No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSHUA JAMES COOLEY

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

PETITION FOR A WRIT OF CERTIORARI

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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 (Feb. 7, 2017)

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

United States v. *Cooley*, No. 17-30022 (Mar. 21, 2019) (petition for reh'g denied, Jan. 24, 2020)

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 919 F.3d 1135. The order of the court of appeals denying panel rehearing and rehearing en banc (App., *infra*, 32a-80a) is reported at 947 F.3d 1215. The order of the district court (App., *infra*, 22a-31a) is not published in the Federal Supplement but is available at 2017 WL 499896.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2019. A petition for rehearing was denied on January 24, 2020 (App., *infra*, 32a-80a). By order of March 19, 2020, this Court extended the deadline for all

petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 81a-85a.

STATEMENT

A federal grand jury in the District of Montana charged respondent with one count of possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). App., *infra*, 5a. The district court granted respondent's motion to suppress evidence obtained as a result of his interaction with a tribal officer. *Id.* at 22a-31a. The court of appeals affirmed. *Id.* at 1a-21a.

1. At approximately 1 a.m. on February 26, 2016, Officer James Saylor of the Crow Tribe of Montana was driving on the section of U.S. Route 212 that lies within the boundaries of the Crow Reservation. App., *infra*, 2a, 23a. That portion of Route 212—a public highway that crosses the reservation pursuant to a right-of-way, see *id.* at 7a-8a—is defined as "Indian country" for many jurisdictional purposes under federal law. See 18 U.S.C. 1151 (defining "'Indian country'" to include "all land within the limits of any Indian reservation * * * including rights-of-way running through the reservation"). When Officer Saylor saw a pickup truck parked on the shoulder in a location with spotty cellphone reception, with its engine running and headlights on, the officer—who "regularly found motorists on the highway

in need of assistance"—pulled over and parked behind it. App., *infra*, 2a; see *id.* at 23a.

Because the truck's windows were closed and tinted, Officer Saylor knocked on the side of the truck. App., *infra*, 2a. At that point, the rear driver's side window briefly lowered, then went up again. *Ibid.* Officer Saylor shined his flashlight into the front window and saw respondent, sitting in the driver's seat, make a thumbs-down signal. *Ibid.* At Officer Saylor's request, respondent then lowered the window approximately six inches—just enough for Officer Saylor to see the top of his face. *Ibid.* Respondent had "watery, bloodshot eyes" and, based on his appearance, "seemed to be" a non-Indian. *Id.* at 2a-3a. A small child climbed from the truck's backseat into respondent's lap. *Id.* at 23a.

Respondent told Officer Saylor that he had pulled over because he was tired. App., *infra*, 3a. In response to further questions, respondent claimed that he had driven from the Town of Lame Deer (26 miles away), where he had tried to buy a car from a man named "Thomas" with the last name of either "Spang" or "Shoulder Blade." *Ibid.* Officer Saylor knew men with both names: Shoulder Blade was a probation officer, and Spang was a suspected drug trafficker. *Id.* at 3a, 24a, 180a-181a. Respondent stated that the car he had intended to purchase had broken down, and the seller had loaned him the truck so that he could drive home. *Ibid.*

Officer Saylor was confused by respondent's claim that he had been attempting to purchase a vehicle at that time of night. App., *infra*, 49a. Officer Saylor was also skeptical that the potential seller "would allow the use of a vehicle with all the personal belongings that [Officer Saylor had] seen in the bed." *Id.* at 50a. And

based on his familiarity with vehicle-registration practices in the area, Officer Saylor was doubtful that Spang or Shoulder Blade would own a truck registered in Wyoming. *Ibid.* When Officer Saylor suggested to respondent that the explanation did not make sense, respondent became agitated, lowered his voice, and started taking long pauses. *Id.* at 3a.

At Officer Saylor's request, respondent rolled his window down further, at which point Officer Saylor noticed two semiautomatic rifles in the front passenger seat. App., *infra*, 4a. Respondent claimed that the rifles belonged to the person who had loaned him the truck. *Id.* at 50a. As the conversation progressed, Officer Saylor detected that respondent was slurring his speech. *Id.* at 182a-183a. Officer Saylor requested identification, and respondent pulled several wads of cash out of his pocket and placed them in the center console. *Id.* at 51a. When respondent placed his hand near his pocket area again, his breathing became shallow and rapid, and he glanced forward with "what is sometimes called a 'thousand-yard stare.'" *Ibid.* In Officer Saylor's experience, such a stare is an indication that a suspect may be about to use force. *Ibid.*

Officer Saylor unholstered his service pistol, held it to his side, and ordered respondent to stop and show his hands. App., *infra*, 4a, 51a. Respondent complied. *Ibid.* On further instruction, respondent produced a Wyoming driver's license. *Ibid.* Officer Saylor attempted to call in respondent's license number, but the call failed due to lack of connectivity. *Id.* at 4a. Officer Saylor then circled the truck and opened the passenger-side door, where he noticed a loaded semiautomatic pistol in the area near respondent's right hand. *Ibid.* Respondent claimed not to have realized that the pistol

was there. *Ibid.* Officer Saylor seized and disarmed the pistol. *Ibid.*

Respondent then "vaguely mentioned that somebody might be coming to meet him at the side of the road." App., *infra*, 52a; see *id.* at 185a. At that point, Officer Saylor ordered respondent to exit the truck, conducted a pat-down, and escorted both him and the child to the patrol car. *Id.* at 5a. Before getting into the police car, respondent took several small, empty plastic bags—which Officer Saylor recognized as the kind commonly used to package methamphetamine—out of his pocket and set them on the hood. *Id.* at 5a, 116a-118a. Officer Saylor placed respondent in the back of the patrol car and called for backup, including from county police, because respondent "seemed to be" a non-Indian. *Ibid.*

While awaiting assistance, and in light of respondent's vague suggestion that someone else might soon be arriving, Officer Saylor took steps to secure the area, including returning to the truck to take possession of the firearms in the cab. App., *infra*, 26a, 52a, 118a. In the course of securing the cab, Officer Saylor noticed in plain view a glass pipe and a plastic bag that appeared to contain methamphetamine, wedged between the driver and middle seats. *Id.* at 5a, 26a, 157a-158a, 188a. Officer Saylor moved the firearms to the hood of his patrol car. *Id.* at 118a. Officers from the county and the Bureau of Indian Affairs (BIA) subsequently arrived on the scene. *Id.* at 120a. In coordination with the county officer, Officer Saylor transported respondent back to the Crow Agency Police Department, where he was interviewed by BIA and local investigators and then arrested by the county officer. *Id.* at 189a-190a.

2. A federal grand jury in the District of Montana indicted respondent on one count of possessing with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1), and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). App., *infra*, 5a. Respondent moved to suppress the evidence obtained as a result of his interaction with Officer Saylor, on the theory (as relevant here) that Officer Saylor had acted outside the scope of his authority as a tribal law enforcement officer in detaining respondent and conducting a search. *Ibid.*

The district court granted respondent's motion, concluding that Officer Saylor's actions were unauthorized and unreasonable, and that suppression of the drug and firearm evidence was required under the analogue to the Fourth Amendment in the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1302(a)(2). App., *infra*, 22a-31a. The court reasoned that Officer Saylor had discovered that respondent was non-Indian based on respondent's appearance when he "initially rolled [the] window down," and it found that Officer Saylor had seized respondent when he drew his sidearm and ordered respondent to show his hands. *Id.* at 29a-30a. And the court took the view that a tribal officer's authority to detain a non-Indian stopped on a public highway "for the reasonable time it takes to turn the person over to state or federal authorities" is limited solely to circumstances in which "'it is apparent that a state or federal law has been violated.'" *Id.* at 27a (quoting *Bressi* v. *Ford*, 575 F.3d 891, 896 (9th Cir. 2009)).

The district court emphasized that the "apparent" standard is "more stringent" than probable cause and stated that it had not been satisfied here. App., *infra*,

27a-28a. The court concluded that Officer Saylor's observations before the seizure—including respondent's "bloodshot and watery eyes," "wads of cash," and "answers to questions that seemed untruthful"—did not suffice to establish an "'apparent'" violation of law. *Id.* at 30a.

3. The government appealed the district court's suppression order, and the court of appeals affirmed. App., *infra*, 1a-21a.

The court of appeals recognized that although an Indian tribe's sovereign authority to charge and punish wrongdoers under its own criminal laws is limited to Indians, a tribe retains the power to "investigate crimes committed by non-Indians on tribal land"—including reservation land held by the tribe or its members (or in trust for them)—"and deliver non-Indians who have committed crimes to state or federal authorities." App., *infra*, 7a (citing *Duro* v. *Reina*, 495 U.S. 676, 697 (1990)). The court also recognized that a tribe could help to enforce state and federal law against non-Indians on non-tribal reservation lands as well. *Id.* at 7a-8a. Like the district court, however, the court of appeals held that in the latter circumstance, a tribe's authority depends upon the existence of an "apparent" or "obvious" violation of state or federal law. *Id.* at 8a-9a (citation omitted).

The court of appeals set forth a framework that allows tribal authorities to "stop those suspected of violating tribal law on public rights-of-way as long as the suspect's Indian status is unknown," but only for the limited purpose of "ascertaining whether the person is an Indian." App., *infra*, 8a. It instructed that such a stop "must be a brief and limited one; authorities will typically need to ask one question to determine whether the suspect is an Indian." *Ibid.* (brackets, citation, and

internal quotation marks omitted). If that "'brief and limited'" inquiry fails to establish that the person is an Indian, then the court would allow a tribal officer to detain the person only if "'it is apparent'"—or "'obvious'"—"that state or federal law * * * has been violated," in which case the person could be detained "'for a reasonable time in order to turn him or her over to state or federal authorities.'" *Id.* at 8a-9a (quoting *Bressi*, 575 F.3d at 896, and *United States* v. *Patch*, 114 F.3d 131, 134 (9th Cir.), cert. denied, 522 U.S. 983 (1997)) (brackets omitted). As to whether a tribal officer could investigate suspected criminal activity, the court took the view that "the power to detain non-Indians on public rights-of-way for 'obvious' or 'apparent' violations of state or federal law does not allow officers to search a known non-Indian for the purpose of finding evidence of a crime." *Id.* at 9a (citation omitted).

The court of appeals acknowledged that it had "not elaborated on when it is 'apparent' or 'obvious' that state or federal law is being or has been violated." App., *infra*, 9a (citation omitted). But, like the district court, the court of appeals concluded that the seizure when Officer Saylor unholstered his sidearm was not justified by any "'apparent'" or "'obvious'" violation of law. *Id.* at 9a-10a, 21a (citation omitted). It further held, despite the absence of adversarial briefing on the issue (which the government had conceded), that the ICRA's Fourth Amendment analogue contains an exclusionary rule, applicable to evidence obtained as the fruit of an unlawful seizure. *Id.* at 11a-14a. And it found that the seizure here was unreasonable, on the theory that when a tribal officer acts in excess of the tribe's sovereign jurisdic-

tion, he is limited to a citizen's arrest authority for felonies committed in his presence—a standard not satisfied here. *Id.* at 18a, 20a-21a.

4. The government petitioned for rehearing en banc, which was denied. App., *infra*, 32a-80a. Judges Berzon and Hurwitz, the two Ninth Circuit judges on the original panel (which had included a Fourth Circuit judge), concurred in the denial of rehearing en banc. *Id.* at 33a-41a. They believed that the framework laid out in the panel opinion would not create significant practical problems for law enforcement on Indian reservations. *Id.* at 33a-34a. And they expanded on their view that the only inherent law-enforcement authority that Indian tribes retain must rest either on the power to enforce criminal law against Indians or the power to exclude unwanted persons from tribal lands. *Id.* at 34a-35a.

Judge Collins, joined by three other judges, dissented from the denial of rehearing en banc. App., *infra*, 41a-80a. He criticized the panel for adopting a "convoluted series of rules that turn on what the officer does or does not know about the driver's tribal status," as well as a standard "more demanding than ordinary probable cause." *Id.* at 42a-44a (emphasis omitted). He explained that he would instead have recognized that tribal officers have the "authority to conduct *Terry*-style investigations"—*i.e.*, brief investigations based on reasonable suspicion—"of non-Indians and, if probable cause arises, to then turn the non-Indian suspect over to the appropriate state or federal authorities for criminal prosecution." *Id.* at 42a; see *Terry* v. *Ohio*, 392 U.S. 1 (1968).

Judge Collins observed that even when articulating limits on "a tribe's *civil* jurisdiction" over public highways on an Indian reservation, this Court had not

"'question[ed] 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.'" App., *infra*, 54a, 65a (quoting *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997)). And he explained that "th[is] Court's explicit recognition that tribal officers may conduct traffic stops of non-Indians for violations of state law on state highways within reservations can only be understood against the familiar backdrop of the settled law governing such stops" under the Fourth Amendment. *Id.* at 66a-67a (emphasis omitted).

Judge Collins also stated that the panel's rule would govern law enforcement not only on public rights-of-way on an Indian reservation, but also on "reservation land that is held in fee by non-Indians," App., *infra*, 76a, which this Court has treated as jurisdictionally equivalent to public rights-of-way, see *Strate*, 520 U.S. at 456. And he stressed that "[r]aising the bar for tribal investigations of non-Indian misconduct on fee lands from reasonable suspicion to 'probable-cause-plus' is a very big deal, and one that literally may have life-or-death consequences for many of the hundreds of thousands of persons who live on Indian reservations located within this circuit." App., *infra*, 76a. Noting the high volume of non-tribal land and the large numbers of non-Indians residing on reservations, *id.* at 76a-77a, he feared that "the troubling consequence of the panel's opinion will be that tribal law enforcement will be stripped of *Terry*-stop investigative authority with respect to a significant percentage (and in some cases a majority) of the people and land within their borders," *id.* at 78a, an issue of

"potential practical significance to the safety and welfare of hundreds of thousands of our fellow citizens," *id.* at 80a.

REASONS FOR GRANTING THE PETITION

The decision below erroneously diminishes the inherent sovereign authority of Indian tribes and unjustifiably impedes the enforcement of state and federal law on Indian reservations throughout the Ninth Circuit. The panel recognized that Indian tribes must retain *some* authority to assist in the enforcement of the state and federal laws applicable to non-Indians on rights-of-way or alienated land within the boundaries of a tribe's reservation. But in limiting such authority solely to detention for "apparent" or "obvious" violations of those laws, App., *infra*, 8a-9a (citation omitted), the Ninth Circuit imposed an unprecedented, indeterminate, and unworkable standard that appears to be significantly more stringent than the traditional legal standards of reasonable suspicion and probable cause. The Ninth Circuit's *sui generis* framework disrupts long-held understandings, reflected in decisions of this Court and others, about law enforcement on reservation land. And its curtailment of meaningful tribal policing authority creates gaps in law enforcement that state and federal governments cannot practically fill, thereby threatening the safety and welfare of everyone on Indian reservations. This Court should grant a writ of certiorari and reverse.

A. The Decision Below Is Incorrect

The ability to protect people and property within its borders is a fundamental aspect—perhaps the most fundamental aspect—of a sovereign's power. See, *e.g.*, *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905). Although

Congress has circumscribed the inherent sovereign power of Indian tribes in certain ways, it has not left them wholly dependent on state or federal largesse to police illegal activity by non-Indians on public roads (or alienated lands) within a reservation. Instead, a tribal officer may reasonably investigate—and, where appropriate, detain—non-Indian suspects to allow for their prosecution by state or federal authorities. The Ninth Circuit erred in reading this Court's cases to hold otherwise.

1. Indian tribes are "distinct, independent political communities," *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), "qualified to exercise many of the powers and prerogatives of self-government," *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). Because tribes enjoy only a "dependent status" in our political order, however, "[t]he sovereignty that the Indian tribes retain is of a unique and limited character." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). It encompasses those powers "not withdrawn by treaty or statute, or by implication as a necessary result of [tribes'] dependent status." *Ibid.*

This Court's decisions establish certain general principles, informed by historical practice, governing inherent tribal authority over non-Indians. In the criminal context, the Court has held that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians" for criminal offenses. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Instead, on lands defined as "Indian country," 18 U.S.C. 1151, the substantive criminal law applicable to non-Indians generally depends on the nature of the crime. Unless Congress has provided otherwise, crimes by non-Indians against Indians generally are exclusively federal, while

crimes by non-Indians against non-Indians are subject to state law, and crimes with no specific victim (like drug trafficking) may be prosecuted under state or federal law, depending on the circumstances. See *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990); *United States* v. *John*, 437 U.S. 634, 651 & n.22 (1978).

Although state and federal law displace tribes' inherent authority to define and punish crimes by non-Indians, tribes are not powerless to police non-Indians for violations of state or federal law within a reservation. Whereas the "exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe," *Duro*, 495 U.S. at 688, investigation and brief law-enforcement detention do not. The rationale for denying tribes the authority to prosecute non-Indians—namely, that non-Indians lack membership in the political community of any Indian tribe, see, *e.g.*, *Oliphant*, 435 U.S. at 210-211—is thus inapplicable to tribal policing of non-Indians within reservation boundaries for violations of the state and federal laws to which those non-Indians are subject. Instead, "[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." *Duro*, 495 U.S. at 697.

This Court described such authority just after noting tribes' "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Duro*, 495 U.S. at 696; see *id.* at 697. Tribal sovereignty is at its apex in cases involving "the land held by the tribe" and "tribal members within the reservation." *Plains Commerce Bank*, 554 U.S. at 327.

But a tribe's authority to protect those on its reservation from the illegal activities of non-Indians is not limited to such lands, and this Court has recognized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987). Even as to reservation land "beyond the tribe's immediate control"—such as land owned in fee by non-Indians—"the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same." *Plains Commerce Bank*, 554 U.S. at 336. Tribal police need not stand idly by, waiting for state or federal authorities, while a non-Indian robs a restaurant on non-Indian fee land, or drives drunkenly on a public highway, within the tribe's reservation.

2. The Court effectively recognized as much in *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), which addressed the scope of inherent tribal authority on the same type of land at issue in this case, namely, "a public highway * * * over Indian reservation land," *id.* at 442. The Court observed that the tribe had "reserved no right to exercise dominion or control over the right-of-way," *id.* at 455, and thus treated the highway, "for nonmember governance purposes," as equivalent to "land alienated to non-Indians," *id.* at 454, 456. The Court determined that the tribe lacked jurisdiction to adjudicate a civil tort dispute stemming from a traffic accident on the highway between two non-Indians. *Id.* at 442-443. But it emphasized that "[w]e 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.

The Court in *Strate* included an approving "Cf." citation to the Supreme Court of Washington's decision in *State* v. *Schmuck*, 850 P.2d 1332 (en banc), cert. denied, 510 U.S. 931 (1993), which had recognized a tribal officer's "inherent authority to stop and detain a non-Indian who has allegedly violated state and tribal law while on the reservation until he or she can be turned over to state authorities for charging and prosecution." *Id.* at 1342; see *Strate*, 520 U.S. at 456 n.11. *Schmuck* had specifically reasoned that a 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." 850 P.2d at 1341. This Court's decision in *Strate*, which distinguished a tribe's authority to patrol public roads on a reservation from its (circumscribed) authority to assert civil jurisdiction over traffic accidents on them, 520 U.S. at 456 n.11, reflects similar reasoning. If a tribe's inherent policing authority were limited to tribal lands, or simply coextensive with its regulatory or adjudicatory powers, then the holding of *Strate* necessarily *would* have called such policing authority into "question." *Ibid.* But *Strate* expressly "did not question the ability of tribal police to patrol the highway." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 651 (2001).

Historical practice reinforces the tribes' retention of inherent authority to exercise certain police functions with respect to non-Indians within the reservation. See, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-140 (1982) (recognizing relevance of history in as-

sessing tribal authority). Various treaties in the eighteenth and nineteenth centuries imposed obligations on tribes to hand over suspects apprehended in tribal territory to the relevant authorities. For example, the Suquamish Tribe agreed "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." Treaty between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory art. 9, *ratified* Mar. 8, 1859, 12 Stat. 929; see also, *e.g.*, Treaty between the United States of America and the Crow Tribe of Indians art. 1, *ratified* July 25, 1868, 15 Stat. 649; A Treaty of Peace and Friendship (Creek Nation Treaty) art. 8, *signed* Aug. 7, 1790, 7 Stat. 37. The Suquamish Tribe would not be able to comply with its obligation under that treaty to "promptly deliver up any non-Indian offender," *Oliphant*, 435 U.S. at 208 (construing treaty), unless it in fact had the authority to do so. And because the treaty did not itself expressly confer that authority, it appeared to rely on inherent sovereign authority that the tribe retained. Cf. *Wheeler*, 435 U.S. at 327 n.24 (referring "to treaties made with the Indians as 'not a grant of rights to the Indians, but a grant of rights from them'") (quoting *United States* v. *Winans*, 198 U.S. 371, 381 (1905)).

3. The Ninth Circuit identified no sound basis for concluding that the Crow Tribe has been divested of its inherent authority to investigate and detain non-Indian suspects like respondent for prosecution by the state or federal government. The panel purported to premise its legal analysis on the view that "tribal officers" have only "two sources of authority"—the power to enforce criminal law against Indians within the reservation, and

the power to exclude non-Indians from tribal lands—neither of which authorizes stops of non-Indians on public rights-of-way on the reservation. App., *infra*, 35a (Berzon and Hurwitz, J.J., concurring in the denial of rehearing en banc); *id.* at 7a (panel opinion). But even the panel was not willing to go so far as to hold that tribes lack *any* inherent authority to detain non-Indians for state or federal crimes—an implausible result that this Court's decisions do not support. The panel instead imposed a *sui generis* framework under which tribal officers may stop vehicles that are apparently violating tribal law, ask (typically only one question) about the driver's Indian status, and detain a driver who is not thereby revealed to be an Indian only for an "'apparent'" or "'obvious'" violation of law. *Id.* at 8a-9a (citation omitted).

That ad hoc regime lacks legal grounding. The standards for tribal policing are not ripe for judicial invention, but instead are the subject of congressional legislation—namely, the ICRA's Fourth Amendment analogue. Indian tribes are not directly bound by the Fourth Amendment, see *Duro*, 495 U.S. at 693, but Congress provided in the ICRA that "[n]o Indian tribe in exercising powers of self-government shall * * * violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures," 25 U.S.C. 1302(a)(2). Courts have interpreted that language in the ICRA *in pari materia* with the similar language in the Fourth Amendment. See, *e.g.*, App., *infra*, 15a (citing *United States* v. *Becerra-Garcia*, 397 F.3d 1167, 1171-1172 (9th Cir. 2005), cert. denied, 547 U.S. 1005 (2006)). And this Court has long held that the Fourth Amendment's similar language al-

lows for investigatory stops based on reasonable suspicion, see, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968), and arrests based on probable cause, see, *e.g.*, *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

Because a tribe lacks authority to try or punish a non-Indian, its "arrest" authority with respect to one is necessarily limited to detention for the purpose of allowing state or federal law enforcement to take custody. See *Duro*, 495 U.S. at 697. But so long as neither the length nor the conditions of such detention are excessive, it is not "unreasonable," 25 U.S.C. 1302(a)(2). See, *e.g.*, *Heien* v. *North Carolina*, 574 U.S. 54, 60 (2014) ("As the text indicates and we have repeatedly affirmed, the ultimate touchstone of the Fourth Amendment is reasonableness.") (citation and internal quotation marks omitted). No heightened level of suspicion, above and beyond probable cause, should be required for such reasonable detention, simply because it is carried out by a tribal officer. "[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 Reservation's roads.'" *Strate*, 520 U.S. at 456 n.11 (quoting *Schmuck*, 850 P.2d at 1341). And Congress, through the ICRA, has made clear that the familiar Fourth Amendment standards supply the appropriate limits.

Even without the ICRA, the Ninth Circuit's "'apparent' or 'obvious'" standard, App., *infra*, 9a (citation omitted), would make little sense. Early treaties appeared to contemplate tribal detention of non-Indian suspects accused of having committed crimes *in the past*, which is inconsistent with limiting detention to those who commit an "apparent" violation of law in the presence of a tribal officer. See, *e.g.*, Creek Nation

Treaty art. 8, 7 Stat. 37 (obligation to "deliver * * * up" certain offenders "who shall take refuge in [a tribal] nation"). Under normal Fourth Amendment standards, the police may stop someone who matches a description of a suspect that another law-enforcement agency is looking to arrest. See *United States* v. *Hensley*, 469 U.S. 221, 223 (1985) (holding that "police officers may stop and briefly detain a person who is the subject of a 'wanted flyer' while they attempt to find out whether an arrest warrant has been issued"). The Ninth Circuit's standard, however, would apparently deny tribes that authority.

The Ninth Circuit's "'apparent' or 'obvious'" standard, App., *infra*, 9a (citation omitted), remains unsound in the present day. As a threshold matter, the Ninth Circuit has not meaningfully defined the standard, see *ibid.*, leaving tribal officers and courts largely at sea as to what is permissible. Like traditional Fourth Amendment standards, the Ninth Circuit's new one "has to be applied on the spur (and in the heat) of the moment," but the Ninth Circuit has failed "to draw [a] standard[] sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001); see *ibid.* (noting the "essential interest in readily administrable rules" under the Fourth Amendment). Even the familiar Fourth Amendment "legal rules for probable cause and reasonable suspicion acquire content only through application," *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996), and starting over with a newly minted standard will sow confusion and inconsistency, leading (as in this

case) to the exclusion of highly probative evidence of serious criminal conduct through no fault of a tribal officer.

In addition, whatever its precise contours, a standard more stringent than reasonable suspicion or probable cause would substantially handicap tribal officers' ability to police illegal activity on the reservation. The panel's rule would preclude investigation and detention across a broad spectrum of cases falling squarely within well-established Fourth Amendment doctrine. For example, a tribal officer would be unable to detain a non-Indian on a public highway based on a 911 tip that the non-Indian had run another car off the road. See *Navarette* v. *California*, 572 U.S. 393, 404 (2014) (finding reasonable suspicion on the basis of such a tip). A tribal officer would be precluded from investigating further if, during an interaction with a non-Indian motorist, he smelled alcohol on the driver's breath or a drug-detecting dog alerted. See *Florida* v. *Harris*, 568 U.S. 237, 248 (2013) (recognizing that dog alert can provide probable cause). And because the decision appears likely to apply not only to public rights-of-way but also to fee land owned by non-Indians, see *Strate*, 520 U.S. at 456 (treating the two as equivalent for jurisdictional purposes), a tribal officer could not investigate a non-Indian who appeared to be casing a store on such land for a possible robbery. See *Terry*, 392 U.S. at 28 (finding reasonable suspicion in that circumstance).

B. The Decision Below Warrants This Court's Review

The broad legal and practical implications of the decision below warrant this Court's review. In imposing such novel impediments on tribal law enforcement, the decision below departs from traditional understandings

of tribes' ability to maintain public safety within reservation boundaries. State-court decisions within and outside the Ninth Circuit have viewed the sort of normal law-enforcement activity here as unproblematic, and both the States and the federal government depend on tribal law enforcement to police reservations in precisely this way. As the judges dissenting from the denial of rehearing en banc recognized, the panel's holding carries "potential practical significance to the safety and welfare of hundreds of thousands of * * * fellow citizens" living within the Ninth Circuit, App., *infra*, 80a (Collins, J., dissenting from the denial of rehearing en banc), which contains a significant percentage of all the Indian reservations in the United States. See Bureau of Indian Affairs, *Indian Lands of Federally Recognized Tribes of the United States*, https://biamaps.doi.gov/bogs/gallery/PDF/IndianLands_2017.pdf (map displaying geographical distribution of Indian reservations).

1. The decision below is in serious tension with decisions from various state courts addressing similar issues. First among those is the Supreme Court of Washington's decision in *Schmuck*, which this Court approvingly cited in *Strate*. See *Strate*, 520 U.S. at 456 n.11. The tribal officer in that case stopped a non-Indian driver for speeding on a public road through a reservation; the driver smelled of alcohol and acknowledged "'ha[ving] a few [drinks],'" but initially refused a field sobriety test; the officer temporarily detained the suspect "until the Washington State Patrol could respond to their location to investigate whether [the suspect] had been driving while under the influence of alcohol or drugs," during which time the driver consented to sobriety testing; and after the State took custody, the

driver was eventually convicted of driving while intoxicated. *Schmuck*, 850 P.2d at 1333-1334 (footnote omitted). In upholding the stop, the Supreme Court of Washington recognized that "public roads * * * are within the territorial jurisdiction of the * * * tribal police * * * for the limited purpose of asserting the Tribe's authority to detain and deliver alleged offenders." *Id.* at 1341. And it emphasized that under a contrary rule, the suspect "could have easily caused extensive property damage or seriously injured other motorists" on the reservation. *Id.* at 1342.

The Supreme Court of Wyoming subsequently adopted *Schmuck*'s basic rationale in *Colyer* v. *State*, 203 P.3d 1104 (2009). There, a BIA officer—whom the court treated as equivalent to a tribal officer for jurisdictional purposes, see *id.* at 1111 n.5—stopped a suspected drunk driver and detained him until a county officer arrived. *Id.* at 1106. Citing *Schmuck* as well as this Court's decision in *Duro* v. *Reina*, *supra*, see *Colyer*, 203 P.3d at 1109-1110, the court found "the law * * * clear that the appropriate action to be taken in circumstances such as those presented in this case is for the reservation officer to detain the appellant for formal arrest by a state officer," *id.* at 1111. State intermediate appellate courts have followed a similar approach in other cases involving stops on public roads through a reservation. See *State* v. *Ryder*, 649 P.2d 756, 757-758 (N.M. Ct. App. 1981), aff'd, 648 P.2d 774 (N.M. 1982); *State* v. *Pamperien*, 967 P.2d 503, 506 (Or. Ct. App. 1998).

2. The Court of Appeals of New Mexico explained that "[t]o hold that an Indian police officer may stop offenders but upon determining they are non-Indians must let them go, would be to subvert a substantial

function of Indian police authorities and produce a ludicrous state of affairs which would permit non-Indians to act unlawfully, with impunity, on Indian lands." *Ryder*, 649 P.2d at 759. To the extent that the Ninth Circuit avoided such a holding, it did so only by qualifying its otherwise categorical elimination of tribal authority with a novel "'apparent' or 'obvious'" standard, App., *infra*, 9a (citation omitted), of uncertain application to the scenarios described in the state decisions cited above. But particularly given that tribal officers have little information as to what the new standard means, it is likely to significantly chill their policing activities.

Officer Saylor, for example, has "regularly found motorists on the highway in need of assistance." App., *infra*, 2a. But according to the Ninth Circuit, he had no law-enforcement authority when he encountered a truck on the side of the road in the middle of the night, with a small child in the cab, and a driver who slurred his speech, gave an implausible story, and looked as though he were about to use a weapon that he had within reach. See pp. 2-4, *supra*. And in finding that Officer Saylor violated ICRA by seizing respondent in the face of a risk of imminent violence, the Ninth Circuit's rule deters officers from taking reasonable steps to protect their own physical safety.

The impediments to law enforcement are exacerbated by the difficulty that tribal officers will have in determining whether a suspect is an Indian (in which case an officer may investigate further) or a non-Indian (in which case he may not). In the panel's view, "authorities will typically need 'to ask one question' to determine whether the suspect is an Indian." App., *infra*, 8a (citation omitted). That presumably means that the officer must take "no" for an answer, even if the suspect

is lying. "The incentive to lie, of course, will be significant, and because (according to the panel) there is no authority to investigate or search a non-Indian, the officer presumably cannot search (for example) for a tribal identification card." *Id.* at 64a (Collins, J., dissenting from the denial of rehearing en banc). Indeed, under the Ninth Circuit's rule, any follow-up questions might themselves provide a basis for a suspect (even one who *does* turn out to be Indian) to move to suppress evidence. In short, the panel's decision "plac[es] enormous weight on a factor that will often be ill-suited for such on-the-spot resolution." *Id.* at 63a. The inevitable result is that tribal officers will err on the side of caution and decline to enforce the law even against many Indians.

3. The decision below will have widespread effects on the many Indian reservations within the Ninth Circuit. As the state decisions above reflect, a tribe's inherent authority to investigate and briefly detain non-Indians anywhere within a reservation has previously been well-accepted. Indeed, the Court's own reference to such authority in *Strate*, even if not an explicit endorsement, has for the last quarter-century provided significant assurance that tribal officers can, in fact, "patrol roads within a reservation, including rights-of-way made part of a state highway," and "detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law." 520 U.S. at 456 n.11; see *Atkinson Trading Co.*, 532 U.S. at 651 (similar).

The Ninth Circuit's break with that common understanding would, as a practical matter, produce a virtual law-enforcement vacuum affecting "a significant percentage (and in some cases a majority) of the people and

land within [the] borders" of tribal reservations. App., *infra*, 78a (Collins, J., dissenting from the denial of rehearing en banc). Public highways frequently cross such reservations, and can often—as in this drug-trafficking case—be conduits for crime. Traffic offenses are in themselves "a serious issue." *Id.* at 77a. The inability of a tribal officer to detain a possible drunk driver who is non-Indian—or who forecloses further investigation by falsely claiming to be non-Indian—could have life-threatening effects. Cf. *Navarette*, 572 U.S. at 403 (upholding tip-based stop of suspected drunk driver notwithstanding "the absence of additional suspicious conduct, after the vehicle was first spotted by an officer").

Applying the Ninth Circuit's framework to reservation lands that have been alienated to non-Indians, which this Court has previously treated as jurisdictionally equivalent to public rights-of-way, see *Strate*, 520 U.S. at 456, substantially increases the scope of the problem. Over time, tribes have "alienate[d]" large portions of their "land to * * * non-Indian[s]." *Montana* v. *United States*, 450 U.S. 544, 548 (1981). In 1981, this Court observed that of the 2.3 million acres on the tribal reservation at issue in this case—the Crow Reservation—approximately 30% of the land was owned in fee by non-Indians, *ibid.*, and that percentage has likely increased over the last four decades. Making matters even more difficult, an officer may not even be able to determine in the moment whether his encounter with a suspect is occurring on tribal land, because land status may vary from plot to plot. See, *e.g.*, *Oliphant*, 435 U.S. at 193 & n.1 (describing Port Madison reservation near Seattle, which in 1978 consisted of 63% non-Indian fee land, as "a checkerboard of tribal community land, allotted Indian lands, property held in fee simple by non-Indians,

and various roads and public highways maintained by Kitsap County").

The number of non-Indians living on reservations is likewise substantial. Although the numbers vary widely, "for the reservations in [the Ninth Circuit] with the largest Indian populations, the percentage of non-Indians residing on the reservation ranges [as] high [as] 68%." App., *infra*, 77a (Collins, J., dissenting from the denial of rehearing en banc). All told, therefore, tribal officers will frequently encounter non-Indians on alienated lands within a reservation. But a tribal officer will now lack, for example, the ability to detain a non-Indian husband, who refuels at a gas station on non-Indian fee land during a car trip with his wife, to ask questions about a fresh-looking bruise on his wife's face. And the officer may be deterred from asking questions even of an Indian husband in similar circumstances, if the officer is uncertain of the husband's Indian status.

4. Other sovereigns cannot be expected to fill the void created by the Ninth Circuit's rule. Due to the sheer size of reservations and the lean staffing of law-enforcement departments in remote areas, federal and state authorities often have only a limited footprint on reservation land. See, *e.g.*, *United States* v. *Terry*, 400 F.3d 575, 579 (8th Cir. 2005) (local sheriff, with "only one patrol car and a single part-time deputy," was 80 miles away from reservation). They often do not perform the day-to-day patrolling necessary to discover domestic, street-level, or traffic-related crimes. "Tribal officers are often the first responders to investigate offenses that occur on the reservation," *State* v. *Kurtz*, 249 P.3d 1271, 1279 (Or. 2011), with federal and state authorities frequently unable to respond expeditiously. See, *e.g.*, Sierra Crane-Murdoch, *On Indian Land*,

Criminals Can Get Away With Almost Anything, The Atlantic, Feb. 22, 2013 ("If an incident [on the Fort Berthold Reservation] requires a [county] deputy, he could take hours to arrive, due to the volume of calls he receives and the reservation's enormity."). Thus, unless detained by tribal law enforcement, a non-Indian suspect on a public highway will, in many cases, have ample time to "drive away," "cause[] property damage," "injure[] other motorists," and "elude[] capture." *Schmuck*, 850 P.2d at 1342.

Because tribal officers are often the first responders to suspected illicit activity, they serve as important sources of evidence for state and federal prosecutions of on-reservation crime. Cf. U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions* (2018), https://www.justice.gov/otj/page/file/1231431/download (explaining federal jurisdiction over on-reservation crime and detailing enforcement efforts). Without that evidence, many of those prosecutions will—like this one—simply dry up. Nor does cross-deputization, by which state or federal governments delegate authority to tribal officers to act on their behalf, supply "a panacea to the problems wrongly created by the panel's decision." App., *infra*, 79a (Collins, J., dissenting from the denial of rehearing en banc). Significant practical obstacles—including a lack of resources for tribal officers to complete the requisite certifications and trainings—frequently impede such arrangements. See Andrew G. Hill, *Another Blow to Tribal Sovereignty: A Look at Cross-Jurisdictional Law-Enforcement Agreements Between Indian Tribes and Local Communities*, 34 Am. Indian L. Rev. 291, 308, 310 (2010). Moreover, cross-deputization agreements often contain reciprocity provisions (authorizing state officers to arrest tribal

members on reservations) or other provisions that tribes may view as an affront to their sovereignty. See, *e.g.*, Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. Rev. 65, 91-93 (2019). Requiring tribes to give up even *more* of their limited sovereignty merely to preserve law and order within reservation boundaries is not an adequate solution to the problems created by the decision below.

5. The "volume of criminal activity within reservation boundaries" amplifies all of these concerns. App., *infra*, 77a (Collins, J., dissenting from the denial of rehearing en banc). As previously noted, see p. 25, *supra*, traffic offenses alone "are a serious issue" on reservations, and "'[a]lcohol-related offenses are exceptionally problematic.'" App., *infra*, 77a (citation omitted). Alcohol-impaired driving caused 43% of traffic fatalities on reservations between 2011 and 2015. See Roadway Safety Inst., University of Minnesota, *Understanding Roadway Safety in American Indian Reservations: Perceptions and Management of Risk by Community, Tribal Governments, and Other Safety Leaders* 2-3 (Oct. 2018), http://www.its.umn.edu/Publications/ResearchReports/reportdetail.html?id=2720.

Violent crime is likewise a serious concern. Between 1992 and 2001, "American Indians experienced approximately 1 violent crime for every 10 residents." Bureau of Justice Statistics, U.S. Dep't of Justice, *American Indians and Crime* 4-5 (Dec. 2004) (BJS), https://www.bjs.gov/content/pub/pdf/aic02.pdf (tallying major categories of violent crime). In a 2016 study, 39.8% of Native American women and 34.6% of Native American men reported experiencing certain types of violence or

other forms of aggression over the previous year. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, Nat'l Inst. of Justice, Sept. 2016, at 2-3, https://www.ncjrs.gov/pdffiles1/nij/249822.pdf. And although data specific to reservations are sparse, from 2000 to 2002, there were nearly 94,000 violent victimizations on Indian reservations and Indian lands. BJS 11.

The decision below nevertheless denies Indian tribes the inherent authority necessary to effectively investigate many crimes by non-Indians, including many crimes with Indian victims, within the boundaries of their own reservations. It thereby disrupts law enforcement in large portions of Indian country, and threatens tribes' ability to protect "the health or welfare of the tribe," *Montana*, 450 U.S. at 566. It does so without any sound basis in this Court's precedents or support from any other court of appeals or state court of last resort. This Court should grant certiorari and correct the Ninth Circuit's significant error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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