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PREVIEW—United States v. Cooley: What Will Happen to the Thinnest Blue Line?

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The Supreme Court of the United States will hear oral arguments in this matter on Tuesday, March 23, 2021, telephonically, at 10 a.m. Solicitor General Jeffrey B. Wall will likely argue for the United States. Eric R. Henkel will likely argue for James Cooley.

I. INTRODUCTION

This case presents the narrow issue of whether a tribal police officer has the authority to investigate and detain a non-Indian on a public right-of-way within a reservation for a suspected violation of state or federal law. The lower courts, holding that tribes have no such authority, granted James Cooley's ("Cooley") motion to suppress evidence. While the issue before the Supreme Court of the United States ("Supreme Court") is itself narrow, it has broad implications. Most notably, this issue greatly impacts tribal officers' safety, as well as the safety of all people who live on, and pass through, reservations. The Supreme Court's decision in this case may affect a tribe's ability to protect those within its territory and clarify the contours of tribal sovereignty.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Crow Reservation spans roughly 2.3 million acres in Montana.[1] A segment of United States Highway 212 ("U.S. 212"), a public right-of-way, crosses the Crow Reservation.[2] At approximately one o'clock in the morning on February 26, 2016, Office James Saylor ("Officer Saylor"), of the Crow Tribe Police Department, noticed a truck parked on the westbound shoulder of this segment of U.S. 212 with its engine running.[3] Officer Saylor decided to approach the truck because, in his experience, drivers in this area often need assistance due to unreliable cellular service.[4] Officer Saylor saw both guns and a child in the cab of the truck, and noted that the driver, Cooley, "appeared to be non-Indian."[5] Officer Saylor's suspicions became aroused in the course of his interaction with Cooley due to his "watery, blood-shot eyes," his demeanor, and his seemingly improbable reasoning for being on the road at that time.[6]

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1. Montana v. United States, 450 U.S. 544, 548 (1981).
2. Pet'r's Br. at 12, Jan. 8, 2021, No. 19-1414.
3. Pet'r's Br. at 4.
4. *Id*.
5. *Id*. at 5.
6. *Id*. at 5–6.

What began as a welfare check ripened into a seizure when Officer Saylor, concerned for his and the child's safety, drew his service weapon and held it at his side.[7] Eventually, Officer Saylor placed Cooley and the child in his patrol vehicle.[8] Subsequently, Officer Saylor radioed for backup from both county police and tribal police; while waiting, Officer Saylor returned to the truck to cut the ignition and secure the guns.[9] In doing so, he saw in plain view what appeared to be methamphetamine and related paraphernalia.[10] After Cooley's arrest by the county officer, an additional search of the truck produced more methamphetamine.[11]

Cooley was charged in the United States District Court for the District of Montana with one count of possessing methamphetamine with intent to distribute and one count of possessing a firearm in furtherance of a drug-trafficking crime.[12] He moved to suppress the evidence resulting from his interaction with Officer Saylor, arguing that the seizure violated the Indian Civil Rights Act of 1968 ("ICRA").[13] The District Court granted Cooley's motion to suppress.[14] The United States appealed to the Ninth Circuit Court of Appeals ("Ninth Circuit") where a three-judge panel affirmed the District Court's order and remanded the case.[15] Following the Ninth Circuit's denial of the federal government's petition for a rehearing en banc,[16] the United States successfully petitioned the Supreme Court for certiorari.[17]

III. SUMMARY OF ARGUMENTS

It is the United States' ("Petitioner") position that tribes retain inherent sovereign authority to exercise limited police powers over non-Indians on public rights-of-way within reservations.[18] Petitioner claims that such authority cannot be divested from the tribes unless expressly withdrawn by a statute or treaty, or if its exercise "would be inconsistent with the overriding interests of the National Government."[19] Further, Petitioner states that the framework delineated by the Ninth Circuit decision is legally unsound because it does not recognize such authority.[20]

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7. *Id.* at 6; Resp't's Br. at 2, 10, 22, Feb. 12, 2021, No. 10-1414.
8. Pet'r's Br. at 7.
9. *Id*.
10. *Id*.
11. *Id*. at 9.
12. United States v. Cooley, No. CR 16-42-BLG-SPW, 2017 U.S. Dist. LEXIS 17276, at *1 (D. Mont. Feb 19, 2020).
13. *Id*.; 25 U.S.C. §§ 1301–1304 (2020).
14. *Cooley*, 2017 U.S. Dist. LEXIS 17276 at *13.
15. United States v. Cooley, 919 F.3d 1135, 1148 (9th Cir. 2019).
16. United States v. Cooley, 947 F.3d 1215, 1216 (9th Cir. 2020).
17. United States v. Cooley, No. 19-1414, 2020 U.S. LEXIS 5621 (Nov. 20, 2020); *see also* United States v. Cooley, SCOTUSBLOG (last visited Feb. 19, 2020), https://www.scotusblog.com/case-files/cases/united-states-v-cooley/.
18. Pet'r's Br. at 17–31.
19. *Id*. at 19.
20. *Id*. at 14–15.

Petitioner also highlights that the decision creates serious concerns regarding safety and practicality.[21] Thus, Petitioner maintains that the Crow Tribe's inherent sovereign authority authorized Officer Saylor's encounter with Cooley, and that the encounter was reasonable under 25 U.S.C. § 1302(a)(2), ICRA's Fourth Amendment parallel.[22] Therefore, Petitioner suggests the Ninth Circuit's decision to affirm the suppression of evidence should be vacated.[23]

It is Cooley's ("Respondent") position that inherent tribal sovereign authority is restricted such that tribes cannot exercise limited police powers over non-Indians on public rights-of-way within reservations.[24] Respondent claims, "[w]here 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.'"[25] Further, Respondent states that any practical concerns are matters for Congress.[26] Thus, because a tribal police officer investigated and detained Cooley, a non-Indian, for a possible violation of state or federal law, Respondent maintains that the encounter exceeded the Crow Tribe's self-government authority.[27] Therefore, Respondent asserts Officer Saylor violated ICRA's Fourth Amendment parallel, and suggests the Ninth Circuit's decision to affirm the suppression of evidence should be upheld.[28]

A. Petitioner's Arguments

1. Tribes Can Investigate and Detain Non-Indians on Public Rights-of-Ways Within Reservations

Petitioner argues that tribes possess inherent sovereign authority to exercise limited police power over non-Indians within reservations, including on public rights-of-way. Petitioner asserts three claims in support of this argument: first, the tribes' status as domestic dependent sovereigns does not divest this authority; second, Supreme Court precedents preserve this authority; and third, historical practice confirms this authority.

First, Petitioner asserts that a "fundamental attribute" of sovereignty is the power to protect the people and property within a sovereign's territory.[29] That power, Petitioner states, includes a

21. *Id*. at 31–47.
22. *Id*. at 14–15, 31.
23. *Id*. at 16, 58.
24. Resp't's Br. at 13–25.
25. *Id*. at 13, 28 (citing Nevada v. Hicks, 533 U.S. 353, 359 (2001) (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).
26. Resp't's Br. at 25–30.
27. *Id*. at 36–39.
28. *Id*. at 13, 38, 40.
29. Pet'r's Br. at 16, 18 (referencing Manigault v. Springs, 199 U.S. 473, 480 (1905)).

sovereign's undisputed authority to reasonably detain and investigate suspects, including suspects who may have violated laws of another sovereign.[30] Further, because tribes were once independent sovereigns,[31] Petitioner states that such authority cannot be divested from tribes unless it is "'withdrawn by treaty or statute, or by implication as a result of their dependent status,'"[32] neither of which has occurred.[33]

Accordingly, Petitioner claims that the tribes' status as dependent sovereigns does not "implicitly" divest the limited authority to investigate and detain.[34] Instead, relying on *Colville*, Petitioner asserts divestiture only occurs when "'the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government.'"[35] Petitioner asserts that a tribes' limited authority to investigate and detain non-Indians within their territory "for suspected federal—and state—law violations *furthers* 'the overriding interests of the National Government,'" and thus is retained,[36] so long as such authority is exercised reasonably under ICRA.[37]

Further, Petitioner asserts that certain federal statutes recognize, rather than withdraw, this authority.[38] Petitioner points to 18 U.S.C. § 1151(a), which defines Indian country as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . including rights-of-way running through the reservation."[39] Petitioner suggests this definition demonstrates Congress's "specific contemplation" and recognition of tribal authority to exercise limited police powers over non-Indians on public rights-of-way within reservations.[40]

Second, Petitioner asserts that Supreme Court precedents preserve the tribes' inherent sovereign authority to reasonably investigate and detain non-Indians within reservations, including on public rights-of-way.[41] Petitioner acknowledges that non-Indians are generally not subject

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30. Pet'r's Br. at 18 (citing Arizona v. United States, 567 U.S. 387, 447 (2012)); United States v. Di Re, 332 U.S. 581, 589 (1948)); Miller v. United States, 357 U.S. 301, 305 (1958); United States v. Smith, 899 F.2d 116, 118 (1st Cir. 1990).

31. Pet'r's Br. at 17 (citing United States v. Wheeler, 435 U.S. 313, 322–23 (1978)); *see also* United States v. Bryant, 136 S. Ct. 1954, 1962 (Indian Tribes as "separate sovereigns pre-existing the Constitution"); Worcester v. Georgia, 21 U.S. 515, 559 (describing Indian Tribes as "distinct, independent political communities").

32. Pet'r's Br. at 19 (citing *Wheeler*, 435 U.S. at 323).

33. Pet'r's Br. at 17, 19.

34. *Id.* at 17–22 (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980)) [hereinafter *Colville*].

35. Pet'r's Br. at 19 (quoting *Colville*, 447 U.S. at 153).

36. *Id.*; *see also* United States v. Jorn, 400 U.S. 470, 479 (1971).

37. Pet'r's Br. at 21 (ICRA secures the United States' interest in ensuring tribal officers investigate and detain non-Indians reasonably via its Fourth Amendment parallel) (emphasis added by Petitioner).

38. *Id.* at 20–21; *see also* 18 U.S.C. §§ 1151–1152; United States v. Lara, 541 U.S. 193, 210 (2004).

39. 18 U.S.C. § 1151(a) (2020).

40. Pet'r's Br. at 21.

41. *Id.* at 22–26.

to prosecution under tribal law.[42] However, Petitioner asserts that the Supreme Court has been "careful to exempt" tribes' limited police powers from the restrictions placed on the tribes' adjudicatory and jurisdictional authority because, whereas the exercise of criminal jurisdiction over a suspect subjects that person to the adjudicatory power of a tribe, reasonable investigation and detainment do not.[43] To support the assertion that a tribes' limited police powers are divorced from a tribes' restricted adjudicatory and jurisdictional authority, Petitioner points to *Duro v. Reina*, in which the Supreme Court stated, "'[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.'"[44]

Also, Petitioner asserts that the Supreme Court has "explicitly recognized" the tribes' inherent sovereign authority to investigate and detain non-Indians within a reservation.[45] Petitioner points to *Strate v. A-1 Contractors*, where the Supreme Court held that a tribe could not adjudicate a civil tort dispute arising out of an accident between two non-Indians on a public right-of-way within a reservation.[46] However, Petitioner asserts that the Supreme Court exempted the tribes' limited police powers from this decision when it stated, "'[w]e do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.'"[47] The Supreme Court accompanied that statement with a citation to *State v. Schmuck*, in which the Supreme Court of Washington held that tribal officers had "'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.'"[48] Petitioner asserts the Supreme Court's "approving" citation to *Schmuck*, combined with its declination to question tribes' police powers in *Strate*, demonstrates its recognition that tribes retain inherent sovereign authority to reasonably investigate and detain non-Indians within reservations.[49]

Further, Petitioner asserts that under *Montana v. United States*, the Supreme Court recognized an exception where "'a tribe may exercise "civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the

42. *Id.* at 3 (citing United States v. Bryant, 136 S. Ct. 1954, 1960 n.4 (2016)); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

43. Pet'r's Br. at 22 (citing Duro v. Reina, 495 U.S. 676, 688 (1990)).

44. Pet'r's Br. at 22 (citing *Duro*, 495 U.S. at 697).

45. Pet'r's Br. at 22–23 (relying on Strate v. A-1 Contractors, 520 U.S. 438 (1997)).

46. Pet'r's Br. at 23.

47. *Id.* (quoting *Strate*, 520 U.S. at 456 n.11); *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651 (2001).

48. Pet'r's Br. at 23–24 (quoting State v. Schmuck, 850 P.2d 1332, 1342 (1993)).

49. Pet'r's Br. at 23.

tribe."""[50] Petitioner claims the Supreme Court's interpretation of this exception "reflects a general principle" that tribes have the ability to protect against "imminent danger," which may include investigating and detaining non-Indians suspected of violating state or federal law.[51]

Finally, Petitioner asserts that historical practice confirms the tribes' inherent sovereign authority to reasonably investigate and detain non-Indians within reservations, including on public rights-of-way.[52] Petitioner points to the fact that various treaties required tribes to "deliver up" non-Indian suspects from reservations to United States authorities to be prosecuted.[53] Similarly, Petitioner points to the "bad men" provisions found in some treaties, including the Treaty Between the United States of America and the Crow Tribe of Indians ("Crow Treaty"),[54] and asserts that the "bad men among the whites" language refers to non-Indians.[55] Petitioner asserts that in order to meet these requirements, it is necessary for tribes to investigate and detain non-Indian suspects.[56] Further, Petitioner asserts that because such treaties did not expressly grant tribes the power to do so, tribes derived the power from their retained inherent sovereignty.[57]

2. The Ninth Circuit's Decision Should Be Vacated

Petitioner asserts that the Ninth Circuit's decision delineated a novel framework to assess tribal officers' interactions with non-Indian suspects on public rights-of-ways within reservations.[58] Under this framework, tribal officers may only stop vehicles suspected of violating tribal laws, inquire about the driver's Indian status (typically one

50. *Id.* at 25 (citing Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 329–30 (2008) (quoting Montana v. United States, 450 U.S., 544, 566 (1981)).

51. Pet'r's Br. at 25–26 (quoting *Montana*, 450 U.S. at 566) (stating drunk driving and the transport of contraband within reservations seriously threatens "the health or welfare of the tribe").

52. Pet'r's Br. at 26–31.

53. *Id.* at 26; *see also* Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 7–8 (2004); Eileen Luna-Firebaugh, *Tribal Policing: Asserting Sovereignty*, SEEKING JUSTICE 17 (2007).

54. Treaty Between the United States of America and the Crow Tribe of Indians, May 7, 1868, 15 Stat. 649.

55. Pet'r's Br. at 29; *see also* Ex parte Crow Dog, 109 U.S. 556, 568 (1883) (interpreting the phrase "bad men among the whites" from the Crow Treaty to mean "whites and their allies").

56. Pet'r's Br. at 29.

57. *Id.* at 26–27 (citing United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978)) (quoting United States v. Winans, 198 U.S. 371, 381 (1905)) (referring to treaties between the United States and Indian Tribes as "not a grant of rights to the Indians, but a grant of rights from them"); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

58. Pet'r's Br. at 15, 33.

question),[59] and may only detain a non-Indian driver if an "'apparent' or 'obvious'" state or federal crime was witnessed during such an encounter.[60] Petitioner argues that because the Ninth Circuit failed to acknowledge tribes' inherent sovereign authority to exercise limited police powers over non-Indian suspects within reservations, it delineated this novel framework instead of evaluating the facts of this case under the correct Fourth Amendment standard, made applicable to the tribes via ICRA's Fourth Amendment parallel.[61] Petitioner supports this argument with three assertions: first, the Ninth Circuit's framework has no legal basis; second, the framework is practically unworkable; and third, it creates safety concerns.[62]

First, Petitioner asserts the Ninth Circuit's framework has no legal basis.[63] Instead, Petitioner states that the Ninth Circuit derived key aspects of the framework, specifically the "'apparent' or 'obvious'" standard, from dictum in a prior circuit decision.[64] Further, Petitioner claims the framework rests on the incorrect premise that tribes derive their police authority from only two sources: the ability to enforce criminal laws against Indians within a reservation and the ability to exclude non-Indians from a reservation.[65] Petitioner claims this conclusion is incorrect based on the preceding argument that tribes retain inherent authority to exercise limited police powers over non-Indians.[66]

Additionally, Petitioner asserts, because the Crow Tribe possesses the inherent sovereign authority to investigate and detain non-Indians within the Crow Reservation, such authority is subject to congressional control and is not ripe for "judicial lawmaking," as with other inherent powers retained by tribes.[67] Thus, Petitioner argues that tribal officers should operate under the standard set forth by Congress in ICRA as opposed to a framework constructed by the Ninth Circuit.[68] Petitioner states courts have interpreted ICRA § 1302(a)(2) "in pari materia" with the Fourth Amendment.[69] Although tribes' authority to arrest non-Indian

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59. United States v. Cooley, 919 F.3d 1135, 1142 (9th Cir. 2019) (citing United States v. Patch, 114 F.3d 131, 134 (9th Cir. 1997)).

60. *Cooley*, 919 F.3d at 1142 (quoting Bressi v. Ford, 575 F.3d 891, 896–97 (9th Cir. 2009)).

61. Pet'r's Br. at 31 (referencing 25 U.S.C. § 1302(a)(2)).

62. Pet'r's Br. at 31, 35.

63. *Id*. at 31–35.

64. *Id*. at 33 (quoting *Bressi*, 575 F.3d at 895–97).

65. Pet'r's Br. at 31–32 (citing United States v. Cooley, 919 F.3d 1135, 1141–42 (9th Cir. 2019)).

66. Pet'r's Br. at 32 (citing Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492, U.S. 408, 425 (1989)).

67. Pet'r's Br. at 33 (citing United States v. Wheeler, 435 U.S. 313, 327 (1978)).

68. Pet'r's Br. at 33–34 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 n.6 (1978)).

69. Pet'r's Br. at 34; *see also* United States v. Lester, 647 F.2d 869, 872 (8th Cir. 1981); State v. Railey, 532 P.2d 205, 206 (N.M. Ct. App. 1975); State v. Madsen, 760 N.W.2d 370, 376 (S.D. 2009); Clark v. Fort Peck Tribes, 15 AM. TRIBAL LAW 203, 205 (Fort Peck Ct. App. 2018).

suspects allows detainment only for the purpose of transferring custody to state or federal law enforcement, detainment of a non-Indian based on reasonable suspicion or probable cause remains reasonable so long as the conditions and length are not excessive.[70] Thus, Petitioner argues that the Ninth Circuit's requirement that a tribal officer must witness an "'apparent' or 'obvious'" violation of state or federal law before detaining a non-Indian is a standard higher than what the Fourth Amendment and ICRA require, and is therefore incorrect.[71]

Second, Petitioner asserts that the Ninth Circuit's framework is practically unworkable.[72] Petitioner states that the framework inappropriately precludes several types of investigatory stops because it exempts any suspect who violates a law other than tribal law, as well as any suspects known to tribal officers to be non-Indians.[73] Petitioner asserts that the result is public rights-of-way, as well as non-Indian land, within reservations become a "safe haven" for suspects.[74] To compound this problem, Petitioner points to the fact that many reservations have alienated sizeable acreage to non-Indians, creating a checkerboard effect such that tribal officers may be unsure of who owns the land they are on at any given time.[75] Thus, Petitioner predicts that the framework will create a chilling effect on tribal policing.[76]

Next, Petitioner asserts the framework inappropriately restricts both investigatory stops and detentions.[77] Petitioner states that by restricting a tribal officer's initial authority during an encounter to determine a suspect's Indian status through one question, the framework requires a tribal officer to let a suspect go if they are non-Indian or their status is unascertainable.[78] Petitioner emphasizes that this provides motivation to lie about one's status.[79] Further, Petitioner asserts that the heightened standard of "'apparent' or 'obvious'" restricts investigation

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70. Pet'r's Br. at 34–35 (citing *Duro*, 496 U.S. at 697); *see also* Heien v. North Carolina, 574 U.S. 54, 60 (2014); Terry v. Ohio, 392 U.S. 1, 21–22 (1968); Beck v. Ohio, 379 U.S. 89, 91 (1964)); *see also* 25 U.S.C. § 1302(a)(2).

71. Pet'r's Br. at 34–35 (quoting Bressi v. Ford, 575 F.3d 891, 896–897 (9th Cir. 2009)); *see also* United States v. Cooley, 947 F.3d 1215, 1221 (9th Cir. 2020).

72. Pet'r's Br. at 35.

73. *Id*. at 36.

74. *Id*. at 37 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997) ("alienated, non-Indian land" is land within a reservation owned in fee by non-Indians, and such alienated lands are jurisdictionally equivalent to public rights-of-way)).

75. Pet'r's Br.at 38; *see also* Montana v. United States, 450 U.S. 544, 548 (1981) (approximately 30% of the 2.3 million acres of the Crow Reservation is owned in fee by non-Indians).

76. Pet'r's Br. at 39.

77. *Id*.

78. *Id*.

79. *Id*. at 40 (citing United States v. Cooley, 947 F.3d 1215, 1230 (9th Cir. 2020) (Collins, J., dissenting from the denial of rehearing en banc)).

and detention in situations that would easily comport with Fourth Amendment and ICRA standards.[80]

Finally, Petitioner asserts that several safety concerns are borne out of the framework.[81] Petitioner points to the fact that reservations have high crime rates, and the framework "threatens to make the situation worse" by curtailing tribal officers' limited police powers over non-Indians.[82] Petitioner asserts this curtailment creates a law enforcement vacuum that other sovereigns "cannot be expected to fill."[83] Petitioner states that cross-deputization is not an appropriate remedy to any of the preceding issues, as Respondent suggests.[84] Thus, Petitioner claims, because of the restrictions created by the framework, as well as its potential chilling effect, the safety of tribal officers, reservation residents, and passers through alike are placed in peril.[85]

B. Respondent's Arguments

1. Tribes Cannot Investigate Nor Detain Non-Indians on Public Rights-of-Way Within Reservations

Respondent argues that tribes do not possess inherent sovereign authority to investigate and detain non-Indians on public rights-of-way within reservations.[86] Respondent makes three assertions in support of this argument: first, tribes are divested of inherent sovereign authority to exercise police power over non-Indians; second, Supreme Court precedents support this restriction; and third, the "bad men" provision in the Crow Treaty does not recognize nor create such authority.[87]

First, Respondent suggests that incorporation divested the tribes' of their inherent sovereign authority to exercise police power over non-Indians.[88] Respondent claims Petitioner's assertion that a sovereign has "undisputed" authority to reasonably detain and investigate suspects who may have violated laws of another sovereign is incorrect.[89] Respondent suggests Petitioner's argument overlooks the "fundamental principle" of Indian law that tribes are not "full territorial sovereigns."[90] Thus,

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80. Pet'r's Br. at 41–42 (referencing 25 U.S.C. § 1302(a)).
81. Pet'r's Br. at 44.
82. *Id*.
83. *Id*. at 45.
84. *Id*. at 47; *see also* Res'p's Br. at 28–30; *Cooley*, 947 F.3d at 1237 (Collins, J., dissenting from the denial of rehearing en banc).
85. Pet'r's Br. at 42–43.
86. Resp't's Br. at 13–21.
87. *Id*. at 13–25, 30–36.
88. *Id*. at 10 (citing Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008)); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).
89. Resp't's Br. at 17–18 (also asserting this matter is disputed in the lower courts and that case law relied on by the Petitioner is unpersuasive).
90. *Id*. (citing Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008)).

Respondent asserts that because tribes' sovereignty is limited, they have no retained authority over non-Indians within reservations, particularly on land which is not owned by a tribe, such as a public right-of-way.[91]

Additionally, although investigating and detaining non-Indian suspects may "further the interests of the United States," Respondent claims tribes do not retain such police power.[92] Respondent argues Petitioner's reliance on *Colville* to claim that tribes retain inherent sovereignty absent divestiture is "self-defeating."[93] To support this argument, Respondent states that an inherent police power exercised by tribes to enforce federal law "contravenes the founders' rejection of a federal police power."[94] Also, Respondent asserts that *Colville* is factually distinct from the case at bar.[95]

Next, Respondent addresses the dissent in *Bourland v. South Dakota*,[96] which, citing *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[.]'"[97] Respondent underscores that the majority in *Bourland* stated, under *Montana*, "'tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' and is therefore not inherent.'"[98] Finally, Respondent claims that neither ICRA nor the definition of Indian country under 18 U.S.C. § 1151 is such a congressional delegation.[99]

Second, Respondent argues that Supreme Court precedents restrict, rather than preserve, the tribes' inherent sovereign authority to investigate and detain non-Indians.[100] Respondent asserts that under *Oliphant*, the Supreme Court restricted the tribes' inherent sovereign authority to matters of self-government, "'absent affirmative delegation of such power by Congress,'" because of the United States' overriding interest in protecting their citizens from "'unwarranted intrusions on their

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91. Resp't's Br. at 17–18.

92. *Id*. at 11; Pet'r's Br. at 13.

93. Resp't's Br. at 20 (citing Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153–54 (1980)).

94. Resp't's Br. at 19 (citing United States v. Morrison, 529 U.S. 698, 618–19 (2000)); *see also* United States v. Lopez, 515 U.S. 549, 566 (1995).

95. Resp't's Br. at 19 (citing *Colville*, 447 U.S. at 144) (explaining *Colville* concerned tribal taxation authority over non-Indians on tribal land engaging in commerce with the tribe, while this case concerns criminal jurisdiction over a non-Indian on a public right-of-way).

96. Resp't's Br. at 20 (citing South Dakota v. Bourland, 508 U.S. 679, 695 n.15 (1993)).

97. Resp't's Br. at 20 (quoting *Bourland*, 508 U.S. at 699) (citing *Colville*, 447 U.S. at 153–154)).

98. Resp't's Br. at 20 (citing *Bourland*, 508 U.S. at 695) (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).

99. Resp't's Br. at 23–24 (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 n.5 (2001)).

100. Resp't's Br. at 13–18.

personal liberty.'"[101] This restriction is further evidenced by *Wheeler*, which Respondent claims reiterates the divestiture of the tribes' inherent sovereign authority over interactions between Indians and non-Indians.[102] Finally, Respondent asserts that under *Montana*, the Supreme Court, applying *Oliphant* and *Wheeler*, held a tribes' retained "'powers of self-government, including the power to prescribe and enforce internal criminal laws' did not" apply to non-Indians.[103] Thus, Respondent argues "'the inherent authority of the tribes [regarding criminal law] has been preserved'" only over members, not non-Indians.[104]

Relatedly, Respondent argues that the tribes' police power over non-Indians cannot be divorced from the tribes' adjudicative or legislative power.[105] Respondent points to the Supreme Court's statement in *Duro* that the tribes' "'retained sovereignty does not extend to non-Indians in the area of criminal enforcement.'"[106] Respondent also points to the Supreme Court's statement in *Strate*: "'[a]s to non-members, we hold a tribe's [civil] adjudicative jurisdiction does not exceed its legislative jurisdiction.'"[107] Further, Respondent asserts that, under *Strate*, tribes have no power to exclude non-Indians from non-Indian land, which includes public rights-of-way.[108] Thus, Respondent claims that *Strate* not only does not recognize the tribes' inherent sovereign authority to exercise police powers over non-Indians as Petitioner suggests, but that it further restricts such authority.[109] Additionally, Respondent asserts that the Supreme Court's declination to question the tribes' authority to police rights-of-way within reservations is unpersuasive dictum.[110] Further, Respondent suggests the Supreme Court's citation to *Schmuck* does not amount to a recognition of the tribes' inherent authority to exercise police powers over non-Indians; rather, Respondent suggests *Schmuck* simply supports the notion that tribes' inherent authority is based only on enforcing tribal law.[111]

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101. *Id*. at 11 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)); *see also* Duro v. Reina, 495 U.S. 676, 688 (1990).

102. Resp't's Br. at 16 (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)).

103. Resp't's Br. (quoting *Montana*, 450 U.S. 544, 547).

104. Resp't's Br. (quoting Nevada v. Hicks, 533 U.S. 353, 378) (Souter, J., concurring)).

105. Resp't's Br. at 21–22 (citing United States v. Lara, 541 U.S. 193, 227 n.1 (2004)).

106. Resp't's Br. at 21–22 (citing United States v. Mazurie, 419 U.S. 544, 557 (1975).

107. Resp't's Br. at 21 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997)).

108. Resp't's Br. at 15 (citing *Strate*, 520 U.S. at 438, 454).

109. Resp't's Br. at 22 (citing *Strate*, 520 U.S. at 465); *see also* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327–28 (2008).

110. Resp't's Br. at 23 (citing *Strate*, 520 U.S. at 456 n.11).

111. Resp't's Br. (citing State v. Schmuck, 850 P.2d 1332, 1335 (Wash. 1993)).

Next, Respondent asserts that Petitioner "inappropriately expand[s]" the *Montana* exception.[112] Respondent suggests that the exception triggers only when conduct by a non-Indian on tribal land threatens the tribe; "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."[113] Respondent asserts that "Cooley's presence in a vehicle pulled over on a right-of-way" does not trigger this exception.[114]

Third, Respondent argues that the "bad men" provision in the Crow Treaty does not recognize, nor create in the Crow Tribe, a limited police power over non-Indians. First, Respondent suggests the Supreme Court should not consider this argument as Petitioner failed to raise it in the lower courts.[115] Alternatively, Respondent argues that Petitioner's interpretation of the provision is too broad, and instead, the provision creates a narrow private right of action for damages to individual Indians.[116]

2. Congress Is the Appropriate Body to Remedy Practical Concerns

Respondent argues that Congress is the appropriate body to remedy concerns on reservations related to practicality or safety, such as jurisdictional voids in law enforcement.[117] In support of this argument, Respondent asserts that the Supreme 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.'"[118] Respondent points to *Oliphant* and *Duro* as "impenetrable" stare decisis.[119]

Next, Respondent asserts that Congress addressed jurisdictional voids when it gave the executive branch the authority to cross-deputize tribal officers, thus "empower[ing] tribes to investigate crime and enforce federal law in Indian country."[120] In fact, Respondent states that cross-deputization appropriately addresses a remedy for the facts presented here.

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112. Resp't's Br. at 24.

113. *Id*. at 25 (citing Montana v. United States, 450 U.S. 544, 566 (1981) (quoting *Plains Commerce Bank*, 554 U.S. at 341)).

114. Resp't's Br. at 25.

115. *Id*. at 31 (citing Singleton v. Wulff, 428 U.S. 106, 120 (1976) (stating "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below").

116. Resp't's Br. at 31–34.

117. *Id*. at 25–30.

118. *Id*. at 27 (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 803 (2014)).

119. Resp't's Br. at 26–27 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978)) (stating jurisdictional voids "have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and punish non-Indians…these are considerations for Congress to weigh[.]")); *see also* Duro v. Reina, 495 U.S. 676, 698 (1990).

120. Resp't's Br. at 28–29; *see* 25 U.S.C. §§ 2803–2805; 25 C.F.R. § 12.21; 25 U.S.C. § 878(a)(3)).

Thus, Respondent claims a judicial finding of inherent authority is unjustified just because of "the reality that relevant officials did not avail themselves of cross-deputization."[121]

IV. ANALYSIS

The issue presented in this case is whether Officer Saylor exceeded the bounds of the Crow Tribes' authority when he seized Cooley and detained him until he transferred custody to state law enforcement.[122] Thus, the decision requires the Supreme Court to squarely address the bounds of tribal criminal jurisdiction over non-Indians within reservations. There are several topics that may inform the Supreme Court's decision, including, but not limited to, Congress's role, concerns regarding practicality and safety, and the Crow Treaty itself.

A. Congress's Role

The Supreme Court will likely address the disagreement between the parties regarding divestiture and congressional intent. Petitioner argues that only Congress can regulate or divest the tribes of inherent sovereign authority, such as the limited power to investigate and detain.[123] Accordingly, Petitioner asserts that Congress has acted via ICRA, and thus, tribal police should operate under ICRA's reasonable standard.[124] However, Respondent argues that incorporation divested the tribes of such authority, and that "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' and is therefore *not* inherent."[125] Further, Respondent asserts that Congress did not intend to delegate such authority to the tribes via ICRA.[126]

In addressing this disagreement, the Supreme Court will likely look to the Members of Congress Amicus Brief. There, amici curiae assert that tribal sovereignty may only be divested by express congressional intent.[127] Further, they assert congressional intent clearly allows tribes to investigate and detain non-Indian suspects in Indian country because of ICRA's enactment and the inclusion of a Fourth Amendment parallel.[128] Thus, this brief suggests that the Supreme Court should vacate the Ninth Circuit's decision, which bolsters Petitioner's position.[129]

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121. Resp't's Br. at 28.
122. United States v. Cooley, 919 F.3d 1135, 1139–41 (9th Cir. 2019).
123. Pet'r's Br. at 13, 17–18.
124. *Id*. at 33–34.
125. Resp't's Br. at 20 (quoting South Dakota v. Bouralnd, 508 U.S. 679, 695 n.15 (1993) (quoting Montana v. United States, 450 U.S. 544, 564 (1981) (emphasis in original)).
126. Resp't's Br. at 36–37.
127. Members of Cong. Amicus Br. at 2–3, 4–7, Jan. 15, 2021, No 19-1414.
128. *Id*. at 3, 8–12; *see also* 25 U.S.C. § 1302(2).
129. Members of Cong. Amicus Br. at 2.

B. Concerns About Practicality and Safety

The Supreme Court, in reaching its decision, will also likely address concerns regarding practicality and safety. Respondent argues that Congress has already appropriately acted to assuage concerns by allowing for cross-deputization of tribal officers.[130] However, Petitioner asserts that the Ninth Circuit's decision threatens the safety of tribal officers, as well as anyone within a reservation, and that cross-deputization is not an appropriate remedy.[131] Further, Petitioner highlights that the Ninth Circuit's decision precludes tribal officers from making investigatory stops, which are constitutional under the Fourth Amendment.[132] In the Members of Congress Amicus Brief, amici curiae assert that Congress has an interest, and is currently engaged in efforts, to enhance public safety in Indian country. This brief suggests that tribal officers' ability to conduct investigatory stops of non-Indians is essential to furthering this effort.[133]

Further, while addressing the issue of public safety, the Supreme Court may refer to the National Indigenous Women's Resource Center ("NIWRC") Amicus Brief, which asserts that murdered and missing indigenous women and girls is a crisis that cannot be addressed properly unless tribal officers can perform investigatory stops of non-Indians within reservations.[134] The NIWRC amici curiae point out that "Native people experience some of the highest rates of violent victimization in the United States."[135] Further, non-Indians commit a majority of these crimes, and many reservations contain vast acreage of non-Indian fee lands as well as non-Indian residents.[136] Thus, the NIWRC brief supports Petitioner's

130. Resp't's Br. at 12, 25–28.

131. Pet'r's Br. at 13, 44–48; *see also* National Congress of American Indians, Tribal Nations and Inter-Tribal Organizations ("NCAI") Amicus Br. at 10, Jan. 15, 2021, No. 19–1414 (stating the Ninth Circuit's ruling "severely impedes" tribes' authority to provide for public safety in Indian country).

132. Pet'r's Br. at 15–16 (stating that under the Ninth Circuit's standard, "[a] tribal officer would be precluded from investigating further if, during an interaction with a non-Indian motorist, he smelled alcohol on the motorist's breath or a drug-detecting dog alerted, the motorist matched the description of the subject of a widely broadcast law-enforcement lookout bulletin, or even (as in this case) the motorist's actions appeared to threaten the officer's own safety"); see also NCAI Br. at 11–14 (stating that the Ninth Circuit's ruling handicaps tribal officers ability to protect themselves and others by contradicting Terry v. Ohio, 392 U.S. 1 (1968)).

133. Members of Cong. Br. at 3, 12–27; *see* Violence Against Women Act ("VAWA") 42 U.S.C. §§ 13925–14045d (2020); Tribal Law and Order Act ("TLOA") Pub. L. No. 111–211, 124 Stat. 2258 (codified in scattered sections of 25 and 42 U.S.C. (2020).

134. NIWRC Br. at 21–27, Jan. 15, 2021, No. 19-1414.

135. *Id*. at 14 (citing André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey*, Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice, 44 (May 2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf).

136. NIWRC Br. at 8, 14–15, 16–20.

argument that cross-deputization is not enough to remedy these principal concerns.

C. The Crow Treaty

Finally, the Supreme Court may address the Crow Treaty. Its relevant recent precedent, *McGirt v. Oklahoma* and *Herrera v. Wyoming*, shows it is both open to treaty interpretation and interested in upholding the United States' treaty promises to the tribes.[137] Still, the Supreme Court may not reach the treaty issue because, as Respondent underscores, the lower courts did not consider it.[138] Generally, a federal appellate court will not consider such an issue.[139] However, the Supreme Court's recent emphasis on upholding treaty promises to the tribes may entice it to forego the general rule and address the issue. But, unlike the case at bar, both *McGirt* and *Herrera* raised relevant treaty issues in the respective lower courts.[140]

If the Supreme Court does address the Crow Treaty, its decision will likely turn on its interpretation of the "bad men" provision. Petitioner asserts that treaties, along with the historical interpretations of "bad men," confirm tribal authority to investigate and detain non-Indians within reservations.[141] Respondent disagrees with Petitioner's interpretation.[142] The Supreme Court may look to the National Congress of American Indians, Tribal Nations and Inter-Tribal Organizations ("NCAI") Brief for guidance on interpreting the Crow Treaty. NCAI amici curiae conclude, "Respondent could qualify as a 'bad man' under the [Treaty], but only 'upon proof made' would he be subject to arrest and punishment."[143] Thus, the NCAI Brief supports the assertion that the Crow Treaty, based on a plain interpretation of its text, reserves the Crow Tribe's right to investigative authority over non-Indians.[144]

Also, it is important to note that both *McGirt* and *Herrera* are split 5–4 decisions with the narrow majority consisting of Justices Ginsburg, Breyer, Sotomayor, Kagan and Gorsuch with Justices Roberts, Thomas, Alito, and Kavanaugh dissenting. Further, the Supreme Court's current makeup is altered due to the passing of Justice Ginsburg and the addition of Justice Barrett. Because the establishing precedents were comprised of narrow majorities, and because Justice Ginsburg is no longer on the bench, it is likely that the case at bar will result in another split decision. But,

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137. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (stating that the Supreme Court should "hold the government to its word"); *see also* Herrera v. Wyoming, 139 S. Ct. 1686, 1696 (2019) (stating that Congress "'must clearly express any intent to abrogate Indian treaty rights") (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999)).

138. Resp't's Br. at 31.

139. Singleton v. Wulff, 428 U.S. 106, 120 (1976).

140. *See McGirt*, 140 S. Ct. 2452; *Herrera*, 139 S. Ct. 1686.

141. Pet'r's Br. at 26.

142. Resp't's Br. at 30.

143. NCAI Br. at 33.

144. *Id.* at 30–34.

overall, if the Supreme Court addresses the Crow Treaty, it will likely follow its recent trend of upholding treaty promises to the tribes, which will probably result in a decision that is favorable to Petitioner.

V. CONCLUSION

Ultimately, the Supreme Court's decision will inform whether tribal police operate under the familiar standard of reasonableness set forth by ICRA and the Fourth Amendment, or under the heightened "apparent" or "obvious" standard delineated by the Ninth Circuit. Whichever side of this issue the Court comes down on, its decision will directly affect the safety of all those within reservations. Additionally, this decision may help clarify the contours of tribal sovereignty.