

Montana's best defense of TikTok ban is deeply flawed, experts say

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Over the next few months, Montana must prove that it has the power to do what the federal government has so far only tried and failed to do: ban TikTok.

While TikTok and several state-based app users have claimed that the state's TikTok ban is unconstitutional and improperly attempts to regulate US-China foreign relations, Montana recently raised its best arguments to uphold the ban. In a court filing last week, Montana sought to convince a US district court to reject TikTok's motion to delay the statewide ban from taking effect on January 1, 2024, until the federal case is resolved. Beyond disputing the relevance of constitutional concerns, Montana took a seemingly hostile stance, calling out TikTok for alleged "hypocrisy" and evasiveness of US authorities attempting to protect Americans' data from foreign spying.

"TikTok's apparent position is it cannot be regulated—by anyone," Montana argued, accusing TikTok of playing "fast and loose" with courts and improperly shifting away from an argument that TikTok made that got Donald Trump's ban overturned.

"When President Trump attempted to regulate TikTok under the

International Emergency Economic Power Act, it argued that the President didn't have the authority to do so," Montana argued. "Now, when the State of Montana is regulating TikTok, the company makes the claim it cannot do so because that power is reserved for the federal government."

Accusing TikTok of capturing "reams of personal, private data from every Montana TikTok user" which can allegedly be accessed by members of the Chinese Communist Party (CCP) at "any time—without asking TikTok," Montana argued that courts should respect that "the State of Montana has the power to regulate products or practices that in its judgment impose unjustifiable consumer harms."

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Montana's argument hinges partly on convincing courts that blocking one social media platform doesn't violate TikTok users' First Amendment rights because there are plenty of other short-video platforms where they can post the same content.

"Despite the company's allegations that Montana's law implicates First Amendment rights, the law is a content-neutral and narrowly tailored law that serves a significant government interest in furthering its consumer protection laws and content-neutral policy that "regulates one channel of Internet expression but leaves all others untouched," Montana said in a statement provided to Ars.

Experts dispute Montana's claims

However, the Electronic Frontier Foundation (EFF) civil liberties director, David Greene, told Ars that TikTok does not appear hypocritical in its arguments. He also noted that it's "the very fact" that Montana's TikTok ban is "only targeting one channel of expression that makes it not content-neutral."

According to Greene, courts define “content-neutral” laws as treating all speakers equally, and Montana must consider not only that TikTok is a platform for speakers but that the platform is a protected speaker sharing content with Montanans.

By singling out the app, the state ban by that logic is seemingly inherently not content-neutral, Greene told Ars, and this is likely why Montana governor Greg Gianforte attempted to revise the law to cover all apps owned by foreign adversaries before he signed it. The governor was seemingly concerned that the ban would not survive strict constitutional scrutiny. However, his suggestion was rejected by state lawmakers, and Greene said that, ultimately, focusing on TikTok could undermine the state’s content-neutral argument.

“The governor tried to make it a neutral law by saying it would apply to any platform,” Greene told Ars. “And the legislature rejected that and said, ‘No, no, we only care about TikTok.’”

The deputy director of the ACLU’s National Security Project, Patrick Toomey, agreed with Greene.

“The Supreme Court has been clear that when a law has the inevitable effect of singling out and suppressing a particular means of expression, the First Amendment’s protections apply in full force,” Toomey said in a statement provided to Ars. “The state can’t evade the First Amendment just by claiming it has another purpose.”

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