No. 19-1414

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSHUA JAMES COOLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

The Ute Indian Tribe of the Uintah and Ouray Reservation (the Ute Tribe) is a sovereign federally recognized Indian Tribe composed of three bands of the greater Ute Tribe—the Uintah Band, the White River Band, and the Uncompahgre Band—who today live on the Uintah and Ouray Reservation in northeastern Utah. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1093 (D. Utah 1981). The current Uintah and Ouray Reservation is a union of two reservations—the Uintah Valley Reservation, created in 1861; and the Uncompahgre Reservation, created in 1882.

The Ute Tribe has been involved in litigation regarding policing power on its Reservation for many years, and it believes that its experience and knowledge from that litigation gives it a unique and important perspective regarding the difficulties which would be created if the Ninth Circuit's decision in *United States v. Cooley*, 919 F.3d 1135 were applied nationwide.

[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.

SUMMARY OF ARGUMENT

In its opening brief, the United States describes the legal and practical problems which would be created if this Court were to affirm the Ninth Circuit's decision in *United States v. Cooley*, 919 F.3d 1135 (9th Cir. 2020).

As described by the United States, the application of the Ninth Circuit's new and unprecedented standard throughout Indian Country would turn all or nearly all reservations in the United States into "checker-boarded" reservations for police stops and detentions. On lands owned in trust by the United States and not subject to a roadway easement, tribal police officers could make stops as authorized by *Terry v. Ohio*, 392 U.S. 1 (1968) (*Terry* stops), which then could ripen into grounds to extend the stop and to detain the suspect until transferred to a state or federal officer. But on reservation lands that are not owned by the United States in trust, or for which there is a roadway easement, tribal police would be required to learn and apply the unique and poorly defined new standard announced by the Ninth Circuit.

The Ute Tribe's Uintah Valley Reservation provides an already existing example of many of the problems which the United States describes with the Ninth Circuit's new standard. That existing test case shows that the United States is not overstating the problems. If the standard were applied nationwide it would preclude effective law enforcement throughout Indian Country.

ARGUMENT

Prior to the Ninth Circuit's decision below, a police officer in the field in Indian Country would apply the same well-established and relatively simple set of policing rules which apply in all other locations in the United States. The officer would conduct his work under those established policing rules at least up to the point at which transport of a suspect was required. At that point, authority to transport or the location to which the suspect would be transported (i.e., whether to a tribal police station or a state police station) would usually[2] be based upon whether the suspect was an Indian or a non-Indian.

In its decision below, the Ninth Circuit held that when a tribal police officer encounters a criminal suspect, the police officer is required to consider the land ownership history of the parcel of land on which the stop occurs. If the land is not owned by the United States in trust for the Tribe, the officer usually can only ask the suspect one question: are you an Indian? If the suspect states he is not an Indian, the officer must let the suspect go unless it is "obvious" or "apparent" that the suspect has committed a crime. *Cooley*, 919 F.3d at 1142, 1147. The Ninth Circuit held that an officer cannot conduct a standard *Terry* stop on

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[2] As will be discussed in detail by other *amici*, tribal police arrest and prosecute non-Indians for some criminal offenses. Tribal police also arrest and transport Indians to state or federal detention in some situations, e.g., when authorized by a valid arrest warrant.

reservation land, unless that land is owned in trust by the United States or the suspect admits he is an Indian.

In its opening brief to this Court, the United States described why the Ninth Circuit's new rule, requiring tribal police to consider land ownership when making *Terry* stop detention decisions, would substantially harm law enforcement and reduce safety on and near Indian reservations.

I. Authority to conduct *Terry* stops should not be checkerboarded based upon land ownership.

The Uintah and Ouray Reservation has a unique and complex legal history. Based upon a complex set of legal reasons that are unrelated to the issue in the current case, tribal police on the Uintah Valley portion of the Uintah and Ouray Reservation are required to consider land ownership when making policing decisions. The Ute Tribe's experience provides a unique acid test for the new rule that the Ninth Circuit announced. The Ninth Circuit's new rule fails that test.

The Uintah and Ouray Reservation is a union of two reservations: the Uintah Valley Reservation and the Uncompahgre Reservation. Executive Order by President Lincoln (Oct. 3, 1861) (reprinted in I C. Kappler, Indian Affairs: Laws and Treaties 900 (2d ed. 1904)) (defining the Uintah Valley Reservation); Executive Order by President Arthur (Jan. 5, 1882) (reprinted in I C. Kappler, Indian Affairs: Laws and

Treaties 901 (2d ed. 1904)) (creating the Uncompahgre Reservation in fulfillment of the Act of Congress of June 15, 1880 and defining that Reservation's boundaries).

All of the land within the exterior boundaries of the Uncompahgre Reservation is "reservation" as that term is defined in 18 U.S.C. § 1151(a), and all of that land is therefore Indian Country. 18 U.S.C. § 1151. For current purposes, the Uncompahgre Reservation is similar to the Crow Reservation and similar to most other large Indian reservations in the western United States. The reservation has an exterior boundary, and all of the land within that exterior boundary is Indian Country, regardless of who now owns the land. Prior to the "Allotment Era," all of the land on an Indian reservation was owned by the tribe or by the United States. During the allotment era, non-Indians were permitted to buy land on most of the large reservations, but purchase by non-Indians did not remove the land from the reservation. It only changed the owner of the land from the United States to a non-Indian. Similarly, issuance of rights of way on a reservation did not remove the land from the reservation. 18 U.S.C. § 1151(a). *See generally Cohen's Handbook of Federal Indian Law* § 1.04. On those reservations, until the Ninth Circuit's decision in *Cooley* sought to restrict tribal sovereign authority, police officers did not need to consider land ownership when making *Terry* stop detention decisions.

The Tribe's Uintah Valley Reservation is different from the Uncompahgre Reservation and most other

reservations. The exterior boundaries of the Uintah Valley Reservation remain intact, *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. *en banc* 1985) (*Ute III*), but hundreds of thousands of acres of land inside the exterior boundaries are not Reservation lands, and are not Indian Country, *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (*Ute V*). On the Uintah Valley Reservation, tribal police have been required to consider land ownership history since 1997.

The Uintah Valley's unique status stems from a unique and legally complex history, which ultimately resulted in *Ute V*. In *Ute V*, the United States Court of Appeals for the Tenth Circuit synthesized prior decisions of this Court, the Tenth Circuit, and the Utah Supreme Court into a holding that land within the exterior boundaries of the Uintah Valley Reservation is Indian Country unless the land was unallotted, opened for non-Indian settlement, and not thereafter returned to tribal ownership. *Ute V*, 114 F.3d at 1528. *See also Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*) (then Judge Gorsuch summarized the prior decisions in *Ute Indian Tribe v. Utah*).

As noted above, on the Crow Reservation and most other reservations, land on an Indian reservation remained part of the reservation notwithstanding purchase by non-Indians. Based upon the *Ute V* decision, most of the parcels of land ceased being reservation lands when purchased by non-Indians. The result is a patchwork of criminal policing authority, which results in many of the insurmountable impediments to

effective law enforcement which the United States ably discusses in its brief to this Court.

This Court's decision in the current case will not cure the difficulty which the Ute Tribe describes in this brief. Those difficulties arise from the interplay between legal holdings governing the mandates of appellate courts, finality of decisions, claims and issue preclusion, and other doctrines. That interplay results in the patchwork of lands which are Indian Country within the exterior boundaries of the Uintah Valley Reservation.

The current case does not raise that issue of whether land is Indian Country. Under the United States Constitution and nearly 250 years of federal law, tribes have territorial jurisdiction over the land on their reservations, regardless of who now owns that land. 18 U.S.C. § 1151. The parties in this case have consistently agreed that the interaction between the police officer and Mr. Cooley occurred on Reservation land.

But what the Ute Tribe emphasizes to this Court is that affirming the Ninth Circuit's decision would impose many of those same prohibitions on effective law enforcement, which currently exist for Indians and non-Indians on and near the Ute Tribe's Uintah Valley Reservation, to all other Reservations and all other tribes. The Ute Tribe would not wish that upon any other tribe or on non-Indians living on other reservations; and this Court should not impose it on tribal reservations throughout the United States.

The land that non-Indians purchased during the Allotment Era ranged from parcels which were a fraction of an acre to larger homesteaded parcels. The non-Indian lands were interspersed with Indian lands and federal lands, creating complex checkerboarded areas of ownership. A parcel of non-Indian lands might be surrounded by miles of tribal lands and tribal members, and the area might be patrolled only by tribal police. The map of the Ute Reservation attached provides an example.[3]

As an example, the largest road through the Uintah Valley Reservation is U.S. 40. If one travels from the east edge of the Reservation to the west edge, one travels in and out of Indian Country at least nineteen times.[4] On many roads on the Uintah Valley Reservation, one can travel in and out of Indian Country multiple times within the space of a minute. In some locations on U.S. 40 and other roadways, one would be

[3] The map is the currently operative map in *Ute Tribe v. Utah*. In that case, the parties stipulated that the map is presumptively correct, but that parties can rebut that presumption. Blue areas on the map are generally those which owned by non-Indians, and yellow are generally the lands owned by the United States, including lands owned in trust for the Ute Tribe and its members. The parties also agreed that determination of whether a particular location is or is not Indian Country often cannot be determined because of the scale of the map. *Ute v. Utah*, D. Utah case no. 75-408, Dkt. 103.

[4] The fact that the Tribe cannot even say for certain how many times one travels in and out of the Reservation, is itself indicative of the unworkable complexity that the Ninth Circuit would create and would expect police officers to apply in the field, as will be discussed below.

on the Reservation if travelling east, but off the Reservation if travelling west. An intoxicated driver would literally weave in and out of Indian Country.

If an officer is following a car that turns off of a public roadway into a driveway, the officer would then need to be told whether the driveway is on non-Indian owned lands which are deemed non-Indian Country.

The Ninth Circuit's decision would impose a similar complexity on nearly all other reservations. As already exists on the Uintah Valley Reservation, the officer would need to consult land records to determine who owns the land and any easements on the land, in order to know whether he can perform a standard *Terry* stop. A few steps one direction or the other could alter the officer's policing authority.

II. The standard that courts apply to determine civil jurisdiction cannot readily be applied by police officers during a traffic stop.

In its decision, the Ninth Circuit held that officers in the field must apply the legal rules which govern whether a tribal court has jurisdiction over a civil suit. Applying that standard in a courtroom can be difficult. Having a police officer apply it in the field is impossible. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (discussing the need for "clear and simple" detention standards that police officers can readily apply in the field).

In its decision, the Ninth Circuit reviewed this Court's decisions that tribal courts lacked adjudicatory jurisdiction over civil cases, and held that police officers are required to conduct that same legal analysis during traffic stops. In the civil jurisdiction cases cited by the Ninth Circuit, this Court had before it developed factual records, and it then applied the law to those developed factual record. For example, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court knew and considered the ownership status of the land, the record regarding easements on the land, and other land history. It also knew and considered which parties were allegedly injured, which parties had caused the injuries, and which parties were members of federally recognized tribes. The record regarding those facts had been created by the lower courts, based upon rules of evidence, resulting in judicial findings of fact.

But the Ninth Circuit's decision would require a tribal officer to apply that standard, designed for a judge to apply in a courtroom, in the field. In its opening brief, the United States ably describes why the Ninth Circuit's decision to require officers to apply that test in the field would not work. The United States' discussion shows why the Ninth Circuit's decision would be contrary to this Court's holding in *Atwater*, that the Fourth Amendment's detention standards must be "clear and simple." *Atwater*, 532 U.S. at 347. For example, the Ninth Circuit requires the officer to consider the current ownership and easement history for the parcel on which the officer

conducts a *Terry* stop. A police officer would generally not have that history.

The *Ute Tribe v. Utah* cases provide an illustration of how difficult it would be for police throughout Indian Country to create an information system which would provide officers with the land history records that the Ninth Circuit expects the officers to have in the field.

The Tenth Circuit's decision in *Ute V*, the decision that defines to this day the lands on the Uintah Valley Reservation which are Indian Country, was issued in 1997. In that decision, the Court synthesized the complex legal history into a clearly stated three-part test. Land on the Uintah Valley Reservation is Reservation unless it was unallotted, patented to non-Indians under specific federal laws, and not thereafter returned to tribal ownership. The Tenth Circuit noted that the decision would require analysis of land records, but that once that analysis was completed, there would be clarity regarding which sovereign had adjudicatory jurisdiction over a crime. *Id.* at 1527, 1530.[5]

It has been 23 years since that decision was issued and has been 9 years since the *Ute Tribe v. Utah* case was re-opened in 2012. But there still is not a definitive map which the parties in that case, or their police officers in the field, can use to determine which lands

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[5] In *Ute V*, land which passed out of Indian hands after 1948 remained Indian Country. In contrast, the Ninth Circuit holds that the checkerboard for *Terry* stop authority will continue to change as land passes out of Indian hands in the future.

within the Uintah Valley Reservation were bought by non-Indians during the Allotment Era.

To the contrary, when there is a question about whether the land is non-Indian owned land that is not Indian Country, a party must request a "land status report" from the United States Bureau of Indian Affairs, and the BIA reviews its land records and issues its opinion on whether the land had been allotted and whether the land had been purchased by non-Indians during the Allotment Era. *E.g.*, *Ute v. Utah, Utah*, D. Ct. case 75-408, Dkt. 1088-4.

The *Cooley* decision, if applied nationwide, would impose a similar requirement on tribal police on all reservations. They would need to know when they are moving from tribally owned to non-Indian owned land, so that they could determine the scope of their policing powers.

The Ninth Circuit would also require the officer to make a decision on whether a person is an Indian, but the officer's decision would not be based upon the tried and tested evidentiary standards that apply in a courtroom. Instead of grappling with how an officer would determine, in the field, whether a person is a member of a federally recognized tribe, the Ninth Circuit suggests that the officer should ask the suspect, and if the suspect states he is a non-Indian, the suspect must be released.

This Courts holdings in civil cases are designed for application in the courthouse, after records have been gathered and a record has been created. They are not

designed for application in the field. Requiring police officers to consult maps in the middle of a *Terry* stop would harm effective law enforcement. It is, unfortunately, what the Ute Tribe's officers must do because there is non-Indian Country within the exterior boundaries of the Uintah Valley Reservation. But it is not what police officers on other reservations should have to do, on land that is unquestionably those tribes' Indian Country.

CONCLUSION

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

Respectfully submitted,

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