

April 19, 2024

Re: Oppose the *Unconstitutional* H.R. 8038, the 21st Century Peace through Strength Act

Dear Representative:

The American Civil Liberties Union strongly urges you to vote “NO” on H.R. 8038, the 21st Century Peace through Strength Act. This bill contains provisions from two bills that the House considered earlier this year. The ACLU opposed what is now Division D of H.R. 8038, when it was before the House as H.R. 7521, the Protecting Americans from Foreign Adversary Controlled Applications Act. Although the timeframe given to divest TikTok and other apps has been extended, it still unconstitutionally infringes on First Amendment rights of more than 170 million Americans who rely on TikTok to receive or express speech on a truly endless array of issues. The ACLU also raised serious concerns about what is now Division E of H.R. 8038, when it was before the House as H.R. 7520, the Protecting Americans’ Data from Foreign Adversaries Act of 2024. While we earlier called for a narrowing of what is now Division E’s scope, so that it would not extend past data brokers to implicate journalists, whistleblowers, and others, no such changes were made. Thus, the ACLU now opposes this portion of the bill because it could obstruct reporting of information that is protected under the First Amendment, and that is considered of value to the American public. **The ACLU urges you to vote “NO” on the bill and will score this vote.**



**National Political
Advocacy Department**
915 15th Street, NW, 6th Floor
Washington, DC 20005-2112
aclu.org

Deirdre Schifeling
Chief Political &
Advocacy Officer

Anthony D. Romero
Executive Director

Deborah N. Archer
President

The Protecting Americans from Foreign Adversary Controlled Applications Act (Division D) Is a TikTok Ban, and Would Violate the First Amendment

The Protecting Americans from Foreign Adversary Controlled Applications Act 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. We urge you to oppose this bill because it is censorship — plain and simple. The longer period to divest is of no practical consequence.

This legislation would forbid app stores and internet hosting services 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 used by more than 170 million individuals across the country to engage in protected speech including political organizing, sharing their art, and accessing news and information. 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 would also ban the app if it is not divested. When the District Court in Montana evaluated that law, it found that Montana’s bill “bans TikTok outright and, in doing so, it limits

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

constitutionally protected First Amendment speech.”² The same reasoning applies here. Because this legislation is a “prior restraint” that would prevent speech before it happens, it’s subject to a heightened level of constitutional scrutiny. To pass muster, 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 an imminent national security threat rising to this level. Even if such an imminent threat did exist, an outright ban is far from the only way to mitigate it. In fact, for one of the fears expressed by members of Congress – the Chinese government accessing the data of U.S. residents – an outright ban 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 – as it has begun considering.

The extension of time allowed to divest before a ban does not lessen our constitutional concerns, because completing a sale to an approved buyer within a maximum of 260 days is still difficult, if not impossible. It takes an average of 8-10 months to sell a company.³ But, there are a number of potential complications in TikTok’s case, including China’s reported refusal to sell⁴, possible antitrust concerns depending on the buyer,⁵ and the due diligence required to buy a multi-billion dollar company. Accordingly, this bill is still nothing more than an unconstitutional ban in disguise, and we urge you to oppose it.

The “Protecting Americans’ Data from Foreign Adversaries Act of 2024” (Division E) Is Overbroad and Sweeps in Protected First Amendment Activity

The overly broad Protecting Americans’ Data from Foreign Adversaries Act of 2024, included as Division of E in H.R. 8038, implicates core First Amendment protections. The Division’s key definitions would extend its reach far beyond the data brokers that it seeks to regulate. Despite exceptions in the bill, it may nonetheless apply to journalists, whistleblowers, and others who should not be within its scope. Because of Division E’s overbreadth, we urge you to vote “NO” on the overall bill.

Division E would apply to any “entity that, for valuable consideration,” discloses a broad list of “personally identifiable sensitive data” – including not just an entity that sells or licenses data, but “releases, discloses, [or] provides access to” it. This is a broad list and would sweep up many entities that are involved in generally publishing or transferring personal information – including journalists and perhaps whistleblowers.

Unfortunately, the bill’s exceptions do not entirely mitigate this reach. One exception includes “reporting or publishing news or information that concerns” matters of “public interest.” However, the “public interest” standard has proven malleable and sometimes leads to contradictory results. Similarly, the bill exempts reporting or “otherwise making available” information “that is available to the general public.” Reporters and

² *Id.* at 35.

³ *How Long Does it Take to Sell a Business?*, Calder Capital, available at <https://www.caldergr.com/timeline-for-business-sale-purchase/>.

⁴ Raffaele Huang, *China Signals Opposition to Forced Sale of TikTok in the U.S.*, The Wall Street Journal (Mar. 15, 2024) <https://www.wsj.com/tech/tiktok-ban-chinese-owners-bytedance-1a857a06>.

⁵ Nicole Narea, *TikTok could avoid a ban with a sale. Finding a buyer won't be easy.*, Vox (Mar. 14, 2024) <https://www.vox.com/technology/2024/3/14/24101155/tiktok-ban-mnuchin-senate-china-shou-meta>.

whistleblowers, however, are valuable to a democratic society precisely because they report on information that is *not* publicly available.

Thus, it is not clear those exceptions would prevent the bill from applying to circumstances such as:

- The publication of [leaked financial documents](#) showing the off-shore financial activity of both public officials and private individuals;
- The [release](#) of photos and documents regarding the abuse of prisoners at Abu Ghraib by United States service members, including the [content of communications](#) among officials discussing those programs; and
- Reporting on a Cabinet member's [health](#) or a general's extra-marital [affair](#).

Each of these incidents would involve the release or disclosure of information covered by the bill – respectively, financial information, the identity of United States service members and the content of communications, health information, and sexual history. Although the ACLU would undoubtedly argue that each of these releases fits within the exception for matters of “public interest,” that term has been subject to strenuous [public debate](#). To avoid chilling protected First Amendment activity, we urge you to vote “NO” on H.R. 8038.

For these reasons, the ACLU strongly urges you to oppose H.R. 8038, for its inclusion of the Protecting Americans from Foreign Adversary Controlled Applications Act, and the Protecting Americans’ Data from Foreign Adversaries Act of 2024. Please do not hesitate to contact us with any questions or comments.

Sincerely,



Christopher Anders
Director, Democracy & Technology



Jenna Leventoff
Senior Policy Counsel



Cody Venzke
Senior Policy Counsel