

***TikTok v. Montana* – State TikTok Ban Blocked by Court Based on Foreign Affairs Preemption**

Introduction

On November 30, 2023, the U.S. District Court for the District of Montana preliminarily enjoined enforcement of a state law banning TikTok in the state of Montana.¹ The Court found that the Montana law impermissibly infringed on the federal foreign affairs power based on direct conflict with the federal Defense Production Act (DPA), field preemption, and the dormant foreign commerce clause (DFFC).

The case is currently on Montana’s appeal before the U.S. Ninth Circuit Court of Appeals, and will join the small canon of cases outlining the contours of preemption in the foreign affairs context. This case garnered multiple amicus briefs and worldwide media attention, and may be the beginning of a resurgence in this relatively less-developed area of foreign relations law as other state legislatures consider similar bans.²

Background

TikTok is an entertainment sharing platform owned by a U.S. company, led by a Singapore and U.S.-based leadership team and “ultimately owned” by ByteDance Ltd.³ According to the Montana legislature, “TikTok is a wholly owned subsidiary of ByteDance, a Chinese corporation,” and China “exercises control and oversight over ByteDance, like other Chinese corporations, and can direct the company to share user information, including real-time physical locations of users.”⁴ According to TikTok’s NewsRoom, “ByteDance Ltd. was founded by Chinese entrepreneurs but today, roughly sixty percent is beneficially owned by global institutional investors,” twenty percent is owned by

employees worldwide, and twenty percent is owned by the company's founder, "a private individual [who] is not part of any state or government entity."⁵

On May 17, 2023, the Governor of Montana signed An Act Banning TikTok in Montana (the Act).⁶ The Act prohibits a mobile application store from allowing TikTok downloads in Montana and prohibits TikTok from operating in Montana. It provides a \$10,000 fine for a violation and a \$10,000 fine for each day the violation continues. The Act has a "contingent voidness" provision stating the Act is "void if tiktok is acquired or sold to a company that is not incorporated in any [...] country designated as a foreign adversary in 15 C.F.R. 7.4 at the time tiktok is sold or acquired."⁷ Designated countries include China, Cuba, Iran, North Korea, Russia, and the Maduro Regime of Venezuela.⁸

The Act's preamble identifies two objectives. First, it aims to prohibit "dangerous content" on TikTok to protect the "health and safety of Montanans."⁹ Second, it aims to protect Montanans' right to privacy by preventing China from engaging in "corporate and international espionage" through user data gathered by TikTok and/or ByteDance.¹⁰

The Act describes China as "an adversary of the United States and Montana."¹¹ One legislator testified, "I believe it's time we stand up to the Chinese and ban TikTok."¹² Other legislators explained the Act "puts an end to China's surveillance operation in Montana" and "[t]he problem is, TikTok and the Chinese government guys. Right now, that is our adversary we're dealing with."¹³ Montana's Attorney General testified in favor of the Act that "TikTok is spying on Americans" and "is a tool of the Chinese Communist Party."¹⁴ He characterized TikTok as "an initial salvo" in an "inevitable" war between China and the United States and "a spying tool on Americans by a foreign enemy."¹⁵

Additional testimony noted the Biden Administration's discussions of a potential federal ban on TikTok, and described the Act as an opportunity for Montana to act in the face of federal inaction. Upon signing, Montana Governor Greg Gianforte stated "[t]oday, Montana takes the most decisive action of any state to protect Montanans' private data and sensitive personal information from being harvested by the Chinese Community Party."¹⁶ The Act's effective date was January 1, 2024.

Five individual creators and viewers of TikTok content residing in Montana filed suit in federal court challenging the Act. TikTok subsequently filed suit, and the two cases were consolidated. The plaintiffs and TikTok claimed the Act violates their First Amendment rights and the commerce clause of the U.S. Constitution, and was subject to foreign affairs preemption. This article solely focuses on foreign affairs preemption.

Foreign Affairs Preemption Issues Before the Court

The federal foreign affairs power can preempt state law in multiple ways. First, preemption occurs when a state law directly conflicts with a federal law validly enacted pursuant to Congress' Article I powers under the Constitution.¹⁷ Second, field preemption, also referred to as dormant foreign affairs preemption, occurs when a state law "intrudes on the field of foreign affairs without addressing a traditional state responsibility."¹⁸ Third, a state law violates the DFFC when it discriminates against foreign commerce, or impairs the federal government's ability to speak with one voice regarding foreign commerce.¹⁹

Direct Conflict

TikTok argued "Congress has created a specific federal regulatory process by which the purported national security concerns that have animated this legislation may be addressed. The TikTok Ban would necessarily disrupt and interfere with that process, which is currently underway."²⁰ TikTok pointed to the DPA, which authorizes the Committee on Foreign Investment in the United States (CFIUS), an executive branch interagency committee, to review foreign acquisitions for national security risks, impose conditions on acquisitions to mitigate risks, and refer transactions to the President who can prohibit the transaction. TikTok noted the federal government was negotiating with TikTok under this federal regime. TikTok also pointed to the International Emergency Economic Powers Act (IEEPA) as controlling federal regulation, which authorizes the president to regulate certain foreign-related property during a national emergency.

In response, Montana argued that the Act was not preempted by either the DPA or IEEPA. Montana argued the Act did not conflict with the DPA or negotiations between the executive and TikTok. Montana pointed to the absence of an express preemption provision in the DPA and argued one was necessary to preclude any state regulation of a business being concurrently investigated by CFIUS. Regarding the IEEPA, Montana pointed to the IEEPA's prohibition on executive regulation of communication channels, and emphasized that it intended to regulate a product solely "within Montana's borders" without attempting to regulate China.²¹ Montana also pointed to TikTok's position in other litigation that the executive cannot regulate it under IEEPA.

The Court concluded the Act likely conflicted with the DPA, but not the IEEPA. The Court discussed the DPA's framework of establishing CFIUS to investigate the effects of foreign transactions on U.S. national security and to negotiate with the involved parties or refer

to the president where credible national security risks exist. The Court discussed TikTok's petition for review of the Trump Administration's 2020 executive order requiring "certain divestment activity for TikTok in the United States," and ongoing negotiations between CFIUS and TikTok.²² The Court acknowledged that while the CFIUS matter is not the same as the Act, it "indicates the depth of the federal government's involvement with TikTok under the [DPA]."²³ Ultimately the Court concluded that even despite express preemption language in the DPA, the Act "conflicts with the United States' ability to interact with and regulate TikTok," and therefore the DPA likely preempts the Act.²⁴ The Court rejected Plaintiffs' express preemption argument under the IEEPA because the IEEPA does not allow regulation of personal communications, which the Act does, and therefore, they are not attempting to regulate the same conduct.

Field Preemption

TikTok argued "foreign affairs and national security are matters over which the U.S. Constitution vests exclusive authority in the federal government, not the States."²⁵ TikTok asserted the Act was attempting to regulate in an area outside traditional state responsibility. TikTok further argued that even if the Act was regulating an area of traditional state competence, its intrusion into foreign affairs necessitated preemption. Montana argued the Act was a valid exercise of Montana's police power that did not have direct impact on foreign relations and was not a political judgment or a distinct political viewpoint about China or its conduct. Montana relied on its "consumer-protection police powers" as justifying the Act with a focus on TikTok's "data-harvesting and storing practices" and argued the Act "regulates TikTok's operations in Montana to protect Montanans' privacy."²⁶ Montana argued references to China in the Act's preamble and legislative history merely restated facts already known to the public, and were not dispositive in a preemption analysis of the Act. Montana also questioned the "vitality" of the "concept" of field preemption.²⁷

The Court first noted that foreign affairs field preemption is "rarely invoked" and "straddles both the conflict preemption and field preemption doctrines."²⁸ The Court held "a district court must prevent a state law from taking effect when it '(1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power."²⁹ The Court concluded the Act was not within an area of traditional state responsibility. The Act's contingent voidness provision, together with the Act's purpose as set forth in its preamble and the legislative history, confirmed the Act's actual purpose was "to stop a perceived national security threat, which cannot serve as an important state interest."³⁰ The Court then analyzed the Act's effect on federal foreign

affairs policy, and concluded the Act intruded on foreign affairs by expressing a “distinct political point of view on a matter of foreign policy.”³¹ Specifically, “from the very first line of the bill, the Legislature makes a distinct foreign policy statement, which is that TikTok is owned by a Chinese corporation that is taking Montanans’ TikTok user data and sharing it with the Chinese government for nefarious purposes.”³² The Court concluded that whether the Act fit within the federal government’s foreign policy toward China did not matter when determining whether the Act intruded on the foreign affairs power.

Dormant Foreign Commerce Clause

TikTok argued the Act’s contingent voidness provision was a direct attempt to regulate the flow of foreign commerce with no legitimate local purpose. Although not emphasized heavily in the parties’ briefing, the Court also found plaintiffs showed a likelihood of success that the Act violated the DFFC by facially discriminating against commerce with China and other countries listed at 15 C.F.R. §7.4.

Conclusion

The Ninth Circuit may provide additional guidance regarding these doctrines, as well as subsequent merits rulings after the preliminary injunction stage. The preliminary injunction appeal should be fully briefed by March 2024, and the lower court proceedings are not stayed pending appeal. With state legislatures exhibiting a greater willingness to regulate in areas traditionally reserved to the federal government, this case could be the beginning of a new chapter in foreign affairs preemption.

About the Author: Anna Conley is an Assistant Professor of Law at the Alexander Blewett III School of Law at the University of Montana.

¹ *Alario, et al. v. Knudsen*, CV 23-56-M-DWM, 2023 WL 8270811 (D. Mont. Nov. 30, 2023).

² Natasha Singer, Sapna Maheshwari & David McCabe, *As Red States Curb Social Media, Did Montana’s TikTok Ban Go Too Far?*, N.Y. TIMES (Oct. 12, 2023).

³ *Alario, supra* note 1, at *2.

⁴ An Act Banning Tiktok in Montana S. 419, 68th Leg., Reg. Sess., Preamble (Montana 2023), <https://leg.mt.gov/bills/2023/billpdf/SB0419.pdf> [hereinafter SB 419].

⁵ See The Truth About TikTok: Separating Myths from Facts, <https://newsroom.tiktok.com/en-us/fil-ph/fact-vs-fiction-on-tiktok>.

⁶ SB 419.

⁷ *Id.*, § 4.

⁸ *Determination of Foreign Adversaries*, 15 C.F.R. 7.4(a)(1)-(6) (2023).

⁹ SB 419, Preamble.

¹⁰ *Id.*; *Hearing on the Floor of the House Judiciary Committee of the Montana House of Representatives*, 68th Leg., Reg. Sess. (Mar. 28, 2023) [hereinafter House Judiciary Committee Hearing] (“we know beyond a doubt that TikTok’s parent company, Byte Dance, is operating as a surveillance arm of the Chinese Community Party and gathers information about Americans against their will or unknown to them”).

¹¹ SB 419, Preamble.

¹² *Second Reading Before the Montana House of Representatives*, 68th Leg., Reg. Sess. (Apr. 13, 2023).

¹³ *Id.*; House Judiciary Committee Hearing.

¹⁴ House Judiciary Committee Hearing.

¹⁵ *Id.*

¹⁶ *Governor Gianforte Bans TikTok in Montana* (May 17, 2023), https://news.mt.gov/Governors-Office/Governor_Gianforte_Bans_TikTok_in_Montana.

¹⁷ *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

¹⁸ *Movesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012) (en banc). *See also Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 418-20 (2003).

¹⁹ *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 57, 66 (1st Cir. 1999); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 311 (1994).

²⁰ Complaint for Declaratory and Injunctive Relief, *TikTok Inc. v. Knudsen*, No. 9:23-cv-61-DWM, ECF No. 1, ¶7(b) (D. Mont. May 22, 2023) [hereinafter Complaint].

²¹ Memorandum in Opposition to Plaintiffs’ and Consolidated Plaintiff’s Motions for Preliminary Injunction, *Alario, et al. v. Knudsen*, No. 9:23-cv-56-DWM, ECF No. 53, 28-29 (D. Mont. August 18, 2023) [hereinafter Opposition].

²² *Alario*, *supra* note 1, *15.

²³ *Id.*

²⁴ *Id.*

²⁵ Complaint, *supra* note 20, ¶7(b).

²⁶ Opposition, *supra* note 21, at 23.

²⁷ *Id.* at 22.

²⁸ *Alario*, *supra* note 1, *12.

²⁹ *Id.* (citing *Movesian*, 670 F.3d at 1073).

³⁰ *Id.* at *14.

³¹ *Id.* (citing *Movsesian*, 670 F.3d at 1076).

³² *Id.*