No. 19-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSHUA JAMES COOLEY

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

BRIEF FOR THE UNITED STATES

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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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 919 F.3d 1135. The order of the court of appeals denying panel rehearing and rehearing en banc (Pet. App. 32a-80a) is reported at 947 F.3d 1215. The order of the district court (Pet. App. 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 (Pet. App. 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 petition for a writ of certiorari was filed

on June 19, 2020, and granted on November 20, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to the petition for a writ of certiorari. Pet. App. 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). Indictment 2. The district court granted respondent's motion to suppress evidence that was obtained as a result of his interaction with a tribal police officer. Pet. App. 22a-31a. The court of appeals affirmed. *Id.* at 1a-21a.

1. "The Crow Tribe first inhabited modern-day Montana more than three centuries ago." *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1692 (2019). In 1868, the United States and the Crow Tribe signed a treaty establishing a Crow Reservation of roughly 8 million acres in what is now southern Montana. Treaty Between the United States of America and the Crow Tribe of Indians (Crow Treaty) art. II, May 7, 1868, 15 Stat. 650; see *Montana* v. *United States*, 450 U.S. 544, 548 (1981). Congress later reduced the Crow Reservation "to slightly fewer than 2.3 million acres." *Montana*, 450 U.S. at 548.

The Crow Reservation contains a section of U.S. Highway 212, a public right-of-way that crosses the reservation. Pet. App. 7a-8a. The portion of Highway 212 that lies within the boundaries of the reservation is "Indian country" under federal law. See 18 U.S.C. 1151(a)

(defining "'Indian country'" to include "all land within the limits of any Indian reservation * * * including rights-of-way running through the reservation"). On lands defined as "Indian country," the applicable substantive criminal law generally depends on the identity of the perpetrator and the victim, and the nature of the crime.

An Indian tribe has inherent authority to prosecute any Indian within its reservation, whether or not the Indian is a member of the prosecuting tribe. See *United States* v. *Lara*, 541 U.S. 193, 210 (2004); see also 18 U.S.C. 1152; 25 U.S.C. 1301(2). Unless Congress has provided otherwise, see, *e.g.*, 18 U.S.C. 1162, the federal government generally may prosecute Indians who commit certain serious offenses—including murder, rape, and sexual assault—regardless of the victim's Indian status. See 18 U.S.C. 1153; *Negonsott* v. *Samuels*, 507 U.S. 99, 102 (1993); *United States* v. *John*, 437 U.S. 634, 651 & n.22 (1978). In addition, the federal government generally may prosecute Indians who commit certain other offenses against non-Indians. See 18 U.S.C. 13, 1152; *Duro* v. *Reina*, 495 U.S. 676, 680 n.1 (1990).

Non-Indians, in contrast, generally are not subject to prosecution under tribal law. See *United States* v. *Bryant*, 136 S. Ct. 1954, 1960 n.4 (2016); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Instead, the current statutory regime establishes default rules under which crimes by non-Indians against Indians generally are exclusively federal, while crimes by non-Indians against non-Indians, as well as crimes by non-Indians with no specific victim (like drug trafficking), generally may be prosecuted under state law. See 18 U.S.C. 13, 1152; *Duro*, 495 U.S. at 680 n.1; *Solem* v. *Bartlett*, 465 U.S. 463, 465 n.2 (1984). In addition, the

federal government generally may prosecute Indians and non-Indians alike for violations of federal criminal statutes of nationwide applicability, such as the federal drug laws. See *United States* v. *Brisk*, 171 F.3d 514, 520-522 (7th Cir.), cert. denied, 528 U.S. 860 (1999).

2. On a cold night in February 2016, Officer James Saylor of the Crow Tribe Police Department was driving on the section of U.S. Highway 212 that lies within the boundaries of the Crow Reservation. Pet. App. 23a, 88a, 91a, 108a, 177a. At approximately 1 a.m., Officer Saylor saw a white, extended-cab pickup truck parked on the westbound shoulder with its headlights on. *Id.* at 2a, 23a, 91a, 177a. Officer Saylor "regularly found motorists on the highway in need of assistance," *id.* at 2a, and the truck was in an area with unreliable cell-phone reception, where motorists might "have no way to contact anyone for help," *id.* at 178a. Officer Saylor pulled over and parked behind the truck to check on the welfare of its occupants. *Id.* at 23a, 178a.

As he approached the truck on foot, Officer Saylor noticed that the truck had Wyoming (rather than Montana) plates, that its engine was running, and that the bed of the truck was full of personal belongings. Pet. App. 93a, 95a, 100a. Because the truck's tinted windows were closed, Officer Saylor knocked on the side of the truck. *Id.* at 2a. At that point, the rear driver's side window briefly lowered and then went up again. *Ibid.* Officer Saylor thought someone might have "hit the wrong button on the control panel," and he "expected the front driver's side window to roll down after that," but it did not. *Id.* at 94a. Officer Saylor shined his flashlight into the front window and saw respondent, sitting in the driver's seat, make a thumbs-down signal. *Id.* at 2a. Unsure of what respondent was trying to convey,

Officer Saylor asked him to roll the window down. *Id.* at 95a. Respondent lowered the window approximately six inches—just enough for Officer Saylor to see the top of his face. *Id.* at 2a. Officer Saylor saw that respondent had "watery, bloodshot eyes" and that he "appeared to be" non-Indian. *Id.* at 95a. Officer Saylor also saw a small child climb from the backseat into respondent's lap. *Id.* at 23a, 95a.

Respondent told Officer Saylor that he had pulled over because he was tired. Pet. App. 3a. In response to further questions, respondent claimed that he had driven from Lame Deer, Montana, a town only 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: Thomas Shoulder Blade was a former probation officer for the Northern Cheyenne Indian Tribe, and Thomas Spang was a suspected drug trafficker. *Id.* at 3a, 180a-181a. Respondent stated that the car that he had intended to purchase had broken down, and that "Thomas" had loaned him the truck so that he could drive home. *Id.* at 100a.

Officer Saylor was puzzled by respondent's claim that he had been attempting to purchase a vehicle at that time of night. Pet. App. 99a-100a. 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 100a. And based on his familiarity with vehicle-registration practices in the area, Officer Saylor was doubtful that "Thomas" would own a truck registered in Wyoming. *Ibid.* When Officer Saylor suggested to respondent that

the story 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. Pet. App. 4a. Respondent claimed that the rifles belonged to "Thomas." *Id.* at 101a. As the conversation progressed, Officer Saylor noticed that respondent was slurring his speech. *Id.* at 100a, 182a-183a. Officer Saylor asked for identification, and respondent pulled several wads of cash out of his front right pants pocket and placed them in the center console. *Id.* at 102a. When respondent placed his hand near his pocket area again, his breathing became shallow and rapid, and he looked forward with what is sometimes called a "thousand-yard stare." *Id.* at 103a. In Officer Saylor's experience, such a stare is an indication that a suspect may be about to become violent. *Ibid.*

Concerned about his and the child's safety, Officer Saylor unholstered his service pistol, held it to his side, and ordered respondent to stop and show his hands. Pet. App. 4a, 101a, 103a-104a, 106a. Respondent complied. *Id.* at 4a. On further instruction, respondent produced a Wyoming driver's license. *Ibid.* Officer Saylor attempted to call in respondent's license number using his hand-held radio, but the call failed because he could not get a signal. *Id.* at 4a, 104a-105a. Although Officer Saylor considered trying to make the call from the more powerful radio in his patrol car, he determined that for safety reasons he could not simply return to his car. *Id.* at 105a. Instead, Officer Saylor circled the truck and opened the front passenger-side door, at which point he

saw a semiautomatic pistol in the area near respondent's right hand. *Id.* at 105a-107a. Respondent claimed not to have realized that the pistol was there. *Id.* at 4a. Officer Saylor secured the pistol and removed a loaded magazine and a round from the chamber. *Id.* at 108a.

Respondent then vaguely mentioned that he was expecting someone to come to meet him at the side of the road. Pet. App. 118a, 185a. Officer Saylor ordered respondent to exit the truck and noticed a bulge in his front right pocket. *Id.* at 109a-110a. Officer Saylor conducted a pat-down and, after finding no weapons, escorted both respondent and the child to the patrol car. *Id.* at 186a. Before getting into the patrol 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 and the child in the back of the patrol car. *Id.* at 26a. Using the radio inside the car, Officer Saylor called for backup from tribal police and, because respondent "seemed to be" non-Indian, from county police as well. *Id.* at 118a.

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. Pet. App. 26a, 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 next to the driver's seat. *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 federal Bureau of Indian Affairs (BIA) subsequently arrived on

the scene. *Id.* at 120a. In coordination with the county officer, Officer Saylor transported respondent to the Crow Police Department, where he was interviewed by BIA and local investigators and then arrested by the county officer. *Id.* at 189a-190a. A subsequent search of the truck uncovered more methamphetamine. *Id.* at 26a, 190a.

3. A federal grand jury in the District of Montana indicted respondent on 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). Indictment 2. Respondent moved to suppress the evidence obtained as a result of his interaction with Officer Saylor, arguing that as a tribal officer, Officer Saylor lacked authority to "conduct a criminal investigation" of respondent, a non-Indian. D. Ct. Doc. 34, at 9 (Nov. 4, 2016).

The district court granted the motion to suppress. Pet. App. 22a-31a. The court took the view that, when a tribal officer stops a person on a public right-of-way on the tribe's reservation and the person turns out to be "non-Indian," the officer's ability to "detain the person for the reasonable time it takes to turn the person over to state or federal authorities" hinges on whether 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 court concluded that no such violation was "apparent" here, and therefore deemed Officer Saylor's actions unauthorized and unreasonable, and held 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). Pet. App. 28a, 30a.

The district court reasoned that Officer Saylor had discovered that respondent was non-Indian based on respondent's appearance when respondent "initially rolled [the] window down," and it found that Officer Saylor had seized respondent when he drew his weapon and ordered respondent to show his hands. Pet. App. 30a; see *id.* at 29a-30a. The court then decided 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 "obvious state or federal law violation" that would allow it to view Officer Saylor's actions as reasonable. *Id.* at 30a.

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

The Ninth Circuit began by distinguishing "tribal land"—by which it meant "non-encumbered tribal property"—from "public rights-of-way that crossover tribal land." Pet. App. 7a. The court recognized that "tribal officers can investigate crimes committed by non-Indians on tribal land and deliver non-Indians who have committed crimes to state or federal authorities." *Ibid.* But it believed that the ability to do so depended solely on the tribe's authority to "exclude non-Indians from tribal land." *Ibid.* And it held that because a "tribe cannot exclude non-Indians from a state or federal highway constructed on [an] easement" within "tribal land," a different legal framework applies on such "public rights-of-way." *Id.* at 8a.

Under the Ninth Circuit's legal framework, tribal authorities cannot "investigate non-Indians who are using such public rights-of-way." Pet. App. 8a. Tribal officers may "stop those suspected of violating tribal law

on public rights-of-way" if "the suspect's Indian status is unknown," but their "initial authority is limited to ascertaining whether the person is an Indian." *Ibid.* 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 and citation omitted). If that inquiry fails to establish that the person is an Indian, the tribal officer may detain the person only "[i]f, during this limited interaction," it "is 'apparent' or 'obvious' that state or federal law is being or has been violated"—in which case the detention may last "'for a reasonable time in order to turn him or her over to state or federal authorities.'" *Id.* at 8a-9a (citations omitted). And a tribal officer can never "search a known non-Indian for the purpose of finding evidence of a crime." *Id.* at 9a.

Applying that legal framework to the circumstances of this case, the Ninth Circuit concluded that Officer Saylor went "beyond the authority of a tribal officer on a public, nontribal highway crossing a reservation" when he "detained [respondent] and twice searched his truck" without "first attempting to ascertain his status" as an Indian or a non-Indian. Pet. App. 11a. It further held, despite the absence of adversarial briefing on the issue (which the government had thought foreclosed by circuit precedent), that the ICRA's Fourth Amendment analogue contains an exclusionary rule, applicable to evidence obtained as the fruit of an unreasonable seizure. *Id.* at 11a-14a. And it affirmed the suppression here on the ground that the limitations on tribal authority that it had laid out made Officer Saylor's actions unreasonable. *Id.* at 18a, 20a-21a.

5. The government petitioned for rehearing en banc, which was denied. Pet. App. 32a-80a. Judges Berzon

and Hurwitz, the two Ninth Circuit judges on the original panel (which had included a visiting Fourth Circuit judge), concurred in the denial of rehearing en banc. *Id.* at 33a-41a. They reiterated, among other things, the panel's rejection of any "tribal authority" to "investigate criminal activity by non-Indians on alienated fee land or federal and state rights-of-way." *Id.* at 37a (emphasis omitted).

Judge Collins, joined by three other judges, dissented from the denial of rehearing en banc. Pet. App. 41a-80a. He would have adhered to the rule that, "when a non-Indian is reasonably suspected of violating state or federal law anywhere within the boundaries of an Indian reservation (including state or federal highways traversing the reservation), tribal police officers have the authority to conduct on-the-spot investigations of the sort authorized under *Terry* v. *Ohio*, 392 U.S. 1 (1968)," 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 41a-42a. Judge Collins criticized the panel for replacing that "previously straightforward" rule with a "convoluted series of rules that turn on what the officer does or does not know about the driver's tribal status," *id.* at 42a-43a, and for replacing "the easily administered reasonable suspicion standard" with "a novel and complex set of standards, all of which are more demanding than ordinary probable cause," *id.* at 44a (emphasis omitted).

Judge Collins observed that even when articulating limits on "a tribe's *civil* jurisdiction" over public highways on an Indian reservation, Pet. App. 54a, 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," *id.* at 65a (quoting *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997)). And he reasoned that this 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 reasoned, without objection from the concurrence, that the panel's framework 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," Pet. App. 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" the Ninth Circuit. Pet. App. 76a. Noting the high amount of non-Indian fee land within reservations and the large number of non-Indians who live 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," a problem of great practical importance "unlikely to be resolved by other sources of law enforcement authority," *id.* at 78a.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case erroneously diminishes the authority of Indian tribes, impedes the enforcement of state and federal law, and threatens the safety of officers, tribal members, and others on Indian reservations. Tribes have always had, and continue to retain, the inherent sovereign authority to reasonably investigate and temporarily detain people within their borders for violations of other sovereigns' laws. That authority, which Congress has regulated but never eliminated, is critical to the interests of the United States, the States, the tribes, and the public. The Ninth Circuit's dismantling of it is legally unsound and practically unworkable.

A. Sovereigns possess inherent powers to protect the people and property within their borders. Those powers generally include the authority to temporarily detain and investigate those suspected of violating the laws of another sovereign, who may then be remanded to the custody of that other sovereign for potential prosecution. It is well established, for example, that States have inherent authority to temporarily detain and investigate those within their borders who are suspected of violating federal law.

Indian tribes necessarily possessed such authority when they were independent sovereigns, and it has not been "withdrawn by treaty or statute, or by implication as a result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). No treaty or statute abolishes it. And far from being inconsistent with the tribes' "incorporation within the territory of the United States," *ibid.*, the ability to investigate and detain non-Indians for suspected federal- and state-law violations *furthers* the interests of the United States. Limited

tribal policing of non-Indians within reservation boundaries, subject to the restrictions of the ICRA's Fourth Amendment analogue, ensures that federal and state laws enacted to protect the public are appropriately enforced on Indian reservations. Without such policing authority, tribal officers cannot appropriately respond to potential criminal activity—such as an in-progress or just-completed robbery—or even protect themselves (let alone others) from harm.

This Court's precedents support tribes' retention of such necessary and beneficial authority within reservation boundaries—including on public rights-of-way through the reservation. Even as it has described limits on tribes' regulatory and adjudicatory authority over non-Indians, the Court has never "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." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997). And longstanding historical practice reflects the understanding that Indian tribes possess such authority as a matter of federal-tribal relations. Numerous treaties between the United States and the tribes rely on the premise that tribes may investigate and temporarily detain non-Indian offenders. Indeed, the United States' treaty with the Crow Tribe—the tribe involved in this case—itself implies that the Tribe will be able to investigate non-Indians for potential violations of federal law.

B. The Ninth Circuit has refused to recognize tribes' inherent authority within reservation boundaries or to evaluate tribal officers' conduct on public rights-of-way

under the familiar Fourth Amendment standards incorporated in the ICRA. Instead, it has erected a novel series of indeterminate restrictions on the ability of tribal officers to investigate and detain non-Indians on public rights-of-way (and, presumably, alienated lands) within a reservation. The Ninth Circuit did not, however, identify any legal basis, other than dictum in a prior circuit decision, for that unprecedented framework. And its approach not only lacks grounding in any statute, treaty, or historical practice, but disregards the ICRA, the Indian treaties, and long-held historical understandings.

Even leaving aside its legal flaws, the Ninth Circuit's approach is highly problematic as a practical matter. To the extent that its contours can be discerned with any precision, it apparently limits tribal officers on public rights-of-way (and alienated lands) to stopping only those suspected of violating tribal law, not federal or state law—and even then, only those whom the officer knows to be Indian or whose Indian status is unknown. For the stops that it allows, the Ninth Circuit's framework also substantially restricts what an officer may do during the encounter. When the suspect's Indian status is unknown, the officer's initial authority is limited to asking whether the suspect is an Indian. If the suspect says that he is not—which may well be a lie—the officer must let him go unless, "during this limited interaction," it "is 'apparent' or 'obvious' that state or federal law has been violated." Pet. App. 8a-9a (citation omitted).

That exception is so narrow that it would preclude further investigation or detention in many cases, including circumstances in which detention would easily be justified under normal Fourth Amendment standards. A tribal officer would be precluded from investigating

further if, during an interaction with a non-Indian motorist, he smelled alcohol on the motorist's breath or a drug-detecting dog alerted, the motorist matched the description of the subject of a widely broadcast law-enforcement lookout bulletin, or even (as in this case) the motorist's actions appeared to threaten the officer's own safety. By drastically curtailing tribal policing authority on significant portions of land within reservation boundaries, the Ninth Circuit's decision leaves a substantial gap in law enforcement on tribal reservations—a gap that state and federal authorities cannot practically fill. Thus, in places where crime is already a serious problem, the Ninth Circuit's decision makes the situation worse. Its judgment should be vacated, and the case remanded for further proceedings.

ARGUMENT

TRIBAL OFFICERS MAY REASONABLY INVESTIGATE AND DETAIN NON-INDIANS ON PUBLIC RIGHTS-OF-WAY WITHIN TRIBAL RESERVATIONS FOR POTENTIAL VIOLATIONS OF STATE OR FEDERAL LAW

A fundamental attribute of sovereignty is a sovereign's power to protect the people and property within its borders from threats to their welfare and security. Although Indian tribes have been divested of certain aspects of their inherent sovereignty, they have not been left wholly dependent on state or federal largesse to police illegal activity by non-Indians on public rights-of-way within a reservation. Instead, tribes retain limited policing powers that affirmatively enhance federal and state sovereignty and provide the only practical way for tribal officers to protect their own and others' safety. In accordance with the ICRA's Fourth Amendment analogue, a tribal officer may stop on reasonable suspicion—

and further detain on probable cause—non-Indian suspects to allow for custody and potential prosecution by state or federal authorities. The Ninth Circuit's substantially more restrictive and convoluted framework, which vitiates tribal authority, lacks any sound legal basis and creates a host of serious practical problems.

A. Tribes Retain Inherent Authority To Reasonably Protect Persons And Property Within Reservation Boundaries From Indian Or Non-Indian Suspects

As preexisting sovereigns, Indian tribes inherently possessed the authority to investigate and detain non-Indian suspects within their borders for delivery to other sovereigns. The tribes' "incorporation within the territory of the United States," *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978), did not counterproductively divest them of their ability to protect people on the reservation from crime by facilitating the enforcement of federal and state law, and Congress has never eliminated that authority.

1. The tribes' status as dependent sovereigns has not abolished their authority to police state and federal crime by non-Indians on their reservations

a. "Before the coming of the Europeans, [Indian] tribes were self-governing sovereign political communities." *Wheeler*, 435 U.S. at 322-323; see *United States* v. *Bryant*, 136 S. Ct. 1954, 1962 (2016) (describing Indian tribes as "separate sovereigns pre-existing the Constitution") (citation omitted); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (describing Indian tribes as "distinct, independent political communities"). Like other sovereigns, they "exercise[d] inherent sovereign

authority over their members and territories." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991).

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). It is accordingly undisputed that a sovereign has the general authority to temporarily detain and investigate those suspected of violating the laws of another sovereign. "It is well established," for example, "that state and local officers generally have authority to make stops and arrests for violations of federal criminal laws." *Arizona* v. *United States*, 567 U.S. 387, 447 (2012) (Alito, J., concurring in part and dissenting in part) (citing *Miller* v. *United States*, 357 U.S. 301, 305 (1958), and *United States* v. *Di Re*, 332 U.S. 581, 589 (1948)); see *id.* at 438 (Thomas, J., concurring in part and dissenting in part) ("States, as sovereigns, have inherent authority to conduct arrests for violations of federal law, unless and until Congress removes that authority."); *United States* v. *Smith*, 899 F.2d 116, 118 (1st Cir. 1990) (Breyer, J.) (presuming default rule, in Fourth Amendment context, that state officers may seize evidence of federal crime).

Following their incorporation into the United States, Indian tribes remain "distinct, independent political communities," *Worcester*, 31 U.S. (6 Pet.) at 559, "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). They therefore retain certain "attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). Because tribes have a "dependent status" in our political order,

the "sovereignty that the Indian tribes retain is of a unique and limited character." *Wheeler*, 435 U.S. at 323. But it continues to encompass those powers "not withdrawn by treaty or statute, or by implication as a necessary result of [tribes'] dependent status." *Ibid.*

b. That retained power necessarily includes the limited authority to investigate and detain non-Indians within reservation boundaries for potential violations of state or federal law and to protect the public from imminent threats. No treaty or statute withdraws such authority. And the tribes' "incorporation within the territory of the United States, and their acceptance of its protection," did not "necessarily divest[] them of" it. *Wheeler*, 435 U.S. at 323.

"Tribal powers are not implicitly divested by virtue of the tribes' dependent status." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (*Colville*). Instead, "[t]his Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Ibid.* Tribes lost, for example, the "power to dispose of the soil at their own will, to whomsoever they pleased," *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (citation omitted), as well as the power to "enter into direct commercial or governmental relations with foreign nations," *Wheeler*, 435 U.S. at 326. In contrast to those powers, however, the authority to investigate and detain non-Indians for suspected federal- and state-law violations *furthers* "the overriding interests of the National Government," *Colville*, 447 U.S. at 153, and therefore remains in place.

The United States' "very vital interest in enforcement of criminal laws," *United States* v. *Jorn*, 400 U.S.

470, 479 (1971) (plurality opinion), benefits considerably from Indian tribes' policing of federal and state crimes within their borders. So long as tribes quickly involve federal or state authorities—who can then decide what to do with the suspect—their efforts substantially advance the law enforcement prerogatives of the United States and the individual States that constitute it. It helps, rather than hurts, the United States and the States for tribal first responders to stop a robbery in progress on the reservation and detain the non-Indian perpetrators, or to investigate non-Indians nearby who match the description of the suspects. See 18 U.S.C. 1951; Mont. Code Ann. § 45-5-401 (2019). It also helps, rather than hurts, for a tribal police officer to detain and investigate a non-Indian whom the officer observed making a possible drug sale within reservation boundaries. See 21 U.S.C. 841; Mont. Code Ann. § 45-9-101 (2019). And it helps, rather than hurts, for tribal patrols to investigate and detain a non-Indian driver on a public right-of-way through reservation land based on reports of random gunfire from the car. See Mont. Code Ann. § 45-5-207 (2019).

Tribes' policing of federal and state crimes on reservations—including the public rights-of-way that run through them—accords with federal statutes governing criminal jurisdiction within Indian country. Those statutes preserve certain inherent prosecutorial powers of tribes (over Indians) within Indian country, thereby anticipating that tribal authorities will patrol that territory. See 18 U.S.C. 1151-1152; *United States* v. *Lara*, 541 U.S. 193, 210 (2004). And they explicitly define "Indian country" to encompass "*all land* within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding

the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. 1151(a) (emphasis added). They thus specifically contemplate tribal policing of rights-of-way, like U.S. Highway 212 within the Crow Reservation, on which it is readily apparent that many travelers will be non-Indians. See *Strate* v. *A-1 Contractors*, 520 U.S. 438, 442-443 (1997); *Oliphant*, 436 U.S. at 194. Particularly given that those highways often serve as conduits for crime, see Pet. App. 77a (Collins, J., dissenting from the denial of rehearing en banc); pp. 44-45, *infra*, the United States has no interest in forbidding—and has not forbidden—the tribal officers patrolling those rights-of-way from stopping and questioning a non-Indian suspect whose activities threaten everyone, Indian or non-Indian, who uses or benefits from the road.

The United States does, of course, have an interest in ensuring that tribal officers carry out such policing activities in a reasonable manner. The ICRA secures that interest by including an analogue to the Fourth Amendment. See 25 U.S.C. 1302(a)(2) ("No 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, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."); see also 25 U.S.C. 1301(2) (defining "powers of self-government" to "mean[] and include[] all governmental powers possessed by an Indian tribe"). The ICRA thus subjects investigation and detention of non-Indian (and other) suspects by tribes to the same limitations that the Constitution imposes on those activities by federal and state officers. But it

would be affirmatively counterproductive to the national interest to deprive tribes of such policing authority altogether.

2. This Court's precedents preserve tribal authority to stop and investigate non-Indian suspects on public rights-of-way within a reservation

This Court has never suggested that tribal officers' authority to patrol public rights-of-way within reservation boundaries excludes non-Indian suspects. The potential criminal conduct of such suspects—which includes drunk or reckless driving, drug trafficking, and other public offenses—endangers both Indians and non-Indians on the road itself, on adjacent reservation lands, and in any place where the road may lead. Although tribal authorities may not themselves prosecute or punish such conduct by non-Indians, they are not powerless to intercede and thereby enable state and federal authorities to do so.

a. The Court's precedents have been careful to exempt a tribe's investigatory and detention authority—including on public rights-of-way—from the limitations that they have recognized on a tribe's adjudicatory and regulatory authority. 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* v. *Reina*, 495 U.S. 676, 688 (1990), investigation and brief law-enforcement detention do not.

Accordingly, "[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. The Court has explicitly recognized such authority as a corollary of tribes' "traditional and undisputed

power to exclude persons whom they deem to be undesirable from tribal lands"—*i.e.*, lands within the reservation that have not been alienated in fee to non-Indians or encumbered by a public right-of-way. *Id.* at 696; see *id.* at 697. But the Court has not limited the authority to such lands. Instead, the Court has suggested that it can be grounded in a tribe's more general inherent authority.

In *Strate* v. *A-1 Contractors*, *supra*, the Court 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." 520 U.S. 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. It thus treated the highway, "for nonmember governance purposes," as equivalent to reservation land "alienated to non-Indians," *id.* at 454, 456, where the "general rule restrict[ing] tribal authority over nonmember activities * * * is particularly strong," *Plains Commerce Bank*, 554 U.S. at 328. But while that rule precluded the tribe from adjudicating a civil tort dispute stemming from a highway accident involving two non-Indians, see *Strate*, 520 U.S. at 442-443, the Court expressly distinguished a tribe's authority to police the activities of non-Indians on a reservation's public roads.

The Court 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." *Strate*, 520 U.S. at 456 n.11. It accompanied that statement with 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. By declining to "question [such] authority," and citing approvingly a decision that had recognized it, this Court in *Strate* signaled that such inherent tribal policing authority remains intact. 520 U.S. at 456 n.11; see *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 651 (2001) (reiterating that the Court in *Strate* "did not question the ability of tribal police to patrol the highway").

b. The principal rationale for denying tribes the authority to prosecute non-Indians, and for circumscribing a tribe's civil adjudicatory and regulatory authority over nonmembers on alienated or encumbered lands, has no application to tribal policing of non-Indians within reservation boundaries for violations of federal or state law. The adjudicatory and regulatory limitations reflect non-Indians' lack of membership in tribal political communities, see *Oliphant*, 435 U.S. at 210-211, as a result of which they "have no part in tribal government" and thus "no say in the laws and regulations that govern tribal territory," *Plains Commerce Bank*, 554 U.S. at 337. But protecting the public from the imminent dangers, and allowing initial investigative policing, of non-Indians' violations of federal and state laws

to which those non-Indians are indisputably subject presents no similar concerns.

While non-Indians may have an interest in being free from laws that they had no say in making, they have no more of an interest in violating federal and state laws on reservations than they do in violating those laws elsewhere. To the extent that a non-Indian driver on a public highway is even aware that he has crossed into a reservation, he has no legitimate basis to expect that he is entering a zone in which the enforcement of state and federal laws will be relaxed. Nor should a law-abiding driver—Indian or non-Indian—fear that limitations on tribal law enforcement will endanger his safety when he enters into the Indian country that tribal officers patrol. Even less should a tribal officer lack the authority to seize a non-Indian motorist who—as in this case—appears poised to end a consensual encounter by attacking the officer. See Pet. App. 10a, 29a-30a, 103a (finding that seizure occurred when Officer Saylor reacted to respondent's "thousand-yard stare" that in the officer's experience presaged violence).

Relatedly, even the limits on tribes' civil adjudicative and regulatory jurisdiction recognized by this Court contain an exception, under which "a tribe may exercise 'civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce Bank*, 554 U.S. at 329-330 (quoting *Montana* v. *United States*, 450 U.S. 544, 566 (1981)). This Court has construed that exception narrowly in the context of civil adjudication and regulation. See *id.* at 341-342. But it reflects a general principle that supports the more modest ability to protect the public from imminent

danger and to aid federal and state law enforcement by temporarily investigating and detaining non-Indians suspected of violating federal and state laws on reservation lands. Activities such as drunk driving or transportation of contraband on the reservation present serious threats to "the health or welfare of the tribe." *Id.* at 329-330 (quoting *Montana*, 450 U.S. at 566). Such conduct endangers the lives, persons, and property of tribal members, and others on the reservation, whether or not the person suspected of committing them is an Indian.

3. Historical practice confirms that tribes retain limited policing authority with respect to non-Indians

The long history of relations between the United States and the tribes illustrates the long-held understanding—indeed, the expectation—that tribes would investigate and detain non-Indian suspects within reservation boundaries. See, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-140 (1982) (recognizing the relevance of history in assessing tribal authority).

a. In the eighteenth and nineteenth centuries, the United States and Indian tribes entered into various treaties that required the tribes to deliver up non-Indian offenders within their territories to the United States for prosecution. See Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 Ariz. St. L.J. 1, 7-8 (2004); Eileen Luna-Firebaugh, *Tribal Policing: Asserting Sovereignty, Seeking Justice* 17 (2007). The tribes could not have satisfied those treaty obligations without detaining and investigating non-Indian offenders based on potential violations of federal law. And because the treaties did not themselves confer that limited policing au-

thority, the treaties necessarily reflected an understanding that the tribes had retained such authority as a matter of inherent sovereignty. 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)).

This Court recognized as much in *Oliphant* v. *Suquamish Indian Tribe*, *supra*. That case involved a treaty between the United States and the Suquamish Indian Tribe, in which the tribe "agree[d] 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. IX, Jan. 22, 1855, 12 Stat. 929. The Court explained that, when that treaty provision is "[r]ead in conjunction with 18 U.S.C. § 1152, which extends federal enclave law to non-Indian offenses on Indian reservations, th[e] provision implies that the Suquamish are to promptly deliver up any non-Indian offender." *Oliphant*, 435 U.S. at 208.

Tribal authorities would be hard-pressed to "deliver up" a "non-Indian offender" without exercising at least some policing authority over non-Indians. In particular, they would need both investigatory authority to identify an offender and detention authority to either transport him to, or hold him for, the federal authorities. And it is implausible to construe later arrangements granting public rights-of-way or creating non-Indian fee land within reservation boundaries to produce significant loopholes in that authority. Nobody involved in any of the relevant arrangements would have

understood that a non-Indian suspect could elude capture by leading tribal pursuers to a public trail or highway, or a plot owned by a non-Indian. Nor would it make sense to conclude that tribal authorities' detention power would lapse if on the way to deliver the suspect to federal authorities (or to a secure local facility to await the federal authorities' arrival), they had to traverse a public right-of-way or land alienated to a non-Indian. Cf. 18 U.S.C. 1151(a) (defining "Indian country" to include such lands); *Oliphant*, 435 U.S. at 208 (construing treaty in light of modern statutory scheme).

b. The United States' treaty with the Suquamish Tribe was not unique. Other treaties likewise required tribes to "deliver * * * up" "offenders against the laws of the United States" to federal authorities. Treaty Between the United States of America and the Nez Percé Indians art. VIII, June 11, 1855, 12 Stat. 960; see, *e.g.*, Treaty Between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians art. VIII, July 16, 1855, 12 Stat. 978 (similar); Treaty Between the United States and the Qui-nai-elt and Quil-leh-ute Indians art. VIII, July 1, 1855, and Jan. 25, 1856, 12 Stat. 973 (similar); Treaty Between the United States and the Yakama Nation of Indians art. VIII, June 9, 1855, 12 Stat. 954 (similar); Treaty Between the United States of America and the Makah Tribe of Indians art. IX, Jan. 31, 1855, 12 Stat. 941 (similar); Treaty Between the United States of America and the S'Klallams Indians art. IX, Jan. 26, 1855, 12 Stat. 935 (1855); Treaty with Nisquallys art. VIII, Dec. 26, 1854, 10 Stat. 1134 (similar).

And still other treaties analogously required tribes to "deliver * * * up" "offenders" who were "residing among [the Indians]," or who were "tak[ing] refuge in

their nation," so that the offenders might be "punished according to the laws of the United States." Treaty of Peace and Friendship, U.S.-Creek Nation (Creek Nation Treaty), art. VIII, Aug. 7, 1790, 7 Stat. 37; see, *e.g.*, Articles of a Treaty, U.S.-Chickasaw Nation, art. V, Jan. 10, 1786, 7 Stat. 25 (similar); Articles of a Treaty, U.S.-Choctaw Nation, art. V, Jan. 3, 1786, 7 Stat. 22 (similar).

In addition, many treaties that did not contain such an obligation nevertheless contained other provisions that were likewise premised on limited inherent policing authority over non-Indians. For example, the United States' treaty with the Crow Tribe—the tribe involved in this case—provides:

> 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 [local federal] 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.

Crow Treaty art. I, 15 Stat. 649.

Under that provision, "bad men among the whites" are non-Indian offenders. See *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883) (describing the phrase as referring to "whites and their allies"). Because the United States would be obligated to take custody of such offenders only upon "proof" of the "wrong" committed, Crow Treaty art. I, 15 Stat. 649, the treaty presumes that the Crow Tribe would be able to obtain such "proof"—which in turn takes as a given the Crow Tribe's ability to investigate non-Indians for potential violations of

"the laws of the United States." *Ibid.* And while the treaty contemplates that federal authorities would come to take the suspect, rather than that tribal authorities would proactively deliver him, nothing indicates that tribal authorities would have to let a suspect go, and thereby allow him to flee, if federal authorities did not arrive instantaneously.

Numerous other treaties with Indian tribes contain similar "bad men" provisions. See Treaty Between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians art. I, July 3, 1868, 15 Stat. 673; Treaty Between the United States of America and the Navajo Tribe of Indians art. I, June 1, 1868, 15 Stat. 667; Treaty Between the United States of America and the Northern Cheyenne and Northern Arapahoe Tribes of Indians art. I, May 10, 1868, 15 Stat. 655; Treaty Between the United States of America and Different Tribes of Sioux Indians art. I, Apr. 29, 1868, 15 Stat. 635; Treaty Between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians art. VI, Mar. 2, 1868, 15 Stat. 620; Treaty Between the United States of America and the Cheyenne and Arapahoe Tribes of Indians art. I, Oct. 28, 1867, 15 Stat. 593; Treaty Between the United States of America and the Kiowa and Comanche Tribes of Indians (Kiowa and Comanche Treaty) art. I, Oct. 21, 1867, 15 Stat. 581; see also Treaty Between the United States of America and the Kiowa, Comanche, and Apache Tribes of Indians, Oct. 21, 1867, 15 Stat. 589-590 (incorporating, by reference, the provisions of the Kiowa and Comanche Treaty). Those "bad men" provisions, like the other treaty provisions discussed above, reinforce the tribes' retention of inherent authority to exercise

certain policing functions with respect to non-Indians within the reservation.

B. The Ninth Circuit's Approach Is Legally Incorrect And Practically Unworkable

The Ninth Circuit in this case refused to recognize tribes' inherent authority to detain and investigate non-Indians suspected of violating federal or state law on the reservation. It therefore failed to evaluate Officer Saylor's conduct under the normal Fourth Amendment standards, including reasonable suspicion and probable cause, applicable to tribes under the ICRA. Instead, it erected a "convoluted series of rules that turn on what the officer does or does not know about [a suspect's] tribal status" and that largely curtail any tribal investigation or detention of non-Indians on significant portions of reservation lands. Pet. App. 42a-43a (Collins, J., dissenting from the denial of rehearing en banc). That framework lacks a sound legal basis, and its substantial diminution of meaningful tribal policing authority creates gaps in law enforcement that state and federal governments cannot practically fill, threatening the welfare and security of everyone on tribal reservations, where a small number of law-enforcement officers must cover huge territories.

1. The Ninth Circuit's approach lacks legal support

a. 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 instead grounded its legal analysis on the premise 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 (*i.e.*, non-alienated or unencumbered) lands—neither of which authorizes stops of non-Indians on public rights-of-way on the reservation. Pet. App. 35a (Berzon and Hurwitz, J.J., concurring in the denial of rehearing en banc); see *id.* at 7a (panel opinion).

For the reasons discussed in Part A, *supra*, that premise was mistaken. Even with respect to non-Indians, "tribes have inherent sovereignty independent of th[e] authority arising from their power to exclude." *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 425 (1989) (plurality opinion) (observing that the Court so "held" in *Merrion*, 455 U.S. at 141). The Ninth Circuit did not identify any express abrogation, by treaty or statute, of the Crow Tribe's undisputed preexisting authority to detain and investigate non-Indian offenders on the reservation. To the contrary, the "bad men" provision in the United States' treaty with the Crow Tribe indicates that the Tribe retained that authority. And the Ninth Circuit likewise did not identify any reason why incorporation into the United States "necessarily divested," *Wheeler*, 435 U.S. at 323, the Crow Tribe—and all other tribes—of such a mutually beneficial ability.

Indeed, if the Ninth Circuit's premise were correct, the implication would be that tribes have *no* sovereign authority *at all* over suspected non-Indian law-breakers on their reservations. But "Indian tribes * * * are a good deal more than 'private, voluntary organizations.'" *Wheeler*, 435 U.S. at 323 (quoting *Mazurie*, 419 U.S. at 557). And even the Ninth Circuit was unwilling to follow its erroneous legal premise to the conclusion that tribes must simply let suspected non-Indian offenders go. See Pet. App. 8a-9a.

b. Under the Ninth Circuit's legal framework, tribal officers may stop vehicles that are apparently violating tribal law, may ask (typically only one question) solely about the driver's Indian status, and may detain a driver who is not thereby revealed to be an Indian only for an "apparent" or "obvious" state or federal crime during the encounter. Pet. App. 8a-9a (quoting *Bressi* v. *Ford*, 575 F.3d 891, 896-897 (9th Cir. 2009)). That restrictive multi-step approach lacks legal support.

The Ninth Circuit did not ground its framework in any treaty, statute, or established sovereign practice. Instead, the panel derived it from a prior circuit decision that presented elements of it in dictum. In that decision, which directly involved only suspicionless roadblock stops, the Ninth Circuit suggested allowing a tribal officer to briefly stop an unidentified driver to ask whether he is an Indian as an ad hoc "solution" to the "obvious practical difficulties" of limited tribal authority to detain and investigate non-Indians on a reservation's public roads. *Bressi*, 575 F.3d at 896. In particular, it described the negligible authority to inquire about Indian status as a judicial "concession to the need for legitimate tribal law enforcement against Indians in Indian country, including the state highways." *Ibid.*

That "concession" is unnecessary, because the tribe's inherent sovereign authority already meets that need. And the framework's ad hoc judicial interest-balancing is inappropriate, because it supplants the well-known rules that Congress has codified in the ICRA. Like other inherent tribal powers, the limited policing authority to detain and investigate non-Indians "remains subject to ultimate federal control." *Wheeler*, 435 U.S. at 327. That control, however, does not come in the form of judicial lawmaking, but instead congressional action—

here, the ICRA, which "extends to 'any person' within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution," including Fourth Amendment rights. *Oliphant*, 435 U.S. at 195 n.6; see *Wheeler*, 435 U.S. at 328 (explaining that the ICRA "made most of the provisions of the Bill of Rights applicable to the Indian tribes").

Thus, although Indian tribes are not directly bound by the Fourth Amendment itself, see *Duro*, 495 U.S. at 693, they are bound by similar statutory language courts have interpreted *in pari materia* with the Fourth Amendment. See, *e.g.*, Pet. App. 15a; *United States* v. *Lester*, 647 F.2d 869, 872 (8th Cir. 1981); *State* v. *Railey*, 532 P.2d 204, 206 (N.M. Ct. App. 1975); *State* v. *Madsen*, 760 N.W.2d 370, 376 (S.D. 2009); *Clark* v. *Fort Peck Tribes*, 15 Am. Tribal Law 203, 205 (Fort Peck Ct. App. 2018). Under that language, the ultimate touchstone for policing decisions is reasonableness, as informed by familiar Fourth Amendment standards. See *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 omitted). Those standards are generally satisfied when investigatory stops are based on reasonable suspicion, see, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968), and arrests are supported by probable cause, see, *e.g.*, *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

Because a tribe lacks authority to prosecute or punish a non-Indian, its "arrest" authority with respect to a non-Indian 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, the detention is not "unreasonable." 25 U.S.C.

1302(a)(2). In particular, no heightened level of suspicion, such as an "apparent" or "obvious" violation of law, Pet. App. 9a (citation omitted), is required simply because the action is carried out by a tribal officer.

2. The Ninth Circuit's approach unsettles and undermines enforcement of federal and state law within reservation boundaries

The novelty of the Ninth Circuit's approach in itself creates significant practical problems. The Ninth Circuit's new standards, like the traditional Fourth Amendment standards that they supplant, "ha[ve] to be applied on the spur (and in the heat) of the moment." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001). But the Ninth Circuit has failed "to draw standards 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." *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 new set of standards will sow confusion and inconsistency—leaving tribal officers to guess at what is permissible and chilling their policing activities.

In addition, to the extent that the new framework's contours can be discerned, their substance is highly problematic. See Pet. App. 43a-44a (Collins, J., dissenting from the denial of rehearing en banc) (describing framework without objection from the concurrence). The new standards upset long-held understandings—reinforced by this Court's own decision in *Strate*—of a

tribe's inherent authority to investigate and briefly detain non-Indians anywhere within a reservation. Until the decision below, "[s]tate and federal courts * * * regularly upheld tribal police actions, including investigation of crimes committed by non-Indians within Indian country." *Cohen's Handbook of Federal Indian Law* § 9.07, at 773 (2012) (*Cohen's Handbook*); see, *e.g.*, *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); *Schmuck*, 850 P.2d at 1342; *Colyer* v. *State*, 203 P.3d 1104, 1111 & n.5 (Wyo. 2009). The Ninth Circuit's new framework, however, produces 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. Pet. App. 78a (Collins, J., dissenting from the denial of rehearing en banc).

a. The Ninth Circuit's approach inappropriately precludes many investigatory stops altogether

At the outset, the Ninth Circuit's decision appears to exempt anyone whose conduct is not proscribed by the tribe's own laws, plus all known non-Indians, from *any* investigative stop by a tribal officer on public rights-of-way within a reservation. As a threshold matter, because an officer may rely only on the tribe's power to apply its own laws to Indians, the officer apparently can stop only "those suspected of violating *tribal* law." Pet. App. 8a (emphasis added). Tribal law, however, will not necessarily cover the full range of conduct that federal or state law would prohibit. See, *e.g.*, Alabama-Coushatta Tribe of Texas Comprehensive Codes of Justice, Title VIII—Criminal Offenses and Violations Code 24 n.2 (rev. Nov. 10, 2015) (noting omission of driving-under-the-influence offense), http://www.tribal-institute.

org/actt/Title%20VIII-%20Criminal%20Offenses%20and%20Violations%20R11-10-15%20Ad.Cod.11-24-14.pdf.

Even more problematically, the Ninth Circuit's conclusion that tribes cannot "investigate non-Indians who are using * * * public rights-of-way," Pet. App. 8a, deprives a tribal officer of the ability to make an investigative stop of anyone on a public right-of-way who the officer "*already knows* * * * is a non-Indian," *id.* at 44a (Collins, J., dissenting from the denial of rehearing en banc). Rather, under the Ninth Circuit's decision, a tribal officer may stop only those whom he knows to be Indian or whose "Indian status is unknown." *Id.* at 8a (panel opinion). It is unclear what awareness or notice would result in an officer being deemed to "know[]" that the suspect is a non-Indian. Cf. Pet. App. 29a-30a (deeming Officer Saylor to have known that respondent was a non-Indian based on his physical appearance). And the Ninth Circuit's restriction implies that if, for example, a tribal officer saw someone he knew to be a non-Indian leave a bar, get into his car, and drive on a public highway in a manner suggestive (but not conclusive) of drunkenness, the officer would apparently be powerless to stop him for a sobriety check, see *id.* at 63a—even though a drunk driver "careen[ing] off down the road, and possibly kill[ing] or injur[ing] Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe," *Schmuck*, 850 P.2d at 1341.

The difficulties extend beyond public rights-of-way. This Court has treated "alienated, non-Indian land"—that is, land within reservation boundaries owned in fee by non-Indians—as jurisdictionally equivalent to public rights-of-way. *Strate*, 520 U.S. at 454; see, *e.g.*, *Plains Commerce Bank*, 554 U.S. at 336 (explaining that "fee land owned by nonmembers has already been removed

from the tribe's immediate control"). And over time, tribes have alienated large portions of their "land to * * * non-Indian[s]." *Montana*, 450 U.S. at 548. For example, in 1981, this Court observed that of the 2.3 million acres on the 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. The Ninth Circuit's approach would turn such land into a safe haven for suspected non-Indian criminals. An officer chasing a non-Indian shooting suspect, for example, would presumably have to break off active pursuit once the suspect makes it either to a public right-of-way *or* to alienated land.

Making matters even more difficult, land status within a reservation may vary from plot to plot. See, *e.g.*, *Oliphant*, 435 U.S. at 193 & n.1 (describing the 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"); *Big Horn County Elec. Coop., Inc.* v. *Adams*, 219 F.3d 944, 948 (9th Cir. 2000) (describing the Crow Reservation as "a checkerboard pattern of land ownership," "composed of fee land owned by non-Indians and members of the Tribe and trust land held by the United States in trust for the Tribe"). A tribal officer may therefore not even be able to determine, in the moment, whether his encounter with a suspect is occurring on unencumbered tribal land or alienated non-Indian fee land. Cf. *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (rejecting an interpretation of

18 U.S.C. 1151 that would have required "law enforcement officers" to "search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government"). As a result, the importance that the Ninth Circuit places on land status may chill tribal policing even on non-alienated and unencumbered lands.

b. The Ninth Circuit's approach inappropriately restricts the scope of investigatory stops and detention

i. Even in situations in which the Ninth Circuit would recognize a tribal officer's authority to conduct an initial stop, its decision substantially restricts what the officer may do during the encounter. The Ninth Circuit's decision instructs that, when a tribal officer stops someone whose "Indian status is unknown" based on a potential violation of tribal law on a public right-of-way, the officer's "initial authority is limited to ascertaining whether the person is an Indian." Pet. App. 8a. If the officer is unable to quickly determine that the person is an Indian, the Ninth Circuit's reasoning would appear generally to require the officer to simply let the suspect go.

The decision substantially compounds that problem by depriving officers even of the authority to reliably "ascertain[] whether the person is an Indian." Pet. App. 8a. The standard for determining whether a person is an Indian is itself the subject of debate among lower courts. See *Cohen's Handbook* § 3.03[4], at 178 (noting that "the federal circuits have struggled to achieve consistency in their determinations"); see also, *e.g.*, *State* v. *Salazar*, 461 P.3d 946, 949 & n.4 (N.M. Ct. App. 2020) (suggesting that "a circuit split has emerged about whether certain factors carry more weight than others" in determining whether a person has been "recognized

as an Indian" by a tribe or the federal government). Yet in the Ninth Circuit's view, "authorities will typically need 'to ask one question' to determine whether the suspect is an Indian." Pet. App. 8a (citation omitted). That presumably means that the officer must take "no" for an answer, even if the suspect is lying.

Such an approach "plac[es] enormous weight on a factor that will often be ill-suited for such on-the-spot resolution." Pet. App. 63a (Collins, J., dissenting from the denial of rehearing en banc). "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 approach, 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. Tribal officers will thus necessarily err on the side of caution, thereby losing the authority to enforce the law even against many Indians. The Ninth Circuit's decision thus impedes not only a tribe's ability to protect the reservation from non-Indians who violate state and federal laws there, but also its ability even to police crimes committed by its own members.

The implications of the Ninth Circuit's approach are profound. Under that approach, tribal police who report to the site of a liquor store robbery cannot detain and substantively question an apparent non-Indian matching the suspect's description who has ducked into the doorway of a nearby building that lies on non-Indian fee land. The tribal police would similarly lack the ability to detain and substantively question an apparently

non-Indian man at a public restaurant on such land to ask questions about a fresh-looking bruise on his spouse's face. Nor could they reasonably investigate an apparent non-Indian seen engaging in a suspicious exchange that might well be a drug transaction in a parking lot on such land. The victim of the robbery, the potentially abused spouse, and those who would ultimately suffer from the proliferation of drugs could well be tribal members who look to tribal police for protection. And even if they are not, the Ninth Circuit's restrictions on tribal policing authority needlessly hamstring the enforcement of state and federal law and the prevention of crime on reservations.

ii. "To 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. The Ninth Circuit attempted to avoid such a holding by qualifying its otherwise categorical elimination of tribal authority with its novel "'apparent' or 'obvious'" exception. Pet. App. 9a (citation omitted). The resulting approach, however, is both unsound and unworkable.

To begin with, the exception's limited temporal scope, which requires that the apparentness or obviousness arise "during th[e] limited interaction" to "determine whether the suspect is an Indian," Pet. App. 8a, does not explicitly permit a stop based on an "apparent" or "obvious" violation that occurs before or after that inquiry. But whether or not that, at least, is permissible, the substance of the "apparent" or "obvious" requirement

is apparently stricter than the Fourth Amendment's, imposing a standard "more demanding than ordinary probable cause." *Id.* at 44a (Collins, J., dissenting from the denial of rehearing en banc) (emphasis omitted). The requirement would thus preclude detention in 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). And because the Ninth Circuit's decision would apply not only to public rights-of-way but also to fee land owned by non-Indians, see pp. 37-38, *supra*, a tribal officer would be unable to detain 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). And the facts of this case illustrate that the Ninth Circuit does not even permit a tribal officer to detain a non-Indian to protect the officer's own physical safety (or a child's) where a suspect, who is not clearly Indian, engages in conduct that presents an imminent risk of violence. See pp. 5-6, *supra*.

Nor would the Ninth Circuit permit a tribal officer to detain a non-Indian who has an outstanding federal or state arrest warrant, or who matches the description of a suspect being pursued by another law-enforcement agency. 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"). Such warrants and bulletins are not based on an "'apparent' or 'obvious'" violation that

a tribal officer has himself observed—let alone one that occurred "during th[e] limited interaction" to determine someone's Indian status. Pet. App. 8a-9a (citation omitted). An inability to act on them is not only detrimental to public safety but also at odds with the treaties between various tribes and the United States contemplating that tribal authorities *could* apprehend and turn over wanted non-Indian suspects. See, *e.g.*, Creek Nation Treaty art. VIII, 7 Stat. 37 (obligation to "deliver * * * up" certain offenders "who shall take refuge in [a tribal] nation"); pp. 26-29, *supra*.

The Ninth Circuit's approach would also foreclose a tribal officer from investigating or "search[ing] a known non-Indian for the purpose of finding evidence of a crime." Pet. App. 9a. "Thus, if a tribal officer pulls over a vehicle based merely upon reasonable suspicion of drunk driving, then once the officer has determined that the driver is not an Indian, the officer may conduct no investigation"—"no questions, no breathalyzer, no walking in line, etc." *Id.* at 62a (Collins, J., dissenting from the denial of rehearing en banc) (emphases omitted). The officer would simply have to let the non-Indian continue to endanger public safety by driving on the right-of-way while possibly substantially impaired. See *Schmuck*, 850 P.2d at 1342 (explaining that "if the Suquamish Indian Tribe did not have the authority to detain, [the non-Indian suspect] would have been free to drive away with an alcohol level exceeding the limit for legal intoxication"). And if, during the encounter, evidence of some other crime arose—for example, if a drug-detecting dog alerted—the officer would not be able to pursue that lead either. See *Florida* v. *Harris*, 568 U.S. 237, 248 (2013) (recognizing that a dog's alert can provide probable cause).

c. The Ninth Circuit's approach endangers public safety

Tribal reservations already experience high rates of criminal activity—including violent crime, drug-trafficking offenses, and impaired driving. See Bureau of Justice Statistics, U.S. Dep't of Justice, *American Indians and Crime* 5-6 (Dec. 2004) (*American Indians and Crime*), https://www.bjs.gov/content/pub/pdf/aic02.pdf (reporting that American Indians "experienced robberies at double the rate for whites" and "aggravated and simple assault[s]" at "more than double the rates for the Nation"); National Drug Intelligence Ctr., U.S. Dep't of Justice, *Indian Country Drug Threat Assessment* 6 (2008) (*Indian Country Drug Threat Assessment*), https://www.justice.gov/archive/ndic/pubs28/29239/29239p.pdf ("Wholesale drug traffickers frequently smuggle large quantities of illicit drugs from source countries into the United States through reservations.") (emphasis omitted); 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.roadwaysafety.umn.edu/publications/researchreports/reportdetail.html?id=2720 (reporting that alcohol-impaired driving caused 43% of traffic fatalities on reservations between 2011 and 2015); Pet. 28-29; Pet. App. 77a (Collins, J., dissenting from the denial of rehearing en banc).

The Ninth Circuit's decision threatens to make the situation worse, by all but eliminating tribal policing authority with respect to apparent non-Indians on public rights-of-way and alienated lands within the boundaries of a tribe's own reservation. Many crimes on reserva-

tions are committed by non-Indians, or Indians presumably unwilling to immediately admit their Indian status to a tribal officer. See *American Indians and Crime* 9 ("When asked the race of their offender, American Indian victims of violent crime primarily said the offender was white (57%), followed by other race [including Indians] (34%) and black (9%)."); *Indian Country Drug Threat Assessment* 22 (reporting that "non-Native American drug traffickers * * * travel to source locations in and outside the [West Central] region [of the United States] in privately owned vehicles to obtain midlevel and retail-level quantities of illicit drugs for distribution on reservations"). And the number of non-Indians living on or passing through reservations is substantial. While 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%." Pet. App. 77a (Collins, J., dissenting from the denial of rehearing en banc). Tribal police will frequently encounter non-Indian—or apparently non-Indian—suspects. But without the ability to investigate their activities and detain them for federal or state authorities, tribal officers will lack the ability to facilitate the enforcement of state and federal law, prevent future crimes, and protect themselves, tribal members, and others from criminal activity.

Other sovereigns cannot be expected to fill the void. Because of 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.*, *Bryant*, 136 S. Ct. at 1960 (observing that, "[e]ven when capable of exercising jurisdiction," "States have not devoted their

limited criminal justice resources to crimes committed in Indian country"); *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). In particular, they often do not perform the day-to-day patrolling necessary to discover domestic, street-level, or traffic-related crimes.

As a result, "[t]ribal 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. And because tribal officers are usually 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 such evidence, many prosecutions will—like this one—simply dry up. Nor does cross-deputization, in which state or federal governments explicitly designate specific tribal officers who may stand in the shoes

of a state or federal officer, supply "a panacea to the problems wrongly created by the panel's decision." Pet. App. 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, 89-93 (2019). Tribes should not have to sacrifice even *more* of their limited sovereignty merely to preserve law and order within reservation boundaries—an inherent aspect of sovereignty that they never lost in the first place.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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