No. 19-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSHUA JAMES COOLEY, RESPONDENT

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

BRIEF *AMICI CURIAE* OF THE CROW TRIBE OF INDIANS, THE NATIONAL CONGRESS OF AMERICAN INDIANS, AND OTHER 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]

Amicus Curiae 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, encompasses 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 ("1868 Treaty"), established the terms of agreement between the two sovereigns and significantly reduced the Tribe's landbase. Among the promises made by the United States to the Crow Tribe, the very first—Article I of the 1868 Treaty—was the ability to ensure the apprehension and prosecution of "bad men," including their exclusion from the Reservation, "upon proof." Officer James Saylor, then a Crow Tribal highway safety agent acting pursuant to a federal contract,[2] investi-

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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 37.2 and all parties have consented to the filing of this brief.

[2] 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

gated the Respondent after finding him parked on rural U.S. Highway 212 on the Crow Indian Reservation, and observing his blood-shot eyes, several firearms, drug paraphernalia 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.[3] Tribal officers' abilities to make on-the-spot decisions to protect Tribal members and non-In-

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by the U.S. Department of the Interior's Bureau of Indian Affairs-Office of Justice Services ("BIA-OJS"). 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.

[3]After decades of receiving meager resources from BIA-OJS and other federal agencies for public safety – notwithstanding the United States' obligations under the 1868 Treaty – the Crow Tribe recently established its own Tribal Police Department. This more than doubled the number of available officers to patrol the Crow Indian Reservation, with additional staffing increases planned. *See Crow Tribe forms police department*, BILLINGS GAZETTE, https://billingsgazette.com/news/state-and-regional/crow-tribe-for.ms-police-department/article_ef5ef7e6-a182-5dd0-83a4-7257c1e3a132.html?utm_medium=social&utm_source=email&utm_campaign=user-share (last visited July 16, 2020); *Crow Tribal Police eye former BIA jail to begin detention operations*, BILLINGS GAZETTE, https://billingsgazette.com/news/state-and-regional/crow-tribal-police-eye-former-bia-jail-to-begin-detention-operations/article_041a0233-9403-5d27-a275-55571305568e.html (last visited July 22, 2020).

dians, to stem the flow of illegal drugs and contraband, and to uphold the 1868 Treaty obligations are of fundamental importance to the Crow Tribe.

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, 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 with respect to tribal law enforcement authority and the solemn responsibilities that tribal officers face daily in providing for the safety and welfare of tribal communities.

Amicus Curiae the Affiliated Tribes of Northwest Indians ("ATNI") 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 ("CTCA") is a non-profit corporation, consisting of 90 federally-recognized tribes, supporting their sovereign rights.

Amicus Curiae the Inter-Tribal Association of Arizona 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 (USET SPF), which represents 30 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 Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Little Shell Tribe, Miami Tribe of Oklahoma, Seneca Nation of Indians, Suquamish Tribe, and Yakama Nation are each federally-recognized tribal governments with distinct interests in protecting public safety.

SUMMARY OF ARGUMENT

Tribal law enforcement officers are duty-bound to protect the public safety and welfare, including Indians and non-Indians. 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-doc-

umented by official United States governmental authorities.[4] Given the persistent resource gap, and inherent jurisdictional challenges, facilitating effective interagency cooperation between and among tribal, state, local and federal authorities is the key 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 in 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 public safety improves.[5]

Such cooperation takes many forms, including formal

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[4] 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, 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. ILOC, A ROADMAP FOR MAKING NATION 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").

[5] ILOC Report, *id.* at 100.

deputation agreements between and among neighboring public safety agencies, along with mutual aid policies and protocols for back-up and reserve staffing, inter-departmental communications, expanded training opportunities, and many other initiatives aimed at promoting collaboration that provides services seamlessly to the public.[6]

Tribal law enforcement officers are no less deserving of respect than their colleagues working for other jurisdictions simply because the government they serve is a tribal nation instead of a city, county or state. Tribal police are typically experienced, qualified, and well-trained, just 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 has the unfortunate and unwarranted effect of treating tribal officers as inferior to their state and local counterparts. If allowed to stand, the panel's ruling would severely hamper tribal law enforcement officers' authority and deny them the same minimum respect afforded to all other officers under *Terry v. Ohio*, 392 U.S. 1 (1968).

The Ninth Circuit mistakenly undercuts the ability of tribal law enforcement officers to protect the public by invalidating 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 investigate non-Indian persons on

[6] ILOC Report, *id.* at 101-115.

reasonable suspicion. The Court of Appeals' rationale for eliminating this important tool of public safety—investigative power premised on reasonable suspicion—rests on its 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 this Court's well-settled precedent is to greatly increase the practical difficulties that law enforcement officers face 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, they must reflect on a Byzantine series of legal questions, even in the dark on the side of a remote rural road, including: whether there is a violation of tribal law, or "obviously" a 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, affords a basis for tribal investigation and prosecution; and whether one or more relevant deputation agreements exist—hypothetical questions that could go on and on. App. at 42a-44a.

As Judge Collins' opinion dissenting from the Ninth Circuit's denial of rehearing en banc reflected, "Considering all of these practical difficulties and issues raised by the panel's opinion here, I am reminded of Justice Scalia's remark: 'There are many questions

here, and the answers to all of them are ridiculous.' *Grady v. Corbin*, 495 U.S. 508, 542 (1990) (Scalia, J., dissenting)." App. at 64a. Judge Collins also succinctly summarized the instant problem: "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.

The Ninth Circuit includes over 75 percent of the nation's 574 federally-recognized 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 (2010), https://www.gao.gov/assets/100/97229.pdf. The ability of law enforcement to ensure the safety of citizens in such a significant area is prima facie an issue of national importance. Judge Collins' analysis of this issue was spot-on: "The concurrence may be right that the 'practical limitations' of the panel decision are 'limited' for those of us who do not live on Indian reservations, but for the hundreds of thousands who do, 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 CREATES A CONFLICT REGARDING TRIBAL OFFICERS' *TERRY*-STOP AUTHORITY.

A. The Analysis of the Panel and the Concurring Opinion Denying En Banc Review Conflicts 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* and *United States v. Bryant*, 136 S. Ct. 1954 (2016).

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

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," 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.

Strate, 520 U.S. 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 Reservation'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 review and 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, correctly recognizing that "the 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) ("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 (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 4643, at *10-13 (E.D. Cal. Jan. 10, 2018) (same); *United States v. Peters*, No. 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).

2. The Ninth Circuit's Ruling Contradicts *Terry*.

In its path-marking decision in *Terry v. Ohio*, this Court balanced: 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," 392 U.S. at 22; with 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 fa-

tally 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 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. 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. 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.

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 permitted by *Terry*, has consistently been upheld. *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 (2009) (reasonable suspicion based on officer's observations during traffic stop justified pat-down); *Illinois v. Wardlaw*, 528 U.S. 119 (2000) (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 not unfamiliar within Indian country. As this Court noted in *Terry*:

> 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 such myriad encounters, relying on their experience and training to observe, assess and determine whether there is reasonable suspicion to act further. 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.

a. Fourth Amendment jurisprudence should be consistent 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 principle mode of discouraging lawless police conduct." 392 U.S. at 12. Here Officer Saylor's routine investigation, and resulting reasonable suspicion, were methodically conducted. Officer Saylor observed several concerning factors and acted professionally and appropriately to assess the need to further investigate the presence of a toddler, firearms and drug paraphernalia in Respondent's vehicle, in the middle of the night, coupled with 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. *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*, *Wardlaw* of any of the other *Terry*-stop jurisprudence.

As noted above, the Crow Tribe and other tribal nations face considerable challenges due to limited available public safety resources, which enhances the need for cooperative arrangements with neighboring jurisdictions. Indian country law enforcement agencies have comparable fewer officers per capita than other law enforcement agencies nationwide. U.S. Commission on Civil Rights, *Broken Promises: Continued Federal Funding Shortfall for Native Americans*, 208, (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. *Id*. at 31-2. *See also* NCAI, Fiscal Year 2021 Budget Request: Advancing Sovereignty Through Certainty and Security (February 10, 2020) 31, http://www.ncai.org/resources/ncai-publications/indian-country-budget-request/NCAI_FY_2021_FULL_BUDGET.pdf (noting BIA 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* 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).

Complicating matters, organized crime, gangs and drug cartels have taken advantage of the limited law enforcement presence on tribal lands to produce narcotics and other contraband. *See Law Enforcement in Indian Country,* 110th Cong. 1st Sess., S. Hrg. 110-106, Senate Committee on Indian Affairs (May 17, 2007). Statement of W. Patrick Ragsdale, Director, BIA, 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/.

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

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. Hrg. 110-106, Senate Committee on Indian Affairs (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. Hrg. 107-605, Senate Committee 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. *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005). 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 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.

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, tribal officers often enter into deputation 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 peoples," 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. Hrg. 107-605.

In addition to affording an obvious easy-out for law violators who frequently are untruthful with law enforcement, tribal identity is not necessarily easily discernible. Similarly, 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. *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 unclear.

3. The Ninth Circuit's Ruling Contradicts *Bryant and Kansas v. Glover*, 589 U.S. __ (2020).

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. 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 on Indian country an exception to ordinary principles that apply in every other context. *See also McGirt v. Okla.*, 591 U.S. __, __ (2020) (slip op., at 21) (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").

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*, 589 U.S. at __ (slip op.,

at 3). 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. *Id.*; *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).

B. The Decision Below Creates a Circuit Split between the Eighth and Ninth Circuits and Squarely Conflicts with Rulings by the Montana Supreme Court, Washington Supreme Court, and Oregon Court of Appeals.

1. Review is warranted for the further reason that the Ninth Circuit's decision conflicts directly with other Circuits.

In *Terry*, 400 F.3d 575, 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. 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 in plain sight. *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 *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'")). The Ninth Circuit's silence on these contrary authorities is deafening and a plain Circuit split results.

2. Review is warranted for the further reason that the Ninth Circuit's holding conflicts with three published state appellate court decisions.

The Ninth Circuit fails to distinguish cases from the Oregon Court of Appeals (*Pamperien*, 967 P.2d 503 (Or. Ct. App. 1998), the Washington Supreme Court (*Schmuck*, 850 P.2d 1332), and the Montana Supreme Court (*Haskins*, 887 P.2d 1189 (Mont. 1994). *See also U.S. v. Peters*, 2017 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. These conflicts remain.

In an area of the law as far-sweeping as Fourth Amendment *Terry*-stop jurisprudence, such disparate rules between Indian country within and outside the Ninth Circuit must be remedied by this Court's review.

II. THE 1868 TREATY RESERVES THE TRIBE'S RIGHT TO INVESTIGATIVE AUTHORITY

ANALOGOUS TO *TERRY*-STOP AUTHORITY.

Federal treaties are the "supreme Law of the Land." U.S. CONST. Art. VI, cl. 2; *see also* Art. I, §8; 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. *New Prime, Inc. v. Oliviera*, 586 U.S. __, __ (2019) (slip op., at 6). Generally, treaties must be interpreted as the Indians would have understood them. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (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).

Several treaties executed during this era included an identical or very similar provision, colloquially referred to as the 'Bad Men' clause,[7] 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." The Federal Circuit, in one of the few cases making up 'Bad Men'-clause jurisprudence, held that "any 'white' can be a 'bad man'" for purposes of 'Bad Men' clause interpretation, *Richard v. United States*, 677 F. 3d 1141, 1152-53 (Fed. Cir. 2012), and it follows

[7] *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).

that any "other people subject to the authority of the United States" can also be "bad men."

Respondent could qualify as a "bad man" under the 1868 Treaty, but only "upon proof made" would he be subject to arrest and punishment. 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. *United States v. Winans*, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted").

Amici underscore that in exchange for the Crow Tribe's cession of more than 30 million acres of land and peace,[8] the 1868 Treaty provides the Crow Tribe with the promise of an enduring Treaty right to law

[8] *See* Herrera, 139 S. Ct. at 1692-93 (recounting 1868 Treaty history); *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).

enforcement and the ancillary investigative power necessary to vindicate that Treaty right. This Court should "hold the government to its word." *McGirt*, 591 U.S. __, __ (slip op., at 1).

III. THE COURT MAY WISH TO CONSIDER SUMMARY REVERSAL.

The Ninth's Circuit's "extraordinary" misreading of *Strate* is so clear and its holding is so palpably incorrect, greatly endangering hundreds of thousands of Native Americans in the Circuit, that the Court may wish to consider summary reversal. App. 41a. For the reasons set forth above and in Judge Collins' dissenting opinion joined by Judges Bea, Bennett and Bress, the Ninth Circuit's flawed analysis warrants summary reversal.

CONCLUSION

For all of the above reasons, the Court should grant the Department of Justice's petition for writ of certiorari.

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