

No. 24-34

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SAMANTHA ALARIO, HEATHER DIROCCO, CARLY ANN GODDARD,
ALICE HELD, AND DALE STOUT,

Plaintiff-Appellees,

and

TIKTOK INC.,

Plaintiff-Appellee,

v.

AUSTIN KNUDSEN, in his official capacity as Attorney General of the
State of Montana,

Defendant-Appellant,

On Appeal from the United States District Court for the District of Montana Nos.
CV 23-56-M-DWM and CV 23-61-M-DWM
Hon. Donald W. Molloy

**BRIEF OF *AMICI CURIAE* CONFEDERATED SALISH AND KOOTENAI
TRIBES, A FEDERALLY RECOGNIZED INDIAN TRIBE, AND THE
NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF
PLAINTIFF-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

The Confederated Salish and Kootenai Tribes is a federally recognized sovereign nation, for which no corporate disclosure is required.

Pursuant to Fed. R. App. P. 26.1(a) and 29(a)(4)(A), the National Congress of American Indians states that it does not have parent corporations, nor is it publicly traded.

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Other Authorities

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COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2023)3

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Davida Delmar, *Indigenous Digital Sovereignty: From the Digital Divide to Digital Equity*, NATIONAL DIGITAL INCLUSION ALLIANCE (2023),
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Dedrick Asante-Muhammad et al., *Racial Wealth Snapshot: Native Americans*, NCRC (2022),
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Siyeh Communications, *History of Siyeh Communications*, <https://www.siycom.com/about> 10, 11

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INTEREST OF *AMICI CURIAE*¹

Amicus curiae the Confederated Salish and Kootenai Tribes of the Flathead Reservation (“CSKT”) is a federally recognized tribe with approximately 8,000 enrolled members, 5,500 of which live on the Flathead Reservation. The Reservation comprises over 1.2 million acres in the northwestern region of Montana. CSKT has an interest in protecting the economic security and health and well-being of its citizens and recognizes the importance of digital resources to achieving these objectives.

Amicus curiae the National Congress of American Indians (“NCAI”) is the oldest and largest national organization comprised of Tribal Nations and their citizens. Since 1944, NCAI has advised and educated Tribal Nations, states, and the federal government on a range of issues, including self-government, treaty rights, and policies affecting Tribal Nations. NCAI works daily to strengthen the ability of Tribal Nations to ensure the health and welfare of their communities.

¹ Counsel for all parties have consented to the filing of this brief. *Amici* affirm that no counsel to a party authored this brief in whole or in part; no party or counsel to a party contributed money intended to fund preparing or submitting this brief; and no person other than *Amici* and their counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

It is uncontested that Montana’s TikTok ban (“Montana law” or “the Ban”) cannot legally take effect on Tribal lands in Montana. Indeed, in response to an inquiry from the District Court, both parties affirmed that the Ban is not enforceable on Tribal lands, as Tribal lands do not fall within the “territorial jurisdiction” of Montana to which the law applies. Tr. of Oct. 12, 2023 Oral Arg. at 19-22, 45-47. Despite this acknowledgment, the record shows the Montana law would likely be enforced on Tribal lands in practice, as TikTok users’ locations cannot be precisely tracked through IP addresses. SER-177. Therefore, a user who is on Tribal lands, and beyond the jurisdictional reach of the State, may nonetheless appear to be outside Tribal lands and within the “territorial jurisdiction” of Montana. Tr. of Oct. 12, 2023 Oral Arg. at 21-22. Because of this likelihood, TikTok’s counsel suggested access to TikTok may be affected on Tribal lands. *Id.* This imposition of Montana law on Tribal lands, even if inadvertent, infringes on Tribal sovereignty. *Amici* write to provide context as to how the Ban infringes upon Tribal sovereignty and on Tribal governments’ interest in exercising digital sovereignty on Tribal lands without state interference.

I. The Montana Ban Improperly Imposes Montana’s Civil Regulations on Tribal Lands and Infringes on Tribal Sovereignty.

It is well established that Tribal Nations were “self-governing political communities” long before the establishment of the United States. *Denezpi v.*

United States, 596 U.S. 591, 598 (2022) (citing *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)). The policy that Tribal Nations are separate sovereigns “has remained.” *Williams v. Lee*, 358 U.S. 217, 219 (1959); see 25 U.S.C. § 5301 (noting the Congressional policy of Tribal Nation “self-government”); Exec. Order No. 14,112, 88 Fed. Reg. 86,021 (Dec. 11, 2023) (noting the policy of protecting “Tribal sovereignty and self-determination.”); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 (Nell Jessup Newton ed., 2023).

As sovereign governments, Tribal Nations have jurisdiction over the activities and conduct on “land belonging to the Tribe or held by the United States in trust for the Tribe.” *Montana v. United States*, 450 U.S. 544, 557 (1981). This authority allows Tribal Nations “[t]o determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; [and] to expel those who enter the reservation without proper authority.”

Swinomish Indian Tribal Cmty. v. BNSF Ry. Co., 951 F.3d 1142, 1153 (2020) (quoting *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976)); see also *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 899 (9th Cir. 2017), as amended (Aug. 3, 2017) (“The Supreme Court has long recognized that Indian tribes have sovereign powers, including the power to exclude non-tribal members from tribal land.”). To avoid interference with these sovereign prerogatives, Tribal jurisdiction on Tribal lands is assumed to be the exclusion of states. *Williams*, 358

U.S. at 219-20. Even on non-Indian fee land within a reservation, Tribal Nations retain jurisdiction to regulate. *See e.g., FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 931 (2019); *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 899-900 (9th Cir. 2019). Unless and “until Congress acts, the tribes retain” their historic sovereign authority. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

Tribal Nations’ exclusive jurisdiction by virtue of their inherent sovereignty is reinforced by federal preemption. This includes treaties with the United States that reserve Tribal Nations’ exclusive jurisdiction within their lands. *See, e.g.,* Treaty with the Blackfeet, 1855, art. 4, 11 Stat. 657 (1855) <https://treaties.okstate.edu/treaties/treaty-with-the-blackfeet-1855-0736>; Treaty with the Crow Indians, 1868, art. II, 15 Stat. 649 (1868) https://indianlaw.mt.gov/_docs/crow/treaties/1868_treaty.pdf; Treaty of Hell Gate, 1855 (Confederated Salish and Kootenai Tribes), art. 2, 12 Stat. 975 (1855) <https://www.washingtonhistory.org/wp-content/uploads/2020/04/hellgateTreaty.pdf>. The United States Supreme Court has consistently held such “right to exclude” language in Indian treaties vests Tribal Nations with civil jurisdiction over members and nonmembers alike and preempts exercise of jurisdiction by states. *See Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164 (1973); *Kennerly v. Dist.*

Ct. of 9th Jud. Dist. of Mont., 400 U.S. 423 (1971); *see also Little Horn State Bank v. Stops*, 170 Mont. 510 (1976).

Likewise, the plain language of the Montana Enabling Act and the Montana Constitution recognize a lack of state jurisdiction over Tribal lands. The Montana Enabling Act conditioned entry into the Union upon Montana disclaiming “all right and title . . . to all lands . . . owned or held by any Indian or Indian Tribes.” Enabling Act of 1889, 25 Stat. 676 at § 4. To leave no doubt, the Enabling Act further provided that Tribal lands would remain under the “absolute jurisdiction and control of the Congress of the United States.” *Id.* The Montana Constitution adopted and ratified these terms, including,

the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Mont. Const. art. I. The Montana Supreme Court has also held that the federal government and Tribal Nations are the sovereigns that retain jurisdiction over Indian country, to the exclusion of states. *Big Spring v. Conway*, 360 Mont. 370, 380 (2011). Thus, Montana generally has no civil regulatory authority over Tribal lands in Montana.

While Montana may not intend for the Ban to be enforced on Tribal lands, the Ban’s enforcement design nevertheless is likely to impose Montana’s civil

regulatory scheme on Tribal lands. Such an imposition exceeds Montana's jurisdiction. To illustrate, in her declaration, Karen Sprenger, Chief Operating Officer of LMG Security, a cybersecurity and information technology consulting firm, testified "[A] user in Sidney, Montana, for example, may be identified as being in North Dakota, or a user in West Yellowstone, Montana may be identified as being in Wyoming. Similarly, a user in Kellogg, Idaho may be identified as being in Montana." SER-182. The Montana Solicitor General testified the same circumstances would pertain to Tribal lands. SER-49.

Besides the preemptive effect of treaties and the Montana Enabling Act, state exercise of jurisdiction is contrary to the "longstanding policy of encouraging tribal self-government . . . [which] . . . operates 'even in areas where state control has not been affirmatively pre-empted by federal statute.'" *Big Spring*, 360 Mont. 370 at 380 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987)). In cases where states are found to have jurisdiction in Indian country, courts conclude so because of unique circumstances in which they find there is no preemptive federal law, there is a lack of Tribal Nations' and the federal government's interest in encouraging tribal self-government, and the state has a significant interest in exercising its regulatory authority in a way that does not infringe upon Tribal self-government. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). These conditions are not met here. As described in detail below, Tribal

Nations have a significant interest in exercising digital sovereignty on their lands to protect the health and welfare of their people. In contrast, Montana has no significant interest in imposing its digital and data sovereignty policy preferences on Tribal lands.² Moreover, there is no reason to let Montana’s policy preferences override those of Tribal Nations. Such an imposition exceeds Montana’s civil regulatory authority and infringes on Tribal sovereignty.

II. Tribal Nations Exercise Digital Sovereignty for the Health and Welfare of Their People.

The Ban interferes with Tribal Nations’ significant interest in crafting their own policy decisions in the digital and data realm to protect the health and welfare of their people. The federal government has recognized Tribal digital sovereignty and closing the “digital divide” as essential for the health and welfare of Tribal Nations, calling access to high-speed internet no longer a luxury, but a necessity.

FACT SHEET: PRESIDENT BIDEN AND VICE PRESIDENT HARRIS REDUCE HIGH-SPEED INTERNET COSTS FOR MILLIONS OF AMERICANS (May 9, 2022),

<https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/09/fact-sheet-president-biden-and-vice-president-harris-reduce-high-speed-internet-costs-for-millions-of-americans/>.

² *Amici* take no position on the underlying merits of the Montana law, only on the imposition of that law on Tribal lands.

Tribal digital sovereignty is an important and growing component of Tribal sovereignty and is critical to close the digital divide and achieve “digital equity” in Indian country. Tribal Nations are a necessary regulatory and governmental authority in the equitable development of digital infrastructure and economies on Tribal land. Tribal Nations exercise their authority to address the unique needs of their communities in an increasingly digital society. In 2019, the American Indian Policy Institute³ conducted a study surveying the extent of the digital divide in Indian country. Davida Delmar, *Indigenous Digital Sovereignty: From the Digital Divide to Digital Equity*, NATIONAL DIGITAL INCLUSION ALLIANCE (2023)

[hereinafter Delmar],

<https://www.digitalinclusion.org/blog/2023/07/19/indigenous-digital-sovereignty/>.

The study found that 18% of reservation residents have no internet access at home, either wireless or land-based internet (cable, DSL, dial-up), and 33% rely on cell phone service for at-home internet. *Id.* A separate study conducted by the Center for Indian Country Development at the Federal Reserve Bank of Minneapolis emphasized these inequities. Anahid Bauer et al., *The Tribal Digital Divide: Extent and Explanations* (2022), [https://www.minneapolisfed.org/-](https://www.minneapolisfed.org/-/media/assets/papers/cicdwp/2021/cicd-wp-2021-03.pdf)

[/media/assets/papers/cicdwp/2021/cicd-wp-2021-03.pdf](https://www.minneapolisfed.org/-/media/assets/papers/cicdwp/2021/cicd-wp-2021-03.pdf). This study found that,

³ The American Indian Policy Institute of the Sandra Day O’Connor College of Law of Arizona State University, <https://ajpi.asu.edu/>.

compared to non-Tribal areas, download speeds are approximately 75% slower in Tribal areas and “the lowest price for basic Internet service in Tribal areas is 11% higher.” *Id.* These inequities are exacerbated by the fact that Native Americans have the highest poverty rate among all demographics. Dedrick Asante-Muhammad et al., *Racial Wealth Snapshot: Native Americans*, NCRC (2022), <https://ncrc.org/racial-wealth-snapshot-native-americans/>. The lack of reliable and affordable internet access makes it challenging for Tribal members to fully engage in economic and social opportunities necessary to thrive in today’s society. The American Indian Policy Institute highlighted that each Tribal Nation experiences unique barriers to closing the digital divide and thus it is important for Tribal Nations to define their own solutions. Delmar, *supra* at 8.

Tribal communities are often located in rural areas, where access to broadband and social media apps is vital. Many Tribal Nations have Facebook accounts, Instagram accounts, YouTube accounts, or other social media accounts that provide critical information to Tribal communities. *See, e.g.*, CSKT Facebook page, <https://www.facebook.com/share/8cg6MwvAK9mDKAM3/?mibextid=A7sQZp> (last visited May 6, 2024). Whether it is to update members about oncoming severe weather, provide information about missing and murdered relatives, preserve culture, or simply notify the community about an upcoming Tribal Council

meeting, access to these platforms is critical to the health and welfare of Tribal Nations. See e.g., Sara Reardon, *Social media helps Native Americans preserve cultural traditions during pandemic*, CNN (Feb. 29, 2021, 3:25 PM EST), <https://www.cnn.com/2021/02/08/health/coronavirus-native-americans-internet-khn-wellness-partner/index.html>.

Tribal Nations already exercise authority in this area by building broadband infrastructure, providing crucial telehealth, telework, and telelearning opportunities to their members, and protecting private Tribal data. Traci Morris, *Indigenous Digital Sovereignty Defined*, ASU AMERICAN INDIAN POLICY INSTITUTE, <https://aipi.asu.edu/blog/2023/07/indigenous-digital-sovereignty-defined#:~:text=Indigenous%20Digital%20Sovereignty%20is%20both,data%2C%20infrastructure%2C%20and%20networks>.

Tribal Nations have the capability to tackle digital inequity and are the proper sovereigns to determine their policies for their communities. A perfect example is the Blackfeet Nation, which established its own corporation, Siyeh Communications, to address specific digital equity needs (such as effective and reliable broadband access) for Tribal members and those within its service areas. Siyeh Communications' goal is to manage and upgrade the telecommunications infrastructure to improve the quality of life and create economic opportunities for the residents and business within its service area. Siyeh Communications, *History*

of Siyeh Communications, <https://www.siycom.com/about>. The Blackfeet Nation Tribal Chairman Tim Davis described Siyeh Communications' efforts as "a major step in the exercise of the Blackfeet Tribe's sovereign rights." *Id.* The Chairman further stated that, Siyeh Communications "gives the Tribe a level of control necessary to prioritize and develop modern telecommunications technology on the Blackfeet Reservation, especially during a pandemic." *Id.*

It is important to recognize that regulation in the digital realm is not a one size fits all. As Tribal Nations lead the effort to strengthen their digital governance, they can address the issues most critical to them and formulate policies that are best for their communities. Indeed, across the United States, 49 Tribal Nations have enacted Tribal laws relating to Tribal data sovereignty, an important subset of digital sovereignty. Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 Mich L. Rev. 75 (2022). Data is increasingly becoming digitally stored and used by third parties, which comes with risks especially understood by Tribal Nations who have experienced a long history of unauthorized storage and use of Tribal data and information. *See, e.g.*, Robyn L. Sterling, *Genetic Research among the Havasupai: A Cautionary Tale*, AMA JOURNAL OF ETHICS (2011), <https://journalofethics.ama-assn.org/article/genetic-research-among-havasupai-cautionary-tale/2011-02>, (Researchers at Arizona State University misappropriated blood samples of approximately 100 members of the Havasupai Tribe for research

which neither the Tribe nor the member-subjects had provided informed consent to conduct). Responsive to this, Tribal Nations have passed their own regulations regarding the use and storage of their data. *See, E.g.*, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, MICHIGAN - TRIBAL CODE, Title 12 https://www.narf.org/nill/codes/grand_traverse/Title_12.pdf; NAVAJO NATION CODE ANNOTATED, N.N.C. Title 13, Ch. 25, § 3252, <https://www.nnols.org/wp-content/uploads/2022/05/13-20.pdf> (setting “the conditions under which investigators, physicians, researchers and others may perform research activities on living human subjects within the territorial jurisdiction of the Navajo Nation.”); *see also e.g.*, CRIT HUMAN AND CULTURAL RESEARCH CODE § 1-101(2), https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.crit-nsn.gov/crit_contents/ordinances/Human-and-Cultural-Research-Code.pdf&ved=2ahUKEwjPzq7tjPqFAxUAGDQIHtyJCmoQFnoECBgQAQ&usg=AOvVaw1o-iMXdvmBXHQOx3ZSfBqG (The Colorado River Indian Tribes code to protect citizens’ data, “including physical, real, cultural and intellectual property and communal property such as blood and tissue samples from the Tribe in large scale human subjects research.”).

Thus, Tribal Nations, just as Montana, have their own serious concerns regarding the gathering and use of Tribal data by a wide range of companies, government agencies, and other actors. However, implementing these laws is a

costly and resource-intensive endeavor. It requires immense investments in broadband infrastructure, network business models, and network technologies.

Broadband Network Deployment Engineering, an Overview, NTIA

BROADBANDUSA, <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-03/Broadband%20Network%20Deployment%20Engineering%20PDF.pdf>. So, for instance, while Tribal codes establishing data privacy laws to protect Tribal citizens' privacy are an important first step in exercising data sovereignty, the effectiveness of their implementation, among other data sovereignty laws, often depends upon the collaboration of states and the federal government.

Implementing Tribal digital sovereignty overall is strengthened when states, the federal government, and Tribal Nations work collaboratively. Already, we see direct and effective partnerships. For example, in California, the digital divide “is especially endemic on tribal lands” as “over a quarter of households” lack effective and reliable broadband service. Ben Polsky et al., *How California Is Bridging the Digital Divide on Tribal Land*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, <https://carnegieendowment.org/2023/08/28/how-california-is-bridging-digital-divide-on-tribal-land-pub-90433>. Wildfires and other weather-related issues often “disturb the basic communications infrastructure needed to” provide emergency services and critical status updates to Tribal populations during weather-related disasters. *Id.* In response, the federal government and California

made federal and state funding available directly to Tribal Nations to assist in improving this infrastructure. *Id.* Further, California partnered directly with the Hoopa Valley Tribe to construct and bring the state-owned fiber infrastructure directly to the Tribe. *Id.* California acknowledged that this state-Tribal partnership worked to strengthen “the [T]ribe’s self-determination and sovereignty goals of providing essential services to its nation.” *Id.*

Montana, too, has seen efforts to build up Tribal digital sovereignty and address the digital divide. The federal government, Tribal Nations, and Montana came together to discuss how recent federal funding could aid in addressing the state’s digital divide. *Envisioning an Equitable, Inclusive, Connected America, Montana*, National Telecommunications and Information Administration, <https://www.ntia.doc.gov/report/2024/office-internet-connectivity-and-growth-2023-annual-report/implementation-partnering-in-the-field-part-two/states-territories/montana>. Laws like the Ban are counterproductive to such efforts. Because the Ban implicates various forms of Tribal self-governance, it should be aligned with Tribal Nations’ goals so that it is not out of step with measures the federal government, states, and Tribal Nations are implementing to strengthen Tribal self-governance. Instead, state laws should be designed to support collective efforts to bring Tribal Nations’ regulatory frameworks in the digital realm to reality. State laws that would have the effect of regulating digital or data

sovereignty on Tribal lands or within Tribal jurisdictions—whether intentionally or inadvertently—have the potential to undermine, rather than help, in this effort.

To avoid this, state lawmakers must design laws touching issues in the digital world carefully, keeping in mind how those laws, and the regulatory policies that will devolve from them, implicate Tribal Nations. This includes ensuring that state laws will not encroach upon Tribal Nation jurisdiction, inconsistent with federal policy of promoting Tribal self-governance. *Bracker*, 448 U.S. at 144-45. State lawmakers must also consider the complex circumstances in which Tribal Nations operate—such as often being in rural areas and having limited visibility by the greater public—to determine if the design of a law may violate Tribal jurisdiction. Montana’s failure to do so here resulted in a law that cannot be implemented without infringement upon Tribal sovereignty. Not only is this precluded by federal and state law, but it is also contrary to the strong interests Tribal Nations, states, and the federal government have in strengthening Tribal digital sovereignty.

CONCLUSION

Tribal digital sovereignty is crucial for Tribal self-governance in today’s world. Because the Ban’s enforcement design is likely to encroach upon the jurisdiction of Tribal Nations in Montana, the Ban is incongruent with state and federal law and is contrary to efforts to strengthen Tribal digital sovereignty.

Dated: May 6, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a) because this brief contains 4,210 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: May 6, 2024

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I hereby certify that on May 6, 2024, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM / ECF system. I certify that all participants in this case are registered CM / ECF users and service will be accomplished by the CM / ECF system.

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