

Montana's TikTok Ban Goes Before the Ninth Circuit

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On November 30, 2023, a federal district court issued a [preliminary injunction](#) barring enforcement of a law [banning](#) TikTok's Montana operations. Without the district court's preliminary injunction, the Montana law would have become effective January 1, 2024. Montana [appealed](#) the district court's order to the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit). As referenced in a [previous Legal Sidebar](#), a [number of states](#) have enacted some type of restriction of TikTok platform usage, but Montana's law (SB 419) represents the first attempted ban of this breadth among U.S. states per [news reporting](#). Several months after the district court preliminarily enjoined SB 419, Congress passed the [Protecting Americans from Foreign Adversary Controlled Applications Act \(P.L. 118-50\)](#) (PAFACAA), the provisions of which are discussed in [another Legal Sidebar](#), as are TikTok's legal actions challenging that law in the D.C. Circuit. The Ninth Circuit ordered a stay of the appellate proceedings regarding Montana's law pending the outcome of the PAFACAA litigation. Oral argument in the PAFACAA litigation is scheduled for September 16, 2024. This Sidebar (1) briefly describes the preliminary injunction of SB 419, (2) discusses selected legal issues before the Ninth Circuit, and (3) highlights some topics that these legal challenges might raise for Congress.

District Court's Preliminary Injunction of SB 419

Montana's TikTok legislation prompted substantial [public commentary](#). According to the law's preamble, [SB 419](#) supports the "health and safety of Montanans" by preventing TikTok's operation in the state and also expresses concerns about TikTok's parent company being subject to control by the People's Republic of China (PRC), gathering of user information, and "dangerous content." (The broader [policy issues](#) related to the legislation are beyond the scope of this Sidebar.)

TikTok and several of its users filed suit in federal district court following passage of the law. TikTok's [complaint](#) asserted violations of [several constitutional rights](#) and provisions (the prohibition against [bills of attainder](#), the [Commerce Clause](#), the [First Amendment](#), and the [Supremacy Clause](#)). [Other challengers](#), comprising TikTok creators and users, made similar arguments. The court found the plaintiffs' arguments compelling, concluding they likely would succeed on the merits. The court determined that the plaintiffs established irreparable harm to their business interests and [granted](#) the preliminary injunction, which prevented SB 419 from taking effect until the court's final resolution of the case.

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Issues Presented to the Ninth Circuit on Appeal

Attorneys for Montana unsuccessfully argued to the district court that the law represents a valid exercise of Montana's [police power](#), that it 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. Montana then appealed the district court's order granting the preliminary injunction to the Ninth Circuit.

In its [opening brief](#), Montana asserts that SB 419 has a "common sense consumer protection purpose" and that the district court erred in concluding that TikTok and its users would win their [constitutional arguments](#). Montana also argues that the district court erred in its application of the [remaining preliminary injunction factors](#). A selection of Montana's various arguments, ordered as they appear in the brief, follows:

- **Police Powers.** Montana asserts that protecting consumers is an exercise of [police power](#), under which states have significant discretion.
- **Data Access.** Montana asserts that, based on news reports, the U.S. user data that TikTok collects likely is available to the PRC [at will](#), underscoring that the Montana legislature enacted SB 419 to protect Montana consumers' [data privacy](#), not to impact the [editorial control](#) of the platform.
- **Burden Shifting.** Montana asserts that the district court, in concluding that TikTok and its users would prevail on their [constitutional claims](#), erroneously [shifted the evidentiary burden](#) for proving those claims to Montana.

The Ninth Circuit's review of the district court's order granting the preliminary injunction is limited. Montana asks the court of appeals to hold that the district court [abused its discretion](#) by relying on "an [erroneous legal standard](#)" or "[clearly erroneous factual findings](#)" (internal quotation marks omitted). Montana emphasizes that a preliminary injunction is a "[drastic remedy](#)" that should not issue where a plaintiff's claim is "[merely plausible](#)" (internal quotation marks omitted). Virginia, together with 18 other states, filed an [amicus brief](#) in support of Montana.

TikTok and its users each [filed a response brief](#) in late April 2024. They maintain that the district court acted properly and emphasize various arguments, including those that follow (ordered as they appear in the briefs):

- **First Amendment.** TikTok and its users argue that the preliminary injunction is justified because SB 419 violates the [First Amendment](#) and the law does not withstand any level of scrutiny that might be applied.
- **Supremacy Clause (Preemption).** TikTok and its users [argue](#) that SB 419 impermissibly conflicts with the Defense Production Act and constitutes an improper incursion into foreign affairs.
- **Commerce Clause.** TikTok and its users [argue](#) that SB 419 likely violates the Commerce Clause by impeding the flow of interstate commerce.

These arguments largely reflect [those made before the district court](#). Between Montana's filing and the response briefs, Congress passed [PAFACAA](#). The response [briefs](#) include [mention of this new law](#) to underscore arguments in favor of [federal preemption](#). TikTok has also brought a [pre-enforcement challenge](#) of the federal law in the U.S. Court of Appeals for the D.C. Circuit. In the present matter, the Ninth Circuit must weigh the various arguments to determine whether the district court properly considered and applied the legal standards governing whether to grant a preliminary injunction [before a final determination on the merits](#) of the claims could be made.

Relevance for Congress

SB 419 and the challenges to it raise some considerations in common regarding application-specific federal legislation. As mentioned above, [PAFACAA](#), passed in April 2024, regulates “foreign adversary controlled applications,” and includes TikTok among such applications. Prominent among the arguments made by TikTok in its pre-enforcement challenge to that law in the D.C. Circuit are [free speech challenges](#). In resolving those arguments, the D.C. Circuit is expected to consider issues such as constitutional protections for speech platforms, the First Amendment doctrine of prior restraints, the question of whether the PAFACAA regulates conduct rather than speech, and the extent to which the law’s “[qualified divestiture](#)” exemption renders it materially different than a ban. The government’s brief, the redacted version of which is available, emphasizes national security and denies the claimed constitutional impediments. Several of these considerations exist also for a state-specific ban like SB 419. Such considerations are potentially relevant whenever regulating an application used to share information, as illustrated in [arguments raised by users](#) challenging an Executive Order directed at WeChat.

As analyzed in [another Legal Sidebar](#), Congress has considered bills that would restrict access to and sharing of information with and via certain platforms. Federal legislation does not face some of the state-specific legal issues presented in the SB 419 litigation, such as preemption or “[Dormant](#)” [Commerce Clause](#) challenges. The legal disposition of some of the other [constitutional questions](#) posed by SB 419 and related legislation may, however, inform the scope of both federal and state authority in this area. While the framework of the constitutional analysis could vary based on specific differences in legislation, the outcome of the litigation may illuminate the extent to which the federal government may legislate with results that limit foreign-owned platforms.

Communications technology is not the only market in which states have sought to limit participation by certain foreign entities. [Recent challenges to Florida’s land ownership restrictions](#) illustrate how state legislation foreclosing foreign participation in varied state markets may prompt litigation. The ultimate results of these suits could offer additional insight into the degree of Congress’s exclusivity in these areas.

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