

**Testimony of Joel Thayer on Montana’s SB 419  
(March 28, 2023)**

Thank you, madam chair, madam vice chair, and esteemed members of this committee, for allowing me to testify in support of SB 419. My name is Joel Thayer, and I am a practicing attorney in the technology space in Washington, D.C., and am president of the Digital Progress Institute, which is a 501(c)(4) non-profit organization that advocates for incremental changes in the tech sector through bipartisan consensus. It is my view that SB 419 presents a measured bill that seeks to address an important public-policy concern—the Chinese government’s use of Chinese-owned technology to surveil American citizens.

Candidly, given the lack of federal leadership regarding a commercial ban of TikTok, Montana is well-suited to act as a leader here.

It’s undeniable that TikTok is more than just an innocuous dancing app. TikTok collects your voice, face, tracks your location, and has been reported to ignore your device’s privacy settings to listen in even when you’re not using it.<sup>1</sup> It is a sophisticated tool designed to monitor your every move and collect your physical characteristics much like other social media companies do, like Meta or Snapchat. But TikTok has one troubling distinction from its competitors—the Chinese government may be the one watching. Currently, the FBI and U.S. Department of Justice are investigating how ByteDance—TikTok’s Chinese parent company—uses the app to spy on American journalists.<sup>2</sup>

Worse, TikTok’s U.S. representatives have been entirely opaque on these matters and have even lied to Congress about its CCP connection under oath.<sup>3</sup> It is no wonder why a bipartisan group of governors, including yours, and Congress unanimously banned the app on government devices last year.<sup>4</sup> Now, there are bipartisan calls to ban it from our markets entirely given the extraordinary risk TikTok poses.<sup>5</sup>

Such potential access from a foreign government to Americans’ data drove the Biden Administration to call for a full ban of the app in our domestic markets. President Biden’s call for a ban harkens back to what the Trump Administration attempted in its 2020 executive order.

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<sup>1</sup> Harry Pettit, *I-SPY Teens Worried as New iOS4 ‘App Spying’ Notification Shows TikTok and YouTube Turned on iPhone’s Mic When They Launch*, The U.S. Sun (Sep. 22, 2020, 11:44 AM EDT). Available at <https://www.the-sun.com/lifestyle/tech-old/1514615/apple-iphone-ios14-app-tiktok-youtube-mic/>.

<sup>2</sup> Emily Baker-White, *The FBI and DOJ Are Investigating ByteDance’s Use of TikTok to Spy on Journalists*, Forbes (Mar. 16, 2023, 11:47 AM EDT). Available at <https://www.forbes.com/sites/emilybaker-white/2023/03/16/fbi-doj-investigating-bytedance-tiktok-surveillance-journalists/?sh=20090fc4a6fc>.

<sup>3</sup> Emily Baker-White, *Leaked Audio From 80 Internal TikTok Meetings Shows that US User Data Has Been Repeatedly Accessed from China*, BuzzFeedNews (Jun. 17, 2022, 12:31 EDT). Available at <https://www.buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access>.

<sup>4</sup> See Samantha Aschieris, *These 31 States Have Banned TikTok on Government-Issued Devices, Networks*, The Daily Signal (last visited Mar. 27, 2023). Available at <https://www.dailysignal.com/2023/01/19/these-31-states-banned-tiktok-government-issued-devices-networks/>; see also, S.1143, 117<sup>th</sup> Congress.

<sup>5</sup> Sapna Maheshwari, *Senator Calls on Apple and Google to Ban TikTok in App Stores*, New York Times (last visited Mar. 27, 2023). Available at <https://www.nytimes.com/2023/02/02/technology/michael-bennet-tiktok-ban.html>.

Strangely, some take issue with banning the app commercially on the grounds that TikTok has a First Amendment right to be in our markets.<sup>6</sup> However, the First Amendment does not prevent the government from imposing a ban on TikTok. The courts have been very clear on this issue. The government would be acting here based on TikTok's conduct (namely, its actions that present an unacceptable national security threat)—not based on the content of TikTok's speech or that of its users.

Courts have consistently distinguished between conduct and speech to determine whether the First Amendment is applicable or prohibitive towards the enactment or enforcement of a particular policy. Indeed, in the U.S. Supreme Court case *Arcara v. Cloud Books, Inc.*, the government shut down an adult bookstore for health violations because its owner used his store to facilitate prostitution.<sup>7</sup> The bookstore argued that shutting down the bookstore violated the First Amendment. The Supreme Court disagreed. Even though we think of a bookstore as a quintessential venue for First Amendment activity, the Supreme Court ruled that the First Amendment did not prevent the government from shutting down the bookstore because the government was acting based on the owner's decision to engage in prohibited, non-speech conduct, in this case the solicitation of prostitution.

I appreciate the opportunity to testify and I look forward to addressing your questions regarding this important bill.

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<sup>6</sup> James Lewis, *TikTok and the First Amendment*, Center for Strategic & International Studies (last visited Mar. 27, 2023). Available at [https://www.csis.org/analysis/tiktok-and-first-amendment#:~:text=The%20U.S.%20government%20does%20not,are%20a%20form%20of%20speech.](https://www.csis.org/analysis/tiktok-and-first-amendment#:~:text=The%20U.S.%20government%20does%20not,are%20a%20form%20of%20speech.;); see also,

<sup>7</sup> *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).