donald Trump's Executive Order banning TikTok nationwide failed to hold up in court, states have been mounting their own legal challenges to the video-sharing platform.

This past week the company and its users scored wins on back-to-back days in two such cases in Indiana and Montana. Late Wednesday, TikTok's lawyers, led by **Megan Crowley** and **Emily Ullman** of **Covington & Burling**, got rulings from a court in Indiana knocking out lawsuits brought by the state's attorney general claiming the company misled users about the amount of content that's inappropriate for children on the platform and the security of users' personal information. A day later, with Covington's **Alex Berengaut** representing TikTok and **Ambika Kumar** of **Davis Wright Tremaine** representing users, a federal judge in Montana issued an injunction finding the state's TikTok ban likely violates the First Amendment.

#### **Litigation Daily: What was at stake for TikTok and its users in these matters?**

**Ambika Kumar:** Thousands of creators in Montana use TikTok to express themselves, find community, and in some instances, make a living. This decision means that they can continue to engage in protected speech. But this case is not just about TikTok and its users. It is one in a growing line of decisions about how the First Amendment applies to the internet. Despite repeated efforts to censor or chill online speech, the judiciary has been a shield.



Courtesy photos

**L-R: Megan Crowley, Emily Ullman, and Alex Berengaut of Covington & Burling, and Ambika Kumar of Davis Wright Tremaine**

We are glad the court recognized the importance of the issues at stake.

**Alex Berengaut:** The stakes in the Montana case were high. First of all, TikTok's own First Amendment rights were at issue, along with those of the creators. In addition, our preliminary injunction motion demonstrated the irreparable economic harms to TikTok if the Montana ban were allowed to enter force. TikTok would lose hundreds of thousands of users in Montana, and it would also suffer other serious business injuries—such as harms to its goodwill and commercial partnerships—not just in Montana but throughout the United States and internationally.

**Emily Ullman:** In Indiana, the company was facing two separate lawsuits brought by the Indiana Attorney General under the state's Deceptive Consumer Sales Act (DCSA). In one case, the state alleged the

company violated the statute by providing app stores with information about the content available on the TikTok platform that led to the platform receiving “12+” or “T for Teen” age ratings. In the other, the state alleged that the company violated the statute by making certain representations regarding its data privacy practices. Both cases were quite significant to TikTok, as the attorney general was seeking injunctive relief requiring the company to change its age rating on the app store to be 17+, change its data privacy disclosures, and pay substantial civil penalties. If the AG had succeeded in these cases, TikTok would have had to modify its nationwide or even global practices to comply with the state’s view of the appropriate disclosures the company should make.

#### **How did these matters come to you and your firms?**

Berengaut: We have been working with TikTok on government-facing litigation matters for several years now, dating back to 2020 when we represented the company in challenging President Trump’s Executive Order banning TikTok nationwide. The courts enjoined that ban and it was later withdrawn by the Biden Administration. Several of the issues from the 2020 litigation were relevant to the Montana case, including our argument in Montana that the ban was preempted because of the federal government’s exclusive control over foreign affairs.

Kumar: Our firm has a long and storied history defending speech in difficult and politically charged cases, including those involving new and emerging technology—from challenging statutes to fending off censorship attempts by politicians. My work in this area began with an amicus brief for the news media in the landmark case *Fair Housing Council of San Fernando Valley v. Roommates.com*, which set the standard for immunity under Section 230 of the Communications Decency Act. Since then, I have litigated online content liability more or less continuously, for clients ranging from short-term rental websites to dating apps. In 2020, we represented TikTok creators challenging President Trump’s ban, and others at the firm helped the WeChat Users Alliance challenge a ban on that service. The lessons

we learned in those cases made us well suited to reprise our 2020 role.

#### **Who is on your teams in these particular cases and how have you divided the work thus far?**

Berengaut: A core group of Covington lawyers handled both the Montana and Indiana cases. Megan Crowley, our partner **John Hall**, and I worked on both the Montana and Indiana cases, and Emily Ullman led on the Indiana app store case. Our colleagues **Bill O’Neil**, **Anders Linderot** and **Marianna Jackson** also helped lead across the three cases, and we had a terrific group of associates, including **Jack Boeglin**, **Kendall Burchard**, **Brenden Cline**, **Chloe Goodwin**, **Noah Resnick**, **Madeline Sanderford**, **Emily Vernon**, **Lindsay Williams** and **Shadman Zaman**. Reflecting the team-based approach we have used across these cases, Megan and Emily divided the oral arguments in Indiana, with Emily arguing the motion about the age ratings and Megan arguing the motion about data privacy. In Montana, Ambika’s oral argument focused on the First Amendment issues and I focused on pre-emption. We also worked closely with our local counsel in both cases: **Rob Cameron** of **Jackson, Murdo & Grant** in Montana and **Daniel Pulliam** of **Faegre Drinker** in Indiana.

Kumar: We had a core team of four attorneys—**Tim Cunningham** in Portland, **Adam Sieff** in Los Angeles, **Chelsea Kelly** in Washington, D.C., and myself—and help from **Sara Fairchild** in Seattle, **Zoe McKinney** in Los Angeles, **Hilary Oran** in New York, **Shontee Pant** in Seattle, and our extraordinary paralegals **Ericka Mitterdorfer** and **Leigha Henson**, both in Seattle. Chelsea worked with our creators, talked them through the litigation process, prepared them for possible testimony, and generally kept us all optimistic. Adam played a key role in framing the legal issues. And Tim was my right hand, providing critical help on all things, as well as much-needed comic relief. And we had excellent on-the-ground help from **Tasha Jones** and **Matthew Hayhurst** of **Boone Karlberg**.

**How many other states’ attorneys generals are pursuing cases similar to Indiana’s? I know each state’s consumer protection regime has its own nuances, but are there themes in these cases challenging the**

## **way TikTok characterizes its content and handles user data that can apply more broadly?**

Megan Crowley: We are currently litigating a nearly identical set of cases filed by the Arkansas Attorney General, and the Utah Attorney General has filed a similar suit as well. These cases are part of a trend in which state AGs are advocating for broad applications of state consumer protection laws to regulate the conduct of out-of-state defendants who operate online. The Indiana decisions will be useful in contesting these claims. For example, the Indiana court's decisions underscore that entities that operate online have due process rights that prohibit state courts from asserting personal jurisdiction over them based on their alleged nationwide conduct. The decisions also highlight that there are ways that companies can interact with the public that don't necessarily fall under the rubric of "consumers."

### **You have a preliminary injunction in the Montana case. What comes next?**

Kumar: The state will decide if it wants to appeal. If it does, we are confident the Ninth Circuit will affirm. If it does not, we look forward to litigating the merits of the case before a court that has shown an understanding of the law and facts.

### **With these rulings in hand, are there any moments from the hearings that led up to them that stand out?**

Berengaut: An interesting moment at the Montana hearing was when the court inquired about the impact of the law on Native American communities, which are not subject to state regulation. We had been focused on this issue as well. To us, this concern illustrates the overbreadth and unfairly burdensome features of the law, which could have restricted Native American communities from accessing TikTok even though the Montana ban would not apply to them.

Kumar: At the beginning of my rebuttal argument, the judge reminded me that the podium can be lowered. One of my friends, who was listening remotely, said that it was his favorite part of the hearing. I'm (just shy of) five feet tall, but I rose to the occasion.

## **What can TikTok and other social media companies take from the outcomes here?**

Kumar: The government cannot close a forum for speech. It does not matter whether there are problems that need solving. Those problems must be solved with precise regulations that do no more damage to the flow of information than needed. More generally, as we see an increasing number of laws aimed at online censorship, we can take heart that courts will apply the First Amendment there just as it has to other media.

Crowley: These decisions make clear that even broadly-worded state consumer protection laws are not boundless, and state AGs' use of them is constrained by statutory text and principles of due process.

Ullman: These lawsuits implicate not one doctrinal issue but many—we combined jurisdictional, common law, statutory, and constitutional arguments to challenge multiple facets of suits that the AG painted on their face as being quite straightforward. As companies face new and different theories of liability, different aspects of these layers of protection will come to the fore.

### **What will you remember most about getting to this point in these cases?**

Kumar: The incredible teamwork that led to this result. I often say DWT has a "no jerks" rule, and based on my experience here, the same is true of Covington. I love what I do. That's rare and in no small part because of my remarkable colleagues.

Berengaut: The process of working together with our client and team to develop the arguments to challenge this unprecedented law, and then to see those arguments reflected in the court's opinion.

Crowley: The satisfaction at seeing the courts in these cases carefully analyze the complex constitutional, statutory, and common law issues in dispute, and ultimately apply the law in an evenhanded and impartial way.