No. 19-1414

In the Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

JOSHUA JAMES COOLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LOWER BRULE SIOUX TRIBE, THE FLANDREAU SANTEE SIOUX TRIBE, AND THE SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

In 1867, Congress created the Great Peace Commission to negotiate treaties with tribes in the west, and the efforts resulted in nine treaties, including the 1868 Treaty with the Crow Tribe of Indians ("Crow Tribe" or "Tribe"). One of the other treaties was the Sioux Nation's 1868 Treaty of Fort Laramie, which pertains to amici curiae the Lower Brule Sioux Tribe, the Flandreau Santee Sioux Tribe, and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation—three federally recognized tribes with various reservation lands located in South Dakota.[1]

"After the Civil War, the United States' westward expansion led to conflict with the Sioux Nation, who saw their buffalo herds, and consequently their economic livelihoods, begin to decline with the passage of settlers along the Oregon Trail." S. Rep. No. 106-368 at 3 (2000). Battles ensued, including the Powder River War of 1866-67, leading to "the signing of the Treaty with the Sioux, 1868, in which the United States set aside lands in South Dakota west of the Missouri River as the Great Sioux Reservation as a 'permanent home' for the Sioux Nation and delineated tribal hunting grounds in the Powder River valley." *Id.* (quoting Treaty Between the United States of America and Different Tribes of Sioux Indians, Apr. 29, 1868, 15 Stat. 635).

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[1] No counsel for any party authored this brief in whole or in part. No one other than amici curiae made a monetary contribution to fund the preparation or submission of this brief. The parties consented in writing to its filing.

The 1868 Treaty of Fort Laramie "was considered by some commentators to have been a complete victory for Red Cloud and the Sioux." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 376 n.4 (1980). In the following years, "it was described as 'the only instance in the history of the United States where the government has gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return.'" *Id.* (quoting D. Robinson, *A History of the Dakota or Sioux Indians* 387 (1904), reprinted in 2 South Dakota Historical Collections (1904)).

There is nearly identical language in Article I of the Crow Tribe's Treaty and the 1868 Treaty of Fort Laramie, and the article is known as a "bad men" provision. Treaty Between the United States of America and the Crow Tribe of Indians, art. I, May 7, 1868, 15 Stat. 649 ("1868 Treaty" or "Treaty"). Examination of the sovereignty tribes hold is central to the case pending before this Court, and that issue requires interpretation of Article I in the 1868 Treaty. The analysis directly impacts the sovereignty and treaty rights of amici. And on a practical level, the case goes to the heart of reservation law enforcement and the protection of tribal members from criminal activity of non-Indian people.

SUMMARY OF ARGUMENT

A tribe's authority draws from inherent tribal sovereignty, treaty provisions, and acts of Congress. This case directly engages the first two. Judge Collins' opinion dissenting from the Ninth Circuit's denial of rehearing en banc and Petitioner's Brief provide resounding and dead-on analysis of the Crow Tribe's inherent sovereignty. *See United States v. Cooley*, 947 F.3d 1215, 1220-38 (9th Cir. 2020) (Collins, J., dissenting from the denial of rehearing en banc); Petr. Br. 16-31.

This case also warrants a textual and historical analysis of the Crow Tribe's 1868 Treaty. With peace as the polestar, the text and surrounding history of the "bad men" provision in Article I of the Treaty show that a Crow Tribal officer has investigative authority over non-Indian people on the Reservation. Under Article I, if a non-Indian person commits wrongs on the Crow Tribe's Reservation, the United States pledges to "arrest[] and punish[]" the individual. 1868 Treaty, art. I, 15 Stat. 649. But first, the Tribe must assure the United States "upon proof made" that the person should go into federal custody. *Id.* In the Great Peace Commission's negotiations leading to the Treaty, peace between Indian and non-Indian people was the top priority, with a focus on preventing conflict incited by non-Indian people on newly created reservations. Presenting their report to the President, the United States negotiators lamented that these non-Indian offenders often evade punishment. The text of Article I, read alongside the historical record underlying the 1868 Treaty, confirms the preservation of the Tribe's

authority to investigate non-Indian offenders on the Reservation.

This treaty-based authority is naturally understood as operating within the framework of law enforcement actions permitted under *Terry v. Ohio*, 392 U.S. 1 (1968). Specifically, if they have reasonable suspicion, Crow Tribal officers may conduct limited protective searches of non-Indian people on the Reservation—a critical tool for de-escalating encounters, promoting reservation peace, and protecting officers. And reasonable suspicion should permit tribal officers stopping non-Indian people to make inquiries to confirm or dispel any suspected criminal activity. Equipping tribal officers with this investigative power accords with the Tribe's textual obligation to prove that the United States should arrest and punish the non-Indian offender. Otherwise, according to the decision below, officers may only observe in plain view any offenses committed by non-Indian people, and only an obvious state or federal crime allows the officer to detain the individual until state or federal authorities arrive. That rule contradicts the language of Article I, is irreconcilable with the history surrounding the 1868 Treaty, and renders the Tribe unable to meet Article I's basic terms.

ARGUMENT

I. The 1868 Treaty confirms the Crow Tribe's investigative power over non-Indian people within the Reservation

Grounded in the text and surrounding history of Article I in the 1868 Treaty, the Crow Tribe reserved authority over non-Indian people committing wrongs on the Reservation, and that power may be understood in terms of law enforcement actions allowed under *Terry*.

A. Treaty text

The tribal sovereignty inquiry in this case should consider the text of the 1868 Treaty at the outset.[2] "As separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), the starting point in analyzing tribal sovereignty is key. Today, in the structure of federal Indian law, tribes are "'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills*

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[2] In analyzing sources of tribal authority, this Court has distinguished between powers set out in treaty or statute and the "inherent sovereign powers of an Indian tribe[.]" *See Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1997). The 1868 Treaty is foundational to the question presented, "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 on a potential violation of state or federal law." Pet. for Cert. I (emphasis added); *see id.* 16. Consequently, examination of the Treaty "is inextricably linked to, and is thus 'fairly included' within, the questions presented." *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005) (quoting this Court's Rule 14.1(a)).

Indian Cmty., 572 U.S. 782, 788 (2014) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatami Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Tribal nations lack "the full attributes of sovereignty" because Congress holds "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo*, 436 U.S. at 56. Congress has employed that power over time. *See United States v. Lara*, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.").

However, in the absence of Congress exercising that authority, a "Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, [and] the proper inference from silence . . . is that the sovereign power . . . remains intact." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982)) (citing *Santa Clara Pueblo*, 436 U.S. at 60) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."); *see Bay Mills*, 572 U.S. at 788 ("Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority.") (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). As for powers encompassed in treaties, "abrogat[ing] treaty rights[]" requires Congress to "'clearly express its intent to do so.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019)

(quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)). The "clear evidence" must demonstrate "that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* (citing *Mille Lacs*, 526 U.S. at 202-203) (internal quotation marks omitted).

A "treaty [is] not a grant of rights to the Indians, but a grant of right from them — a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). The treaty text "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," *Mille Lacs*, 526 U.S. at 206, "and the words of a treaty must be construed 'in the sense in which they would naturally be understood by the Indians[.]'" *Herrera*, 139 S. Ct. at 1699 (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979)) (internal quotation marks omitted). This Court then "look[s] beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Mille Lacs*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)).

The 1868 Treaty defines essential aspects of the Crow Tribe's sovereignty and governs the relationship between the Tribe and the United States. Like others made throughout history, the Treaty established a Reservation for the Tribe and the Tribe ceded millions of acres of traditional territory. *Herrera*, 139 S. Ct. at

1692 ("Pursuant to the 1868 Treaty, the Crow Tribe ceded over 30 million acres of territory to the United States."). Unlike many treaties of Native nations, the 1868 Treaty contains a unique exchange of promises in Article I.

The very first words of Article I declare that "peace between the parties to this treaty shall forever continue." 1868 Treaty, art. I, 15 Stat. 649. In the next two sentences, the United States and the Tribe commit to their joint mission for peace: "The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it." *Id.*

With that foundation, Article I obligates the United States to "arrest[] and punish[] according to the laws of the United States[]" any "bad men among the whites or among other people, subject to the authority of the United States," who "shall commit any wrong upon the person or property of the Indians[.]" *Id.* The Treaty places a burden of proof on the Tribe, specifying that the United States will take custody of such a person only "upon proof made[.]" *Id.* The paragraph concludes with the United States agreeing to "reimburse the injured person for the loss sustained." *Id.*

Interpreting the text of this "bad men" provision requires examination of "the historical record and . . . the context of the treaty negotiations to discern what the parties intended by their choice of words." *Mille Lacs*, 526 U.S. at 202.

B. Treaty history

The years between the end of the Civil War and the 1868 Treaty were marked with intense conflict caused by white migrants traveling west into territory historically held by tribes. *See Sioux Nation*, 448 U.S. at 374. Before tribes of the Sioux Nation signed the 1868 Treaty of Fort Laramie with the United States, there was "the Powder River War of 1866-1867, a series of military engagements in which the Sioux tribes, led by their great chief, Red Cloud, fought to protect the integrity of earlier-recognized treaty lands from the incursion of white settlers." *Id.* United States Senator James Doolittle of Wisconsin led an investigation that produced the Doolittle Report, finding that "[t]he long litany of violence on the plains was traced in every instance to white hands, often those of the military, but primarily of ordinary people, the pioneers." *A Bad Man Is Hard to Find*, 127 Harv. L. Rev. 2521, 2523-54 (2014) (citing Joint Special Comm. Appointed Under Joint Resolution of March 3, 1865, Conditions of the Indian Tribes, S. Rep. No. 39-136 (1867)). The clashes inflicted an economic toll on the United States, including construction failures in the great transcontinental railroad project. *Id.* The Doolittle Report documented testimony from tribal leaders about "the mistreatment of the women in their nations, who were killed, mutilated, otherwise attacked and coerced into prostitution and other sexual relationships with United States soldiers." *Elk v. United States*, 87 Fed. Cl. 70, 80 (Fed. Cl. 2009).

So on July 20, 1867, Congress established the Great Peace Commission ("Commission"). An Act to

Establish Peace with Certain Hostile Indian Tribes, ch. 32, 15 Stat. 17 (1867). The Commission met with tribal leaders to negotiate treaties that would secure peace in the west. *See* Kerry R. Oman, *The Beginning of the End: The Indian Peace Commission of 1867-1868*, 22 Great Plains Q. 35, 47-48 (2002). Lieutenant General William Tecumseh Sherman, "a principal negotiator of these treaties, describe[d] the breaking out of hostilities as often attributable to the actions of 'bad men' among the whites." *Elk*, 87 Fed. Cl. at 80. During the Commission's negotiations with the Crow Tribe, "the Crow were assured in 1867 that they would receive 'a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass.'" *See Montana v. United States*, 450 U.S. 544, 574 (1981) (Blackmun, J., dissenting in part) (quoting Proceedings of the Great Peace Commission of 1867-1868, at 86 (Institute for the Development of Indian Law (1975))).

On January 7, 1868, the Commission presented its report to the President and determined that "[m]any bad men are found among the whites; they commit outrages despite all social restraints; they frequently, too, escape punishment." N.G. Taylor et al., Report to the President by the Indian Peace Commission 49 (1868) ("Commission's Report").[3] In the same paragraph of the Commission's Report, it notes that American cities outside reservations need "a policeman at every corner" because crime is a part of human nature, and it emphasized "[h]ow often, too, it is found impossible to discover the criminal." *See id.* The

[3] Available at http://history.furman.edu/~benson/docs/peace.htm.

Commission's Report was mindful of the United States' economic interest in continuing to build western railroads, and that peace with tribes was an essential ingredient to that progress. *See id.* 99 ("If peace is maintained with the Indian, every obstacle to the spread of our settlements and the rapid construction of the railroads will be removed.").

Eventually, negotiations culminated in nine treaties between Indian tribes and the United States bearing many similar articles, including "bad men" provisions, and the treaties' overriding objective was to establish and preserve peace. *See Tsosie v. United States*, 825 F.2d 393, 395 (Fed. Cir. 1987) (finding the nine "treaties were all duly ratified[]" and "[a]ll say that peace is their object and all contain 'bad men' articles in similar language"); *see also Jones v. United States*, 846 F.3d 1343, 1361 (Fed. Cir. 2017) (highlighting the "peace-creating and peace-maintaining policy" of a treaty with a "bad men" provision); Petr. Br. 30 (collecting treaties with "bad men" provisions). These "nine treaties with the Indians were a significant accomplishment[,]" because the tribes involved were among the "dominant powers" of tribal nations on the continent. *See Garreaux v. United States*, 77 Fed. Cl. 726, 736 (Fed. Cl. 2007).

C. Tribal authority

The text and history described above show that the 1868 Treaty reserved the Crow Tribe's investigative authority over non-Indian people like respondent in this case. The tribes that entered into treaties with "bad men" provisions generally did so from a position of strength, and they sought to ensure that non-Indian

people could not disrupt the peace on the newly established reservations. Recognizing that non-Indian people are more properly subjected to its prosecution authority, the United States pledged to prosecute such people, but only if the Crow Tribe could demonstrate the necessity of that course of action. Only "upon proof made" by the Tribe. 1868 Treaty, art. I, 15 Stat. 649. Article I assumes that tribal authorities will be the first to initiate contact with these offenders. And to satisfy the burden of proof, the Treaty must contemplate that the Tribe has some investigative power over non-Indian people on the Reservation. If not, the Tribe can almost never gather the proof the Treaty requires.

The history surrounding the 1868 Treaty evinces the common interests of the parties in preventing and processing non-Indian offenders on the Reservation. The Commission's Report indicated that those individuals "*frequently, too, escape punishment*[,]" highlighting the critical need for reservation law enforcement. Commission's Report 49 (emphasis added). Escaping punishment can mean evading capture, but the use of the word "punishment" communicates an interest in seeing the person prosecuted, and successful prosecution often requires on-the-spot investigation during the initial encounter. Article I of the Treaty addressed the reality that non-Indian people will inevitably commit wrongs on the Crow Tribe's Reservation, and rather than allow that to spark new wars, the Treaty enshrined the Tribe's authority over non-Indian offenders within the Reservation and obligated the United States to "arrest[] and punish[]" the wrongdoer "and also

reimburse the injured person for the loss sustained." 1868 Treaty, art. I, 15 Stat. 649.

If this power reserved to the Tribe in the 1868 Treaty did not exist today, it would need to be due to an express act of Congress—but there is no such statute.[4] "Bad men" provisions "ha[ve] not become obsolete[,]" and Congress has not abrogated the treaty right. *See Tsosie*, 825 F.2d at 394. Courts continue to enforce the provisions, specifically the reimbursement requirement. *See e.g.*, *Jones*, 846 F.3d at 1359 (interpreting the "bad men" provision of the 1868 treaty pertaining to the Ute Indian Tribe); *Richard v. United States*, 677 F.3d 1141, 1143-53 (Fed. Cir. 2012) (determining that "the 'bad men' provisions found in Article 1 of the Laramie Treaty of 1868 are not limited to 'an agent, employee, representative, or otherwise acting in any other capacity for or on behalf of the United States.'") (quoting 1868 Treaty of Fort Laramie, art. I, 15 Stat. 635); *Tsosie*, 825 F.2d at 394 (holding Congress had not abrogated the "bad men" provision in the Navajo Treaty of 1868); *Elk*, 87 Fed. Cl. at 72-73, 78-82 (enforcing the "bad men" provision in the 1868 Treaty of Fort Laramie in favor of a member of the Oglala Sioux Tribe for an assault).

To get more specific: the Treaty's text and purpose accord with tribal officers having authority over non-

[4] This Court's decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203-04 (1978), however, did clarify that a tribe's authority over offenders on a reservation may not be an exercise of inherent tribal criminal jurisdiction over non-Indian people because tribes generally lack that power. But the issue before the Court here relates to a non-Indian person suspected of committing a state or federal crime, not a tribal offense.

Indian people on the Reservation within the bounds delineated in *Terry* and its progeny. When reasonable suspicion exists, *Terry* authorizes various law enforcement actions. The officer may investigate whether the individual presents a threat by doing a limited frisk or examination of a car's passenger compartment. *Terry*, 392 U.S. at 27 (approving "a reasonable search for weapons for the protection of the police officer"); *see Michigan v. Long*, 463 U.S. 1032, 1035 (1983) (holding that a "protective search of the [car's] passenger compartment was reasonable under the principles articulated in *Terry*"). And the officer can briefly ask questions and obtain information from the individual to confirm or dispel suspicion of criminal activity. *See Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 186 (2004). Both of these types of *Terry* investigations fall within the tribal power embodied in Article I of the 1868 Treaty.[5]

In light of the Treaty's intent to promote peace and prevent conflict between Crow Tribal members and non-Indian people, it naturally follows that tribal officers may conduct limited searches to protect themselves. The Treaty's goal of conflict reduction supports a limited *Terry* protective search because "suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed." *See Long*, 463 U.S. at 1048-49 (finding "roadside encounters between police

[5] Even without Article I, this is an uncontroversial statement. As detailed by the Crow Tribe, federal and state courts throughout the country have come to the conclusion that tribes maintain some investigative power over non-Indian wrongdoers on reservations. *See* Crow Tribe of Indians Amici Br. 10-12 (collecting cases).

and suspects are especially hazardous[]"). Otherwise, tribal officers are exposed to significant danger in stopping people, and those stopped may retain ready access to weapons for use against the officers. The Tribe would be unable to follow through with its "pledge" to "maintain [peace.]" 1868 Treaty, art. I, 15 Stat. 649. The dynamic of the law enforcement stop would be turned on its head and the risk of conflict would soar.[6]

Further, a *Terry* investigation where the tribal officer obtains certain baseline information from the non-Indian person also fits within Article I. As a matter of commonsense, the Tribe's burden of proof in establishing that non-Indian suspects are "bad men" must come with the ability to obtain information from the suspect—if not, the Tribe has never been able to meet the fundamental terms of the Treaty. It contradicts the Treaty's text to interpret the "bad men" provision as describing only the Tribe's right to have an officer observe in plain view an obvious state or federal offense on a right-of-way and temporarily detain the non-Indian person until applicable authorities arrive. There is no such restrictive language in Article I. And the Treaty's historical context—specifically, the negotiations dedicated to achieving peace on

[6] Additionally, in the specific paragraph of the Commission's Report discussing the problem presented by "bad men," it drew a parallel to the need for officers "at every corner" in American towns outside of reservations, Commission's Report 49, depicting a situation similar to those where an officer on patrol conducts a *Terry* protective frisk. *See Illinois v. Wardlow*, 528 U.S. 119, 121 (2000) (upholding "protective patdown search for weapons" done by "police officers patrolling an area known for heavy narcotics trafficking[]").

reservations—shows that Article I must authorize tribal inquiries of non-Indian people parallel to actions permitted under *Terry*. For tribal and non-tribal officers alike, "the ability to briefly stop [a suspect], ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and *bringing offenders to justice*." *See United States v. Hensley*, 469 U.S. 221, 229 (1985) (emphasis added).

A practical reality of the issue before this Court is that *Terry* investigations are essential for public safety on all roads within reservations. Judges Berzon and Hurwitz acknowledged that many tribal officer *Terry* stops of non-Indian people will be traffic-related. *See United States v. Cooley*, 947 F.3d 1215, 1216 (9th Cir. 2020) (Berzon and Hurwitz, J.J., concurring in the denial of rehearing en banc) (specifying that the panel opinion allows tribal officers to stop a non-Indian person speeding or driving drunk). And "[t]raffic offenses are a serious issue[]" in this case, considering that motor vehicle-related death rates for Native people are more than double that of white or Black Americans. *See id.* at 1236-37 (Collins, J., dissenting from the denial of rehearing en banc) (discussing data from the Centers for Disease Control and Prevention). On the public's interest in highway safety, this Court has minced no words: it "is a vital public interest" that the Court has called "compelling" and "paramount" in order "to give adequate expression to the stakes." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2535 (2019) (plurality opinion). The Court has underscored that it is crucial for an officer to get accurate and admissible blood alcohol concentration information of a person suspected

of drunk driving. *See id.* at 2535-37. The decision below prohibits a tribal officer from obtaining any information from a non-Indian drunk driver aside from personally observing the driving before the stop. Consequently, the compelling public interest in roadway safety would go ignored because tribal officers would be hamstrung.

The United States Court of Appeals for the Federal Circuit has developed case law interpreting "bad men" provisions, and that body of law supports the Crow Tribal officer's *Terry* authority. The Federal Circuit has emphasized that the provision requires a criminal wrong based on the United States government's treaty responsibility to "arrest" in these circumstances. *See Jones*, 846 F.3d at 1355-56. To be valid, the arrest depends on whether, "'at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge . . . were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.'" *Id.* (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

Under the Ninth Circuit's decision, the only way for the Crow Tribe to provide the United States with probable cause to arrest "bad men" is to observe an obvious state or federal violation. But if the Treaty intended to focus on such an extremely narrow type of detectable criminal activity, it would not have employed the word "arrest[]" without any limiting explanation. The more natural reading of Article I is that, bearing in mind the Tribe's duty to, "upon

proof[,]" show the need for the United States to "arrest[]" the non-Indian person, tribal officers are within their authority if they conduct a *Terry* investigation based on reasonable suspicion. *See* 1868 Treaty, art. I, 15 Stat. 649.

The Federal Circuit's interpretation of the territorial language in "bad men" provisions, protecting against wrongs "upon the person or property of the Indians[,]" supports the exercise of *Terry* authority in this case. *See Jones*, 846 F.3d at 1359. Tracing its precedents and those of the United States Court of Federal Claims, the Federal Circuit determined that strictly imposing "a geographic limitation would ill-serve the peace-creating and peace-maintaining policy of the 1868 Treaty" of the Ute Tribe. *Id.* at 1361. "Wrongs occurring off-reservation that occur as a direct result of wrongs occurring on-reservation may be as injurious to peace as those same acts occurring wholly on reservation." *Id.* This reasoning, distinguishing between on-reservation and off-reservation activity, reveals that no text in the "bad men" provision in the Crow Tribe's 1868 Treaty creates a meaningful distinction between non-Indian versus Indian land within the Reservation. If off-reservation conduct can fall within the scope of Article I, then so can on-reservation activity on a state highway.[7] This Court

[7] In fact, the "bad men" claim before the Federal Circuit in *Richard*, 677 F.3d at 1143-44, was preceded by a federal criminal prosecution of the offender for being intoxicated while driving on a highway and killing a man walking on the shoulder of the road with his vehicle, and the factual basis statement supporting the plea agreement to involuntary manslaughter indicated that the event occurred on a state highway within the Pine Ridge Indian

has long recognized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mutual*, 480 U.S. at 18. While tribal and non-tribal reservation lands sometimes involve different analyses, the authority highlighted in *Iowa Mutual* cannot go from "important" to virtually non-existent when the land is a right-of-way within a reservation considered Indian country under 18 U.S.C. § 1151.[8]

Affirming the decision below would require finding that the Tribe has never had any investigative power over non-Indian people on a right-of-way within the Reservation, which belies the fundamental premise that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority."[9] *Bay Mills*, 572

Reservation. *See United States v. Hotz*, CR. 08-50094, Doc. 22 (D.S.D. Jan. 6, 2009). But that was no obstacle to the "bad men" claim.

[8] This Court in *Strate*, 520 U.S. at 454 n.9, noted that in the context of criminal law, Indian country generally (though not always) encompasses "rights-of-way running through [a] reservation[,]" and importantly, Congress employed the same definition of Indian country when it restored tribal criminal jurisdiction over non-Indian people in domestic violence and related cases pursuant to the Violence Against Women Reauthorization Act of 2013. *See* 25 U.S.C. § 1304(a)(3); Nat'l Indigenous Women's Res. Ctr. Amici Br. 23.

[9] And as explained by the National Indigenous Women's Resource Center, recent acts of Congress demonstrate a tendency toward bolstering—not blocking—tribal authority over non-Indian people committing wrongs on reservations. *See* Nat'l Indigenous Women's Res. Ctr. Amici Br. 22-24 (discussing the Violence Against Women Reauthorization Act of 2013 and the Tribal Law and Order Act of 2010).

U.S. at 788 (quoting *Wheeler*, 435 U.S. at 323). It also runs counter to the "well established" principle "that treaties should be construed liberally in favor of the Indians[.]" *See Oneida Cty., N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). Even if the Court found the Treaty is ambiguous about the power the Crow Tribe retained over non-Indian people in these circumstances, that ambiguity must be resolved in favor of finding tribal authority. *See id.* ("[A]mbiguous [treaty] provisions [are] interpreted to [tribes'] benefit[.]"). But the Court's analysis need not reach that point because the text and history of the 1868 Treaty settle the issue. The Tribe has investigative authority over non-Indian people within the Reservation.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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