

# Montana's TikTok Ban, an Injunction, and Pending Legal Actions

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On November 30, 2023, a U.S. district judge issued a [preliminary injunction](#) preventing Montana from enforcing a [ban on TikTok's operations](#) in the state. According to [media reporting](#), while a [number of states](#) have some type of proscription of TikTok platform usage, Montana's law (SB 419) represents the first attempted ban of this breadth among U.S. states. This Sidebar (1) briefly describes SB 419, (2) discusses legal challenges to the law, (3) explains the primary bases for the preliminary injunction, and (4) highlights some topics that these legal challenges might raise for Congress.

## SB 419 Attempts to Restrict TikTok's Montana Operations

[Public information](#) about the reasons for Montana's TikTok legislation abounds. [SB 419's](#) preamble states that the law promotes the "health and safety of Montanans" and lists concerns including the People's Republic of China's (PRC's) status as "an adversary," as well as TikTok's status as a "subsidiary of . . . a Chinese corporation" over which "the [PRC] exercises control and oversight," improper procurement and sharing of user data, and promotion of "dangerous content." (Analysis of these claims, as well as the broader [policy issues](#) prompted by the legislation, is beyond the scope of this Sidebar.)

[SB 419](#) would ban TikTok in Montana by (1) prohibiting mobile application ("app") stores from making the TikTok app available to users in Montana; (2) prohibiting TikTok's operation in all places subject to Montana's criminal jurisdiction; and (3) including penalties and enforcement provisions. Absent the preliminary injunction, SB 419 would become effective January 1, 2024, assuming no trigger of a novel clause that could void the law "if TikTok was acquired by or sold to a company that is not incorporated in any other country designated as a foreign adversary in [15 C.F.R. § 7.4](#) at the time TikTok is sold or acquired." The referenced *Code of Federal Regulations* provision implements [Executive Order 13,873](#), *Securing the Information and Communications Technology and Services Supply Chain*, discussed in [this CRS In Focus](#).

To date, no other states have enacted a ban this broad against TikTok or any other social media platform. Instead, [more than half of U.S. states](#) prohibit the use of TikTok on at least some state-issued devices. A

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number of [public postsecondary institutions](#) have followed suit, enacting policies that prevent university Wi-Fi or university-issued devices from being used to access the app. [Utah](#), [Arkansas](#), [Texas](#), and [Louisiana](#) all passed legislation in 2023 restricting children’s access to social media platforms (including TikTok), and similar legislation has [been introduced](#) in other states.

## Court Preliminarily Blocks Ban on Constitutional Grounds

In issuing the preliminary injunction, which prevents SB 419 from taking effect until the court’s final resolution of the dispute on the merits, the district court cited several constitutional concerns with the law. TikTok’s [complaint](#) asserts violations of [several constitutional rights](#) and provisions, including those related to [bills of attainder](#), the [Commerce Clause](#), the [First Amendment](#), and the [Supremacy Clause](#). [Other challengers](#) (a group of TikTok creators and users) raise similar arguments, and the court consolidated the suits. Brief descriptions of these constitutional concepts (ordered as they appear in the TikTok complaint and then the other users’ complaint) and how they might apply in the final determination follow:

- **First Amendment:** The First Amendment protects free speech and association. TikTok’s challenge asserts that SB 419 [unconstitutionally violates its First Amendment rights](#), in part by using a content-based justification effectively to shut down the platform. TikTok claims a right to exercise [editorial judgment](#) on how to transmit speech, while users argue the law limits their rights to speak on the platform. [Similar challenges](#) arose in response to earlier Trump Administration restrictions on TikTok and WeChat.
- **Supremacy Clause (Preemption):** The Supremacy Clause establishes the Constitution and the laws of the United States as the “supreme [l]aw of the [l]and.” The Supreme Court has [understood](#) this clause to mean that federal law preempts conflicting state law, rendering it unenforceable. When state law conflicts with a specific federal law, that is called *conflict preemption*. In certain contexts, federal interests may be so dominant as to [occupy certain fields](#) of law entirely, known as *field preemption*. Based on these principles, there are areas where state legislation is invalid. [TikTok argues](#) that SB 419 is [federally preempted](#) because the regulation of a foreign-owned app to secure U.S. user data interferes with the exclusive federal powers over foreign affairs and national security. Other specific preemption arguments from the users appear below.
- **Commerce Clause:** The Commerce Clause confers upon Congress the power to regulate interstate and foreign commerce and restricts states from impairing such commerce. The “[Dormant](#)” [Commerce Clause doctrine](#) prohibits certain kinds of regulatory discrimination by states against out-of-state economic interests. TikTok alleges that SB 419 [violates the Commerce Clause](#) by unduly burdening interstate and foreign commerce through a ban that is “state-specific [but that] risks disrupting the flow of travel and commerce between States.”
- **Bills of Attainder:** Article I of the Constitution prohibits bills of attainder, which the Supreme Court has interpreted to include laws that impose forms of [punishment without a trial](#). TikTok alleges that SB 419 is an unconstitutional bill of attainder because, in TikTok’s view, the law [targets TikTok alone](#) rather than regulating social media companies generally. Similar challenges by [Huawei](#) and [Kaspersky Lab](#) in recent years to other government actions did not succeed.
- **Fourteenth Amendment:** The Due Process Clause of the [Fourteenth Amendment](#) provides that no state shall “deprive any person of life, Liberty, or property without due

process of law.” TikTok users argue that SB 419 [violates the Fourteenth Amendment](#) by depriving Montanans of their property and liberty interests in using TikTok and that the state did so without providing adequate notice or opportunity for users to respond.

- **The International Emergency Economic Powers Act (IEEPA):** IEEPA gives the President regulatory authority over a variety of economic transactions in the event of a national emergency that constitutes an [unusual and extraordinary threat](#). Executive Orders [13,873](#) and [14,034](#) invoked IEEPA authority in response to concerns about foreign adversaries’ access to American digital data. As discussed in this [Legal Sidebar](#), the executive branch imposed—and then withdrew—IEEPA-based restrictions on TikTok. The users allege that SB 419 [conflicts with the IEEPA and the Executive Orders](#) and is therefore preempted because it undermines the executive branch by imposing a ban that the executive branch rescinded.
- **Section 721 of the Defense Production Act:** Section 721 gives the President and the Committee on Foreign Investment in the United States (CFIUS) authority to review certain [transactions](#) with foreign parties to [determine](#) “the effects of the transaction on the national security of the United States.” The users [argue](#) that SB 419 is preempted because it prevents the President and CFIUS from exercising their authority under Section 721 by preventing them from placing conditions on TikTok’s operation in the United States.

On the basis of these claims, the plaintiffs together sought a preliminary injunction against SB 419. Attorneys for Montana responded that the law represents a valid exercise of Montana’s police power and does not violate any of the claimed constitutional provisions, that federal law does not preempt the ban, and that the ban would have only an indirect and thus permissible effect on interstate commerce. The court found the plaintiffs’ arguments compelling, determined they likely would succeed on the merits, and granted the preliminary injunction. Some aspects of the plaintiffs’ constitutional arguments that the court found persuasive follow:

- **First Amendment:** The court [concluded](#) the ban would not likely survive even a medium level of scrutiny (called *intermediate scrutiny*) with respect to the First Amendment claim. The court based this conclusion in part on its view that Montana did not have a compelling government interest in foreign affairs, an area where states do not have constitutional authority. The court also said the preamble to the law was indicative of an anti-Chinese purpose. Even if Montana did have a compelling interest, the court found that the law is likely not “narrowly tailored,” in part because it would [burden more speech than necessary](#) to meet its interests.
- **Supremacy Clause (Preemption):** The court determined that SB 419 would likely be preempted via [foreign affairs field preemption](#) and at least one instance of conflict preemption. The court did not find persuasive Montana’s argument that the law serves a consumer protection purpose and found its novel avoidance clause (triggered upon sale of the company) indicative of its [true foreign affairs purpose](#). Further, the court found reports of ongoing CFIUS negotiations with TikTok pursuant to the Defense Production Act to represent at least one instance of [conflict preemption](#).
- **Commerce Clause:** The court found that Montana did not provide sufficient evidence of the law’s significant local benefit as contrasted to the attendant burden on interstate commerce. The court also agreed with plaintiffs that the law [facially discriminates](#) against commerce with China, a concept Montana did not contest.

After finding that the plaintiffs established irreparable harm to their business interests, the court [granted](#) the preliminary injunction.

## Relevance for Congress

Several issues raised by SB 419 and the challenges to it mirror potential considerations for Congress in weighing whether any federal app-specific legislation could survive litigation. Congress has considered bills that would limit access to and transmission of information through and to certain apps. Examples, some of which are analyzed in this [Legal Sidebar](#), include:

- the [Government Off TikTok Act](#) (H.R. 5144),
- the [ACES Act of 2023](#) (H.R. 4927),
- the [No TikTok on American Devices Act](#) (H.R. 503/S. 85),
- the [Protecting Personal Data from Foreign Adversaries Act](#) (H.R. 57),
- the [DATA Act](#) (H.R. 1153),
- the [RESTRICT Act](#) (S. 686),
- the [ANTI-SOCIAL CCP Act](#) (H.R. 1081/S. 347), and
- the [SAFETY on Social Media Act of 2023](#) (S. 872).

While federal legislation does not face preemption or “Dormant” Commerce Clause hurdles, some of the [remaining constitutional questions](#) posed by SB 419 may be litigated if bills seeking to regulate TikTok and other social media sites become federal law. The contours of the constitutional analysis could vary, however, given differences in the federal proposals. The final results of the legal challenges to SB 419 may further define the scope of the federal and state remit to legislate in ways that restrict foreign-owned apps or platforms.

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