

March 6, 2024

The Honorable Cathy McMorris Rodgers
Chairman, Committee on Energy & Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Frank Pallone
Ranking Member, Committee on Energy & Commerce
U.S. House of Representatives
Washington, D.C. 20515

Re: Oppose H.R. 7521, the Protecting Americans from Foreign Adversary Controlled Applications Act

Dear Chairwoman McMorris Rodgers, Ranking Member Pallone, and Members of the House Energy & Commerce Committee:

We, the undersigned free-speech and civil-liberties organizations, strongly urge you to oppose HR. 7521, the “Protecting Americans from Foreign Adversary Controlled Applications Act,” because it would violate the First Amendment rights of Americans across the country who rely on TikTok for information, communication, advocacy, and entertainment. This bill would functionally ban the distribution of TikTok in the United States, and would grant the President broad new powers to ban other social media platforms based on their country of origin.

Before addressing substantive concerns, we object to the Committee’s extremely condensed consideration of this bill. Despite this legislation’s sweeping First Amendment and government overreach implications, it was scheduled for markup just two days after it was introduced. There was no meaningful opportunity for interested stakeholders to study and address the complex implications of this legislation with members of the Committee.

H.R. 7521 is censorship — plain and simple. In a purported attempt to protect the data of U.S. residents from Chinese government acquisition, this legislation would forbid app stores and internet service providers from offering TikTok so long as the company remains under foreign ownership. Passing this legislation would trample on the constitutional right to freedom of speech of millions of people in the United States. TikTok is home to massive amounts of protected speech and association: it enables its users to discuss their opinions, share their hobbies, make art, and access news from down the street and around the world. Jeopardizing access to the platform jeopardizes access to free expression.

Courts have been clear: banning TikTok violates the First Amendment. A recent case held that the state of Montana cannot ban the operation of TikTok because doing so would violate the First Amendment.¹ Like Montana’s TikTok ban, this bill also precludes app stores and internet service providers from offering

¹ Tiktok v. Knudsen, 9:23-cv-00061-DWM (D. Mont. 2023) <https://www.documentcloud.org/documents/24179554-tiktok-inc-v-knudsen>.

TikTok. When the District Court in Montana evaluated that law, it found that Montana’s bill “bans TikTok outright and, in doing so, it limits constitutionally protected First Amendment speech.”² The same reasoning applies to H.R. 7521.

When analyzing First Amendment concerns, a court must determine that the ban is necessary to prevent extremely serious, immediate harm to national security. However, there is no public evidence of a national security threat rising to this level. Moreover, an outright ban is not only far from the least restrictive solution to the purported problem, it is actually ineffective because the Chinese government could continue to access the data of U.S. residents in myriad other ways. If Congress wants to protect Americans’ data, it should pass comprehensive privacy legislation.

It does not improve matters to say that this isn’t a ban but a requirement that the company be sold to a less concerning owner. Generally, the government cannot accomplish indirectly what it is barred from doing directly, and a forced sale is the kind of speech punishment that receives exacting scrutiny from the courts. This bill would now attempt to ban TikTok by conditioning TikTok’s continued operation in the United States on the company’s sale to an approved buyer, which may prove difficult if not impossible to accomplish in the required timeframe.³

Banning or requiring divestiture of TikTok would also set an alarming global precedent for excessive government control over social media platforms. The United States has rightfully condemned other countries when they have banned specific social media platforms, criticizing these efforts as infringing on the rights of their citizens.⁴ If the United States now bans a foreign-owned platform, that will invite copycat measures by other countries, banning American-owned speech intermediaries and companies from operating in their borders, with significant consequences for free expression globally.

The bill also flies in the face of the democratic principles behind the historic and invaluable Berman Amendment, which — for the past 35 years — has barred the President from regulating or banning the import or export of news, art, and other information. Congress enacted the Berman Amendment in recognition of the essential democratic values in preserving and protecting the rights of people in the United States to receive information from people and organizations abroad. Congress was particularly concerned that the International Emergency Economic Powers Act (IEEPA), which enables the President to impose sanctions on trade with hostile nations, could be used to deny Americans access to expressive works and information originating abroad — notwithstanding Americans’ right to receive and exchange information. The bill being rushed through Congress now threatens that principle.

People in the United States have a right to use TikTok and other platforms to exchange their thoughts, ideas, and opinions with millions of people around the country and the world. The undersigned groups strongly urge you to oppose H.R. 7521 and to support our constitutional right to express ourselves, to receive information, and to associate freely. Thank you for your attention to these concerns.

² *Id.* at 35

³ Sapna Mahshwari and David McCabe, *TikTok Could be Hard to Sell to Potential Buyers*, NY Times (Mar. 16, 2023), <https://www.nytimes.com/2023/03/16/business/media/tiktok-buyer-biden.html>.

⁴ Press Release, *Nigeria’s Twitter Suspension*, State Department (June 10, 2021) <https://www.state.gov/nigerias-twitter-suspension/>.

Sincerely,
American Civil Liberties Union
Center for Democracy & Technology
Electronic Frontier Foundation
Fight for the Future