

Montana SB 419 — TikTok Ban

VETO REQUEST

April 18, 2023

Dear Governor Greg Gianforte,

NetChoice respectfully asks you to **veto** SB 419.

The bill not only violates the First Amendment, it also sets a dangerous precedent of lawmakers banning access to constitutionally protected speech without substantiated evidence of national security risks. And while national security concerns are of paramount importance, they must not be weaponized against politically disfavored businesses and individuals. Indeed, it is one thing for the government to ban access to applications on *government*-issued devices. But banning access on privately bought and privately owned devices is an extraordinary exercise of government power—and it's an unjustified and unconstitutional means to protecting national security.

1. Creates a very dangerous precedent that government can start banning our freedom to visit websites we want to access;
2. Sets a precedent that other states will weaponize to ban access to conservative websites and apps under the guise of "security";
3. Violates conservative principles of limited government and free markets;
4. Creates unintended and overly broad harms in an attempt to ban access via "Application Stores;" and
5. Violates the First Amendment's protection against government censorship and regulation of speech.

NetChoice fully agrees with Montana's elected officials that the *Chinese Communist Party* is a national security threat that Americans must take seriously. In fact, NetChoice has long argued that the United States must take seriously the CCP's goal of displacing American leadership in technology and innovation precisely because it's a national security threat.

Creating a dangerous Precedent for Speech

But we part ways on means. Rather than target businesses based on their country of origin, as SB 419 does, NetChoice supports efforts to hold the CCP—the true threat—accountable. Banning TikTok

on privately owned devices—and punishing private third parties like App Stores—does nothing to weaken the CCP. Instead, it punishes Montanans who enjoy TikTok and American businesses lawfully engaged in commerce and speech dissemination.

Our concerns are not theoretical. When President Trump tried to ban TikTok and end its business arrangements by executive order, a Trump-appointed judge enjoined the government from executing the order because the government had no authority to ban Americans from accessing “informational materials.”¹ If the President lacks the authority to ban TikTok on unsubstantiated national security grounds, so too do state legislatures.

Just as Montana might ban TikTok for national security reasons, New York and California could use similar reasoning to ban President Trump’s Truth Social and conservative apps like Parler and GETTR because they might lead to another January 6th.

Legal arguments aside, it’s simply bad practice to ban access to information. Just as Montana might ban TikTok for national security reasons, New York and California could use similar reasoning to ban President Trump’s Truth Social and conservative apps like Parler and GETTR because they might lead to another January 6th. And one can easily imagine the European Union—bitter over American industry’s success—banning those apps and others under the same pretext. Even worse, the precedent could be weaponized to punish websites and apps for *promoting* free speech. California could use it to target and destroy Twitter over Elon Musk’s new content-moderation policies on the grounds that Saudi Arabian-based firms invested in Twitter.

The need to remove mandates imposed on “Application Stores”

Even if the Committee is unpersuaded on the bill’s constitutional and practical concerns, NetChoice strongly recommends the Committee limit the bill’s scope to avoid imposing liability on third-party app stores.

Doing otherwise not only conflicts with the First Amendment, which prohibits the government from imposing liability on the distribution of lawful speech, it also sets a dangerous precedent for other states to follow. Indeed, imposing liability on app stores would be a backdoor attempt at blocking access to constitutionally protected speech—states like California could prohibit app stores from offering Parler or TruthSocial on the grounds that, because the underlying apps are dangerous, the app stores must act as roving government censors.

¹ *Tiktok Inc. v. Trump*, 507 F. Supp. 3d 92 (D.D.C. 2020).

States like California could prohibit app stores from offering Parler or TruthSocial on the grounds that, because the underlying apps are dangerous, the app stores must act as roving government censors.

At the same time, the bill fails to even define what a “mobile application store” is. This exposes the covered entities to incredibly broad and unintended consequences. It would be absurd to make a mobile device liable when a Montana native can visit TikTok.Com via their mobile device’s browser and download the application, but that is what the legislation does. Simultaneously, there is no definition of what is a “mobile device.” Since laptops are certainly mobile devices, this law would make it illegal to visit the TikTok website on a laptop.

SB 419 would also make a device maker liable just because someone used the TikTok application in the state of Montana—resulting in the potential for intrastate harms. Consider an Idaho resident visiting Bozeman: if they opened the app the device maker would be hit with incredible fines – requiring a de facto ban between the states. This might sound like a good idea, but this is the same constitutionally unsound extraterritorial harm Montana faces when California bans non-free range chicken and fossil fuels.

Finally, the legislation fails to define what an “application” is. From the early days of the internet, programs have run inside of web browsers. Whether run by JAVA, PERL, FLASH, or modern-day processing, all “applications” within a web browser would be covered by this legislation’s overly broad definitions.

It is clear that the restrictions on “application stores” are riddled with unintended consequences and overbreadth and must be removed.

Practical Problems of SB 419

Consider the practical impossibilities as well. An app like Twitter would be liable for featuring content a user uploaded from TikTok. And given the internet’s international scope, it is unreasonable to impose liability on digital platforms, apps, and websites—all featuring billions of pieces of content—for failing to remove TikTok-originated content.

What’s more, it’s impossible to comply with—unless websites began screening each individual piece of content. The latter is unlawful under Section 230(c)(1) of the Communications Decency Act and the First Amendment. And it would be a disaster for the open internet.

Content creation would come to a screeching halt and free speech online would cease to exist. Indeed, an obligation to screen would directly undermine the Republican Party’s goal of increasing speech online and fighting against extensive moderation and filtering.

And as if that weren't bad enough, the bill further violates the First Amendment by failing to give adequate notice of what's required and by whom. For example, the bill doesn't adequately define App Store, leaving private entities guessing whether they must comply. That will chill even more speech as entities over-screen and moderate in their best effort to comply.

Further complicating compliance is the fact that users can download plug-ins and add-ons directly from websites. Imposing liability each time users evade restrictions is unreasonable and impracticable. The bill says nothing about how these factually fuzzy but common experiences play out under the bill's provisions.

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NetChoice understands and shares lawmakers' concerns about the CCP. But we urge Montana lawmakers to think twice before passing this unlawful and dangerous bill. TikTok's security infrastructure is still under review by intelligence agencies in the federal government. States should not intrude on that process. Nor should they trample on the First Amendment.

For these reasons, we respectfully ask that you veto SB 419.

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice

NetChoice is a trade association that works to make the internet safe for free enterprise and free expression.