

Montana's TikTok Ban and Pending Legal Actions

June 1, 2023

On May 17, 2023, Montana's governor signed into law 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 ban of this breadth among U.S. states. This Sidebar (1) briefly describes SB 419, (2) discusses the legal challenges brought against the law to date, and (3) highlights some topics that these legal challenges might raise for Congress.

SB 419 Restricts TikTok's Operations in Montana

[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](#) bans 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. SB 419 does not become effective until January 1, 2024, and contains a novel clause that could void the law before it takes effect: a change in TikTok's corporate ownership such that it would not be a company of a country designated as a "foreign adversary" in [15 C.F.R. § 7.4](#) at the time of sale or acquisition would void SB 419. This provision of the Code of Federal Regulations 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, [33 states](#) prohibit TikTok from being used on at least some state-issued devices. A 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](#) and [Arkansas](#) recently passed

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legislation restricting children’s access to social media platforms, and similar legislation has [been introduced](#) in other states.)

Lawsuits Have Challenged SB 419 on Constitutional and Other Grounds

On May 22, 2023, TikTok filed a [complaint](#) in federal court asking the court to invalidate and prevent enforcement of the law on the basis that it violates [several constitutional rights](#) and provisions, including those related to [bills of attainder](#), the [Commerce Clause](#), the [First Amendment](#), and the [Supremacy Clause](#). The complaint also disputes facts conveyed by the Montana legislature. Brief descriptions of these constitutional concepts (ordered as they appear in the complaint) and how they might apply here follow:

- **First Amendment:** The First Amendment protects free speech and association. TikTok’s challenge to SB 419 asserts that the law [unconstitutionally violates its First Amendment rights](#) by using a content-based justification effectively to shut down 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. In certain contexts, federal interests may be so dominant as to [occupy certain fields](#) of law entirely. 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.
- **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.

A group of five Montanans who use the TikTok app to create content filed a separate [complaint](#) on May 17, 2023, the same day SB 419 was signed into law. As in TikTok’s complaint, the users’ complaint alleges SB 419 violates the First Amendment, Commerce Clause, and Supremacy Clause. The users’ complaint also asserts other legal challenges.

- **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.” The 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):** The 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.

The merits of the plaintiffs’ claims have yet to be litigated. Attorneys for Montana have not yet filed a response detailing the position of Montana’s Attorney General.

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 and transmission of information through and to certain apps. Examples, as analyzed in this [Legal Sidebar](#), include 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 Commerce Clause hurdles, some of the [remaining constitutional questions](#) presented for SB 419 may be litigated if the listed bills, or other bills seeking to regulate TikTok and other social media sites, become federal law. The 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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