



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Brendan Carr
Commissioner

March 7, 2024

The Honorable Cathy McMorris Rodgers
Chair, 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: H.R. 7521, Protecting Americans From Foreign Adversary Controlled Applications Act

Dear Chair Rodgers, Ranking Member Pallone, and distinguished Members of the House Energy and Commerce Committee:

A broad cross-section of U.S. representatives, national security experts, and individual Americans alike have offered their strong support for H.R. 7521. And for good reason. H.R. 7521 is a smart, targeted bill that addresses the serious national security threats TikTok poses by requiring it to divest from Chinese Communist Party (CCP) control. Recently, the ACLU and others have opposed this legislation, but their arguments are predicated on a misreading of both the bill and Supreme Court law.

The bill protects First Amendment rights because it regulates conduct, not content.

Supreme Court precedent makes clear that Congress can require TikTok to cut ties with the CCP without violating the First Amendment. Specifically, the Supreme Court draws a distinction between laws based on the *content* of speech on the one hand and those based on *conduct* on the other. Laws that fall into the first category almost always violate the First Amendment. But those that fall into the second category by regulating non-expressive conduct do not.

Here, this bill is not based on the content of TikTok's protected speech or on any of the lawful content that TikTok users want to post, share, or receive. Instead, the bill takes action based on TikTok's illicit conduct—namely, the concrete threat to national security that TikTok poses as evidenced by its own pattern of illicit actions—conduct that is not protected by the First Amendment.

The Supreme Court's decision in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), offers an analogous case in point. There, the government shut down a bookstore because the owner used the facility to engage in illegal conduct. The owner argued that, notwithstanding the illegal conduct, the

government could not close the store because the First Amendment protected the selling and purchasing of books. That is the exact same type of argument that the ACLU makes today. And the Supreme Court rejected it.

While the Supreme Court recognized that closing the store would have an incidental burden on protected speech, because people could no longer use that store to browse books, it upheld the closure because the government acted based on the owner's unlawful conduct, not based on the content of any speech. So too here.

The First Amendment does not protect espionage, and the Constitution does not require the government to allow TikTok's national security threat to persist simply because TikTok also enables Americans to use the platform for protected speech.

And to be clear—H.R. 7521 presents an even easier case from a First Amendment perspective because, contrary to the ACLU's representation—the bill would enable Americans to continue using TikTok, provided that it genuinely cuts ties with the CCP.

The bill does not grant the government any broad new powers.

Contrary to the ACLU's suggestion, H.R. 7521 does not give the Administration broad new powers. This bill is a smart, targeted, and rifle shot approach that addresses the serious risks posed by TikTok's ties to the CCP. As the text expressly states, "nothing in this Act may be construed to authorize the Attorney General to pursue enforcement . . . against an individual user of a foreign adversary controlled application." The bill goes on to state that "nothing in this Act may, except as expressly provided herein, to alter or affect any other authority provided by or established under another provision of Federal law." It does not sweep at all beyond an application that is both controlled by a foreign adversary and poses a demonstrated national security risk.

The Montana case only reinforces the need for Congress to pass this bill.

The ACLU suggests that a district court case that reviewed Montana's state law ban on TikTok means that Congress cannot enact H.R. 7521. But this argument is based on a misreading of that decision. That case turned on the district's court determination that an individual state did not have the authority to regulate what the court viewed as a matter of foreign affairs. That determination—whatever its merits—has no application at all to Congress, which plainly has authority to regulate in this area. Indeed, that court case only reinforces the need for Congress to act.

Congressional action on TikTok has not been rushed, far from it.

The ACLU argues that Congress has rushed too quickly through the process of acting on TikTok. Not so. The House Energy and Commerce Committee held a full Committee hearing on TikTok all the way back in March of last year when TikTok's Chief Executive Officer Shou Zi Chew testified. And that was far from the beginning of Congress's detailed and comprehensive consideration of TikTok's national security threats. TikTok's Chief Operating Officer testified before lawmakers on TikTok's risks in September 2022. TikTok's head of public policy testified before congressional lawmakers in October 2021. And it was publicly reported a year ago now that the Biden Administration ordered TikTok—after years of review and engagement through the CFIUS

process—to divest its ties to the CCP or face a ban in order to resolve TikTok’s national security risks.

The ACLU’s argument that privacy legislation would address TikTok’s national security threats misses the mark.

Privacy laws and national security laws are not the same thing. Just look at Europe. The E.U. has enacted some of the strictest data privacy laws in the world, and yet it has also taken separate actions to ban TikTok from official devices. Those bans would have been unnecessary if privacy laws alone were adequate to address the security risks posed by untrustworthy actors.

The ACLU’s reference to the Berman Amendment and IEEPA is a red herring.

The ACLU suggests that the Berman Amendment and IEEPA, or at least the principles underlying those laws, somehow conflict with Congress passing H.R. 7521. That is not the case. Those enactments impose certain limits on unilateral Executive Branch actions. They do not constrain in any way Congress’s decisions to pass laws like H.R. 7521.

Sincerely,

A handwritten signature in blue ink, appearing to read 'B Carr', with a long horizontal flourish extending to the right.

Brendan Carr