No. 19-1414

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOSHUA JAMES COOLEY

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

## REPLY BRIEF FOR THE PETITIONER

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Respondent provides no sound reason for this Court to leave in place the Ninth Circuit's unprecedented, unwarranted, and unworkable curtailment of the sovereignty of Indian tribes. The decision below precludes tribal officers from routine law-enforcement activities necessary to protect both the tribe and the public at large from dangerous and criminal activity within the boundaries of the tribe's reservation. See Pet. 20. It unrealistically requires such officers generally to determine from a single question whether a suspect is an Indian. See Pet. 23-24. And it deters tribal officers uncertain of a suspect's Indian status from investigating crimes—or even protecting themselves or others from potential harm—unless the illegal activity is "apparent" or "obvious." See Pet. 22-23 (quoting Pet. App. 9a). Those unjustified limitations on tribal authority, which threaten seriously to undermine the safety of Indians

and non-Indians alike on reservations in the Ninth Circuit, warrant this Court's review.

Respondent's brief in opposition is most notable for what it does not contain. Respondent attempts to ground the Ninth Circuit's novel rule in this Court's precedents, but he identifies no decision that comes close to embracing it. Indeed, like the Ninth Circuit, respondent ultimately acknowledges that tribes necessarily retain *some* police authority over non-Indians on public highways and non-Indian fee land within reservation boundaries. Respondent attempts to deny any confusion in the lower courts as to the precise scope of that authority, but provides no evidence that other courts apply the Ninth Circuit's newly minted "apparent" or "obvious" standard, as opposed to the normal Fourth Amendment standard that Congress has prescribed through the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1302(a)(2). And he offers no meaningful response to the considerable practical problems that the Ninth Circuit's approach creates, as highlighted by the dissenting judges below, the government's petition for a writ of certiorari, and the amicus briefs supporting that petition. This Court should grant certiorari and reverse the decision below.

**A. The Decision Below Is Incorrect**

As explained in the petition (Pet. 11-20), this Court's precedents, the historical record, and the ICRA all support a narrow tribal power to investigate and detain non-Indians under normal Fourth Amendment standards for conduct that takes place on the reservation. See, *e.g.*, *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997); *Duro* v. *Reina*, 495 U.S. 676, 697 (1990). The Ninth Circuit's contrary rule was invented out of

whole cloth, and respondent's efforts to defend that rule are unsound.

1. Although "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians" for criminal offenses, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), "[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 been clearest that such detention authority exists on reservation land held by the tribe or its members, see *id.* at 696-697, but its precedents likewise support such authority on public highways and non-Indian fee land within the reservation's boundaries, see Pet. 13-14; *Strate*, 520 U.S. at 456 n.11.

Respondent contends (Br. in Opp. 6) that "police power can[not] be divorced from criminal jurisdiction," and the same considerations that preclude a tribe's exercise of criminal jurisdiction similarly preclude investigation and detention. That argument disregards both *Duro* v. *Reina*, *supra*, and *Oliphant* v. *Suquamish Indian Tribe*, *supra*, each of which distinguished police authority from full criminal jurisdiction. See *Duro*, 495 U.S. at 697; see also *State* v. *Schmuck*, 850 P.2d 1332, 1339 (Wash.) (en banc) ("*Oliphant* holds that tribal courts do not have criminal jurisdiction to *try and punish* non-Indian offenders. At the same time, the Court *acknowledged* the continuing vitality of the Tribe's power * * * to detain offenders and turn them over to governmental authorities who do have authority to prosecute."), cert. denied, 510 U.S. 931 (1993). It also disregards the treaties demonstrating that tribes historically retained the power to apprehend and deliver wrongdoers to the relevant authorities. See Pet. 15-16.

The rationale for precluding the trial and conviction of non-Indians for tribal crimes does not extend to the investigation and detention of non-Indians for state or federal crimes. In limiting tribal regulatory and adjudicatory authority over non-Indians, this Court has observed that non-Indians lack membership in any tribal political community, see *Oliphant*, 435 U.S. at 210-211, and thus "have no say in the laws and regulations that govern tribal territory," *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). But the limited police authority at issue here does not subject non-Indians to tribal laws and regulations. Instead, it simply facilitates the exercise of sovereign authority by state and federal governments, which plainly *do* enjoy jurisdiction over non-Indians. Non-Indians have no more of a liberty interest in violating state and federal law on Indian reservations than they do elsewhere. And Congress has ensured that tribal police respect the rights of those they encounter, whether Indian or non-Indian, through the enactment of the ICRA.

2. This Court's decision in *Strate* v. *A-1 Contractors*, *supra*, effectively endorsed the limited authority of tribal officers to conduct investigations and detentions like the one at issue here. By declining to "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," 520 U.S. at 456 n.11, the Court signaled that such inherent tribal authority remains intact.

Respondent argues that the *Strate* footnote does no more than "acknowledge[] that the question of * * *

[tribal] authority" to "'detain and transport'" was "beyond the purview of the question presented," which concerned a tribe's adjudicatory jurisdiction over a tort action stemming from a car accident on a public highway within the reservation. Br. in Opp. 3 (emphasis omitted); see 520 U.S. at 442. But if respondent were correct that adjudicatory jurisdiction bears on investigatory and detention authority, then the Court's rejection of adjudicatory jurisdiction in *Strate* necessarily *would* have called tribal police authority on public highways into "question." 520 U.S. at 456 n.11; see Pet. 15.

*Strate*'s statement to the contrary is thus best understood as rejecting a connection between a tribe's adjudicatory jurisdiction and its police authority and as confirming the existence of the latter. See *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 651-652 (2001) (reiterating that *Strate* "did not question the ability of tribal police to patrol the highway"). That is particularly so in light of *Strate*'s approving citation of *State* v. *Schmuck*, *supra*, in which the Washington Supreme Court sitting en banc held that "an Indian tribal officer has 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." *Schmuck*, 850 P.2d at 1342; see *Strate*, 520 U.S. at 456 n.11.

3. In any event, even respondent himself—like the Ninth Circuit—does not ultimately deny that tribes have at least *some* policing authority on public rights of way within reservation boundaries. See Br. in Opp. 4; Pet. App. 8a. His position (Br. in Opp. 4-5), like the Ninth Circuit's decision, instead reduces to the assertion that such authority cannot be exercised in compliance with the normal Fourth Amendment standards of

reasonable suspicion and probable cause, but instead requires an "apparent" or "obvious" violation of state or federal law. Pet. App. 9a (citation omitted). As explained in the petition (Pet. 16-20), that standard has no apparent legal basis and conflicts with Congress's adoption of the Fourth Amendment's language in the ICRA.

Although respondent contends (Br. in Opp. 2) that the "Ninth Circuit's opinion is entirely consistent with this Court's jurisprudence," he identifies no affirmative support in any of this Court's precedents for the panel's novel rule. He asserts (*id.* at 4) that *Strate* and *Duro* sanctioned only "the power to *detain* and *transport*," not "the power to detain, investigate, and generally police," but neither case even hints at the "apparent" or "obvious" standard for detention adopted by the court of appeals. Pet. App. 9a (citation omitted); see *Strate*, 520 U.S. at 456 n.11; *Duro*, 495 U.S. at 697. To the contrary, *Strate*'s citation of *Schmuck*—which appears to rely on normal Fourth Amendment policing standards, see p. 8, *infra*—suggests the opposite. Respondent also has no response to the practical difficulties that the Ninth Circuit's new and uncertain standard creates. As the petition explains (Pet. 20), that standard appears to preclude a wide variety of commonplace investigatory activities necessary for public safety. And the indeterminacy of a standard completely unfamiliar to law-enforcement officers will itself unduly deter necessary police activity. Pet. 19, 23.

Respondent also offers nothing to rehabilitate the Ninth Circuit's apparent adjunct rule that tribal officers are generally permitted to ask only one question to determine whether a suspect is an Indian, and are required to accept the answer. See Pet. 23-24. That requirement, too, appears to lack any legal basis and is

fundamentally unworkable. And it would allow serious criminals to escape law-enforcement officers through the expediency of a simple lie that officers will be powerless to expose through follow-up questioning or investigation. See Pet. App. 64a (Collins, J., dissenting from the denial of rehearing en banc). 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. Nothing in this Court's precedents supports that result.

**B. The Question Presented Is Significant**

In any event, whatever the correct answer on the merits, respondent fails to explain why issues of such consequence should go unreviewed by this Court. The court of appeals' dramatic constriction of tribal authority, along with its imposition of a novel and unworkable legal standard, endangers "the safety and welfare of hundreds of thousands" of Indians and non-Indians alike residing and working on reservations in the Ninth Circuit. Pet. App. 80a (Collins, J., dissenting from the denial of rehearing en banc). The brief in opposition does not meaningfully address those consequences, but instead implicitly asks this Court to leave in place a paradigm-shifting and potentially dangerous new legal regime.

1. As the petition explains (Pet. 24), the decision below is a sea change in the status quo. To the extent that respondent contends otherwise (Br. in Opp. 7), he appears to assume that state courts recognizing tribal policing authority in circumstances like those at issue here have implicitly been applying the "apparent" and "obvious" standard that the Ninth Circuit adopted. But he provides no evidence that courts have departed from

the ICRA's Fourth Amendment analogue in that way. Indeed, the state cases cited in the petition suggest otherwise.

In *Schmuck*, the Supreme Court of Washington upheld a tribal officer's stop of a non-Indian for speeding on a public road on a reservation, administration of field sobriety tests, and detention of the suspect until a state officer arrived. 850 P.2d at 1333-1334, 1337. Respondent attempts (Br. in Opp. 11) to distinguish *Schmuck* from this case on the ground that the tribal officer there observed clear traffic violations—including speeding and running a stop sign—whereas the tribal officer here did not. But the facts described in the *Schmuck* opinion indicate that the tribal officer there did not detain the defendant for transfer to state authorities based on the observed traffic violations, but instead for suspected drunk driving—for which the officer appeared to have no more than probable cause. 850 P.2d at 1334. Moreover, it is not even clear that the decision below in this case would allow detention based on observed legal violations, like traffic infractions, that are not felonies. See Pet. App. 63a, 78a (Collins, J., dissenting from the denial of rehearing en banc) (noting this ambiguity); compare *id.* at 8a, with *id.* at 18a. Nor can respondent distinguish *Schmuck* on the theory that it involved the question of tribal "'*authority*'" to stop and detain, rather than the "*reasonableness*" of the detention. Br. in Opp. 9 (quoting *Schmuck*, 850 P.2d at 1335 n.3). The same "authority" question is at issue here. The court below in this case held that the tribal officer lacked authority to investigate and detain respondent, not that the scope of the search or seizure was unreasonable if he possessed such authority.

The Wyoming Supreme Court's decision in *Colyer* v. *State*, 203 P.3d 1104 (2009), is likewise in significant tension with the decision below. There, the court upheld a Bureau of Indian Affairs (BIA) officer's stop of a suspected drunk driver and detention of him until a county officer arrived. *Id.* at 1106, 1111. Respondent notes (Br. in Opp. 15) that "no tribal officers were involved in *Colyer*," but he disregards that the court expressly treated the BIA officer as equivalent to a tribal officer for jurisdictional purposes. See *Colyer*, 203 P.3d at 1111 n.5. Respondent further argues (Br. in Opp. 15-16) that *Colyer* is distinguishable because the BIA officer "observed traffic-related criminal activity prior to stopping the driver and detaining him." But even assuming that the facts of *Colyer* would meet the Ninth Circuit's "apparent" or "obvious" standard, the Wyoming Supreme Court gave no indication that such a standard was required.

2. As the amici in this case confirm, the panel's decision carries substantial practical significance and threatens serious harm to the welfare of those who work and live on reservations in the Ninth Circuit. See generally Crow Tribe of Indians Amici Br.; Nat'l Indigenous Women's Res. Ctr. Amici Br.

The Ninth Circuit is home to a large number of reservations, many of which have significant non-Indian populations and non-Indian land ownership. By elevating the threshold for tribal detention—and virtually eliminating tribal investigation—of non-Indians outside tribal land on a reservation, the panel's decision hamstrings the ability of tribal police to maintain law and order in areas that, in many cases, already suffer from understaffed law enforcement and high crime rates. See Pet. 24-29; Nat'l Indigenous Women's Res. Ctr. Amici Br. 12-14, 16-20.

Respondent does not meaningfully contest any of this. He briefly asserts (Br. in Opp. 1) that the implications of the decision below are limited to "public right[s]-of-way," apparently suggesting that the decision does not extend to a reservation's non-Indian fee land. Even if the implications were so limited, that would not obviate the need for this Court's review. See Pet. 20, 25 (detailing practical problems in that context); cf. *Strate*, 520 U.S. at 442 (reviewing question of tribal jurisdiction on public right-of-way through reservation). But the implications are likely to be much greater, as this Court has treated non-Indian fee land and public rights-of-way as jurisdictionally equivalent. See *Strate*, 520 U.S. at 456. Respondent provides no basis for distinguishing between them—or any response to the additional administrability problems presented by the decision's application to non-Indian fee land. See Pet. 20, 25-26.

Respondent also asserts without elaboration (Br. in Opp. 17) that the case "involves a technical issue of Indian tribal authority and a unique factual scenario." But investigation and detention on the basis of reasonable suspicion or probable cause—which the decision below precludes—are commonplace and far from "unique." Respondent claims (*ibid.*) that the "unexceptional nature of the legal issue and the unusual nature of the factual scenario are underscored by" the government's citation "to four examples between 1981 and 2009" of appellate decisions on the subject. But any infrequency with which the issue is litigated on appeal simply underscores that the tribal authority asserted here remained virtually unquestioned for decades, until the Ninth Circuit's disruptive decision in this case. And because the main effect of that decision will be to *deter* commonplace law-enforcement activity (see Pet. 20, 23), its impact will be felt much more on the

ground than in the courts. Particularly because the new regime "literally may have life-or-death consequences" for those subject to it, Pet. App. 76a (Collins, J., dissenting from the denial of rehearing en banc), this Court should review it.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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