No. 19-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSHUA JAMES COOLEY

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

REPLY BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaty, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 19-1414

UNITED STATES OF AMERICA, PETITIONER

v.

JOSHUA JAMES COOLEY

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

REPLY BRIEF FOR THE UNITED STATES

Respondent makes no meaningful attempt to defend the Ninth Circuit's restrictive and novel framework for tribal policing of state and federal law on public rights-of-way within an Indian tribe's reservation. He instead proposes a legal regime under which tribes would, at most, be allowed only the even *more* circumscribed policing authority of an ordinary individual citizen. His efforts to so diminish tribes' sovereignty, however, conflict with the law and history of sovereign authority in general and tribal authority in particular; misconstrue the source and nature of the specific authority described in the government's opening brief; and advocate an unworkable approach that would sow confusion and invite serious harm to everyone who lives, works, or simply travels on a reservation, including law-enforcement officers themselves. This Court should reject that insupportable and impractical curtailment of tribal sovereignty

and confirm that the current longstanding practice, under which tribes exercise limited authority to investigate and temporarily detain non-Indians on a reservation in aid of state and federal law enforcement, may continue.

A. The Authority To Police Violations Of State And Federal Law Is Inherent In Tribal Sovereignty

Respondent's restrictive approach to tribal sovereignty in this context is fundamentally misguided. As the opening brief explains (at 17-31), tribes retain the inherent sovereign authority to investigate and temporarily detain people within their borders for violations of state or federal law.

1. To the extent respondent disputes (Br. 17) that a sovereign generally has the power to respond to potential violations of another sovereign's laws, he lacks any sound basis for doing so. Unless barred (implicitly or explicitly) by statute, States and the federal government routinely take law-enforcement actions in furtherance of each other's laws. And their authority to do so is well established.

The Constitution's Interstate Rendition Clause presupposes the sovereign authority of States to act on one another's behalf. It provides that a "Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." U.S. Const. Art. IV, § 2, Cl. 2. The constitutional requirement that States "deliver[] up" fugitives within their territory to other States for prosecution would be impossible to satisfy without both the investigatory authority to identify a fugitive and the detention authority to transfer him to another State's officials. *Ibid.*

This Court's decisions analogously recognize that, as a general matter, "States, as sovereigns, have inherent authority to conduct arrests for violations of *federal* law, unless and until Congress removes that authority." *Arizona* v. *United States*, 567 U.S. 387, 438 (2012) (Thomas, J., concurring in part and dissenting in part) (emphasis added). In *United States* v. *Di Re*, 332 U.S. 581 (1948), for example, the Court exercised its "supervisory power over the federal courts" and found that the only relevant restrictions on a state officer's authority to conduct a warrantless arrest of a suspect for violating federal law were the restrictions that the State itself had imposed. *Virginia* v. *Moore*, 553 U.S. 164, 172 (2008); see *Di Re*, 332 U.S. at 589-591. In analyzing the issue, the Court in *Di Re* did not undertake to examine whether the federal government had affirmatively conferred arrest authority on the State. The Court instead looked only to whether federal or state law placed *limits* on authority that the State inherently possessed. See *Di Re*, 332 U.S. at 588-591.

Subsequent decisions of this Court have likewise considered the scope of a state officer's authority to conduct warrantless arrests for federal offenses as a matter "to be determined by reference to state law." *Miller* v. *United States*, 357 U.S. 301, 305 (1958) (citing *Di Re*, 332 U.S. at 589); see *Ker* v. *California*, 374 U.S. 23, 37 (1963) (plurality opinion) ("[T]he lawfulness of arrests [by state officers] for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution."); *Johnson* v. *United States*, 333 U.S. 10, 15 n.5 (1948) ("State law determines the validity of arrests without warrant."). And in order to regulate that authority through state-law procedures, the

State must have inherently possessed the authority to begin with.[*]

2. Because policing violations of another sovereign's law is an inherent sovereign power, it is a power that Indian tribes necessarily possessed when they were independent sovereigns. See *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978) (explaining that "the tribes were self-governing sovereign political communities"). The tribes have since been implicitly divested of certain powers by virtue of their "dependent status"; the Court has "found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as

---

[*] Lower court decisions similarly recognize—in accord with *Di Re*—that state officers may police violations of federal law. See, *e.g.*, *United States* v. *Smith*, 899 F.2d 116, 118 (1st Cir. 1990) (Breyer, J.) (rejecting claim that "state police lacked 'authority' to seize [a] weapon" that "they reasonably believe[d] constitute[d] evidence of a federal crime"); *United States* v. *Bowdach*, 561 F.2d 1160, 1168 (5th Cir. 1977) ("It is well established that absent an express federal statute defining who is allowed to execute federal arrest warrants, the validity of the arrest should be determined by the law of the state where the arrest took place."); *United States* v. *Janik*, 723 F.2d 537, 548 (7th Cir. 1983) ("We infer that Illinois officers have implicit authority to make federal arrests."); *Gonzales* v. *City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) ("The general rule is that local police are not precluded from enforcing federal statutes."); *United States* v. *Turner*, 553 F.3d 1337, 1346 (10th Cir.) (rejecting claim that "because possession of ammunition is not a crime under state law, state law enforcement could not seize the ammunition and detain [the defendant] on that basis"), cert. denied, 556 U.S. 1263 (2009); *Commonwealth* v. *Craan*, 13 N.E.3d 569, 577 (Mass. 2014) (explaining that the "authority" of "'local police'" to "'enforc[e] federal statutes'" "derives from State law") (citation omitted); *People* v. *LaFontaine*, 705 N.E.2d 663, 666 (N.Y. 1998) (looking to state law to determine whether state officers could execute a federal arrest warrant within the State).

when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153-154 (1980) (*Colville*). But as the government's opening brief demonstrates (at 17-31), the limited investigatory and detention authority at issue here is one that the tribes retain. Rather than being "inconsistent with the overriding interests of the National Government," such authority *advances* "the overriding interests of the National Government" in the enforcement of domestic law. *Colville*, 447 U.S. at 153.

Respondent does not meaningfully dispute that the limited authority at issue here is not only consistent with, but furthers, federal and state interests. And he errs in contesting (Br. 18-20) the applicability of the consistency principle, the abandonment of which would mean that tribes could be implicitly stripped of even the most complementary authority. Respondent's efforts to distinguish one decision that embraces the principle (*Colville*, *supra*) disregards others that likewise make clear that "tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'" *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) (citation omitted); see *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *Wheeler*, 435 U.S. at 325-327; *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978). The Court's endorsement of the principle both predates (*Colville*) and postdates (*San Carlos*, *supra*, and *Mescalero*, *supra*) the Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981), which respondent

would interpret (Br. 11, 20) to have abrogated the principle. Respondent is unable to identify any decision of this Court that has in fact done so. See Resp. Br. 19 (citing *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 406 (1989)); see *Brendale*, 492 U.S. at 426-427 (plurality opinion) (explaining how the Court's decisions harmonize with the principle).

Respondent's passing suggestion (Br. 19) that the authority at issue here would "contravene[] the founders' rejection of a federal police power" is similarly misguided. What the Founders rejected was a general power in Congress to enact legislation—not the power of law-enforcement officials to detain and investigate people suspected of violating federal law.

3. As the opening brief describes (at 26-31), long-standing practice confirms that tribes continue to possess the relevant authority. Respondent does not even attempt to explain how the United States could have entered into so many treaties that required Indian tribes to "deliver up" non-Indian offenders within their territories to the United States for prosecution in the absence of a background understanding that tribes retained authority to carry out the investigation and detention necessary to do so. See Gov't Br. 26-29. Like the similar wording of the Interstate Rendition Clause, see p. 2, *supra*, the "deliver up" language presupposes sovereign authority to undertake those actions. And respondent's attempt (Br. 30-36) to dismiss the relevance of "bad men" provisions like the one in the treaty to which the Crow Tribe here is a party, see Gov't Br. 29-31, is unsound.

Article I of the Crow Tribe treaty, like other similar treaties, commits the United States to "proceed at once

to cause [a non-Indian] offender to be arrested and punished according to the laws of the United States," based on "proof made to the [local federal] agent and forwarded to the Commissioner of Indian Affairs at Washington city" that the "bad m[a]n" in question has "commit[ted] any wrong upon the person or property of the Indians." Treaty Between the United States of America and the Crow Tribe of Indians (Crow Treaty) art. I, May 7, 1868, 15 Stat. 649. The treaty expressly contemplates that proof will be "made *to*"—not "by"—the federal agent, thereby presupposing earlier investigation by the tribe. And if the proof is satisfactory, the treaty requires the United States to act "at once"—not by starting a fresh investigation of its own.

Respondent errs in relying (Br. 33-34) on Article V of the treaty to support a contrary interpretation. That article provides that the federal agent

> shall * * * keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

Crow Treaty art. V, 15 Stat. 650.

The agent's ministerial obligation to keep an office open for rapid "inquiry" into matters that are presented—which could include, for example, recording of land, see Crow Treaty art. VI, 15 Stat. 651—does not turn the

agent into a one-person police squad who must personally carry out every step of investigating a non-Indian's crime. The procedures on "depredation[s]," in turn, are not designed for non-Indian offenders; in contradistinction to *Indian* offenders, who may commit "wrong[s] *or* depredation[s] upon * * * person or property," the treaty describes non-Indian offenders solely as doing "wrong[s]," *id.* art. I, 15 Stat. 649 (emphasis added). See Law Professors Amicus Br. 29 n.7. Moreover, even if those procedures did apply, the agent's duty to "cause the evidence to *be taken* in writing" would simply reinforce the background premise that evidence will be presented to the agent, not exclusively gathered by him. Crow Treaty art. V, 15 Stat. 650 (emphasis added); see *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1699 (2019) ("Indian treaties must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.") (citation and internal quotation marks omitted).

The understanding of tribal inherent authority reflected in the treaties has informed federal, state, and tribal law enforcement through the present day. In those rare cases in which the authority issue has been actively litigated, rather than simply taken as a given, it has repeatedly been confirmed. See Gov't Br. 36 (citing authorities). The Legislative and Executive Branches have both likewise understood tribes to retain the limited authority at issue here. See Current and Former Members of Congress Amicus Br. 10-11, 15-17, 24-25; Former United States Attorneys' Amicus Br. 27-29. Respondent cannot refute that the approach he urges would be a major disruption of longstanding arrangements and practices.

B. Respondent Offers No Sound Basis To Conclude That Tribes Have Been Divested Of Their Inherent Authority To Police Violations Of State And Federal Law

Respondent's remaining counterarguments lack merit. His characterization of the government's arguments as resting on some source other than the tribes' inherent authority is mistaken. And to the extent that he addresses the tribes' inherent authority, he offers no sound basis to conclude that the tribes have been divested of a limited inherent authority to police violations of state and federal law.

1. As explained above and in the government's opening brief (pp. 2-8, *supra*; Gov't Br. 17-31), the authority at issue here is inherent, and need not be conferred by any external source. Respondent's challenges to posited external sources are accordingly misplaced.

The government has not argued, for example, that the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, is a "grant of authority" to the tribes. Resp. Br. 37 (emphasis omitted). It has instead observed that the ICRA *constrains* the tribes' exercise of inherent policing authority by prohibiting "unreasonable search[es] and seizures." 25 U.S.C. 1302(a)(2); see Gov't Br. 21-22. The ICRA is thus relevant because it shows that Congress has regulated the tribes' authority to detain and investigate non-Indians. In doing so, Congress has foreclosed courts from fashioning a different set of standards, as the Ninth Circuit did here. See Gov't Br. 33-35.

Nor has the government argued that the "Indian country" jurisdictional provisions of 18 U.S.C. 1151 or 1152 confer the relevant authority on the tribes. The point instead is that those provisions necessarily contemplate tribal policing on public rights-of-way within a reservation. See Gov't Br. 20-21. Section 1151 defines

"Indian country" to encompass "*all land* within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 18 U.S.C. 1151(a) (emphasis added). Section 1152 then makes clear that the tribes retain inherent criminal jurisdiction over Indians on such land, meaning that they will police the entirety of their reservations. See 18 U.S.C. 1152. Congress's acceptance of tribal policing on rights-of-way and non-Indian fee land on reservations further confirms that the limited tribal policing authority at issue here is perfectly consistent "with the overriding interests of the National Government." *Colville*, 447 U.S. at 153.

The government also has not argued that the Crow Treaty—or any of the other treaties discussed in the government's opening brief (at 26-31)—itself "create[s] tribal police authority over non-Indians." Resp. Br. 30 (capitalization and emphasis omitted). Rather, what the government has pointed out (Br. 26-31; pp. 6-8, *supra*) is that those treaties rest on the understanding that the tribes have retained the inherent authority to engage in the type of policing at issue here. Respondent thus errs in suggesting (Br. 30) that those treaties present a different issue from the issue of inherent authority that the Ninth Circuit addressed below.

2. With respect to tribes' inherent authority, respondent does not point to any "treaty or statute" that may have "withdrawn" the tribes' limited inherent authority to police violations of state and federal law. *Wheeler*, 435 U.S. at 323. Nor can he show that such authority was "withdrawn * * * by implication as a necessary result of [the tribes'] dependent status." *Ibid.*

Respondent's argument on that issue exclusively relies (Br. 15-17, 20-25) on decisions concerning a tribe's *regulatory or adjudicatory* powers over non-Indians—*i.e.*, a tribe's powers to apply tribal law to non-Indians or subject them to judgment by a tribal court. See *Strate* v. *A-1 Contractors*, 520 U.S. 438, 442 (1997) (concluding that tribe lacked civil "adjudicatory authority" over "personal injury actions against defendants who are not tribal members"); *Duro* v. *Reina*, 495 U.S. 676, 679 (1990) (concluding that tribe lacked "authority to impose criminal sanctions against a citizen outside its own membership"); *Montana*, 450 U.S. at 564-565 (concluding that tribe lacked civil "regulat[ory]" authority over "hunting and fishing by nonmembers * * * on lands no longer owned by the tribe"); *Oliphant*, 435 U.S. at 212 (concluding that tribe lacked criminal "jurisdiction to try and to punish non-Indians"); see also *Wheeler*, 435 U.S. at 324 (concluding that tribe retained inherent authority "to charge, try, and punish members of the Tribe for violations of tribal law").

Neither regulatory nor adjudicatory authority is at issue here. The Court has consistently distinguished regulatory and adjudicatory powers, which a tribe may lack over non-Indians in many circumstances, from the more modest power to investigate or detain non-Indians on the reservation for violations of state or federal law in order to remand them to state or federal authorities, which a tribe retains. See *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 651 (2001) (noting that the Court in *Strate* "did not question the ability of tribal police to patrol the highway"); *Strate*, 520 U.S. at 456 n.11 (same); *Duro*, 495 U.S. at 697 (distinguishing a tribe's "jurisdiction to try and punish an offender" from a tribal officer's "power to detain the offender and transport

him to the proper authorities"); *Oliphant*, 435 U.S. at 208 (distinguishing a tribe's obligation "to promptly deliver up any non-Indian offender" to federal authorities from a tribe's criminal jurisdiction to "try and punish him [itself]"). Such limited investigatory or detention authority does not involve the application of either tribal law or tribal-court jurisdiction to a non-Indian.

Respondent's contention that the longstanding law-enforcement practice at issue here is in fact precluded by this Court's precedents (*e.g.*, Br. 25) rests on over-reading individual words or phrases by viewing them out of context. He asserts (Br. 21), for example, that the Court in *Duro* v. *Reina*, *supra*, "recognized that tribes' retained sovereignty does not extend to non-Indians in the area of *criminal enforcement*." But the Court in that case used the phrase "criminal enforcement" to refer to the exercise of criminal "adjudicatory" and "prosecuting" power over non-Indians—not the limited policing authority at issue here. *Duro*, 495 U.S. at 688. Respondent also quotes this Court in *Oliphant* v. *Suquamish Indian Tribe*, *supra*, as stating that "incorporation into the United States divested tribes of sovereignty over non-Indians 'except in a manner acceptable to Congress.'" Resp. Br. 15 (quoting *Oliphant*, 435 U.S. at 210). But the actual quote from *Oliphant* concerned only the tribes' criminal adjudicatory power; what the Court said was that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power *to try* non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210 (emphasis added).

Indeed, if respondent were correct (Br. 25) that this Court would have to "overrule *Oliphant* and *Duro*" in order to decide this case in the government's favor, then

this Court could not have signaled, after those decisions, that tribes retain the limited policing authority here, as it did in *Strate* v. *A-1 Contractors*, *supra*. There, in the course of determining that a tribe lacked civil adjudicatory authority over a highway accident involving non-Indians, see 520 U.S. at 442-443, the Court emphasized that it was not "question[ing] 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," *id.* at 456 n.11. That footnote—along with the Court's reiteration of it in *Atkinson Trading Co.* v. *Shirley*, 532 U.S. at 651—would have made little sense if *Oliphant* and *Duro* had already foreclosed the existence of such tribal authority. And respondent provides no principled basis for his passing suggestion (Br. 22) that welfare checks like the one in this case are more akin to impermissible adjudicatory or regulatory authority than to the authority referenced in *Strate*. To the contrary, the Ninth Circuit resolved this case based on its views on the general issue of traffic stops. See Pet. App. 7a-9a.

To the extent that respondent acknowledges the distinction between tribal regulatory or adjudicatory power and the limited policing authority at issue here, he errs in suggesting (Br. 21) that the latter effects an even greater "imposition of sovereignty and deprivation of liberty." As the opening brief explains (at 24-25), the opposite is true. This Court has stated that a tribe's exercise of criminal regulatory and adjudicatory authority over non-Indians imposes a particularly "serious" "intrusion on personal liberty" because it subjects non-Indians to "trial by political bodies that do not include them." *Duro*, 495 U.S. at 693; see *Oliphant*, 435 U.S. at 210-211.

The limited policing authority here, in contrast, does not subject non-Indians to any regulation, adjudication, or punishment by political bodies that do not include them. It merely allows tribal officers to protect themselves and others by assisting in federal or state enforcement of the laws by which non-Indians are already governed. Thus, unlike a tribe's exercise of criminal regulatory and adjudicatory authority, such limited policing authority does not implicate the interest of non-Indians in being free from laws that they had "no say" in making, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008), and is consistent with the United States' overriding sovereignty.

C. Respondent's Alternative Framework Is Even More Debilitating And Unworkable Than The Ninth Circuit's

After concluding that tribes lack inherent authority to detain and investigate non-Indian suspects like respondent on public rights-of-way within their reservations, the Ninth Circuit attempted to compensate for the obvious infeasibility of that conclusion through a "convoluted series of rules" of its own creation. Pet. App. 42a (Collins, J., dissenting from the denial of rehearing en banc); see, *e.g.*, *id.* at 8a (panel opinion). The government's opening brief (at 31-47) documents the flaws in that ad hoc framework, and respondent makes no meaningful attempt to defend it. Instead, he appears to advocate an alternative approach that would leave tribal officers with even *less* power to protect people and property on Indian reservations. That approach replicates, and also exacerbates, the flaws of the Ninth Circuit's complex of rules. And contrary to respondent's suggestion (Br. 28-30), cross-deputization is no "panacea to th[ose] problems." Pet. App. 79a (Collins, J., dissenting from the denial of rehearing en banc).

1. Like the Ninth Circuit, respondent rejects (Br. 2) the existence of any inherent tribal authority "over non-tribal members on non-tribal lands" within a reservation. Thus, in many respects, respondent's approach is the same as the Ninth Circuit's—and just as problematic. It would inappropriately preclude tribal officers from conducting many investigative stops altogether, see Gov't Br. 36-39; it would require officers conducting stops to make unreliable, on-the-spot determinations regarding whether the suspect is a non-Indian, see *id.* at 39-41; and it would generally require officers to simply give a pass to anyone whom they could not ascertain to be an Indian, see *id.* at 41.

Respondent's deviations from the Ninth Circuit only make matters worse. Unlike the Ninth Circuit, which instructed that "[o]fficers cannot presume for jurisdictional purposes that a person is a non-Indian—or an Indian—by making assumptions based on that person's physical appearance," Pet. App. 9a, respondent would apparently *require* officers to consider physical appearance in determining a person's Indian status. See, *e.g.*, Resp. Br. 2 ("Because Officer Saylor immediately realized [respondent] appeared to be non-Indian, his subsequent seizure and searches of [respondent] were *ultra vires*.") (citation omitted); *id.* at 10. Such mandatory profiling by physical appearance is not only inappropriate, but also an unreliable indicator of who qualifies as an Indian under the various approaches in the lower courts. See Gov't Br. 39-40; Pet. App. 9a-10a; see also Cayuga Nation Amicus Br. 21-22. And respondent does not address what an officer should do when faced with conflicting indicia of Indian status, or the degree of certainty an officer must possess before acting.

Even more significantly, respondent does not defend the Ninth Circuit's exception to its general rule, under which a tribal officer on a public right-of-way may detain a non-Indian suspect if, during the "limited interaction" necessary to ascertain the suspect's non-Indian status, it "is 'apparent' or 'obvious' that state or federal law is being or has been violated." Pet. App. 8a-9a (citation omitted). Respondent instead seems to contemplate an even more circumscribed authority, pursuant to which an officer who is unable to determine Indian status with the requisite degree of certainty (whatever that may be) has no more authority than that of "a private person * * * in the same circumstances" under "the common law" at the time of the Founding. Resp. Br. 22 n.2 (quoting Pet. App. 18a). That view of tribal authority is untenable.

As this Court has recognized, "Indian tribes * * * are a good deal more than 'private, voluntary organizations.'" *Wheeler*, 435 U.S. at 323 (citations omitted). The Ninth Circuit understood the common law at the time of the Founding to permit only citizen's arrests for felonies that a private individual personally observed. See Pet. App. 18a. If that account is correct—and if Founding-era law, as opposed to current law, see Mont. Code Ann. § 46-6-502 (2019), were indeed the proper reference point—then a tribal officer's authority to detain a non-Indian in a case like this "will not extend to a wide array of serious and dangerous traffic offenses that are only misdemeanors," including "a first-time DUI in Montana." Pet. App. 63a (Collins, J., dissenting from the denial of rehearing en banc). Furthermore, it is unrealistic to "expect every police officer to know the details of frequently complex penalty schemes," especially "on the spur (and in the heat) of the moment."

Atwater v. *City of Lago Vista*, 532 U.S. 318, 347-348 (2001). Tribal officers may thus be reluctant to conduct citizen's arrests altogether.

2. Respondent asserts (Br. 26-27) that the practical problems with his approach cannot be a basis for rejecting it. But the problems with respondent's approach extend far beyond the practical challenges it would create; as explained above and in the opening brief (pp. 2-14, *supra*; Gov't Br. 17-31), respondent's approach is also inconsistent with principles of tribal sovereignty, longstanding historical practice, and this Court's precedents. Moreover, respondent's assertion that the practical problems with his approach are irrelevant relies solely on this Court's decisions in *Duro* and *Oliphant*, which address "[c]riminal trial and punishment" by the tribe. *Duro*, 495 U.S. at 693 (citing *Oliphant*, 435 U.S. at 210). Those decisions lack any "stare decisis" (Resp. Br. 27) force in this case, which concerns the limited on-the-ground policing authority necessary to the proper effectuation of Senate-ratified treaties. See Gov't Br. 26-31; pp. 6-8, *supra*. Among other differences, because the policing authority often must be exercised on the spot—meaning that officers will often lack certainty about a suspect's Indian status, the nature of the land on which the encounter occurs, or other factors necessary under respondent's approach, see Gov't Br. 36-41—its absence would substantially chill even a tribe's efforts to enforce its own laws against its own members on its own lands. See *id.* at 39, 40; see also, *e.g.*, Ute Indian Tribe Amicus Br. 2-13.

Respondent alternatively suggests (Br. 28) that any law-enforcement "void" created by his approach can be filled by cross-deputization agreements. Such agree-

ments, however, are a poor fit for the gaps that his approach creates. As a threshold matter, they typically grant powers far beyond the limited policing authority at issue here. Under 25 U.S.C. 2804, for example, the Secretary of the Interior can make agreements with tribes pursuant to which the Secretary may grant qualifying tribal officers powers listed in 25 U.S.C. 2803, the most relevant of which is the power not just to temporarily detain a non-Indian suspect until federal officers arrive, but to conduct a full "arrest" for certain violations of federal law. 25 U.S.C. 2803(3); see 21 U.S.C. 878(a)(3) (similarly authorizing Attorney General to empower cross-deputized officers to "make arrests"). And in order to make such agreements worthwhile for both the government and the tribe, cross-deputization typically also includes the other additional Section 2803 powers—such as the power to detain and pursue non-Indians *outside* the tribe's reservation, so long as the underlying offense was committed in Indian country. 25 U.S.C. 2803(3) and (5).

Furthermore, cross-deputization agreements require each side to accept responsibilities that are typically disproportionate to the limited policing authority at issue here. Under a Section 2804 agreement, for example, the federal government would be required to treat a cross-deputized tribal officer as "a Federal law enforcement officer," 25 U.S.C. 2804(a)(3)(B)(ii), for purposes of (among other things) federal tort liability and workers' compensation benefits, 25 U.S.C. 2804(f); see 5 U.S.C. 3374(c)(2), 8191. And a tribe that entered into such an agreement would be required, among other things, to allow the federal Bureau of Indian Affairs to "investigate any allegations of misuse of authority." 25 C.F.R. 12.21(a). Tribes may view such conditions as an affront to their sovereignty. See, *e.g.*, Kevin Morrow,

Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country, 94 N.D. L. Rev. 65, 92 (2019) (referencing "the suspicion and lack of trust that reportedly prevails between tribal police and surrounding law enforcement agencies") (citation omitted).

Finally, even when such a cross-deputization agreement exists, the process of actually deputizing tribal officers can be expensive and burdensome. Under Section 2804, for example, officers must be individually cross-deputized. See 25 U.S.C. 2804(a)(2). And to obtain the requisite commission, each officer must complete a background investigation and training. See 25 U.S.C. 2804(a)(3)(A); 25 C.F.R. 12.32. That process often takes months to complete. And even after obtaining the requisite commission, the officer would have only the power to police violations of federal law—not the state law that will supply the relevant prohibition for many common offenses committed on a public right-of-way or non-Indian fee land within reservation boundaries.

In order to obtain even limited authority to police those common violations, respondent's approach would require a separate cross-deputization agreement with the State. Such an agreement may be difficult or impossible to negotiate, contain substantial limitations, have significant practical implementation problems, and be subject to withdrawal or modification if the overall relationship deteriorates for any reason. See Cayuga Nation Amicus Br. 25-27. Tribes should not have to enter into such agreements simply to exercise the core sovereign authority to protect the safety of people and property inside their borders.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

MARCH 2021