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 THE CAYUGA NATION, THE CHEROKEE NATION, THE MILLE LACS BAND OF OJIBWE, THE TUNICA-BILOXI TRIBE OF LOUISIANA, AND THE CALIFORNIA TRIBAL POLICE CHIEFS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the lower courts erred in suppressing evidence on the theory that a police officer of an Indian tribe lacked authority to temporarily detain and search respondent, a non-Indian, on a public right-of-way within a reservation based on a potential violation of state or federal law.

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INTEREST OF *AMICI CURIAE*[1]

The Cayuga Nation is a federally recognized Indian nation, with a reservation in upstate New York recognized by the 1794 Treaty of Canandaigua. The Nation operates a police force, consisting of more than 20 highly trained officers that provides law enforcement services within the Nation's reservation.

The Cherokee Nation is the largest federally recognized Indian tribe in the United States, with more than 385,000 enrolled citizens. The Nation operates the Cherokee Nation Marshal Service, which is a certified law enforcement agency with jurisdiction throughout the Cherokee Nation reservation and an annual budget of more than $10 million. The Cherokee Nation encompasses nearly 7,000 square miles across 14 counties in northeastern Oklahoma. More than 98% of that land is non-Indian land. The Marshal Service averages about 2,500 non-Indian contacts a year.

The Mille Lacs Band of Ojibwe is a federally recognized Indian tribe with more than 4,300 enrolled citizens and a reservation located in central Minnesota. The Mille Lacs Band of Ojibwe has been recognized as a sovereign Nation by the United States in the Treaty of

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

1837 and the Treaty of 1855. The Mille Lacs Band of Ojibwe established a tribal police department in 1984 that employs over 20 full-time police officers and has an annual budget of more than $3 million.

The Tunica-Biloxi Tribe of Louisiana is a federally recognized Indian tribe with over 1,200 enrolled tribal members and a reservation located south of Marksville, Louisiana. The Tunica-Biloxi Tribe operates and maintains a tribal police department that provides professional police services to the public.

The California Tribal Police Chiefs Association (CTPCA) is an unincorporated association of chiefs from tribal police and public safety departments of approximately 20 federally recognized Indian tribes located throughout the state of California. The CTPCA was organized in 2008 with the goal of bringing together California tribal police chiefs to address pressing issues such as lack of funding, jurisdictional challenges, and best practices for keeping their respective tribal communities safe.

Amici have deep experience in tribal law enforcement. The tribal police departments that *Amici* have established and serve embody the sovereign right of Indian tribes to govern themselves and their ancestral lands. These police departments employ tribal police officers to serve and protect their tribal communities—both Indian and non-Indian. Similar to federal, state, and local police officers, tribal police officers are responsible for enforcing the law in a fair and impartial manner, protecting their communities from crime, and responding to emergencies. In fulfilling these duties, tribal officers face the same risks and dangers as any

other police officers. For these reasons, *Amici* have a strong interest in defending the authority of their tribal law enforcement to conduct stops under *Terry v. Ohio*, 392 U.S. 1 (1968), of anyone, whether Indian or not, who is reasonably suspected of being involved in criminal activity. *Amici* also have a strong interest in maintaining law and order in Indian country, particularly when a court decision—like the decision below—threatens to undermine the authority of tribal law enforcement, condemn tribal law enforcement to a second-class status, and effectively force tribes to rely on state and local law enforcement to keep the peace on their reservations. Each *Amicus* thus has a strong interest in ensuring the judgment below is reversed.

SUMMARY OF ARGUMENT

I.A. The tribal police departments that *Amici* have established depend on the rule this Court recognized, decades ago, in *Terry v. Ohio*, 392 U.S. 1 (1968)—that law enforcement officers may conduct "brief investigative stops" when they have "reasonable suspicion" that the person stopped has committed or is committing a criminal offense. *Navarette v. California*, 572 U.S. 393, 396-97 (2014). That rule serves two critical purposes. First, *Terry* stops serve the "legitimate interest in 'crime prevention and detection.'" *Michigan v. Long*, 463 U.S. 1032, 1046-47 (1983). Simply put, police are charged with preserving law and order—and police thus have an important interest in apprehending those who have committed crimes and stopping those who are about to commit crimes. Where officers have reasonable suspicion of criminal activity, this interest justifies the limited intrusion on personal liberty *Terry* stops entail.

Second, *Terry* recognizes that policing is dangerous work. For police officers, the "most common cause of workplace fatalities . . . is direct violence from other people."[2] *Terry* acknowledges that brief investigative stops are justified, despite their intrusion on personal liberty, because "we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where

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[2] Michael B. Sauter & Charles Stockdale, *The Most Dangerous Jobs in the US Include Electricians, Firefighters, and Police Officers*, USA Today (2019), https://www.usatoday.com/story/money/2019/01/08/most-dangerous-jobs-us-where-fatal-injuries-happen-most-often/38832907/.

they may lack probable cause for an arrest." *Terry*, 392 U.S. at 24.

B. As *Amici's* experience testifies, these rationales apply equally in Indian country. Lower courts have repeatedly and correctly recognized that tribal law enforcement maintains the authority to conduct *Terry* stops when there is reasonable suspicion that criminal activity has occurred. Every appellate decision—aside from the decision below—has recognized that this authority extends equally to non-Indians suspected of violating state and federal laws. *See, e.g.*, *United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005); *State v. Schmuck*, 850 P.2d 1332, 1342 (Wash. 1993) (en banc). Tribal police may detain such persons until the proper law enforcement authority, with responsibility for charging or prosecution, arrives. Without the authority to conduct *Terry* stops of non-Indians, tribal law enforcement would be simply unable to maintain law and order on Indian reservations.

II. The Ninth Circuit's new rule, if adopted, would eliminate tribal officers' *Terry* authority and undermine law and order throughout Indian country. The Ninth Circuit's new rule appears to require tribal officers to "ask one question" to ascertain a "suspect's Indian status"—and if the suspect claims to be non-Indian, the tribal officer must release the suspect unless it is "obvious" or "apparent" that a state or federal crime has been committed. Pet. App. 8a.

A. This rule leaves tribal police officers with a series of terrible options. To begin, if tribal officers are averse to legal risk—which they may be, given the civil liability and criminal proscution that can result from stops later

deemed unlawful—they can simply avoid making *Terry* stops and end encounters once a suspect claims to be non-Indian. But with *Terry* stops so essential to maintaining law and order, and with lying about Indian status so easy, that option will devastate public safety on Indian reservations. Alternatively, tribal officers can try to conduct their own on-the-spot assessments of suspects' claims that they are non-Indian. But the tests for Indian status are not designed to be applied by officers on the beat. So, this option is not an option at all. Finally, tribal officers may weigh whether *Cooley*'s novel "apparent" or "obvious" standard is satisfied. But whatever this standard's precise meaning, it clearly demands more than probable cause—and it is simply too restrictive to provide the authority tribal officers need to maintain law and order on their reservations.

This Court has emphasized that the Fourth Amendment demands standards that are "clear and simple" enough for police officers to "appl[y] on the spur (and in the heat) of the moment." *Atwater v. City of Lago Visa*, 532 U.S. 318, 347 (2001). The Ninth Circuit's rule does the opposite. No one knows what its invented "apparent" or "obvious" standard means—unlike the well-worn standards of "reasonable suspicion" or "probable cause," which decades of caselaw have made concrete. And as just explained, the test for Indian status is not designed to be applied, and cannot be applied, by police officers in the field.

B. Below, the Ninth Circuit suggested that its new rule would not have serious consequences because (1) cross-deputization agreements can confer on tribal police officers the authority to stop and arrest non-

Indians; and (2) tribal police officers have the same authority every citizen has to make: a "citizen's arrest," including of non-Indians. Neither claim is correct.

To be clear, *Amici* agree that cross-deputization agreements can make significant contributions to law and order. When Indian nations find in local governments genuine partners, who are equally committed to securing law and order on the reservation, cross-deputization can mitigate the problems that divided jurisdiction creates. Indian nations, however, are not always so fortunate as to find supportive local partners. And many circumstances can intervene between the promise of what cross-deputization agreements *can* achieve and what *actually happens* when Indian nations seek to enter such agreements.

Negotiations on cross-deputization agreements can be contentious. Even when those negotiations succeed, the agreements sometimes limit cross-deputization—such as restricting the tribe to a particular number of cross-deputized officers or limiting the circumstances under which the officers can exercise their cross-deputized authority. Sometimes, state and local governments will attempt to leverage the desire of the tribe—which has the greatest interest in maintaining law and order on its reservation—for a cross-deputization agreement to obtain unrelated concessions that undermine tribal sovereignty or interests. Even successful cross-deputization agreements can collapse due to a change in leadership or a clash of personalities. *Amici* themselves have experienced these phenomena. This experience teaches that Indian tribes in many states cannot count on cross-deputization agreements to

provide the authority they need to maintain basic law and order on their reservations.

Far worse is the suggestion that tribal law enforcement should content themselves with "citizens' arrest" authority. Tribes are separate sovereigns, pre-existing the Constitution. It badly corrodes tribal sovereignty, to say the least, to treat sovereign tribal police officers as no different than private citizens or mall security guards. Moreover, citizens' arrest authority is narrow. Indeed, it is likely narrower than the decision below's untenable "apparent" or "obvious" standard. For example, many states limit this authority to circumstances in which a citizen personally observes a felony in his presence—and citizens' arrest authority does not include the power to conduct any type of search.

Arguments based on "citizens' arrest" authority may reflect a belief that tribal police departments are not *real* police departments—and so cannot be trusted with the powers real police exercise. This view, however, bears no relation to reality. True enough, this Court's decision in *Oliphant* prohibits Indian tribes from actually prosecuting non-Indians. But this jurisdictional limitation does not bespeak a lack of competence or professionalism among tribal police. To the contrary, as *Amici*'s experience shows, tribal police are professional and well-trained—often better trained than state and local officers. They are fully capable of responsibly carrying out the authority *Terry* recognizes and maintaining law and order on their reservations while respecting civil liberties.

Amici urge the Court to reverse the decision below and to reject the untenable rule it has created.

ARGUMENT

In the decision below, the Ninth Circuit concluded that tribal police officers do not have authority to conduct *Terry* stops of non-Indians on public rights-of-way or non-Indian fee lands, holding instead that tribal police can only conduct stops of persons suspected of violating the law for the limited purpose of determining their Indian status. If the person claims to be non-Indian, tribal police can continue the stop only if "it is apparent," or "obvious," "that a state or federal law has been violated." Pet. App. 8a (internal quotation marks omitted).

Amici agree with the United States and the other *amici* that this novel limit contravenes this Court's precedent and core principles of tribal sovereignty. *Amici* write here to underscore the practical harm that will result from the Ninth Circuit's decision to bar tribal police officers from exercising the authority on which every other law enforcement agency depends. As sovereign Indian nations that have established police departments and that rely on those police departments to maintain law and order on their reservations, *Amici* are acutely aware of the practical problems the decision below creates. *Amici* urge this Court to reject the Ninth Circuit's rule and restore to tribal police the critical tool that *Terry* recognizes.

I. The Authority To Conduct *Terry* Stops Is Important.

A. *Terry* Stops Are A Critical Part Of Any Police Officer's Toolkit.

Ever since this Court decided *Terry* in 1968, *Terry* stops have become an essential tool in every police officer's toolkit, including the officers that *Amici* Tribes employ and the CTPCA rely upon. *Terry* reasonably weighs the "interest of the individual"—*i.e.*, the right to be free of unreasonable searches and seizures under the Fourth Amendment—against the "legitimate interest in crime prevention and detection" and the "need for law enforcement officers to protect themselves and other prospective victims of violence." *Long*, 463 U.S. at 1047 (internal quotation marks omitted). Simply put, *Terry* stops allow police officers to do their jobs in preventing crime and apprehending criminals, while protecting themselves against suspects who may be armed and dangerous.

Terry first furthers the public interest in "crime prevention and detection." *Id.* (quotation marks omitted). Although the Fourth Amendment guarantees protection against unreasonable searches and seizures, it "does not require a policeman . . . to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972). Hence, *Terry* holds that police may "briefly stop" a "suspicious person and make reasonable inquiries" to "confirm[] or dispel[] his suspicions" after "observ[ing] unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Minnesota v. Dickerson*, 508 U.S. 366, 372-73

(1993) (internal quotation marks omitted). *Terry* thus allows police officers to do *police work*—by investigating their reasonable suspicions and gathering the evidence that may provide the probable cause for a full arrest.

As well, *Terry* ensures that police officers can protect themselves while carrying out their critical work in protecting the public. *Long*, 463 U.S. at 1047; *see Ybarra v. Illinois*, 444 U.S. 85, 93 (1979) (A "law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons"). As this Court explained long ago, "it [is] too plain for argument that the ... justification [for a *Terry* stop]—the safety of the officer—is both legitimate and weighty." *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

Terry appropriately recognizes that police work is dangerous and that officers' encounters with suspects are unpredictable. The "[s]treet encounters between citizens and police officers . . . range from wholly friendly exchanges of pleasantries . . . to hostile confrontations of armed men involving arrests, or injuries, or loss of life." *Terry*, 392 U.S. at 13. In particular, as this Court has emphasized, roadside encounters—like the one that gave rise to this case—are "especially fraught with danger to police officers." *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (quotation marks omitted); *Mimms*, 434 U.S. at 110 ("[W]e have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile.").

Recent data from the Bureau of Labor Statistics ("BLS") underscore that *Terry*'s concerns in 1968 remain pressing today. The BLS explained that police work "leave[s] officers at risk of workplace injuries and

dying in the line of duty." Bureau of Labor Statistics, U.S. Dep't of Labor, *Injuries, Illnesses, & Fatalities: Police Officers 2018* (last updated July 7, 2018), https://www.bls.gov/iif/oshwc/cfoi/police-2018.htm. And in particular, "the most common event or exposure leading to fatal workplace injuries among police officers" is exactly what *Terry* is meant to prevent—"violence or other injuries" from suspects, of which "[h]omicides made up the majority [or 87.5%]." *Id.* *Terry* stops thus remain a critical tool for enabling police to do their work "without fear of violence." *Dickerson*, 508 U.S. at 373 (quotation marks omitted).

Since *Terry*, this Court has relied on *Terry*'s twin rationales to uphold a broad range of authorities that—taken together—constitute the core of modern police work. *Terry* allows police:

- To stop an individual who appears to be "casing" a business for a robbery. *Terry*, 392 U.S. at 6.
- To stop individuals suspected of criminal activity based on tips from reliable informants, *Adams*, 407 U.S. at 146-47, or "wanted" posters from other police departments, *United States v. Hensley*, 469 U.S. 221, 223 (1985).
- To pursue and stop individuals who embark on "unprovoked flight" from officers in areas known for crime. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).
- To frisk an individual the officer has stopped for concealed weapons. *Terry*, 392 U.S. at 10.

- To stop vehicles based on reasonable suspicion of criminal activity, *United States v. Cortez*, 449 U.S. 411, 412 (1981), or based on 911 calls reporting reckless driving, *Navarette*, 572 U.S. 393.
- To search the inside of a car's passenger compartment if the officer suspects an occupant may have access to a weapon. *Long*, 463 U.S. at 1034-35.
- To require suspects to identify themselves during a stop. *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 189 (2004).

In short, without the authority *Terry* recognizes, policing as we know it today would not exist.

B. *Terry* Authority Is Especially Important For Tribal Law Enforcement In Indian Country, As To Both Indians And Non-Indians.

Just like other police, tribal police departments depend on the authority *Terry* confers—including stops of non-Indians on non-Indian land. True enough, this Court has held that absent congressional action, jurisdiction to prosecute non-Indians generally lies elsewhere. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *superseded by statute as stated in United States v. Lara*, 541 U.S. 193 (2004). But *Terry* is not about prosecution. And the core interests *Terry* protects—enabling police to preserve law and order while keeping themselves safe—applies equally to non-Indians.

On Indian reservations, maintaining law and order often requires doing so with respect to non-Indians on rights of way or land owned in fee. Many Indian reservations contain a significant proportion of fee lands, and—along with those lands—a significant proportion of non-Indians. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648 (2001) (noting that "millions of acres throughout the United States" is "non-Indian fee land within a tribal reservation"); Pet. App. 47a (Collins, J., dissenting from the denial of rehearing en banc) ("Although reservations vary widely, there are some in which a large percentage of the reservation's land area is non-Indian fee land, and some that have very significant numbers of non-Indian residents."). Many reservations also border highly populated areas or contain landmarks or places of interest—drawing non-Indian visitors to reservation lands. *See* Tribe Choudhary, *2005-2006 Comprehensive Economic Development Strategy of the Navajo Nation* 46, http://www.navajobusiness.com/pdf/CEDS/CEDS%202005%20-%2006%20Final.pdf (over 2.5 million tourists visited the Navajo Nation's scenic sites in 2004).

Even though jurisdiction to *punish* non-Indians typically rests with state and federal governments, those governments often cannot—or will not—*patrol* reservation lands. As a result, the responsibility for maintaining law and order within a tribe's exterior borders falls to tribal police. Tribal police thus must investigate crimes by non-Indians and, if needed, detain suspects until state or federal authorities arrive for charging and prosecution. As this Court has recognized, "[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 v. Reina*, 495 U.S. 676, 697 (1990), *superseded by statute as stated in Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

Again and again, lower courts have recognized that tribes have authority to make *Terry* stops, including of non-Indians. The facts of these cases illustrate how important this authority is to maintaining law and order on reservations.

In *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975), a tribal police officer observed a truck and driver he did not recognize—who appeared Mexican, not Indian—on a state road in a sparsely populated area near the Mexican border. After the driver pulled over of his own accord, the officer approached him. *Id.* at 1178. When the driver was unable to produce a license or registration, the officer searched the vehicle and discovered more than 1,000 pounds of marijuana. *Id.* at 1177-79. The Ninth Circuit denied the driver's motion to suppress.

In *United States v. Terry*, 400 F.3d 575 (8th Cir. 2005), Lynn Bettelyoun called in a "domestic violence complaint" against her husband, Randy Terry. *Id.* at 578. When tribal police found a yellow pickup truck at the property and "smelled alcohol on [the] breath" of its occupant, the officer removed the occupant from the truck. *Id.* Because the department's "common practice was to detain a suspect first and then determine race" later, the officer did not ask about race—and it turned out, Terry was a non-Indian. *Id.* Nonetheless, the officer conducted a search under *Terry v. Ohio* and found "a rifle and a pack of beer." *Id.* Terry was convicted of

possessing a firearm after being convicted of a crime of domestic violence. *Id.* at 577. The Eighth Circuit explained that Indian tribes "must have [the] power" to investigate crimes by non-Indians and that the limit on Indian tribes' power instead comes from the Fourth Amendment's prohibition on "effecting a constitutionally unreasonable search or seizure." *Id.* at 579-80.[3]

In *State v. Schmuck*, 850 P.2d 1332 (Wash. 1993), a tribal police officer pulled over a pickup truck that was speeding. *Id.* at 1333-34. When the officer approached, he quickly ascertained that the driver was non-Indian—but also that he "smelled of intoxicants." *Id.* at 1334. When the driver initially refused to take a field sobriety test, the tribal officer detained him until state police could arrive. *Id.* The driver ultimately failed "four field sobriety tests." *Id.*

The Washington Supreme Court held that the tribal officer had authority to detain the driver, explaining that "[h]olding that the Tribe does not have a limited authority to stop and detain alleged offenders who

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[3] Indeed, *United States v. Terry* vividly illustrates how badly the decision below would undermine the ability to protect Native women against domestic violence. As the brief of the National Indigenous Women's Resource Center explains in greater detail, Native women already go missing and are murdered at extraordinary rates—and the decision below will only exacerbate the problem. *Cf.* 25 U.S.C. § 1304 (narrow tribal prosecutorial jurisdiction over non-Indians committing domestic violence offenses, restricted to persons in a "dating" or "intimate" relationship and to "participating tribes" that adopt certain procedures, among other requirements).

present a clear threat to community members would severely hamper the Tribe's ability to protect the welfare of Indians, as well as non-Indians, on the Reservation." *Id.* at 1342. In the "20 minutes it took for [state police] to respond," the court observed, the driver "could have easily caused extensive property damage or seriously injured other motorists." *Id.* Or he "could have left the Reservation and eluded capture by the State." *Id.* Particularly given that "[a]s a practical matter, the . . . Tribe provides most of the law enforcement patrols on the Reservation," the Washington Supreme Court deemed it intolerable to deny *Terry* authority to tribal police. *Id.* at 1341.

Other examples abound. *See, e.g.*, *United States v. Peters*, No. 3:16-CR-30150, 2017 WL 9292244, at *3 (D.S.D. Mar. 16, 2017) (tribal officer had authority to investigate a bar fight involving a non-Indian and could detain non-Indian until proper law authority arrived), *report and recommendation adopted by* 2017 WL 1383676 (D.S.D. Apr. 13, 2017); *State v. Haskins*, 887 P.2d 1189, 1196 (Mont. 1994) ("[T]ribal police officers have authority to investigate unlawful criminal activity on the reservation"); *State v. Ryder*, 649 P.2d 756 (N.M. Ct. App. 1982) (tribal officer had authority to detain and search a non-Indian suspected of illegal drug possession), *aff'd*, 648 P.2d 774 (N.M. 1982); *State v. Pamperien*, 967 P.2d 503, 505 (Or. Ct. App. 1998) (tribal officers have inherent authority to stop non-Indian driver from speeding). Indeed, *Amici* are aware—from their own experience—that these reported cases are only the tip of the iceberg. For example, after receiving a tip that a drug dealer would be making a "hand off" on

the reservation, tribal officers of a CTPCA member stopped and investigated a non-Indian on a reservation right of way and uncovered OxyContin, a drug associated with several deaths in the area.

As this solid wall of authority testifies, tribal police departments like those of *Amici* depend every day on the authority *Terry* provides, as to non-Indians as well as Indians. By contrast, if tribal police lose *Terry* authority—as the Ninth Circuit's decision threatens—tribal police will be at sea. If they immediately determine that the suspects are non-Indians, they may be unable to frisk suspects for their own protection. *Terry*, 392 U.S. at 10. Officers may be powerless to act on tips that non-Indian individuals they encounter are wanted for serious crimes, like homicide or human trafficking. *See Adams*, 407 U.S. at 146; *Navarette*, 572 U.S. at 404. They may not even be able to force individuals who appear to be non-Indian to *identify* themselves during a stop, so that the officers can check for outstanding federal or state warrants. *Hiibel*, 542 U.S. at 188. And if non-Indians embark on "unprovoked flight" from tribal police in high-crime areas, tribal police may have to let them go. *Wardlow*, 528 U.S. at 124.

In short, tribal police officers will be unable to do police work. Although tribes' authority is at its apex as to a tribe's own members, "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). The Ninth Circuit's rule eliminates a critical part of tribes' core ability to maintain law and order on their reservations,

and it could allow non-Indian perpetrators to avoid the reach of law enforcement in tribal communities.

II. The Ninth Circuit's Rule, If Adopted, Will Undermine Law And Order On Reservations Nationwide.

Hamstringing the authority of tribal police under *Terry* is bad enough—but the Ninth Circuit's rule is especially pernicious because of *how* it effects this result. Namely, the Ninth Circuit has spun out of whole cloth a completely new test that creates impossible dilemmas for tribal police officers charged with maintaining law and order. Under the Ninth Circuit's rule, tribal officers may stop suspects only "as long as the[ir] Indian status is unknown." Pet. App. 8a. Tribal police must then "ask one question"—namely, whether the suspect is a non-Indian—and if the answer is yes, the tribal officer must release the suspect unless it is "obvious" or "apparent" that a state or federal crime has been committed. *Id.* at 8a, 19a-20a (quotation marks omitted). This test, if it becomes law, will devastate law and order on Indian reservations.

A. The Ninth Circuit's Rule Puts Tribal Police In An Impossible Situation.

Imagine a tribal police officer who, at 3 a.m., encounters a vehicle stopped on the side of an isolated reservation road. Over his scanner, the officer has just heard of a stabbing in the next town. As the officer approaches the car, the driver rolls down his window. The officer sees that the driver's hand is bleeding—and in the passenger seat, the glint of what the officer believes is a knife. Heeding the Ninth Circuit's decision

in *Cooley*, the officer asks, "Are you an Indian?"; the answer comes, "No." The officer wonders if the driver might be lying—but he doesn't know. Can he detain the driver and pat him down? Or must he let the driver go? *Cooley* leaves this officer, and others like him, with a series of options that are uniformly terrible.

First, if the officer prioritizes avoiding legal risk, he can simply end the encounter, avoid making a *Terry* stop, and let the driver go. Tribal police certainly have good reasons to want to avoid legal risk, as they can face criminal prosecution[4] or civil suits for stops that are later deemed unlawful. *See, e.g.*, *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1149 (9th Cir. 2017) (recounting how local police arrested a tribal officer and charged him with false imprisonment based on the officer's detention of a non-Indian); *Mille Lacs Band of Ojibwe v. Cnty. of Mille Lacs*, No. 17-cv-5155, Mem. Op. & Order at 3-21 (D. Minn. Dec. 21, 2020), ECF No. 217 (recounting how police officers of *Amicus* Mille Lacs Band curtailed law enforcement activity after the county voided a longstanding cooperative agreement and threatened Band officers with arrest). And in the example above, it is by no means *clear* that the officer has authority to make a stop under *Cooley*.

To choose that option, however, would be to give up on law and order on the reservation. Yes, the driver has claimed to be non-Indian. But the "incentive to lie . . .

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[4] Under 18 U.S.C. § 1162 (commonly referred to as "Public Law 280") and similar statutes, certain states have criminal jurisdiction to prosecute Indians even for alleged crimes committed on reservations. States sometimes invoke this authority to prosecute tribal police officers they regard as acting unlawfully.

will be significant, and because (according to the panel) there is no authority to investigate or search a non-Indian, the officer presumably cannot search (for example) for a tribal identification." Pet. App. 64a (Collins, J., dissenting from the denial of rehearing en banc). Meanwhile, the stabbing reported over the officer's radio is a serious crime, and one that presages future danger to those on the reservation (and off). As a New Mexico court observed, "[t]o hold that an Indian police officer may stop offenders but upon determining they are non-Indians must let them go, would be to subvert a substantial function of Indian police authorities and produce a ludicrous state of affairs which would permit non-Indians to act unlawfully, with impunity." *Ryder*, 649 P.2d at 759.

Second, the officer can try to evaluate for himself the driver's claim to be non-Indian. That option, however, is also untenable. For one thing, it is an invitation to resort to crass and offensive stereotypes.[5] And those stereotypes do not even have any hope of *working*. Who "counts as an Indian for purposes of federal Indian law varies according to the legal context. There is no universally applicable definition." *Cohen's Handbook of*

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[5] *See Stolen Identities: The Impact of Racist Stereotypes on Indigenous People Hearing Before the S. Comm. On Indian* Affairs, 112th Cong. 19 (2011) (statement of Charlene Teters, Institute of American Indian Arts) ("To turn us into stereotypes is to stop seeing us as individuals and to trap us in someone else's mistaken idea of who we are."); Joey Clift, *8 of the Biggest Misconceptions People Have About Native Americans*, Insider (Jan. 9, 2020), https://www.insider.com/misconceptions-native-americans-usa-culture-2020-1 ("[T]here are Natives with hair of all lengths and colors and skin in any tone imaginable.").

Federal Indian Law 170-71 (Nell Jessup Newton et al. eds., LexisNexis 2005) (citations omitted). Hence, "there is no precise formula for courts to use to determine the unequivocal meaning of Indian status." Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 Am. Indian L. Rev. 177, 177 (2011). Some courts have used a two-prong test that was first established by this Court in *United States v. Rogers*, 45 U.S. 567 (1846), looking to whether "the defendant [has] Indian blood," and has tribal or federal recognition as an Indian. *Id.* at 572. But good luck to the police officer who tries to apply that test at 3 a.m. on the side of a road.

Third, the officer can try to assess whether *Cooley*'s "apparent" or "obvious" standard is satisfied. But that standard is completely invented and provides no guidance at all, leaving tribal officers, prosecutors, and courts alike at sea. *See* Pet. App. 9a ("[The Ninth Circuit has] not elaborated on when it is 'apparent' or 'obvious' that state or federal law is being or has been violated.").

Return to the hypothetical at the beginning of this section. The officer surely has reasonable suspicion that the driver, with his bloody hand and the potential knife, has committed a crime. He may even have probable cause. But is it *obvious* that the driver has committed a crime? Probably not: He could have cut himself changing a tire. And while the officer thinks he saw a knife, he is not sure. The only sure thing is that no

guidance exists to help the officer determine whether the Ninth Circuit's newly minted standard is satisfied.[6]

This Court has emphasized that police officers must make their Fourth Amendment judgments "on the spur (and in the heat) of the moment." *Atwater*, 532 U.S. at 347. Hence, the least courts owe to police officers—who, every day, put their lives on the line—is to craft "readily administrable rules" that are "sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest." *Id.*; *see New York v. Belton*, 453 U.S. 454, 458 (1981) (Fourth Amendment rules "ought to be expressed in terms that are readily applicable by the police in the

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[6] The concurring opinion of Judges Berzon and Hurwitz suggests that the decision below will have limited practical effect because a violation of a state vehicle code could satisfy the "apparent" or "obvious[]" standard—allowing tribal police to detain a suspect until state police arrive. Pet. App. 33a (Berzon, J., concurring). This suggestion, however, provides no fix. First, many state vehicle code violations are not "arrestable." It is far from clear that, under *Cooley*, tribal police officers can detain suspects for violations that the state has determined do not justify arrest. It is also utterly implausible to suggest that states will dispatch patrol cars in response to run-of-the-mill vehicle code violations on Indian reservations. Second, this suggestion ignores officer safety. If tribal officers cannot conduct a *Terry* stop (and frisk), they cannot be sure the suspect will not harm them in the minutes or hours it may take state or local police to arrive. Third, this suggestion is no help in many of the circumstances in which *Cooley*'s rule threatens public safety. Sometimes tribal police officers will approach a vehicle that is already stopped, in which case there is no state vehicle code violation (as in *Cooley* itself). And *Cooley*'s rule likely applies to non-Indian fee land as well, where vehicle code violations are irrelevant.

context of the law enforcement activities in which they are necessarily engaged and not qualified by all sorts of ifs, ands, and buts") (quotation marks omitted). The Ninth Circuit's new rule is the very opposite—in both the novel "apparent" or "obvious" standard it asks police officers to apply, and in the impossible inquiry into a suspect's Indian status it invites them to undertake.

More than that, the Fourth Amendment requires standards that tribal police can be *trained* on. Police officers do not walk around with reprints from the U.S. Reports or F.3d. They rely on training programs and standardized procedures. For well-established standards like reasonable suspicion and probable cause, training programs abound—and as detailed below, tribal police officers are trained through these types of rigorous training programs. *Infra* II.B. But no training exists for the novel inquiries the Ninth Circuit invites police officers to undertake. As one veteran CTPCA police chief has stated, "[t]here isn't anything higher than probable cause or, at least I wasn't ever trained on it." *Cooley*'s misbegotten standard leaves tribal police rudderless during the years—or more likely, decades—it will take for courts to elaborate on that standard's meaning and for police departments to distill it into training.

B. Cross-Deputization Agreements And Citizens' Arrests Are No Solution.

The Ninth Circuit offered two solutions to the untenable dilemma *Cooley* creates: cross-deputization agreements and citizens' arrests. Neither, however, solves the many problems that result from the Ninth Circuit's rule.

Cross-deputization. Make no mistake, *Amici* see enormous value in cross-deputization agreements. *Amicus* Cherokee Nation, for example, has 58 cross-deputization agreements with governments across its jurisdiction. When Indian nations find in local governments genuine partners, who are equally committed to securing law and order on the reservation, cross-deputization agreements can yield important benefits. In many places where tribal and state jurisdiction intermingle, cross-deputization agreements are simply essential—and they will remain so however this Court decides this case.

But *Amici* are also keenly aware that cross-deputization agreements are no magic cure, particularly for the nationwide problems that would result if the Ninth Circuit's rule became law. Pet. App. 79a (Collins, J., dissenting from the denial of rehearing en banc) (cross-deputization not a "panacea to the problems wrongly created by the panel's decision"). Many circumstances can intervene between the promise of what cross-deputization agreements *can* achieve and what *actually happens* when Indian nations seek to enter such agreements.

Cross-deputization agreements are "frequently the product of intense and complicated negotiations," including the "geographical reach of the agreements, the jurisdiction of the parties, liability of officers performing under the agreements, and sovereign immunity." Matthew L.M. Fletcher et al., *Indian Country Law Enforcement and Cooperative Public Safety Agreement*, 89 Feb Mich. B.J. 42, 44 (2010). Local governments understand how important law and order

is to tribes on their reservations. As a result, cross-deputization agreements sometimes become bargaining chips that local governments seek to use to extract unrelated concessions. Those dynamics can mean that, for many tribes, cross-deputization agreements are not a viable solution *in practice* notwithstanding their undoubted virtues *in theory*.

Even where tribes and state or local governments can reach agreements, those agreements often contain significant limits. They may restrict *how many* tribal officers can be cross-deputized, with the result that some officers are cross-deputized but others are not. *E.g.*, *United States v. Green*, 140 F. App'x 798, 799 (10th Cir. 2005) (first responder was not-cross deputized; later arrival was). They may limit *when* tribal officers can act as cross-deputized officers. *E.g.*, *Ouart v. Fleming*, No. CIV-08-1040-D, 2010 WL 1257827, at *6 (W.D. Okla. Mar. 26, 2010) ("Agreement expressly authorizes Tribal officers to act as commissioned … County deputies if they are requested by … County law enforcement officers"). Cross-deputization agreements can also create loopholes for criminal defendants to litigate. Any Indian Country defense lawyer worth his or her salt will scour the paperwork looking for a technicality that will let a guilty client go free.

Finally, even the most successful agreements are always precarious, vulnerable to a change in local or tribal leadership—and to the whims of tribes' local counterparts. *See* Kevin Morrow, *Bridging The Jurisdictional Void: Cross-Deputization Agreements In Indian Country*, 94 N.D. L. Rev. 65, 92 (2019) ("Agreements can fall apart if an elected county sheriff

refuses to cooperate with tribal police"). *Amici* are all too familiar with this unfortunate reality.

One of *Amici*'s police officers arrested a motorist who turned out to be the cousin of the local police chief. Shortly after, the tribe found its cross-deputization agreement cancelled. Thanks to this fit of pique, for two years tribal police could not stop anyone in the area—given the uncertainty surrounding the extent of their authority absent a cross-deputization agreement.

Amicus Mille Lacs Band of Ojibwe is keenly aware of the same dynamic. The Band established a tribal police department and entered into a law enforcement agreement with Mille Lacs County in 2008. In 2016, the County unexpectedly terminated the agreement, immediately restricted access to its records management system, refused to prosecute some offenders investigated by the Band's officers, and issued a law enforcement protocol to warn the Band's officers that impersonation of a law enforcement officer was a felony. Then the County demanded that the Band, as a condition of entering a new agreement, curtail the exercise of criminal and civil jurisdiction over the Band's *own members* and agree to a long list of other measures that no government can or should accept. *Amici* agree with the United States that "Tribes should not have to sacrifice even *more* of their limited sovereignty merely to preserve law and order within reservation boundaries." Pet'r Br. 47.

Citizens' Arrests. The Ninth Circuit also suggested that tribal police may rely on the authority to conduct a "citizen's arrest"—namely, the common-law right that any citizen has to seize a person who has committed a

felony in the citizen's presence. But this is no solution either. As the Washington Supreme Court has explained, "[t]here would be a serious incongruity in allowing" a sovereign tribe "to exercise no more police authority than its tribal members could assert on their own." *Schmuck*, 121 Wash. 2d at 392. For one thing, this "result would seriously undercut a tribal officer's authority on the reservation and conflict with Congress' well-established policy of promoting tribal self-government." *Id.* Moreover, the "citizens' arrest" authority is often limited to cases where an individual has "personally observ[ed]" a "felony" and "does not include *any* authority to conduct searches." Pet. App. 44a (Collins, J., dissenting from the denial of rehearing en banc).[7] For example, "[p]otentially, DWI drivers would simply drive off or even refuse to stop if pulled over by a tribal officer with only a citizen's arrest capability." *Schmuck*, 121 Wash. 2d at 392; *cf. Becerra-Garcia*, 397 F.3d at 1171-72 (rejecting argument that uniformed tribal police officers made a detention pursuant to "citizens' arrest" authority and noting that, for "Fourth Amendment purposes, an individual is a government agent if the government knew of and acquiesced in the officer's activities, and the party performing a seizure intended to assist law enforcement"). As well, treating tribal police as private citizens might strip them of the qualified and sovereign

[7] The limits on "citizens' arrest" authority are matters of state law. States define this authority in different ways—and that variability will multiply the problems *Cooley* creates. *Cf.* Cal. Penal Code §837 (California's requirements).

immunity defenses that should rightly be available to tribal police acting in their scope of employment.

The Ninth Circuit's position threatens to create the mistaken impression that tribal police departments are not *real* police departments and so cannot be trusted with the authorities available to real police departments. This unfortunate view bears no relation to reality. The officers that tribal police departments hire are well-trained and professional. They typically receive the same, or more, training than state police—and in many cases, are also trained to federal standards.

- A survey of 17 tribal police departments that are members of *Amicus* CTPCA showed that 174 of 187, or 93%, of their tribal officers attended a police academy. The same survey showed that a majority of the police chiefs and tribal officers came from state and local police departments and held advanced Police Officers Standards and Training ("POST") certifications—California's minimum educational requirements for police officers[8]—and also possessed many years of law enforcement experience.

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[8] *Amicus* CTPCA recently adopted a standard entitled *Minimum Law Enforcement Standards for California Tribal Police Officers*, which includes hiring qualifications and incorporates California's POST requirements. Graduating from a POST academy or the Indian Police Academy is a standard requirement of the CTPCA's *Minimum Standards*. *See* California Indian Legal Services, *California Tribal Police Chiefs Association Adopts Police Officer Standards* (Jan. 11, 2021), https://www.calindian.org/california-tribal-police-chiefs-association-adopts-police-officer-standards/.

- *Amicus* Tunica-Biloxi Tribe of Louisiana requires each of its tribal officers to maintain state certification by attending a 6-month state police academy. Indeed, former state police officers *prefer* to work for Tunica-Biloxi and actively seek opportunities to do so, citing a better working environment and higher pay.
- *Amicus* Mille Lacs Band also requires its officers to be certified under Minnesota's POST standards, and most hold Special Law Enforcement Commissions issued by the Bureau of Indian Affairs. They have received numerous commendations for their work on gang and drug investigations.
- The officers of *Amicus* Cayuga Nation possess an average of 20 years of law enforcement experience with the police departments of New York and its subdivisions. Each officer has been certified as a law enforcement officer by the New York State Division of Criminal Justice Services.
- All Cherokee Nation Marshals receive training at the Federal Training Center in Artesia, New Mexico, to federal standards. Unlike state police in Oklahoma, Marshals must complete their training before they can carry a gun—and as a result, each new recruit spends a year or more in training before patrolling independently. Then, every year, Marshals must complete nearly twice as much continuing education as their Oklahoma counterparts—40 hours compared with 24 hours (and officers in fact complete an average 80 hours a year). The Marshalls have also honed an array

> of specialized capabilities, including a dive team, swift water rescue team, and a SWAT team. Of the 31 Marshals officers, 28 are qualified in one of these specialized capabilities. The Marshals complete about 60 SWAT activations a year—on par with the police department of Tulsa, Oklahoma (the largest municipality within the Nation's reservation).

Amici urge the Court to reject the Ninth Circuit's invitation to assimilate Indian tribes' sovereign and well-trained police officers to private citizens and to condemn them to a second-class status that leaves them beholden to state and local police to preserve law and order on Indian reservations.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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