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 FOR RESPONDENT

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QUESTION PRESENTED

Whether a tribal police officer who is not cross-deputized has authority to detain, investigate, and search a non-Indian on a public right-of-way for a possible violation of state or federal law when the violation is not apparent or obvious.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

BRIEF FOR RESPONDENT

Respondent Joshua James Cooley respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

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 court of appeals judgment 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

The statutory provisions involved are set forth at Pet. App. 81a–85a.

STATEMENT OF THE CASE

A. Introduction

When, during the course of a welfare check, Crow Police Department Officer Saylor, assessed "that [Mr. Cooley] appeared to be non-native," Officer Saylor lacked sovereign authority to do anything more than call nearby federal and state authorities. Pet. App. 95a. When Officer Saylor made that call, those authorities arrived quickly. *Id.* at 187a–188a. Because Officer Saylor immediately realized Mr. Cooley appeared to be non-Indian, *id.* at 95a, his subsequent seizure and searches of Mr. Cooley were *ultra vires*. For these reasons, suppression was required.

This is not a case about the wisdom or prudence of Officer Saylor's actions or about efficiency or good policy. The issue here presents the threshold question of tribal jurisdiction. This Court has, through decades of consistent opinions, delineated the scope of that jurisdiction to exclude police power over non-tribal members on non-tribal lands, such as the public right-of-way where Officer Saylor seized and searched Mr. Cooley. The Solicitor General's plea for "good policy" to avoid a parade of horribles is a disguised invitation for this Court to overrule firmly-established precedent and embark on a wholly different jurisprudence that would itself pose a host of unintended collateral consequences. Mr. Cooley does not challenge tribal sovereignty; he simply asks the Court to respect tribal sovereignty as this Court has previously defined it.

B. Factual background

On April 21, 2016, a federal grand jury in the District of Montana charged Mr. Cooley with one count of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), and one

count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). Pet. App. 5a. Mr. Cooley, a non-Indian, moved to suppress evidence obtained by a tribal officer, who had seized and searched Mr. Cooley on a public right-of-way, and the district court granted his motion. *Id.* at 22a–31a. The Ninth Circuit affirmed and denied a petition for rehearing en banc. *Id.* at 1a–21a, 32a.

Around 1:00 a.m. on February 26, 2016, Mr. Cooley and his young child were sitting in a parked truck on the westbound shoulder of U.S. Route 212 within the Crow Indian Reservation in southern Montana. Pet. App. 2a. James D. Saylor, a law enforcement officer for the Crow Police Department, passed Mr. Cooley's truck while driving his patrol unit eastbound on Route 212. *Id.* at 2a, 177a.

Wondering if the truck or its occupants needed assistance, Officer Saylor turned his patrol car around and pulled up behind the truck. *Id.* at 2a. He exited his patrol car and approached the driver's side of the truck. *Id.* The truck had Wyoming license plates and its engine was running, with its headlights on. *Id.* at 2a, 23a, 48a.

Officer Saylor knocked on the side of the truck and announced, "law enforcement, is everything okay?" *Id.* at 179a. Officer Saylor shined his flashlight into the window and observed Mr. Cooley in the driver's seat, who gave a thumbs-down motion. *Id.* Officer Saylor then asked Mr. Cooley to lower his window. *Id.* Mr. Cooley complied and partially lowered his window. *Id.* at 2a. When the windowed lowered, Officer Saylor observed a young child climbing from the back seat of the truck into Mr. Cooley's lap. *Id.* at 3a, 179a. He also observed Mr. Cooley "appeared to be non-native" and had "bloodshot eyes." *Id.* at 95a. He

did not smell any alcohol. *Id.* Officer Saylor asked Mr. Cooley "if everything was okay." *Id.* at 97a.

According to Officer Saylor's own account, Mr. Cooley responded that he "had pulled over because he was tired" and, Officer Saylor added, this "[isn't] uncommon." *Id.* at 97a. Officer Saylor apologized to Mr. Cooley, thinking "[he] may have woken [Mr. Cooley's] child." *Id.* at 179a. Mr. Cooley told Officer Saylor "it was okay" and "again assured [him] that he had only pulled over because he was tired." *Id.* at 179a–180a. According to Officer Saylor, "[a] lot of travelers go through that particular stretch of highway, . . . and they will pull over because of various reasons, tired, bathroom, et cetera." *Id.* at 3a.

But Officer Saylor persisted. *Id.* Although Mr. Cooley's eyes appeared bloodshot, this observation did not, by itself, lead Officer Saylor to believe Mr. Cooley was impaired. *Id.* at 97a. Officer Saylor testified that he wanted to "make sure that . . . [Mr. Cooley] and the child . . . were both safe and secure along side [sic] of the road." *Id.*

Officer Saylor asked Mr. Cooley "where he had come from," and Mr. Cooley answered, "Lame Deer." *Id.* at 98a. Officer Saylor was "surprised" by this answer because Lame Deer was only 26 miles away and he "had assumed [Mr. Cooley] had been driving for a while considering it was late at night." *Id.* at 180a. Officer Saylor was also surprised because "[Mr. Cooley] did not appear to be Native" and, in Officer Saylor's experience, although it was "quite common" to see vehicles with Wyoming license plates in and around Lame Deer, "most usually the drivers of the vehicles appeared to be Native American and were from other Indian Reservations." *Id.*

Officer Saylor continued, asking Mr. Cooley "why he had been in Lame Deer." *Id.* at 136a. Mr. Cooley said he had gone there to purchase a vehicle from a man named Thomas. *Id.* at 136a–138a. Officer Saylor asked for Thomas's last name, and Mr. Cooley said he was not sure but thought it might be "Spang" or "Shoulderblade." *Id.* at 180a–181a.

Officer Saylor knew Thomas Shoulderblade was a probation officer. *Id.* at 181a. He also recognized, based on prior dealings, the name "Thomas Spang" as being "associated with drug activities on the Northern Cheyenne Indian Reservation." *Id.* at 181a, 98a–99a.

Mr. Cooley's answers did not make sense to Officer Saylor; he conveyed that sentiment to Mr. Cooley. *Id.* at 3a, 181a. According to Officer Saylor, Mr. Cooley "became agitated" and stated, "I don't know how it doesn't make any sense, I told you I cam[e] up to buy a vehicle." *Id.* at 3a, 181a.

Still unsatisfied with Mr. Cooley's explanation, Officer Saylor told Mr. Cooley to roll his window down further; Mr. Cooley complied. *Id.* at 24a, 181a. Officer Saylor observed the butts of two rifles in the front passenger seat. *Id.* Officer Saylor testified, "just having weapons in a vehicle, especially in Montana, isn't cause for too much alarm, in my mind." *Id.* at 101a.

Officer Saylor "continued to probe [Mr. Cooley] for a response that would explain the discrepancies." *Id.* at 182a. Officer Saylor asked Mr. Cooley for identification. *Id.* at 183a. Mr. Cooley said his identification was in his pants pocket. *Id.* With his child still in his lap, Mr. Cooley reached into his pocket and pulled out cash, which he placed on the dashboard. *Id.* According to Officer Saylor, as Mr. Cooley was emptying his

pocket in search of his identification, his breath became shallow and he "began to stare intently forward." *Id.* Officer Saylor testified that such a "thousand-yard" stare is, to him, an indication that a suspect is possibly about to use force. *Id.* at 103a. Officer Saylor drew his service pistol, ordered Mr. Cooley to stop what he was doing, and told him to show his hands. *Id.* at 24a, 183a–184a. Mr. Cooley immediately complied, attempting to raise both hands while still holding his child in his lap. *Id.* at 24a–25a, 184a. Officer Saylor told Mr. Cooley he was no longer allowed to move unless told to do so. *Id.* at 25a, 184a. Officer Saylor instructed Mr. Cooley to retrieve his identification from his pocket. *Id.* Mr. Cooley complied, producing his Wyoming driver's license. *Id.*

Although Officer Saylor knew that he could radio dispatch from his patrol car, he did not return to the car but instead maneuvered around the truck to the passenger side and opened the door. *Id.* at 184a. He did this because he "did not want to . . . allow [Mr. Cooley] the opportunity to cause [him] harm." *Id.*; but see *id.* at 146a ("THE COURT: But didn't you open the passenger door and eliminate the barrier?"). Officer Saylor then observed that the two rifles in the passenger seat were unloaded. *Id.* at 25a, 185a. He also observed a pistol under the center console. *Id.* He reached into the truck, grabbed the pistol, and removed its magazine. *Id.* at 108a.

Officer Saylor ordered Mr. Cooley out of the truck. *Id.* at 25a, 186a. Still holding his child, Mr. Cooley complied. *Id.* Officer Saylor patted Mr. Cooley down and, after finding no weapons, ordered him into the back of the patrol unit. *Id.* Mr. Cooley asked if he could empty his pockets first. *Id.* Officer Saylor allowed Mr. Cooley to empty his pockets on the hood of the patrol unit. *Id.* Mr. Cooley removed cash and a

few empty Ziploc bags from his pockets. *Id.* at 26a, 186a–187a.

Officer Saylor placed Mr. Cooley in the back of his patrol car and radioed for assistance. *Id.* at 26a. Because Mr. Cooley was non-Indian, Officer Saylor requested dispatch to send a deputy from the Big Horn County Sheriff's Department. *Id.* Officer Saylor then returned to the truck in order to "secure [his] scene." *Id.* at 118a. Officer Saylor turned off the truck's engine, seized the ignition key, seized the firearms from the passenger area, and placed those items on the hood of his patrol unit. *Id.* According to his written report, in the process of turning off the engine, Officer Saylor observed ammunition in the truck. *Id.* at 188a. As a result, he "decided to check the driver side where [he] had seen the ammunition to see if another weapon was present." *Id.* While searching for additional weapons, Officer Saylor found a glass pipe and a plastic bag tucked between the driver's seat and center console. *Id.* at 188a. The plastic bag appeared to contain a white crystalline substance, which Officer Saylor suspected was methamphetamine. *Id.*

"Shortly thereafter," as Officer Saylor put in his report, federal and state officers arrived on scene, including an officer of the Bureau of Indian Affairs ("Lt. Brown") and a deputy from Big Horn County ("Deputy Gibbons"). *Id.* at 5a, 26a, 187a–188a. Even though Mr. Cooley was secured in the back of Officer Saylor's patrol car, Lt. Brown directed Officer Saylor to conduct an additional search of the truck and to seize "whatever [he] had discovered in plain view." *Id.* at 188a. Officer Saylor returned to the truck and "began collecting the evidence as instructed." *Id.* According to his written report, he "decided to seize all weapons, suspected controlled substances, money, drug paraphernalia, ammunition, and electronics

such as cell phones and communication devices which were in plain view." *Id.* at 188a–189a. Officer Saylor continued his search of the truck and, among other things, found a closed iPhone box "under the driver's seat." *Id.* at 161a, 188a–189a. Officer Saylor opened the box and observed a "white powdery crystalline substance," which he suspected was methamphetamine. *Id.* at 189a, 5a.

C. District Court Proceedings

Mr. Cooley was charged in the District of Montana with one count of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), and one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). He moved to suppress evidence obtained as a result of his encounter with Officer Saylor because Officer Saylor exceeded the Crow Tribe's authority when he seized Mr. Cooley, in violation of the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1301 et seq.

The district court granted Mr. Cooley's motion. It determined that Officer Saylor had identified Mr. Cooley as a non-Indian "when Mr. Cooley initially rolled his window down," and that Officer Saylor's seizure of Mr. Cooley and search of his vehicle were unlawful. Pet. App. 6a. The court reasoned that a tribal officer cannot detain a non-Indian on a state or federal right-of-way unless it is apparent at the time of the detention that the non-Indian has been violating state or federal law. The court found "[n]one of Mr. Cooley's actions, whether taken individually or cumulatively, establish[ed] an obvious state or federal law violation." *Id.* at 30a. Officer Saylor therefore had no authority to seize Mr. Cooley. The court concluded that ICRA, which contains language mirroring the Fourth Amendment, requires suppression of evi-

dence in federal court obtained by tribal officers in violation of ICRA.

D. Appellate Proceedings

In affirming, the Ninth Circuit held Officer Saylor violated ICRA's "prohibition on unreasonable searches and seizures" when he seized Mr. Cooley, a non-Indian, to investigate him for evidence of possible violations of state or federal law. *Id.* at 12a. The court concluded Officer Saylor had no authority to detain and investigate a non-Indian on a public right-of-way because the tribe cannot enforce criminal law against non-Indians or exclude them from public rights-of-way. *Id.* at 8a–9a. The court stated that while Officer Saylor could have detained Mr. Cooley for an "apparent" or "obvious" violation of state or federal law, that authority did not authorize Officer Saylor to detain and investigate Mr. Cooley for evidence of possible violations. *Id.* at 9a. Noting that ICRA's prohibition is "nearly identical to the prohibition in the Fourth Amendment," the court held that the evidence recovered after the illegal seizure was properly excluded because Officer Saylor exceeded the tribe's jurisdictional authority. *Id.* at 12a, 16a–17a.

The Ninth Circuit denied the government's petition for rehearing en banc. Judges Berzon and Hurwitz reaffirmed the distinction between detaining non-Indians on state rights-of-way to "*investigate* [for] criminal activity" and detaining non-Indians on rights-of-way for conduct violating state law. *Id.* at 37a. They concluded the tribe cannot investigate for possible violations of state or federal law and "at most" the tribe can detain for conduct violating state or federal law. *Id.* at 38a. Judge Collins, joined by Judges Bea, Bennett, and Bress, argued the tribe must have authority to investigate non-Indians on rights-of-way or alienated fee lands for possible viola-

tions of state or federal law, or the authority to "exclude non-Indian *state and federal law violators* from the reservation would be meaningless." *Id.* at 56a. He construed *Strate* to not only allow detaining violators of state law but to condone broad *Terry*-style authority to investigate non-Indians upon reasonable suspicion. *Id.* at 56a–57a. He argued, even if Officer Saylor lacked jurisdiction, the evidence should not have been excluded because he analogized this case to a lack of state law authority to take a specific police action and not to a lack of jurisdiction because jurisdictional issues are generally territorial. *Id.* at 72a–73a.

SUMMARY OF ARGUMENT

Indian tribes do not possess, as part of their retained inherent sovereign authority, executive police power over non-Indians on public rights-of-way. Once Officer Saylor immediately and correctly concluded that Mr. Cooley was non-Indian, he lacked sovereign authority to detain and investigate him. His decision to detain, investigate, and search Mr. Cooley during the course of a purported welfare check, and to subsequently search the vehicle in which Mr. Cooley and his child had been resting alongside U.S. Route 212, exceeded the bounds of his authority in violation of ICRA.

The incorporation of Indian tribes into the United States necessarily limited their inherent tribal sovereignty and, "by virtue of their incorporation into the American republic, [tribes] lost 'the right of governing … person[s] within their limits except themselves.'" *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008) (quoting *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978)) (emphasis, internal quotation marks omitted from

Oliphant in *Plains Commerce Bank*). As this Court held in *Oliphant*, a seminal case in a long line of precedent, "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress" because, as the overriding sovereign, the United States has "great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978); see also *Duro* v. *Reina*, 495 U.S. 676, 688 (1990). Subjecting a non-Indian U.S. citizen to tribal detention, search, and seizure in order to investigate possible violations of federal law is, without question, an intrusion on the personal liberty of that non-Indian citizen and, therefore, falls squarely outside the sovereign authority of Indian tribes.

Against this historical and political backdrop, tribes cannot be said to have retained police power over non-Indians as part of their inherent sovereignty simply because it "*furthers* the interests of the United States." Pet. Br. 13. This justification defies this Court's opinion in *Oliphant*. The interest of the United States is, first and foremost, in protecting its citizens from intrusions on their personal liberty and the United States secured that interest by reserving criminal jurisdiction over non-Indian citizens. *Oliphant*, 495 U.S. at 210. Furthermore, this justification relies on a rationale articulated in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), that is distinguishable from this case and was forever displaced by the Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981).

Although the unique and limited sovereignty of Indian tribes may give rise to jurisdictional gaps in Indian country, this Court has expressly rejected pleas to find inherent tribal sovereignty on the basis of

public policy concerns in order to fill such voids, and it should do so here. *Oliphant*, 435 U.S. at 212; *Duro*, 495 U.S. at 698. Instead, this Court defers to Congress as the plenary and exclusive authority over Indian affairs. *McGirt* v. *Oklahoma*, 140 S. Ct. 2452, 2478 (2019). Indeed, Congress has already exercised that plenary authority and filled the alleged jurisdictional gap in this case by providing for cross-deputization of tribal law enforcement officers. While the government complains that cross-deputization is impeded by practical obstacles, Pet. Br. 47, it has disregarded that Congress has already filled the alleged void here. Regardless, the appropriate body to remedy any obstacle is Congress.

The government also raises, for the first time, the issue of whether the Treaty Between the United States of America and the Crow Tribe of Indians, May 7, 1868, 15 Stat. 649 ("1868 Treaty"), establishes that the Crow Tribe retained inherent sovereign authority over non-Indians. Though the general rule is that a federal appellate court will not consider an issue not passed upon below, even if this Court countenances the government's effort here, the argument fails as the language of the treaty does not support the tribal police power advanced by the government. The "bad men" clause of the treaty provides that the United States will arrest and punish "bad men among the whites" for crimes against the person or property of Indians upon proof made to the federal agent. 1868 Treaty, art. I. The text and history of this clause, and the court decisions interpreting it, reveal that (1) neither the tribe nor the United States contemplated tribal police power over non-Indians, (2) the treaty confirms the police power of the United States over non-Indians, and (3) the treaty establish-

es a private right to restitution for losses sustained by individual Indians.

Finally, ICRA does not create tribal police jurisdiction over non-Indians. It restrains tribes in exercising powers of self-government, including executive police power. Where, as here, a tribal law enforcement officer exceeds tribal self-government authority, ICRA provides a remedy in the form of the exclusionary rule, as conceded by the government. Because Officer Saylor lacked authority to detain, investigate, seize, and search Mr. Cooley, and then search his vehicle, his actions were *ultra vires*. Thus, the Ninth Circuit appropriately upheld the district court's decision to suppress evidence obtained as a result of the illegal seizure and searches.

ARGUMENT

I. INHERENT TRIBAL SOVEREIGNTY DOES NOT INCLUDE POLICE POWER OVER NON-INDIANS ON RIGHTS-OF-WAY

The Ninth Circuit's decision in this case is consistent with the boundaries of tribal law enforcement authority that this Court has already established in a long line of precedent. Over the last forty years, the Court has repeatedly held that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Plains Commerce Bank*, 554 U.S. at 330 (quoting *Atkinson Trading Co., Inc.* v. *Shirley*, 532 U.S. 645, 659 (2001)). "Where nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Nevada* v. *Hicks*, 533 U.S. 353, 359 (2001) (quoting *Montana*, 450 U.S. at 564) (emphasis added);

see also *Plains Commerce Bank*, 554 U.S. at 328 ("This general rule restricts tribal authority over nonmember activities taking place on the reservation").

Officer Saylor's seizure and search of Mr. Cooley falls squarely outside tribal authority because Mr. Cooley was on a public right-of-way, and Officer Saylor immediately and accurately assessed that Mr. Cooley was non-Indian. "The sovereign authority of Indian tribes is limited in ways state and federal authority is not." *Id.* at 340. The Court frequently notes the "sovereignty that the Indian tribes retain is of a unique and limited character." *Id.* at 327 (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). "It centers on the land held by the tribe and on tribal members within the reservation." *Id.* (citing *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)).

The government's brief relies principally on policy pleas concerning what is "necessary and beneficial" to "not counterproductively" delineate tribal sovereignty. Pet. Br. 14, 17. Said differently, it proposes that tribal sovereignty be defined by what "helps, rather than hurts." Pet. Br. 20. In contradiction to numerous holdings of this Court, the government claims tribes have retained complete, inherent territorial sovereignty in Indian country to police state and federal crime. *Id.*

The government resorts to broad notions of sovereignty, ignoring that "[o]nly full territorial sovereigns enjoy the 'power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens,' and Indian tribes 'can no longer be described as sovereigns in this sense.'" *Atkinson Trading Co., Inc.* v. *Shirley*, 532 U.S. 645, 654 (2001) (quoting *Duro*, 495 U.S. at 685). The government's position ignores the extent to which tribal sovereign authority is

circumscribed. It extends only to tribal members and tribal land[1] for the purpose of governing tribal internal and social relations. *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). Here, Officer Saylor detained, investigated, seized, and searched a non-Indian on a public right-of-way for possible violations of state or federal law and, thus, exceeded the Crow Tribe's authority.

A. *Oliphant*, *Wheeler*, and *Montana* limit the criminal enforcement power of tribes over non-Indians on non-Indian land.

This Court has previously rejected the government's argument that retained inherent tribal sovereignty extends to criminal jurisdiction over non-Indians. The government appeared as *amicus curiae* in support of the Suquamish Indian Tribe, which had asserted criminal jurisdiction over non-Indians, arguing this external authority flowed from the tribes' retained inherent sovereignty. *Oliphant*, 435 U.S. at 196. But the Court limited tribal sovereignty to matters of self-government because incorporation into the United States divested tribes of sovereignty over non-Indians "except in a manner acceptable to Congress." *Id.* at 209–10 (citing *Fletcher,* 10 U.S. (6 Cranch) at 147); see also *Montana*, 450 U.S. at 565 ("[I]nherent

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[1] The distinct power to exclude requires the landowner's possessory interest. Consequently, Indians' power to exclude is limited to tribal land. "The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from *tribal lands*." *Duro*, 495 U.S. at 696 (emphasis added). "[N]on-Indian fee parcels have ceased to *be* tribal land." *Plains Commerce Bank*, 554 U.S. at 336. The tribal landowner's power to exclude no longer attaches to public rights-of-way, which are non-Indian land. *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997).

sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

In the same term, the Court, in affirming the federal prosecution of an Indian following a tribal court conviction on a lesser included offense, explained that there was no violation of the Double-Jeopardy Clause because Indian tribes, though implicitly divested of sovereignty in areas involving relations between tribes and nonmembers, retained sovereignty over relations among members of the tribe. *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978).

And just three terms later, applying *Oliphant* and *Wheeler*, the Court rejected the Crow Tribe's "authority to prohibit all hunting and fishing by nonmembers of the Tribe on non-Indian property within reservation boundaries." *Montana*, 450 U.S. at 547. The Court distinguished between those inherent powers retained by the tribes and those divested, observing: "the powers of self-government, including the power to prescribe and enforce internal criminal laws" did not extend to non-members. *Id.* at 564; see also *id.* ("These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to *determine their external relations*.") (emphasis in original). As Justice Souter later observed: "the inherent authority of the tribes has been preserved" over members, but not non-members, without restriction to criminal law. *Hicks*, 533 U.S. at 378 (Souter, J., concurring).

The government points to the *Montana* opinion to contend that "the limits on tribes' civil adjudicative and regulatory jurisdiction . . . contain an exception . . . [that] reflects a general principle that supports the more modest ability . . . to aid federal and state law enforcement by temporarily investigating and detain-

ing non-Indians suspected of violating federal and state laws on reservation lands." Pet. Br. 25–26. But that exception concerned only activities on "fee lands," not, as here, public rights-of-way, and applied in the civil—not criminal—context. *Montana*, 450 U.S. at 566. *Montana* thus provides no support for a claim that the tribes retained inherent authority to enforce criminal law on public rights-of-way. Pet. Br. 24.

Casting aside tribes' unique and limited sovereignty, the government states it is "undisputed that a sovereign has the general authority to temporarily detain and investigate those suspected of violating the laws of another sovereign." Pet. Br. 18. In support, the government cites various partially dissenting and majority opinions in *Arizona* v. *United States*, 567 U.S. 387, 347, 438 (2012) (Alito, J., concurring in part and dissenting part) (Thomas, J., concurring in part and dissenting in part); *United States* v. *Di Re*, 332 U.S. 581, 589 (1948); and *United States* v. *Smith*, 899 F.2d 116, 118 (1st Cir. 1990). The government's statement is misleading and wrong on multiple levels.

First, as a general proposition, the remarkably broad principle the government is advancing appears to be anything but "undisputed" in lower courts. See Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 Harv. L. Rev. 471, 478–94 (2018).

Second, more importantly, and as explained above, the government's argument ignores a fundamental principle of Indian law: Indian tribes are not full territorial sovereigns; their sovereignty is unique and limited; they have lost the right of governing persons within their borders except themselves. "[They] do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains*

Commerce Bank, 554 U.S. at 328 (citing *Montana*, 450 U.S. at 565). And this limitation on their authority is "particularly strong" on non-Indian land. *Id.*

For this reason, alone, the cases cited by the government are inapposite because none of them involved an Indian tribe or dealt with Indian law. Instead, all involved issues relating to the interplay between state and federal authority. See *Arizona,* 567 U.S. at 388; *Di Re*, 332 U.S. at 589; *Smith*, 899 F.2d at 118–19. As the court of appeals correctly observed, "[t]he divisions between tribal authority on the one hand, and federal and state authority on the other, have deep roots that trace back to the nation's founding." Pet. App. 20a.

Because Officer Saylor acted without sovereign authority, his exercise of police power over Mr. Cooley violated ICRA. Therefore, contrary to the government's contention, the lower courts correctly suppressed the evidence on the ground that Officer Saylor lacked the authority to detain and search a non-Indian on a public right-of-way based upon a potential violation of state or federal law. See, *infra*, Section IV.

B. The government resurrects a readily distinguished, and expressly rejected, analysis to try to create retained inherent sovereignty.

Citing *Colville*, 447 U.S. at 153, the government claims that tribes retain sovereign authority to police federal crime on non-Indian land because it "*furthers* 'the overriding interests of the National Government.'" Pet. Br. 19 (emphasis in Petitioner's Brief). The government's reliance on *Colville* is wrong for at least four reasons.

First, as a general proposition, the existence of an inherent police power in a domestic dependent nation to enforce the overriding sovereign's laws contravenes the founders' rejection of a federal police power. See *United States* v. *Morrison*, 529 U.S. 598, 618–19 (2000) (National Government denied federal police power); *United States* v. *Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power").

Second, *Colville* dealt with tribal taxation authority which, as the Court noted, "was very probably one of the tribal powers under 'existing law' confirmed by § 16 of the Indian Reorganization Act of 1934[.]" 447 U.S. at 153. The Court noted how taxation authority "differ[ed] sharply from *Oliphant* . . . in which [the Court] stressed the shared assumptions of the Executive, Judicial, and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians." *Id.* (citations omitted).

Third, unlike here, where Mr. Cooley parked on a right-of-way and did not engage with the tribe in any way, *Colville* involved non-Indians on *tribal* land *engaging in commerce with* the tribe, resulting in significant tribal tax revenue. *Id.* at 144. This important factual distinction was substantiated in *Brendale*, where a plurality of this Court recognized that *Colville*'s analysis does not translate to non-Indian lands, particularly where no "consensual relationship" exists. *Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 455 (1989) (White, J.) (noting that "[*Colville*] did not involve the regulation of fee lands, as did *Montana*[,]" and further noting the import of the "consensual relationship" factor in *Colville*) (internal citation omitted).

Finally, in *South Dakota* v. *Bourland*, 508 U.S. 679, 695 n.15 (1993), this Court dismissed the notion of finding inherent tribal sovereignty over non-Indians on fee lands under the language in *Colville*. There, Justice Blackmun dissented and, citing to *Colville*, stated "[t]his Court has found implicit divestiture of inherent sovereignty necessary only 'where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government[.]'" *Id.* at 699 (Blackmun, J., dissenting) (quoting *Colville*, 447 U.S. at 153–154). Based on *Montana's* general proposition, the majority emphatically rejected the dissent's take on inherent sovereignty, stating "[the dissent] shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' and is therefore *not* inherent." *Id.* at 695 n.15 (emphasis in original) (quoting *Montana*, 450 U.S. at 564) (internal citation omitted).

Thus, the government's reliance on *Colville* is self-defeating. *Colville* is not only factually distinct from this case on multiple levels, but, after *Montana*, its analysis does not extend to non-Indians. The Court has forever invalidated its "interest furthering" rationale.

C. Tribal police power cannot exceed its regulatory and adjudicative jurisdiction.

The government believes this Court's precedents preserve police power that exceeds repeated limits on inherent adjudicatory and regulatory authority. To maintain this untenable position–that retained police power over non-Indians on non-Indian land exceeds all other tribal self-government authority over internal relations–the government conflates landowners' power to exclude with retained inherent sovereignty.

The Court applied *Oliphant* and *Montana* in its unanimous decision in *Strate*, where it reached its holding after applying the *Montana* framework to tribes' civil adjudicatory jurisdiction. "As to non-members, we hold a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454 (1997); see also *Plains Commerce Bank*, 454 U.S. at 330 (quoting *Strate*, 520 U.S. at 453.)

Police power–the ultimate imposition of sovereignty and deprivation of liberty–cannot exceed adjudicative or legislative power. *United States* v. *Lara*, 541 U.S. 193, 227 n.1 (2004) (Souter, J., dissenting) ("*Bourland* was a civil case about the regulation of hunting and fishing by non-Indians. Its applicability in the criminal context is presumably *a fortiori*."). That limitation applies with greater force when the government's justification for it is to empower tribes to enforce federal law. Contrast *Wheeler*, 435 U.S. at 331 ("They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation.").

In *Duro*, the Court recognized that tribes' retained sovereignty does not extend to non-Indians in the area of *criminal enforcement*:

> The tribes are, to be sure, "a good deal more than 'private voluntary organizations,'" and are aptly described as "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). In the area of *criminal enforcement*, however, tribal power does not extend beyond internal relations among members.

495 U.S. at 688 (emphasis added). The Court continued to emphasize the liberty of citizens, noting the role of Congress, as opposed to retained tribal sovereignty, in encroaching on individual liberty. "In the absence of such legislation, however, Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.'" *Id.* at 693 (quoting *Oliphant*, 435 U.S. at 210).

Even though the government acknowledges *Strate*'s recognition that tribal adjudicatory authority cannot exceed regulatory authority over non-Indians, Pet. Br. 14, the government nevertheless creates a tribal police power over non-Indians by seizing on a footnote in *Strate*: "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law." *Strate*, 520 U.S. at 455–56 n.11. This case does not involve a stop for violating state law.[2] There was, instead, a welfare check, followed by tribal detention and investigation to potentially discover illegality. Indeed, *Strate* does not establish an inherent tribal police power over non-Indians on a public right-of-way, but instead limits tribal authority because tribes lack a "right to occupy and exclude" on public rights-of-way. *Id.* at 456; see also *Plains Commerce*

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[2] Further, a tribal officer's authority to detain non-Indians for violating state or federal law is not proof of sovereign authority because, as the Ninth Circuit noted, "a seizure of a felon by an officer acting *outside of the scope of his sovereign's authority* may be reasonable if the common law would allow a private person to seize the felon in the same circumstances." Pet. App. 18a (emphasis added).

Bank, 454 U.S. at 327–28 (distinguishing power to exclude from inherent sovereignty over nonmembers).

Moreover, the footnote in *Strate* is dictum. Determining tribal civil jurisdiction over a traffic accident between nonmembers on a public highway does not require considering tribal policing of that same highway. "It is to the holdings of our cases, rather than their dicta, that [the Court] must attend[.]" *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994). Obiter dictum does not control a future case where the very issue is presented. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

The government also suggests that *Strate*'s "Cf." cite to *Schmuck* amounts to an approval of *Schmuck*. Pet. Br. 23–24. Inapposite to the government's argument here, the court in *Schmuck* ruled that the tribal officer could stop to *enforce internal criminal and civil laws*, reiterating that inherent tribal authority was based on enforcing *tribal law*. *State* v. *Schmuck*, 850 P.2d 1332, 1335 (Wash. 1993). Moreover, *Schmuck* expressly did not consider the reasonableness of the detention, *id.* at n.3, and instead was a traffic stop for flagrant criminal activity, which the court justified based on the power to exclude because "Indian country," as defined in § 1151, includes all land within a reservation. *Id.* at 1341.

As in *Schmuck*, the government claims the definition of "Indian country" in 18 U.S.C. §§ 1151–52 "specifically contemplate[s] tribal policing of rights-of-way," Pet. Br. 21, even though the Court has ex-

plained "[s]ection 1151 simply does not address an Indian tribe's inherent authority over nonmembers on non-Indian fee land." *Atkinson*, 532 U.S. at 653 n.5.

Finally, the government attempts to inappropriately expand the second *Montana* exception, which recognizes civil tribal authority over non-Indians on fee lands "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. "*Montana*'s second exception can be misperceived." *Atkinson*, 532 U.S. at 657 n.12 (internal citation omitted). This exception only covers conduct on tribal lands that imperils the political integrity of the tribe:

> The exception is only triggered by nonmember conduct that threatens the Indian tribe, it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually "imperils" the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

Id. (citing *Montana*, 450 U.S. at 566). Irrespective of the percentage of non-Indian fee land within a reservation, *Montana*'s second exception grants Indian tribes nothing "beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459 (quoting *Montana*, *supra*, at 564).

Strate rejects the government's distortion of *Montana* to implicitly authorize tribal police to detain and investigate non-Indians who jeopardize public safety

through activities like transporting contraband. *Id.* at 457–58. "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule." *Id.*; see also *Plains Commerce Bank*, 554 U.S. at 341 ("The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community.") (internal citation omitted).

Mr. Cooley's presence in a vehicle pulled over on a right-of-way "cannot fairly be called 'catastrophic' for tribal self-government." *Id.* (citing *Strate*, 520 U.S. at 459). Police power over him is not "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Strate*, 520 U.S. at 459 (quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)). Divining a tribal police power to further the interests of the United States to enforce federal laws is not necessary for tribes to make their own laws to self-govern, let alone to avoid catastrophic harm to tribal self-government.

II. THIS COURT DEFERS TO CONGRESS'S PLENARY AUTHORITY TO REMEDY ANY JURISDICTIONAL VOIDS, INCLUDING ALLEGED VOIDS IN LAW ENFORCEMENT, ON INDIAN RESERVATIONS

The government invites the Court to overrule *Oliphant* and *Duro* and fill an alleged jurisdictional gap in law enforcement on reservations by finding that tribes have inherent criminal authority to police non-Indians within all of Indian country. See Pet. Br. 20–21. "Jurisdictional gaps are hardly foreign to this area of law." *McGirt*, 140 S. Ct. at 2478 (citing *Duro*, 495 U.S. at 704–06 (Brennan, J., dissenting)). Yet,

the Court has made clear that it will not find inherent tribal authority in order to remedy alleged jurisdictional voids in Indian country. *Duro*, 495 U.S. at 698. Instead, the Court defers to Congress as the body with plenary and exclusive authority to legislate in connection with Indian affairs. *McGirt*, 140 S. Ct. at 2478; *Duro*, 495 U.S. at 698; *Oliphant*, 435 U.S. at 212.

The government's argument also ignores the fact that Congress has already exercised its plenary power to address the alleged jurisdictional void. In doing so, Congress did not recognize or affirm inherent tribal power to enforce federal law and police non-Indians. Rather, it authorized the executive branch to delegate this power to tribal law enforcement via cross-deputization. Although the government complains that cross-deputization is often impeded by "significant practical obstacles," such as insufficient resources and required certifications and trainings, Pet. Br. 47, its concerns only serve to underscore that Congress is the appropriate body to address these issues. The answer to "practical obstacles" is not to ask this Court to find inherent tribal authority; it is to seek the resources from Congress that the government here admits are the source of those obstacles.

A. This Court rejects jurisdictional voids as a basis for finding tribal authority and expressly defers to Congress's plenary authority.

This Court is very familiar with the practical challenges facing tribal law enforcement officers in connection with crimes committed by non-Indians within Indian country. Its decisions in cases like *Oliphant* and *Duro*, which govern the criminal jurisdiction of tribes, address head-on the concern of jurisdictional

voids that may arise as a result of the complex patchwork of federal, state, and tribal law.

Notwithstanding these practical challenges, this Court has honored the "fundamental commitment of Indian law [which] is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014) (citing *Kiowa Tribe of Oklahoma* v. *Mfg. Techs. Inc.*, 523 U.S. 751, 758–60 (1998)). In *Oliphant*, this Court acknowledged that jurisdictional voids, "have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." 435 U.S. at 212. Instead, "these are considerations for Congress to weigh[.]" *Id.*

The Court reaffirmed this principle in *Duro*, again rejecting policy concerns over jurisdictional voids as a basis for conferring criminal jurisdiction powers to the tribes. "If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs." *Duro*, 495 U.S. at 698. And the Court in *Duro* further rejected the very same arguments the government and its *amici* advance here; namely, "the tribes will lack important power to preserve order on the reservation, and nonmember Indians will be able to violate the law with impunity." *Id.* at 696. Instead, the Court concluded, "[t]he argument that only tribal jurisdiction could meet the need for effective law enforcement did not provide a basis for finding jurisdiction in *Oliphant*; neither is it sufficient here." *Id.* The government's arguments here thus run headlong into an impenetrable wall of stare decisis.

B. Congress has addressed the alleged void by providing for cross-deputization and is best situated to remedy practical obstacles that remain unaddressed.

Congress has exercised its plenary authority and addressed the alleged void in this case. It has given the executive branch broad responsibility, discretion, and authority to empower tribes to investigate crime and enforce federal law in Indian country via cross-deputization. As with the government's "practical difficulties," the reality that relevant officials did not avail themselves of cross-deputization does not justify usurping Congress's plenary authority with a judicial finding of inherent tribal authority in this case.

Relevant here, the Secretary of the Interior's authority includes the power to "authorize a law enforcement officer of [any Federal, tribal, State, or other government agency] to perform any activity the Secretary may authorize under section 2803 of this title." 25 U.S.C. § 2804(a)(1)–(2). The law enforcement "activities" the Secretary is empowered to authorize under section 2803 are wide-ranging and substantial. See 25 U.S.C. § 2803. Among other things, the Secretary may authorize an officer to make warrantless arrests in Indian country for offenses[3] committed in his presence or for felony offenses, misdemeanor domestic violence offenses, and misdemeanor controlled substance offenses if the arrest is based on probable cause. 25 U.S.C. § 2803(3)(A)–(D). The Secretary's authority covers the situation presented here

[3] The term "offense" as used in 25 U.S.C. § 2803 is defined as "an offense against the United States and includes a violation of a Federal regulation relating to part or all of Indian country." 25 U.S.C. § 2801(7).

as the Secretary may authorize tribal officers to "make inquiries of any person . . . concerning any matter relevant to the enforcement or carrying out in Indian country of a law of . . . the United States[,]" *id.* at § 2803(5), and "perform any other law enforcement related duty." *Id.* at § 2803(7).

Congress also authorized the Secretary to prescribe administrative rules relating to the enforcement of federal law in Indian country. 25 U.S.C. § 2805. The Secretary exercised this authority and commissioned all "BIA law enforcement officers" to carry out the law enforcement activities enumerated under section 2803 and authorized the BIA to "issue law enforcement commissions to . . . tribal full-time certified law enforcement officers to obtain active assistance in enforcing applicable Federal criminal statutes[.]" 25 C.F.R. § 12.21. Officer Saylor was not so commissioned in this case.

Additionally, any "head of a Federal agency with law enforcement personnel or facilities" is authorized to engage with Indian tribes by entering agreements "relating to (1) the law enforcement authority of the Indian tribe, or (2) the carrying out of a law of . . . the United States[.]" 25 U.S.C. § 2804(e). Moreover, the executive branch's authority to empower tribal law enforcement is not confined to the parameters in title 25. Under 21 U.S.C. § 878, "any State, *tribal*, or local law enforcement officer *designated by the Attorney General* may . . . make [warrantless arrests] (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause[.]" 21 U.S.C. § 878(a)(3) (emphasis added). In addition, the Attorney General may designate the officer to "perform such other law enforcement duties as the Attorney General may designate." *Id.* at

§ 878(a)(5). Officer Saylor was not so designated here.

In its brief, the government decries the existence of a "virtual law-enforcement vacuum," Pet. Br. 36, and claims that other sovereigns cannot be expected to "fill the void." *Id.* at 45. But as this Court so plainly said in *Duro*: "If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs." 495 U.S. at 698. If the government wishes this Court to overrule the long line of authority that includes *Oliphant* and its progeny, then it should forthrightly say so.

III. THE "BAD MEN" CLAUSE IN THE 1868 TREATY DOES NOT RECOGNIZE OR CREATE TRIBAL POLICE AUTHORITY OVER NON-INDIANS

A. This argument was not raised or passed on in the lower courts.

The government argues that the "bad men" clause in the 1868 Treaty recognizes the police power exercised by the Crow Tribe here. That issue was not raised, let alone considered, in either of the lower courts. Pet. App. 1a–31a. Consequently, this Court should not consider it. See *Singelton* v. *Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). That general rule has all the more weight where the government is the petitioner. While the Court may "affirm on any ground," this Court has expressed reluctance to be a Court of first resort. But that is exactly what the government's "bad men" argument suggests this Court should now do.

Even if the Court were to countenance such an effort by the government here, that effort fails because the "bad men" clause does not support the government's broad reading.

B. The "bad men" clause creates a private right of action for damages to the person or property of individual Indians.

The history and text of the "bad men" provisions plainly show that they were intended to provide a means of redress for injuries to individual tribal members. The core of these provisions addresses restitution to tribal members, not tribal police authority over non-Indians. As to the latter, the "bad men" provisions are properly read to ensure that criminal enforcement against non-Indians is the province of federal authorities, not tribal authorities. Judicial interpretations confirm that reading.

1. The text and history of the "bad men" clause establishes this interpretation.

In 1867, Congress established the Indian Peace Commission to establish peace with certain hostile Indian tribes. See An Act to Establish Peace with Certain Hostile Indian Tribes (1867 Act), July 20, 1867, ch. 32, 15 Stat. 17. Congress instructed the Commission to "call together the chiefs and headmen of such bands or tribes of Indians as are now waging war against the United States or committing depredations upon the people thereof" in order to "ascertain the alleged reasons for their acts of hostility." *Id.*

Members of the Indian Peace Commission met with Crow Tribe leaders at Fort Laramie in November of 1867. Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868*, 86–92 (1975). During the meeting, Tribe leaders complained of injuries individual Indians had suf-

fered to their persons and property. See *id.*, at 87–89; *id.* at 86–92 (Bear's Tooth: "Your young men have destroyed the young grass and have set the country on fire. They kill the game, not because they want it. They leave it to rot on the roadside."); *id.* at 87 (Bear's Tooth: "Some time ago, a white Chief struck one of my people on the head with a revolver."); *id.* at 88 (Black Foot: "The whites have made two branches of a road . . . and have cut up the best game country we have.").

The Commission responded to these complaints and explained how the President would always be willing to make "amends" for the injuries caused by his "bad children who commit those things without his knowledge." *Id.* at 89–90. It then explained the process for addressing complaints, telling Tribe leaders to "always" direct complaints of injury to their local federal agent: "When you have any grievance to complain of, always go to your agent. He will inform your Great Father, and he will have you righted." *Id.* at 90.

Six months later, the United States and the Crow Tribe entered into the 1868 Treaty that the government relies upon here.

Article I of the 1868 Treaty provides, in pertinent part, as follows:

> If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse

> the injured person for the loss sustained.

1868 Treaty, art. I.

Consistent with the statements made during the Commission meetings in November of 1867, Article I obligates the United States to "reimburse" any Indian whose "person or property" is injured as a result of "any wrong" committed by "bad men among the whites." Additionally, Article I provides that such reimbursement will be made "upon proof made to the [local federal] agent and forwarded to the Commissioner of Indian Affairs at Washington City."

Article V then sets forth the local federal agent's process for fielding and investigating complaints made under the treaty provisions:

> The United States agrees that *the [local federal] agent for said Indians shall* in the future make his home at the agency building; that he shall reside among them, and *keep an office open at all times* for the purpose of *prompt and diligent inquiry into such matters of complaint, by* and against *the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law.* In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

1868 Treaty, art. V (emphasis added).

Contrary to the government's contention, the history and text of the 1868 Treaty reveal the parties' recognition that authority to investigate and punish crimes of non-Indians resided with the United States,

and their intent to implement a complaint procedure for processing personal injury claims. Thus, if a *bad man among the whites* commits a wrong *upon the person or property* of any Indian, a *complaint* must be made to the *federal agent* who maintains a local office "for the purpose of prompt and diligent inquiry into such matters of complaint . . . as may be presented for investigation." 1868 Treaty, art. V. Once a complaint is presented, the agent investigates the matter and forwards his findings (proof) to the Commissioner of Indian Affairs, who then reimburses the injured party for the loss sustained.

2. Lower court opinions have consistently read the "bad men" provision as a private right of redress and a reservation of federal authority.

Judicial interpretations of treaties containing identical, or virtually identical, "bad men" provisions confirm that these provisions concerned redress and reserved investigative and prosecutorial powers for federal authorities, not the tribes. In 1970, the United States Court of Claims—the Federal Circuit's predecessor—concluded the "bad men" clause created a private, *civil* cause of action for *damages* for *individual tribal members*. *Hebah* v. *United States*, 428 F.2d 1334, 1338 (Ct. Cl. 1970).

In fact, the decision in *Hebah* strongly suggests that the "bad men" clause creates a private cause of action for *only* individual tribal members, not tribal governments. *Id.* ("The tribe is not to be the channel or conduit through which reimbursement is to flow."). See also *Cheyenne & Arapaho Tribes* v. *United States*, No. 20-143, 2020 WL 7251080, at *5 (Fed. Cl. Dec. 9, 2020) (dismissing a tribal government's claim for damages under the "bad men" clause and noting that it had "uncovered no case in which a tribe has suc-

cessfully brought an *independent* claim for damages under a 'bad men' clause.") (emphasis in original)).

Indeed, the Federal Circuit and the Court of Federal Claims have consistently analyzed and addressed the "bad men" clause in the context of a private cause of action for damages brought by individual tribal members. See, *e.g.*, *Begay* v. *United States*, 219 Ct. Cl. 599, 600 (1979) (*"Begay I"*); *Begay* v. *United States*, 224 Ct. Cl. 712, 713 (1980) (*"Begay II"*); *Tsosie* v. *United States*, 825 F.2d 393 (Fed. Cir. 1987); *Richard* v. *United States*, 677 F.3d 1141 (Fed. Cir. 2012); *Jones* v. *United States*, 846 F.3d 1343 (Fed. Cir. 2017); *Elk* v. *United States*, 87 Fed. Cl. 70 (2009).

3. A review of the "bad men" provisions reveals the different interests of the parties.

The first "bad men" provision in Article I further provides, "the United States will . . . proceed at once to cause the offender to be arrested and punished according to the laws of the United States." 1868 Treaty, art. I. This language contrasts starkly with the language used in the second "bad men" provision, which deals with wrongs committed by "bad men among the Indians." When a "bad man" among the Indians commits a wrong "upon the person or property of any one, white, black, or Indian," the Tribe must "deliver up the wrongdoer to the United States, to be tried and punished according to its laws." *Id.* In the event the Tribe refuses to "deliver up" the wrongdoer, the United States is then authorized to reimburse "the person injured . . . from the annuities or other moneys due or to become due . . . under this or other treaties made with the United States." *Id.*

That contrasting language reveals the "bad men" provisions promoted different interests for each of the

treaty parties by providing them with different remedies. On the one hand, the provisions reflect the United States' interest in adjudicating guilt and punishment; on the other hand, they reflect "Indian cultures of the day," which were "traditionally focused on restorative compensatory mechanisms to resolve harm created by misconduct." Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 Ariz. St. L.J. 1, 9 (2004). Thus, while the second "bad men" provision obligates tribes to "deliver up" Indians accused of wrongdoing, "notably absent from the treaties was any provision under which [the tribe] . . . could seek extradition from the United States of a non-Indian accused[.]" *Id.* at 8. Instead, the tribe's only recourse was "to offer proof of the wrong to [the] local Indian agent for submission to Washington, which would 'proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.'" *Id.* at 8–9 (internal citation omitted).

IV. OFFICER SAYLOR EXCEEDED HIS AUTHORITY IN VIOLATION OF ICRA

The government maintains that ICRA confers jurisdiction upon tribal officers because it contemplates individual guarantees of protection for non-Indians and Indians alike in the course of tribal exercises of self-government. Pet. Br. 21, 33–34. But that argument is wholly circular; that is, it assumes that because civil rights are protected, jurisdiction must exist. As with the government's "inherent authority" argument, this Court's carefully delineated jurisdictional lines concerning tribal authority to enforce criminal law against non-Indians preclude the government's assumption. Nor is there any language in

the ICRA that would confer jurisdiction. Like other civil rights protections, including the Fourth Amendment itself, those rights–and their attendant tests, like reasonableness–can only be invoked where the search or seizure was undertaken with valid authority in order to promote or advance a legitimate sovereign interest in self-governance. In the absence of that authority, ICRA's only application is to provide the remedy for Officer Saylor's *ultra vires* acts–exclusion of the evidence obtained as a result of his seizure of Mr. Cooley.

A. ICRA is a restraint on tribal police power, not a grant of authority over non-Indians.

ICRA restricts Indian tribes in "exercising powers of self-government," including "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and . . . the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. §§ 1301(2), 1302(a). More specifically, ICRA includes a prohibition on unreasonable searches and seizures nearly identical to the prohibition in the Fourth Amendment. 25 U.S.C. § 1302(a)(2).

The government maintains that Officer Saylor exercised inherent tribal police power when he investigated, seized and searched Mr. Cooley to enforce federal law, Pet. Br. 25–26, but that "exercise of tribal power [went] beyond what is necessary to protect tribal self-government or to control internal relations," *Hicks*, 533 U.S. at 359 (quoting *Montana*, 450 U.S. at 564). It was an exercise of authority in order to police and regulate a non-Indian on a right-of-way

and, as such, exceeded the limits of tribal sovereignty, and violated ICRA's prohibition against "unreasonable search and seizures." 25 U.S.C. § 1302(a)(2).

In *Oliphant*, the Court expressly rejected the notion that ICRA "confirmed" the existence of any inherent authority over non-Indians by extending its enumerated guarantees to "any person." 435 U.S. at 195 n.6. Instead, the Court stated, ICRA "merely demonstrates Congress' desire to extend the Act's guarantees to non-Indians *if and where* they come under a tribe's criminal or civil jurisdiction by either treaty provision or Act of Congress." *Id.* (emphasis added).

Thus, the government's argument fails because the Crow Tribe exceeded its powers of self-government when Officer Saylor, after ascertaining the non-Indian status and well-being of Mr. Cooley and his child, nevertheless chose to detain, further investigate, and search Mr. Cooley. Pet. App. 180a.

B. The exclusionary rule applies in this case.

The government concedes the exclusionary rule applies in this case, Pet. Br. 8, which is consistent with its position before the Ninth Circuit. The Ninth Circuit, in turn, expressly relied upon this concession and also noted the absence of any argument for an exception to the exclusionary rule. Pet. App. 11a (noting how "[t]he government agrees" with the determination that "the exclusionary rule applies in federal court to violations of ICRA's Fourth Amendment counterpart"); *id.* at n.5 (further noting, because the government was not pressing the issue, "we have no occasion to consider whether any exception to the exclusionary rule applies in this context").[4] And the

[4] On page 10 of its merits brief, the government pivots from the statement on page 8 of its petition, stating it "had thought

only exception available where officers are acting outside the scope of their authority–the personal observation of a felony–is simply not applicable here. Pet. App. 18a (citing 4 William Blackstone, *Commentaries* *293; 2 David S. Garland & Licius P. McGehee, *The American and English Encyclopaedia of Law* 863, 884–89 2d ed. 1896)).

[the exclusionary rule issue was] foreclosed by circuit precedent." Pet. Br. 10. To be clear, the record reflects the government expressly conceded this issue. Pet. 8; Pet. App. 11a.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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