No. 19-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSHUA JAMES COOLEY, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, TRIBAL NATIONS AND INTER-TRIBAL ORGANIZATIONS

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QUESTION PRESENTED

Whether the lower courts erred in suppressing evidence on the theory that a police officer of an Indian tribe lacked authority to temporarily detain and search respondent, a non-Indian, on a public right-of-way within a reservation based on a potential violation of state or federal law.

RELATED PROCEEDINGS

United States District Court (D. Mont.):

United States v. Cooley, No. 16-cr-42-BLG-SPW, 2017 U.S. Dist. LEXIS 17276 (D. Mont. Feb. 7, 2017).

United States Court of Appeals (9th Cir.):

United States v. Cooley, 919 F.3d 1135 (9th Cir. 2019)(petition for reh'g denied, *United States v. Cooley*, 947 F.3d 1215 (9th Cir. 2020)).

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INTERESTS OF THE *AMICI CURIAE*[1]

The Crow Tribe of Indians is a sovereign, federally-recognized Indian tribe with more than 14,000 enrolled citizens, approximately 9,000 of whom reside on the Crow Indian Reservation in southern Montana. The Reservation spans nearly 3,500 square miles, encompassing parts of several counties and borders the City of Billings, the State of Wyoming, and the Northern Cheyenne Indian Reservation. Notably, the Second Treaty of Fort Laramie between the United States and the Crow Tribe, executed on May 7, 1868, 15 Stat. 649 (the "1868 Treaty"), established the terms of agreement between the two sovereigns and significantly reduced the Tribe's land-base. The first promise made by the United States to the Crow Tribe—Article I of the 1868 Treaty—was the apprehension and prosecution of "bad men," including their exclusion from the Reservation, "upon proof." Treaty of Fort Laramie between the United States of America and the Crow Tribe, art. 1, May 7, 1868, 15 Stat. 649.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no person or entity other than *amici curiae* and their counsel authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission of the brief. The parties were notified of the intention of *amici curiae* to file as required by Rule 37.3 and all parties have consented to the filing of this brief.

Officer James Saylor, then a Crow Tribal highway safety agent acting pursuant to a federal contract,[2] investigated the Respondent after finding him parked on rural U.S. Highway 212 on the Crow Indian Reservation, and with blood-shot eyes, several firearms, and a toddler in the vehicle. Officer Saylor's investigation uncovered more than 50 grams of methamphetamine, a violation of both federal and Tribal law occurring within the Crow Indian Reservation. Tribal officers' ability to make on-the-spot decisions to protect all persons on reservations, to stem the flow of illegal drugs and contraband, and to uphold the treaty obligations are of fundamental importance to all tribal nations and inter-tribal organizations that serve tribal governments. *Amici* here offer tribal governments' perspectives. Collectively, *amici curiae* represent the governmental voices of more than 200 tribes, serving more than one million residents of Indian reservations throughout the country.

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 tribal, state, and federal governments on a range of issues,

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[2] At the time of the investigation of Respondent, Officer Saylor was employed by the Crow Tribe through a federal contract program for tribal highway safety enhancement. *See* App. at 88a-89a; 177a-78a. Between Officer Saylor's investigation of Mr. Cooley and the District Court motion practice on Respondent's motion to suppress, Officer Saylor became a federal agent employed directly by the U.S. Department of the Interior's Bureau of Indian Affairs-Office of Justice Services ("BIA-OJS").

including the development of effective law enforcement policy that best protects the safety and welfare of individuals living in and around Indian country. NCAI is uniquely situated to provide critical context to the Court about tribal governments' law enforcement authority and the solemn responsibilities that tribes uphold daily in providing for the safety and welfare of tribal communities.

Amicus Curiae Navajo Nation is a sovereign tribal nation with ratified treaties with the United States from 1849 and 1868. The "1868 Navajo Nation Treaty" includes a "Bad Man Clause" similar to the provision in the Crow Tribe's 1868 Treaty. Treaty Between the United States of America and the Navajo Tribe of Indians, art. 1, June 1, 1868, 15 Stat. 667. The Nation has more than 300,000 citizens. The Nation's sovereign territory spans across Arizona, New Mexico and Utah, and overlaps with ten counties, encompassing over 27,000 square miles. The Nation is home to approximately 175,000 people. The Nation's police force is responsible for patrolling the entire Navajo Nation, a land base larger than ten states, with a ratio of less than one officer to every one thousand people, compared to the recommended United States' average of two and a half officers to every one thousand people. With world-class sites such as Canyon de Chelly National Monument and Monument Valley Tribal Park, and several major state and federal highways crossing the Nation's lands, there are many non-Indian visitors, some of whom commit criminal offenses while present on the Nation. Often, Nav-

ajo police officers are the only law enforcement available within an hour or more to respond to incidents involving such non-Indians.

Amicus Curiae the Affiliated Tribes of Northwest Indians is a non-profit organization, founded in 1953 and comprised of nearly 50 federally-recognized Indian tribes from the greater Northwest, with the intent to represent and advocate for the interests of its member tribes and to protect and preserve tribal sovereignty and self-determination.

Amicus Curiae the California Tribal Chairpersons' Association is a non-profit corporation, consisting of 90 federally-recognized tribes, supporting their sovereign rights.

Amicus Curiae the Inter-Tribal Association of Arizona ("ITAA") is comprised of 21 federally-recognized Indian tribes with lands located primarily in Arizona, as well as California, New Mexico, and Nevada. Founded in 1952, ITAA is a united voice for tribal governments on common issues and concerns.

Amicus Curiae United South and Eastern Tribes Sovereignty Protection Fund, which represents 33 federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico, advocates on behalf of its Tribal Nation members by upholding, protecting, and advancing their inherent sovereignty interests.

Amici Curiae Akiak Native Community, Blackfeet Tribe, Bois Forte Band of Chippewa, Cheyenne River Sioux Tribe, Confederated Tribes and Bands of the Yakama Nation, Confederated Salish and Kootenai Tribes, Confederated Tribes of the Grand Ronde Community of Oregon, Ewiiaapaayp Band of Kumeyaay Indians, Fond du Lac Band of Lake Superior Chippewa, Fort Belknap Indian Community, Karuk Tribe, Kaw Nation, Kootenai Tribe of Idaho, Little Shell Tribe, Lower Sioux Indian Community in the State of Minnesota, Makah Indian Tribe, Menominee Indian Tribe of Wisconsin, Mandan, Hidatsa, and Arikara Nation, Miami Tribe of Oklahoma, Nez Perce Tribe, Northern Cheyenne Tribe, Poarch Band of Creek Indians, Prairie Band Potawatomi Nation, Prairie Island Indian Community, Pueblo of San Felipe, Red Lake Band of Chippewa Indians, Rosebud Sioux Tribe, Saint Regis Mohawk Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Seneca Nation of Indians, Shakopee Mdewakanton Sioux Community, Southern Ute Indian Tribe, Spirit Lake Nation, Squaxin Island Tribe, Suquamish Tribe, Swinomish Indian Tribal Community, Tulalip Tribes of Washington, Ute Mountain Ute Tribe, and Wyandotte Nation are each federally-recognized tribal governments with distinct interests in protecting public safety and tribal sovereignty.

SUMMARY OF ARGUMENT

Tribal governments, like all other governments, have a fundamental responsibility to provide safety

and protect the welfare of those within their jurisdictions, whether Indian or non-Indian. The chronic and systemic underfunding of tribal public safety departments by the federal government, as compared to similarly-situated jurisdictions outside Indian country, is well-documented.[3] Facilitating effective interagency cooperation among tribal, state, local and federal authorities is vital to promoting public safety. As a national advisory commission appointed by the President and Congress to enhance public safety on and near Indian reservations concluded:

> [G]reat promise has been shown in those States where intergovernmental recognition of arrest authority occurs. It is also true wherever intergovernmental cooperation has become the rule, not the exception, that arrests get made, interdiction of crime occurs, and confidence in

[3] Most recently, the Indian Law and Order Commission ("ILOC"), the bi-partisan, independent advisory board created by the Tribal Law and Order Act of 2010, Public Law 111-211, tit. II, 124 Stat. 2258, 2261, concluded that Indian country is served on average by approximately one-half the number of law enforcement officers as comparable jurisdictions. This gap widens for Indian reservations where the federal government provides policing through the BIA-OJS – the situation on the Crow Indian Reservation when this case arose. Indian Law & Order Commission, A ROADMAP FOR MAKING NATIVE AMERICA SAFER, Report to the President and Congress of the United States 67 (Nov. 2013), *available at* https://www.aisc.ucla.edu/iloc/report/ ("ILOC Report").

public safety improves.[4]

Such cooperation takes many forms, including formal deputization agreements between neighboring public safety agencies, mutual aid policies and protocols for back-up and reserve staffing, inter-departmental communications, expanded training opportunities, and many other initiatives aimed at promoting seamless and collaborative public safety services to tribal communities. *See* ILOC Report, at 101-115.

Tribal law enforcement officers are no less deserving of respect than their colleagues employed by a city, county or state simply because the government they serve is a tribal nation. Tribal governments ensure that their police typically are as experienced, qualified, and well-trained as their federal, state, and local government counterparts, and just as willing to put their lives on the line to protect and serve the public. Yet the Ninth Circuit's decision below, if allowed to stand, would severely hamper tribes' ability to protect the public by denying their officers the same minimum respect afforded to all other officers under *Terry v. Ohio*, 392 U.S. 1 (1968).

The Ninth Circuit decision below invalidated 40-year-old Circuit precedent to hold that tribal police officers, *alone among law enforcement officers in the United States*, are not allowed to *Terry*-stop and inves-

[4] *Id.* at 100.

tigate non-Indian persons based on reasonable suspicion, effectively undercutting tribal law enforcement officers' ability to protect the public. The Appeals Court's rationale for eliminating this important investigative tool of public safety rests on an erroneous interpretation of this Court's decades-old precedent in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

The result of the Ninth Circuit's novel reinterpretation of *Strate* is to greatly increase the practical difficulties that law enforcement officers encounter in the field. The Ninth Circuit held that tribal law enforcement officers holding reasonable suspicion cannot conduct a minimal search sufficient to protect themselves or address immediate risks to public safety. Instead, the Ninth Circuit now requires tribal officers to first consider a Byzantine series of legal questions, even in the dark on a remote rural road, without backup, including: whether there is a violation of tribal law, or an "apparent" or "obvious" violation of state or federal law; what is the status of the land within the reservation where the officer's encounter is occurring; what is the Indian status of the individual(s) involved in the encounter; whether a federal statute, such as the Violence Against Women Act of 2013, 25 U.S.C. § 1304 ("VAWA"), affords a basis for tribal investigation and prosecution; and whether one or more relevant deputization agreements exist—questions that burden tribal officer decision-making in a manner that could jeopardize tribal officer safety when split-second decisions are required in an encounter. App. at 42a-44a.

As Judge Collins' opinion dissenting from the Ninth Circuit's denial of rehearing en banc succinctly summarizes:

> The panel's extraordinary decision in this case directly contravenes long-established Ninth Circuit and Supreme Court precedent, disregards contrary authority from other state and federal appellate courts, and threatens to seriously undermine the ability of Indian tribes to ensure public safety for the hundreds of thousands of persons who live on reservations within the Ninth Circuit.

App. at 41a.

To Judge Collins' point, the Ninth Circuit includes over 75 percent of the nation's 574 Indian tribes and encompasses more than 71 million reservation acres, roughly 80 percent of the country's total reservation lands. More than a quarter of all matters referred to federal prosecutors in Indian country originate in the Ninth Circuit. U.S. Gen. Accounting Office, GAO-11-167R, *Declinations of Indian Country Matters*, 7 (Dec. 13, 2010), https://www.gao.gov/assets/100/97229.pdf. For this reason, and as stated by Judge Collins: ". . . for the hundreds of thousands [of Indian reservation residents in the Ninth Circuit], it makes a great deal of difference if tribal law enforcement lacks on-the-spot authority to detain and investigate non-Indians based on the reasonable suspicion standard." App. at 47a.

ARGUMENT

I. THE NINTH CIRCUIT'S RULING SEVERELY IMPEDES TRIBES' AUTHORITY TO PROVIDE FOR PUBLIC SAFETY IN INDIAN COUNTRY.

A. Tribes Provide for the Daily Protection of Tribal Citizens, Tribal Property and Communal Resources, and Deserve the Same Law Enforcement Authorities as Other Governments.

The Ninth Circuit's ruling–that tribal law enforcement officers may detain non-Indians on public highways within reservations only long enough to determine whether they are, or are not, Indian, with longer durations of detention being appropriate only in limited circumstances–is inconsistent with strong federal policies encouraging tribal self-governance and respecting tribal sovereignty. These policies are critical to ensure tribal governments can provide all citizens on reservations the same protections of life, liberty, and property as federal, state, and local governments provide citizens elsewhere. Importantly, this Court's precedent and current federal policies empower tribal governments to provide such protections. The Ninth Circuit's ruling threatens to severely alter how tribal governments are able to protect their citizens, property, and other resources against actions by outside offenders within Indian country.

1. The Ninth Circuit's Ruling Contradicts *Terry* and Handicaps Tribes' Ability to Provide Important Public Safety Services within Indian Country.

In its path-marking decision in *Terry v. Ohio*, this Court balanced the following interests: a government's interest to detect and prevent crime, which it said, "underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is not probable cause to make an arrest," *Terry*, 392 U.S. at 22; the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him," *id*. at 23; and the "constitutionally protected interests of the private citizen" under the Fourth Amendment. *Id*. at 21.

The Court acknowledged the government's public safety interests as a "legitimate investigative function," dependent upon police officer training and experience. *Id*. at 22. In considering police officer safety concerns while carrying out these duties, the Court noted:

> Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year

> in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.

Id. at 23-24.

In balancing these interests against an individual's Fourth Amendment protections, the Court stated "[e]ach case . . . will . . . have to be decided on its own facts," *id*. at 30, and upheld "stop and frisk" as constitutionally permissible if two conditions are met. First, the investigatory stop must be lawful. *See id*. That requirement is met in an on-the-street encounter, *Terry* determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. *Id*. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous. *Id*. at 30-31.

This Court has consistently upheld law enforcement officers' authority to investigate and to temporarily detain individuals based on reasonable suspicion, and to conduct the sort of limited on-the-spot investigation that *Terry* permits. *See, e.g., Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (upholding reasonable suspicion standard); *see also Arizona v. Johnson*, 555 U.S. 323, 330-34 (2009) (finding reasonable suspicion based on officer's observations during traffic stop justified pat-down and recognizing that

"traffic stops are especially fraught with danger to police officers") (citing *Michigan v. Long*, 463 U.S. 1032, 1047 (1983)); *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (reasoning that officers' information on context of encounter in area of high gang activity justified reasonable suspicion).

The strong governmental interests and officer safety interests present in *Terry v. Ohio* are equally present within Indian country. As this Court noted in *Terry*, officers face myriad encounters:

> Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Some of them begin with a friendly enough manner, only to take a different turn upon the interjection of some unexpected element into the conversation.

392 U.S. at 13.

Tribal officers too must react instantly in all situations, relying on their experience and training to observe, assess, and determine whether there is reasonable suspicion to act further. For example, with respect to traffic stop encounters, this Court has stressed that "'[t]he risk of harm to both the police and the occupants [of a stopped vehicle] is minimized…if

the officers routinely exercise unquestioned command of the situation.'" *Arizona*, 555 U.S. at 330-31 (quoting *Maryland* v. *Wilson*, 519 U.S. 408, 414 (1997) (in turn quoting *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981), and citing *Brendlin v. California*, 551 U.S. 249, 258 (2007)). The Ninth Circuit's ruling greatly hinders the ability of officers to make the common-sense, split-second decisions that are essential to professional law enforcement and that minimize the risk of harm to both law enforcement and citizens.

a. Jurisprudence interpreting ICRA's Fourth Amendment analogue should be consistent with Fourth Amendment jurisprudence more broadly, both within and outside of Indian country.

Terry professes that "[e]ver since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry*, 392 U.S. at 12 (citing *Weeks v. United States*, 232 U.S. 383, 391-93 (1914)). "Thus, its major thrust is a deterrent one." *Terry*, 392 U.S. at 12 (citing *Linkletter v. Walker*, 381 U.S. 618, 629-35 (1965)). Here, Officer Saylor's routine investigation, and resulting reasonable suspicion, were methodically conducted, in accord with the Fourth Amendment analogue of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §1302. Officer Saylor observed several concerning factors and acted professionally and appropriately in assessing the need to further investigate. These factors included: 1) the presence of a toddler along with semi-

automatic rifles and a loaded firearm, in Respondent's vehicle, in the middle of the night; 2) Respondent's decidedly unconvincing explanation that he was purchasing a vehicle with out-of-state plates from either a probation officer or a drug dealer; 3) Respondent's erratic and agitated behavior in response to Officer Saylor's questions; and 4) Respondent's delay in providing identification and instead repeatedly placing wads of cash on the vehicle dashboard and then hesitating to comply with Officer Saylor's continuing requests for identification with shallow breath and a 1,000 yard stare. *See* App. at 47a-52a. Officer Saylor addressed the situation according to his experience and training, and immediately took appropriate steps to ensure his own safety and the safety of the child in the vehicle. His judgment is not deserving of less respect than the officers involved in *Rodriguez*, *Johnson*, *Wardlow* or any of the other *Terry*-stop jurisprudence.

As noted above, tribal nations face considerable challenges due to limited available public safety resources and it is critical to have strong and workable cooperative arrangements with neighboring jurisdictions. Tribes have comparably fewer officers per capita than other governments nationwide. U.S. Commission on Civil Rights, *Broken Promises: Continued Federal Funding Shortfall for Native Americans*, 208 (Dec. 2018), https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf. In addition, tribal law enforcement officers must perform their duties for a population with one of the nation's highest rates of violent crime, and must do so despite being

systemically underfunded. *See id.* at 32; *see also* NCAI, *Fiscal Year 2021 Budget Request: Advancing Sovereignty Through Certainty and Security*, 31 (Feb. 10, 2020) http://www.ncai.org/resources/ncai-publications/indian-country-budget-request/NCAI_FY_2021_FULL_BUDGET.pdf (noting that the Bureau of Indian Affairs generally funds tribal law enforcement at about 20 percent of estimated need). At a time when the United States, outside of Indian country, has generally experienced steady or declining incidents of violent crime – at least until very recently – rates of those crimes in Indian country remain unabated, often exceeding state rates by some 20 times the state average, including staggering rates of domestic violence and sexual assault. *See, e.g.,* Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. Rev. 65, 68 (2019); Troy A. Eid, *Beyond Oliphant: Strengthening Criminal Justice in Indian Country*, THE FEDERAL LAWYER (April 2007); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 786 (March 2006).

Further complicating matters, organized crime, gangs and drug cartels have taken advantage of the jurisdictional patchwork and limited law enforcement presence on tribal lands to produce narcotics and other contraband. *See Law Enforcement in Indian Country,* 110th Cong. 1st Sess., S. Hr'g. 110-106, Senate Committee on Indian Affairs (May 17, 2007), Statement of W. Patrick Ragsdale, Director, BIA, Department of Interior ("DOI"), at 6; *see also* Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get*

Away With Almost Anything, The Atlantic (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/. The Ninth Circuit's decision further exacerbates tribal governments' challenges to safeguard the public in light of these jurisdiction and resource issues.

b. Tribal officers' Terry-stop authority within Indian country should not turn on roadside determinations of Indian status, which is not easily discernible and is not a precise metric for jurisdiction.

Further compounding these facts, and in contrast to *Terry*, the Ninth Circuit would have tribal officers relegate public safety concerns as secondary, in favor of a complicated inquiry of a suspect's Indian status, sometimes while serving as the lone officer on shift in a remote rural area roughly the size of Delaware – the Crow Indian Reservation:

> On many reservations, there is no 24-hour police coverage. Police officers often patrol alone and respond alone to both misdemeanor and felony calls. Our police officers are placed in great danger because back up is sometimes miles and hours away, if available at all.

Law Enforcement in Indian Country, 110th Cong. 1st Sess., S. Hr'g. 110-106, Senate Comm. on Indian Af-

fairs (May 17, 2007), Statement of W. Patrick Ragsdale, Director, BIA, DOI, at 6; *see also Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the U.S. Supreme Court*, 107th Cong., 2d Sess., S. Hr'g'. 107-605, Senate Comm. on Indian Affairs (July 11, 2002).

The question of who is an Indian for purposes of criminal jurisdiction is not always easy to determine. Rather, the question of Indian status can be litigated and turns on such factors as: 1) tribal enrollment; 2) government recognition, formally and informally; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life. *See United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005). Additionally, precedent regarding who is an "Indian" for purposes of criminal jurisdiction is not uniform among Circuits and is not always limited to enrolled members of a federally-recognized Indian tribe. For these reasons, tribal and federal authorities regularly train tribal police officers to secure the scene and contact them to assist with assessing jurisdictional questions.

The Ninth Circuit also fails to consider how these roadside jurisdictional inquiries might differ for one of the several dozen Indian tribes who are exercising criminal jurisdiction over non-Indians pursuant to VAWA. For those tribes, the question of jurisdiction does not turn on the Indian status of the suspect, but rather requires a complicated inquiry into the nature of the suspected crime and whether the suspect falls

within one of the exceptions to tribal jurisdiction enumerated at 25 U.S.C. § 1304(b)(4).

And yet, the Ninth Circuit imposes on tribal officers the unique burden of applying a complicated series of federal laws and inquiries to determine whether their authority has been limited with respect to a particular encounter occurring within the boundaries of the tribal government's Indian country. No other law enforcement agency in the country is required to put this type of determination ahead of reasonable public safety concerns. This burden directly affronts tribal sovereignty and violates the "paramount federal policy of ensuring that Indians do not suffer interference with their efforts to develop . . . strong self-government." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1007 (10th Cir. 2015)(internal quotations and citations omitted).

Subjecting tribal officers to proscriptive rules in lieu of *Terry*-stop authority consistent with their law enforcement brethren creates additional practical issues. Tribal law enforcement officers are trained and proficient in exercising their duties consistent with *Terry*-stop authority, and this effective removal of that authority with respect to non-Indians on rights-of-way within the reservation will require a distinct and separate Fourth Amendment training for tribal officers. Further, as stated above, tribal officers often enter into deputization agreements with neighboring communities and it is important that their Fourth Amendment training mirror local non-Indian jurisdictions.

Additionally, this Ninth Circuit holding may result in increased illegal trafficking on throughways within Indian reservations by non-Indians emboldened by this erroneous holding. It is common knowledge that to evade tribal law enforcement jurisdiction, one need only disclaim identity. A generation after this Court's *Oliphant v. Suquamish Tribe* decision finding that tribes had been implicitly divested of criminal jurisdiction over non-Indians because of tribes' status as "conquered and dependent" peoples, 435 U.S. 191, 196 (1978) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)), then-United States Senator Ben Nighthorse Campbell questioned the impact of *Oliphant* and observed that "the word is out that people can get off the hook, so to speak, if they are not Indian and they do something on Indian land." S. Hr'g. 107-605.

The Ninth Circuit's holding creates an obvious easy-out for law violators who frequently are untruthful with law enforcement, especially where, as discussed earlier, tribal identity is not necessarily easily discernible. *Terry*-stop authority for tribal law enforcement officers allows for better coordination with appropriate law enforcement officers, in those instances where tribal arrest authority is not present or is unclear, or where violators may be untruthful.

II. THE NINTH CIRCUIT'S RULING IS CONTRARY TO SETTLED LAW SUPPORTING TRIBAL OFFICERS' *TERRY*-STOP AUTHORITY AND HAS DISTURBING PRACTICAL IMPLICATIONS.

A. The Analysis of the Panel and the Concurring Opinion Denying En Banc Review Conflict with This Court's Precedents.

The Ninth Circuit's holding that tribal officers lack investigative power with respect to non-Indians on a public highway right-of-way on the Crow Indian Reservation cannot be reconciled with this Court's decisions in *Strate*, *Terry*, *United States v. Bryant*, 136 S. Ct. 1954 (2016), *Kansas v. Glover*, 140 S. Ct. 1183 (2020), and their progeny.

1. The Ninth Circuit's Ruling Directly Contradicts *Strate* and *Terry*.

As Judge Collins observed: "[N]othing in *Strate* requires the panel's troubling disregard of sovereign tribal authority." App. at 47a. Rather, in noting that the state highway right-of-way in *Strate* was "open to the public, and traffic on it is subject to the State's control," *Strate*, 520 U.S. at 456, this Court qualified that general statement as follows:

> We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain

> and turn over to state officers nonmembers stopped on the highway for conduct violating state law.

Id. at 456 & n.11 (referencing *State v. Schmuck*, 850 P.2d 1332, 1341 (Wash. 1993) (recognizing that a limited tribal power "to stop and detain alleged offenders in no way confers an unlimited authority to regulate the right of the public to travel on the [r]eservation's roads"), *cert. denied,* 510 U.S. 931 (1993)).

Of course, this supplements this Court's previous broader understanding iterated in *Duro v. Reina*, 495 U.S. 676, 697 (1990), superseded by statute on other grounds, that "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." Moreover, the tribal power to eject state and federal lawbreakers from reservations "would be meaningless were the tribal police not empowered to investigate such violations," and so "[o]bviously, tribal police must have such power." *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975). For these reasons, this Court must reverse the panel's erroneous holding that tribes "lack the ancillary power to investigate non-Indians who are using such public rights-of-way." *United States v. Cooley*, 919 F.3d 1135, 1141 (9th Cir. 2019).

Until the panel's decision below, and consistent with this Court's holding in *Strate*, *Ortiz-Barraza* was well-settled and widely followed. Numerous courts

have expressly endorsed the Ninth Circuit's *Ortiz-Barraza* conclusion that tribes may detain and investigate non-Indians for suspected violations of state and federal law. "[T]he power to maintain public order by investigating violations of state law on the reservation . . . is clearly an incident of general tribal sovereignty." *State v. Pamperien*, 967 P.2d 503, 505-06 & n.4 (Or. Ct. App. 1998); *see also id.* at 506 & n.4 ("tribal law enforcement officers have the authority to investigate on-reservation violations of state and federal law as part of the tribe's inherent power as sovereign," and this power extends to non-Indians "stopped on a state highway"); *see also United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005) (holding that "tribal police officers do not lack authority to detain non-Indians whose conduct disturbs the public order on their reservation" and that "[a]t the time that the tribal officers stopped Mr. Terry they clearly had a reasonable and articulable suspicion that 'criminal activity may be afoot'") (quoting *Terry v. Ohio*, 392 U.S. at 30)); *State v. Haskins*, 887 P.2d 1189, 1195-96 (Mont. 1994) (stating that tribe's power "to restrain non-Indians who commit offenses within the exterior boundaries of the reservation and to eject them by turning such offenders over to the proper authority" includes the ancillary "authority to *investigate* violations of state and federal law") (emphasis added) (citing *Ortiz-Barraza*, 512 F.2d at 1180)); *State v. Schmuck*, 850 P.2d 1332, 1340-42 (Wash. 1993) ("[T]he Tribe's authority to stop and detain is not necessarily based exclusively on the power to exclude non-Indians from tribal lands, but may also be derived

from the Tribe's general authority as sovereign") (emphasis omitted); *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1152 & n.3 (9th Cir. 2017) (same); *Bressi v. Ford*, 575 F.3d 891, 896 (9th Cir. 2009) (same); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1175 (9th Cir. 2005) (same and stating that "[i]ntrinsic in tribal sovereignty is the power to exclude trespassers from the reservation, a power that necessarily entails investigating potential trespassers"); *Bishop Paiute Tribe v. Inyo County*, No. 1:15-cv-00367-DAD-JLT, 2018 U.S. Dist. LEXIS 4642, at *10-13 (E.D. Cal. Jan. 10, 2018) (same); *United States v. Peters*, No. 3:16-CR-30150-RAL, 2017 U.S. Dist. LEXIS 56754, at *6–7 (D. S.D. Mar. 16, 2017) (same, quoting *Ortiz-Barraza* and *Strate*); *Bressi v. Michael Ford*, No. CV-04-264 TUC JMR, 2007 U.S. Dist. LEXIS 111561, at *13 (D. Ariz. Mar. 27, 2007) (same); *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1199 (C.D. Cal. 1998) (same). Indeed, the Ninth Circuit stands alone among courts in its fundamental misreading of *Strate*, setting tribal governments apart from the commonsense standard of *Terry*.

2. The Ninth Circuit's Ruling Contradicts *Bryant* and *Glover*.

In *Bryant*, the Court recognized that, in response to "the high incidence of domestic violence against Native American women," Congress enacted a felony offense of domestic assault in Indian country by a habitual offender. *Bryant*, 136 S. Ct. at 1958-59. In finding that uncounseled tribal court convictions could be

used for statutory sentencing enhancement purposes and the Sixth Amendment did not apply to tribal court convictions, the Court "resisted" creating a second class of tribal court convictions, *id.* at 1966, and avoided precisely what the Ninth Circuit did below: imposing an exception on Indian country to ordinary principles that apply in every other context. *See also McGirt v. Okla.*, 140 S. Ct. 2452, 2457 (2020) (noting the "perils of substituting stories for statutes" and declining Oklahoma's invitation to "finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others"). Here, the Ninth Circuit panel substituted its own revisionist "story" of implied common law losses of tribal investigative authority for this Court's express disclaimer of any implications for tribal law enforcement investigative authority in *Strate* and ignored the better-reasoned authority of *United States v. Terry* and other cases.

Nothing in the Fourth Amendment inhibits law enforcement from investigating upon reasonable suspicion arising from "a particularized and objective basis," as plainly arose from Officer Saylor's observations of Respondent. *Glover*, 140 S. Ct. at 1187 (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) and *Terry*, 392 U.S. at 21-22). This is a "commonsense nontechnical [standard] that deal[s] with the 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Torry v. City of Chicago*, 932 F.3d 579, 587 (7th Cir. 2019)(quoting *Ornelas v. United States*, 517 U.S.

690, 695 (1996) (alterations in *Torry*, internal quotation and citations in *Ornelas* omitted). Indeed, "[t]he reasonable suspicion inquiry 'falls considerably short' of 51% accuracy." *Glover*, 140 S. Ct. at 1188 (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)). "[T]o be reasonable is not to be perfect." *Glover*, 140 S. Ct. at 1188 (quoting *Heien v. North Carolina*, 574 U.S. 54, 60 (2014)). It is context that matters to the Fourth Amendment analysis—relevant characteristics of the location, evasive behaviors, inferences from human behaviors—all of which Officer Saylor reasonably assessed based on his training and experience. *See Adams v. Williams*, 407 U.S. 143, 144 (1972); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975); *Cortez*, 449 U.S. at 418.

The *Cooley* panel's *Strate*-based restriction on tribal law enforcement investigative power—more than two decades later—inappropriately deprives tribal law enforcement officers of the ability to make the "commonsense judgments and inferences" federal law permits all other law enforcement officers to utilize. *Glover*, 140 S. Ct. at 1188 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)). The panel's opinion flies in the face of this Court's reminder that the Court has "repeatedly rejected courts' efforts to impose a rigid structure on the concept of reasonableness" and instead voices confidence in law enforcement officers' "factual inferences based on the commonly held knowledge they have acquired in their everyday lives." *Glover*, 140 S. Ct. at 1190 (citing *Arvizu*, 534 U.S. at 274, and *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989)); *see also Bryant*, 136 S. Ct. at

1968 (Thomas, J. concurring); *United States v. Lara*, 541 U.S. 193, 224 (2004) (Thomas, J., concurring in judgment).

The legal status of the remote rural highway on which Mr. Cooley was pulled over does not undermine the reasonable suspicion Officer Saylor held given the totality of circumstances. *United States v. Crenshaw*, No. 20-cr-00015-JD-1, 2020 U.S. Dist. LEXIS 220617, at *5 (N.D. Cal. Nov. 23, 2020) (holding that *Cooley*, 919 F. 3d 1135 (9th Cir. 2019) provides no support for out-of-precinct challenge to county officers' otherwise proper *Terry*-stop in neighboring jurisdiction).

Nor does Mr. Cooley's citizenship status bear on Officer Saylor's reasonable suspicion of criminal activity based on his observations as informed by his training and experience. *United States v. Santiago-Francisco*, 819 Fed. Appx. 157, 163 (4th Cir. 2020) (holding officer not required to determine detained individual's national citizenship status in order to meet reasonable suspicion inquiry; the individual's immigration status was irrelevant to the indicia of unlawful activity the officer observed).

These legal technicalities do not undercut the reasonableness of Officer Saylor's efforts to secure the safety of the toddler in Mr. Cooley's vehicle, his own safety, and to intercede to deter drug-trafficking on the Crow Indian Reservation when Cooley exhibited numerous common drug-related indicators and possessed weapons within easy reach. *See* App. at 47a-52a; *see also United States v. Vaccaro*, 915 F.3d 431,

436-38 (7th Circ. 2019) (finding where obvious weapons were present in vehicle, officer safety concerns justified traffic-stop search).

The Ninth Circuit panel's decision contravenes these settled principles of reasonable suspicion and, in so doing, creates significant practical concerns that implicate the safety of tribal law enforcement officers and the public.

B. The Ninth Circuit's Decision Conflicts Directly with Better-Reasoned Eighth Circuit and State Court Authorities and Obscures and Impedes Tribal Governments' Ability to Provide Public Safety.

In *United States v. Terry*, the Eighth Circuit rejected Fourth Amendment suppression efforts by a non-Indian defendant of whom the responding tribal police officer was reasonably suspicious based on his observations in their encounter. *United States v. Terry*, 400 F.3d at 582-83. A tribal officer responded to a domestic violence complaint at the defendant's wife's home, which was located on the Pine Ridge Indian Reservation. *Id.* at 578. He asked the defendant to exit his truck; he then handcuffed defendant and placed him in custody. *Id.* The officer searched the truck after observing ammunition, a rifle, and alcohol. *Id.* The defendant appeared to be intoxicated. *Id.* at 578-79. The Eighth Circuit upheld the district court's denial of a motion to suppress, finding that "tribal police officers do not lack authority to detain non-Indians whose conduct disturbs the public order on their

reservation." *Id*. at 579 (citing *Strate*, 520 U.S. at 456 n.11; *Duro*, 495 U.S. at 696-97; and *Ortiz-Barraza*, 512 F.2d at 1180).

Inexplicably, both the *Cooley* panel and the opinion concurring in the denial of en banc review are silent as to both: (a) the Eighth Circuit's straightforward 2005 review of these same precedents in *United States v. Terry*; and (b) the Tenth Circuit's contrary decision on the same legal issues of potential extraterritorial *Terry*-stops. App. at 75a (noting that "even geographically extraterritorial arrests by an officer do not violate the Fourth Amendment . . . because the defect is merely the absence of authorization under the law of the neighboring state," and citing *United States v. Jones*, 701 F.3d 1300, 1312 (10th Cir. 2012) ("In particular, we specifically reject Mr. Jones's assertion that . . . '[w]hen a person is seized outside the state jurisdictional limit of a law enforcement officer who is acting without a warrant, that person's Fourth Amendment constitutional right to be free from unreasonable seizures has been violated'")).

Tribal *amici* urge the Court to consider adopting the Eight Circuit's straightforward approach in *United States v. Terry*. That approach carefully balances tribal law enforcement officers' duty to protect tribal lands and citizens, and ensure their own safety while doing so, against the due process rights of private citizens of another sovereign.

This straightforward approach is supported by several cases from state courts, including the Oregon

Court of Appeals (*Pamperien*, 967 P.2d 503 (Or. Ct. App. 1998)), the Washington Supreme Court (*Schmuck*, 850 P.2d 1332 (Wash. 1993)), and the Montana Supreme Court (*Haskins*, 887 P.2d 1189 (Mont. 1994)). *See also U.S. v. Peters*, 20 No. 3:16-CR-30150-RAL, 17 U.S. Dist. LEXIS 56754, at *7 (D. S.D. Mar. 16, 2017) (stating that "[f]ederal and state courts . . . have likewise regularly upheld tribal police actions, including stopping, investigating and detaining non-Indians suspected of criminal conduct" and citing *Ortiz-Barraza*, 512 F.2d at 1179-80 and *Strate*, 520 U.S. at 456 n.11 "where the Court did not 'question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers non-members stopped on the highway for conduct violating state law'"). App. at 65a-71a. Tribal law enforcement officers not only need uniform clarity in carrying out their duties, but also parity with the authority of law enforcement officers employed by neighboring jurisdictions.

III. THE 1868 TREATY RESERVES THE TRIBE'S RIGHT TO INVESTIGATIVE AUTHORITY ANALOGOUS TO *TERRY*-STOP AUTHORITY.

Federal treaties, like federal statutes and the Constitution itself, are the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The 1868 Treaty provides:

> ARTICLE I.
>
> From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.
>
> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, **upon proof** made to the agent, and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

(Emphasis supplied).

The 1868 Treaty's plain text is unavoidable, and the Court's task is to ascertain and follow the original meaning of the law. U.S. CONST. art. III, § 2, cl. 1; *New Prime, Inc. v. Oliviera*, 139 S. Ct. 532, 539 (2019). Generally, treaties must be interpreted as the Indians would have understood them. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019)); *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011-

12 (2019). In addition, any ambiguities should be "resolved from the standpoint of the Indians." *Winters v. United States*, 207 U.S. 546, 576-77 (1908); *see also Cougar Den*, 139 S. Ct. at 1016 (Gorsuch, J., concurring)(stating that interpretation of treaties must be "consistent with the treaty's original meaning" and that the Court "normally construe[s] any ambiguities against the drafter who enjoys the power of the pen")(internal citation omitted).

Several treaties executed during this era included an identical or very similar provision, colloquially referred to as the "Bad Men" clause,[5] the first paragraph of which "desire[s] peace" between the respective tribe, and the United States, including "whites, [and] . . . other people subject to the authority of the United States." *See e.g.*, Treaty Between the United States of America and Different Bands of Sioux Indians, art. 1, Apr. 29, 1868, 15 Stat. 635; Treaty Between the United States of America and the Northern Cheyenne and Northern Arapahoe Tribes of Indians, art. I, May 10, 1868, 15 Stat. 655; Treaty Between the United States of America and the Eastern Band of Shoshone and Bannock Tribe of Indians, art. I, July 3, 1868, 15 Stat. 673; Treaty Between the United States of America and the Kiowa and Comanche Tribes of Indians,

[5] *See A Bad Man is Hard to Find*, 125 Harv. L. Rev. 2521, 2525-27 (Jun. 20, 2014) (describing nine treaties with substantially identical "Bad Men" clauses between the United States and the Crow, Northern Arapaho, Northern Cheyenne, Eastern Band of Shoshone, Bannock, Navajo, Sioux, Comanche and Kiowa, Cheyenne and Arapaho, Apache, and Ute Tribes).

art. I, Oct. 21, 1867, 15 Stat. 581; Treaty Between the United States of America and the Cheyenne and Arapahoe Tribes of Indians, art. I, Oct. 28, 1867, 15 Stat. 593; *see also* Treaty Between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians, art. VI, Mar. 2, 1868, 15 Stat. 619; Treaty Between the United States of America and the Kiowa, Comanche, and Apache Tribes of Indians, Oct. 21, 1867, 15 Stat. 589. One such treaty is the Navajo Treaty of 1868. The Navajo Nation's and other tribes' reliance on such clause is not a theoretical argument about a relic of the past. As noted above, the Navajo Nation encompasses a vast swath of land spanning three different states and numerous counties. The Navajo Nation police therefore rely on the "Bad Men" clause of the Treaty of 1868 on a daily basis while patrolling over 27,000 square miles of land, many miles away from the assistance of other jurisdictions.

Respondent could qualify as a "bad man" under the 1868 Treaty, but only "upon proof made" would he be subject to arrest and punishment.[6] *See* Br. for Indian Law Scholars as *Amici Curiae* Supporting Pet'r, at 11-24 (Jan. 15, 2021); *see also Cougar Den*, 139 S. Ct. at 1012 (stating that courts focus their interpretation of treaties "upon the historical context in which it was written and signed") (citing *United States v. Winans*,

[6] Some have argued that bad men clauses apply only to government employees, but that is not the case. *See Richard v. United States*, 677 F. 3d 1141, 1152-53 (Fed. Cir. 2012).

198 U.S. 371, 381 (1905), and *Tulee v. Washington*, 315 U.S. 681, 684 (1942)).

Accordingly, Crow Tribal law enforcement *Terry*-stop authority is wholly consistent with the 1868 Treaty's promise to punish bad actors among non-Indians "upon proof made." The investigative nature of *Terry*-stop authority is critical to detecting and preventing crime on the Crow Indian Reservation, and modern-day coordination with local jurisdictions for the arrest of non-Indians ensures such "bad men" are "punished according to the laws of the United States," as the Crow Tribe and others specifically reserved in their treaties with the United States. *See Winans*, 198 U.S. at 381 ("the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted…they reserved rights…to every individual Indian, as though named therein").

Amici underscore that in exchange for the Crow Tribe's cession of more than 30 million acres of land and peace,[7] the 1868 Treaty provides the Crow Tribe with the promise of an enduring Treaty right to law enforcement and the ancillary investigative power necessary to vindicate that Treaty right. This Court

[7] *See Herrera*, 139 S. Ct. at 1692-93 (recounting 1868 Treaty history); *see also Jones v. United States*, 846 F.3d 1343, 1348 (Fed. Cir. 2017) (explaining that, by 1868, Congress had concluded that the "aggressions of lawless white men" were the cause of most Indian wars and the "bad men" provisions of contemporary treaties with tribes were understood to be essential to maintaining peace).

should "hold the government to its word." *McGirt*, 140 S. Ct. at 2459.

CONCLUSION

For all of the above reasons, the Court should reverse the panel decision below.

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