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TECH

TikTok Ban Signed in Montana, Paving Way for First Amendment Legal Battle

Ban is slated to take effect next year—if it survives expected litigation

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Montana Gov. Greg Gianforte signed a bill banning TikTok from operating in Montana and forbidding downloads of the app. PHOTO: THOM BRIDGE/ASSOCIATED PRESS

Montana's governor signed the country's first bill that outright bans TikTok, paving the way for a legal fight that could determine the fate of a nationwide prohibition that is under consideration in Washington.

Republican Gov. Greg Gianforte on Wednesday signed the bill into law after Montana's legislature passed it last month. The legislation drew criticism from Chinese-owned TikTok and free-speech advocates including the American Civil Liberties Union.

The Montana ban is set to go into effect on Jan. 1. Any legal challenge, though, could trigger an injunction to delay the ban's start date.

The law would bar TikTok from operating within the Treasure State, and would also forbid app stores, such as Google's and Apple's, from making TikTok available to download within Montana. TikTok and app stores would be liable for fines of \$10,000 a day for violating the law. Individual TikTok users wouldn't be punished.

“Gianforte signed a bill that infringes on the First Amendment rights of the people of Montana by unlawfully banning TikTok,” a TikTok spokeswoman said in a statement. She did not say whether the company plans to pursue legal action.

TikTok, in an earlier statement, said, “The bill’s constitutionality will be decided by the courts.”

Google declined to comment, and Apple didn’t respond to a request for comment.

It is unclear how the ban would be enforced or what would happen to Montanans who downloaded the app before the ban’s Jan. 1 start date. There also remain unanswered questions over whether Montanans could use a workaround, such as a virtual private network, to make their devices look like they are outside the state.

When pressed for specifics, the Republican state senator who sponsored the legislation, Shelley Vance, said the onus of complying with the legislation would be on TikTok itself.

The ACLU called the statewide ban unconstitutional.

“With this ban, Governor Gianforte and the Montana legislature have trampled on the free speech of hundreds of thousands of Montanans who use the app to express themselves, gather information, and run their small business, in the name of anti-Chinese sentiment,” the ACLU’s local policy director, Keegan Medrando, said in a statement.

The bill’s authors have said they expect the legislation to face court battles. Gov. Gianforte said in a statement Wednesday that Montana is taking “the most decisive action of any state to protect Montanans’ private data and sensitive personal information.”

Shortly after lawmakers passed the bill, Gianforte sought changes to broaden the legislation so it would apply to all social-media apps that provide data to foreign adversaries. The suggested changes were meant to address legal concerns, a spokeswoman for the governor’s office said. But Gianforte received the bill at the end of the legislative session, so there wasn’t time to send it back to lawmakers for changes.

As part of Wednesday’s signing, the governor also said he is directing some state employees to bar the use of all social-media applications tied to foreign adversaries on state equipment and for state business in Montana. Gianforte, in a memo, listed examples of such apps, including the popular messaging app WeChat, which is used by more than 1 billion worldwide. It is unclear how many people use WeChat in Montana.

A legal challenge over the Montana bill could give insight into whether courts would uphold federal efforts aimed at banning TikTok, which has 150 million users in the U.S.

Congress members have introduced bills that would either ban TikTok nationwide or give a presidential administration more power to do so. The Biden administration recently asked TikTok to separate itself from its Chinese owners or face a possible ban.



Beijing-based TikTok has an office in Culver City, Calif., and 150 million users in the U.S. PHOTO: JANE HAHN FOR THE WALL STREET JOURNAL

Lawyers say Montana faces potential challenges to the ban based on concerns over free speech, which is protected by the First Amendment.

A potential case would be clear-cut in TikTok's favor, said Jameel Jaffer, executive director of the Knight First Amendment Institute at Columbia University. "Montana is going to have a very difficult time persuading the courts that this kind of ban is consistent with the First Amendment," he said.

Supporters of the Montana bill say the state has legal precedence to win a challenge.

The Montana legislation cited national-security concerns as the basis for banning TikTok. Some Biden administration officials and Congress members say the Chinese government could order TikTok's parent company, Beijing-based ByteDance, to use TikTok to spy on Americans or distribute propaganda.

TikTok says that such a scenario has never happened and that it would refuse to comply with an order. The company says it has proposed to the Biden administration a \$1.5 billion plan to silo its U.S. operations from China.



TikTok CEO Shou Zi Chew testifying at a House committee hearing on data privacy earlier this year. PHOTO: EVELYN HOCKSTEIN/REUTERS

The First Amendment protects, among other things, freedom of speech but isn't absolute. Concerns over national security and other issues could justify the government's attempt to regulate speech.

In 2010, for example, the U.S. Supreme Court upheld a federal law banning "material support" for foreign terrorist organizations, even advice about entirely legal activities, disregarding arguments that the measure treads on free-speech rights.

And in 1986, the Supreme Court upheld an order that closed an adult bookstore that had facilitated prostitution. The bookstore had contended the closure violated the First Amendment.

The Supreme Court ruled on the bookstore's conduct, not its content, said Joel Thayer, a lawyer who runs the Digital Progress Institute, a think tank. He said Montana is regulating TikTok's conduct, such as the company's relationship with its Chinese parent, ByteDance.

"The question comes down to: Do the courts view Montana's law as regulating conduct or speech?" said Thayer, who testified in favor of the Montana bill at the request of the state's Republican attorney general, Austin Knudsen. Knudsen helped write the legislation.

Critics of the bill said Montana and federal officials haven't presented enough evidence to justify a blanket ban on TikTok.

"The U.S. government hasn't pointed to any specific or direct evidence of national-security harm from TikTok—only vague speculation about how Americans' data might be used, or how the Chinese government might be able to promote propaganda," said Ashley Gorski, a lawyer for the ACLU.

It isn't clear how many of TikTok's 150 million users are located in Montana. Eight people testified against the bill during a hearing in the Montana House of Representatives in March, including Shauna White Bear, a creator who built a following for her moccasin business on TikTok. She also penned an opinion piece in the local newspaper, the Billings Gazette.

Montana state Rep. Zooey Zephyr, a Democrat, said she has received hundreds of emails opposing the bill. In March, TikTok published a post on its website, telling users in Montana to let their state representatives know that they don't support the bill.

Zephyr, the state's first transgender lawmaker and a vocal opponent of the TikTok ban, has also been locked in a battle with the Montana House's Republican majority, who barred her from the House floor.

Nationwide, 46% of registered voters support a ban, whereas 35% oppose it, a recent Wall Street Journal poll found. A majority of Republicans are in favor of a U.S. ban on TikTok compared with just a third of Democrats, according to the poll.

Jaffer, of Columbia University, said another potential legal challenge for any governmental ban on TikTok is that there are less-restrictive options to mitigate national-security concerns, such as government officials simply educating Americans about potential propaganda on the platform.

Should Montana have to defend its TikTok ban in court, the state could face an additional challenge since it doesn't have a special claim to the knowledge of national-security threats that federal officials have, Jaffer said.

Jaffer said he would expect TikTok to challenge the Montana bill in a federal court in Montana to establish a precedent applicable beyond the state. The case could be appealed to the Ninth U.S. Circuit Court of Appeals afterward, but Jaffer said he thinks it would be unlikely for the U.S. Supreme Court to hear a potential case on what he thinks is a straightforward issue.

Thayer, the Montana bill's supporter, said he also expected that a potential case to go no further than the Ninth Circuit but that the court would rule in Montana's favor.

—Jennifer Calfas contributed to this article.

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