No. 19-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
***Petitioner*,**

v.

JOSHUA JAMES COOLEY,
***Respondent*,**

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A TRIBAL POLICE OFFICER WHO IS NOT CROSS-DEPUTIZED HAS AUTHORITY TO DETAIN, INVESTIGATE, AND SEARCH A NON-INDIAN ON A PUBLIC RIGHT-OF-WAY FOR A POSSIBLE VIOLATION OF STATE OR FEDERAL LAW WHEN THE VIOLATION IS NOT APPARENT OR OBVIOUS.

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STATEMENT OF THE CASE

Mr. Cooley incorporates by reference the statement of facts set forth in the Ninth Circuit's opinion. (Pet'r App. 2a-6a); *United States v. Cooley*, 919 F.3d 1135, 1139-1141 (9th Cir. 2019).

REASONS FOR DENYING THE PETITION

This case does not present an important question. The Ninth Circuit's opinion conforms with decisions of this Court. There is no conflict among the circuits, and the Ninth Circuit's opinion is not in conflict with any decision of a state court of last resort. The factual scenario in this case is unique, and the practical implications of the decision below are limited.

The Ninth Circuit's opinion recognizes that tribal officers can stop non-Indians on public rights-of-way across Indian reservations long enough to determine whether they are Indians, and it further recognizes that tribal officers can detain them long enough to turn them over to state or federal authorities *if* they were obviously violating state or federal law. The issues in this case arise only when a non-cross-commissioned tribal officer (1) is on a public right-of-way running through an Indian reservation and (2) undertakes to detain and investigate whether a non-Indian committed some crime that has nothing to do with demonstrated danger.

The government asserts that the Ninth Circuit's opinion is in "serious tension" with decisions of various state courts. The government is wrong, the state cases are readily distinguished, both legally and factually, and its assertion is belied by a dearth of court decisions addressing the same issue. This Court should deny the Petition for a Writ of Certiorari.

I. The Ninth Circuit's opinion is consistent with this Court's jurisprudence.

The government argues that the Ninth Circuit's opinion "disrupts long-held understandings, reflected in decisions of this Court and others, about law enforcement on reservation land." (Pet. 11). The government maintains that the decision below "disrupts" understandings reflected in *Duro v. Reina*, 495 U.S. 676 (1990) and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The government is mistaken because its interpretations of *Duro* and *Strate* are strained, flawed, and incorrect. The Ninth Circuit's opinion is entirely consistent with this Court's jurisprudence, and the government is disregarding fundamental Indian law strictly limiting tribal authority over non-Indians.

The government first cites *Duro* for the proposition that "[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." (Pet. 13) (quoting *Duro*, 495 U.S. at 697).

The government then cites to a footnote in *Strate* wherein this Court stated "[w]e do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law." (Pet. 14-15) (quoting *Strate*, 520 U.S. at 456 n.11).

The government maintains that this Court's footnote in *Strate* "effectively recognized" that the proposition stated in *Duro—i.e.*, the authority to "detain and transport" non-Indian violators of state or federal law—includes the authority to detain, investigate, search, and generally police non-Indians on rights-of-way running through reservation lands. (Pet. 14).

The government's argument is wrong. It ignores fundamental Indian law. Contrary to the government's contention, the Ninth Circuit's opinion is consistent with *Duro* and *Strate*.

First, the footnote in *Strate* is dicta and it does not, as the government suggests, acknowledge the *existence* of Indian tribes' inherent authority to "detain and transport" non-Indians on public highways. Instead, the footnote acknowledged that the *question* of whether that authority exists was beyond the purview of the question presented in *Strate*. *Strate*, 520 U.S. at 456 n.11 (stating that "[w]e

do *not here question* the authority … .") (emphasis added).

More importantly, the government is misinterpreting *Duro* and *Strate* by inserting words that do not exist. Throughout the Petition, the government repeatedly conflates the power to *detain* and *transport* with the power to detain, investigate, and generally police. (Pet. 12-13, 15-16, 20). Even a cursory review of *Duro* and *Strate*, however, reveals that this Court did *not* recognize that Indian tribes possess the broad authority to detain, investigate, search, and generally police non-Indians. Instead, this Court at most recognized a narrow circumstance in which a tribal officer possesses a limited authority to *detain* non-Indian offenders and *transport* them to the custody of state or federal authorities. *Duro*, 495 U.S. at 697; *Strate*, 520 U.S. at 456 n.11. The narrow circumstance giving rise to this limited authority *only* exists when, in the course of exercising tribal authority, the officer encounters a non-Indian who is violating state or federal law. In that circumstance, the tribal officer may exercise the limited authority alluded to in *Duro* and *Strate*, *i.e.*, the officer may *detain* and *transport* the non-Indian to the custody of state or federal authorities.

Thus, contrary to the government's contention, the decision below is entirely consistent with this Court's jurisprudence. Indeed, the Ninth Circuit acknowledged and upheld tribal officers' authority to *detain* non-Indian violators of state or federal law for

purposes of *turning them over* to the appropriate authorities. And just like *Duro* and *Strate*, where this Court did not recognize the existence of an additional, and much broader, criminal authority to investigate, search and generally police, the Ninth Circuit likewise did not recognize the existence of this additional authority over non-Indians, particularly on non-Indian land.

The government relies on a flawed extension of this Court's statements in *Duro* and *Strate* in order to advance an argument that is purportedly grounded in notions of "inherent sovereign authority of Indian tribes." (Pet. 11). Although the government invokes the concept of "inherent sovereignty," it fails to reconcile its position with the fundamental principle that this Court recognized in *Oliphant*: Indian tribes lack criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

This lack of criminal jurisdiction is rooted in the diminished sovereignty that necessarily results from Indian tribes' dependence on the government of the United States. Reservations are part of the United States, and tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority." *Id.* at 208-09 (quoting *United States v. Rogers*, 45 U.S. (4 How.) 567, 571 (1846)). That dependent status "necessarily diminished" tribal sovereignty. *Id.* (quoting *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823)).

The "intrinsic limitations on Indian tribal authority" and "the overriding sovereignty of the United States" were the foundation of this Court's conclusion in *Oliphant*. *Oliphant*, 435 U.S. at 209. Tribal dependency stripped tribes of "*the right of governing every person within their limits except themselves*." *Id*. (quoting *Fletcher v. Peck*, 6 Cranch 87, 147 (1810) (Johnson, J., concurring) (italics added in *Oliphant*). Indian tribes lack criminal jurisdiction over non-Indians because the United States has manifested a "solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id.* at 210. At bottom, then, by "submitting to the overriding sovereignty of the United States," Indian tribes necessarily relinquished all criminal authority over "non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.*; *see also Montana v. United States*, 450 U.S. 544, 565 (1981) ("inherent sovereign powers do not extend to the activities of nonmembers of the tribe"); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001) ("Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed.").

Here, the government's assertion that Indian tribes possess inherent police authority over non-Indians is at odds with fundamental Indian law. Indeed, the government not only fails to explain how inherent tribal sovereignty extends to police power over a non-Indian on a public right-of-way, but also fails to explain how police power can be divorced from criminal jurisdiction in the first place. It is the

government's Petition, and not the Ninth Circuit's opinion, that is inconsistent with this Court's jurisprudence. The Petition should be denied.

II. The Ninth Circuit's opinion is not in tension with state court decisions.

The government argues that the decision below is "in serious tension with decisions from various state courts addressing similar issues." (Pet. 21). The government cites four state court decisions in support of its argument. A review of those decisions demonstrates that they are not in "serious tension" with the Ninth Circuit's opinion.

The government first cites to the Supreme Court of Washington's decision in *State v. Schmuck*, 850 P.2d 1332 (Wash. 1993), cert. denied, 510 U.S. 931 (1993). In *Schmuck*, a police officer for the Suquamish Indian Tribe ("Officer Bailey") observed a pickup truck "obviously exceeding" the posted speed limit as it traveled down a road running through the Port Madison Reservation. *Schmuck*, 850 P.2d at 1333. Officer Bailey turned on his emergency lights and pursued the truck, which responded by speeding up. *Id*. at 1333-1334. Officer Bailey then turned on his siren and continued to pursue the truck down multiple streets of the reservation. *Id*. at 1334. After running a stop sign and continuing to accelerate, the truck eventually stopped and pulled over. *Id.*

Officer Bailey approached the truck, requested a driver's license, and noted that the driver smelled of alcohol. *Schmuck*, 850 P.2d at 1334. The license identified the driver as David Schmuck ("Schmuck"), who was not an enrolled member of any recognized Indian tribe. *Id.* Officer Bailey asked Schmuck if he had been drinking, and Schmuck said, "I've had a few." *Id.* Officer Bailey asked if Schmuck would submit to field sobriety testing, and Schmuck refused. *Id.* At that point, because Schmuck was non-Indian, Officer Bailey temporarily detained him pending the arrival of Washington State Patrol to "investigate whether Schmuck had been driving while under the influence of alcohol or drugs." *Id.* Officer Bailey contacted the Washington State Patrol, and a state trooper ("Trooper Clark") arrived approximately 20 minutes later. *Id.*

Upon arrival, Trooper Clark detected a "strong odor" of alcohol emanating from Schmuck and observed that his eyes were "bloodshot and watery." *Schmuck*, 850 P.2d at 1334. Trooper Clark removed Schmuck from the vehicle, conducted field sobriety testing, and eventually arrested Schmuck for driving while intoxicated. *Id.*

Ultimately, Schmuck's case reached the Supreme Court of Washington, which addressed the questions of (1) whether the Suquamish Indian Tribe possessed the inherent authority to initiate the traffic stop and (2) whether the Suquamish Indian Tribe possessed the inherent authority to detain Schmuck based upon

conduct violating state law for purposes of turning him over to state authorities. *Schmuck*, 850 P.2d at 1335.

The Supreme Court of Washington began its analysis by noting how the question before it was "limited to the sole question of whether the Tribe has inherent *authority* to stop and detain." *Schmuck*, 850 P.2d at 1335 n. 3 (emphasis in original). Noting how Schmuck was not challenging the *reasonableness* of his detention, the court expressly declined to address "any arguments by respondent or amicus curiae regarding the scope of the detention." *Id.*

After clarifying the narrow question before it, the Supreme Court of Washington addressed the first issue and concluded that the tribe had the authority to "stop Schmuck to investigate a possible violation of the Suquamish traffic code and to determine if Schmuck was an Indian, subject to the code's jurisdiction." *Schmuck*, 850 P.2d at 1337.

With respect to the second issue, the Supreme Court of Washington held that Officer Bailey had the authority to detain Schmuck pending arrival of state law enforcement. *Schmuck*, 850 P.2d at 1344. The court concluded that this authority derived, primarily, from two sources. First, the court emphasized how "[t]he Suquamish Indian Tribe expressly retained in its treaty the Tribe's inherent authority to detain offenders and turn them over to government officials for prosecuting." *Id.* at 1337.

Second, the court determined that the authority derived from the Suquamish Indian Tribe's inherent power to exclude trespassers from the reservation. *Id.* at 1339-1341.

Contrary to the government's contention, the Ninth Circuit's opinion is not in tension with *Schmuck*. To begin, just like *Schmuck*, the Ninth Circuit's opinion recognizes that tribal officers *can* stop non-Indian offenders on public rights-of-way within reservations and *can* detain them long enough to turn them over to state or federal authorities. Although the Ninth Circuit's opinion goes one step beyond *Schmuck* by addressing the *scope* of tribal officers' detention authority, this does not mean, as the government suggests, that the two cases are in tension. Indeed, the *sole* question in *Schmuck* was limited to whether the tribe had *authority* to detain, and the Supreme Court of Washington made clear that it was not addressing "any arguments … regarding the scope of the detention." *Schmuck*, 850 P.2d at 1335 n. 3.

Thus, the Ninth Circuit's opinion is entirely consistent with *Schmuck*, and to the extent the government suggests otherwise, it is merely speculating about what *Schmuck*'s outcome *might* have been *if* the Supreme Court of Washington had not declined to address the *scope* of tribal officers' detention authority over non-Indians.

Moreover, the factual scenario in *Schmuck* bears no resemblance to the factual scenario in this case. Here, Officer Saylor's initial encounter with Mr. Cooley was the result of a welfare check. (Pet'r App. 2a). Officer Saylor observed no criminal conduct prior to the encounter or prior to identifying Mr. Cooley as non-Indian, but he nevertheless undertook to detain, investigate and search Mr. Cooley for non-traffic-related criminal activity. (Pet'r App. 2a-6a).

Schmuck involved entirely different facts. The tribal officer in *Schmuck* observed an unknown driver commit multiple blatant traffic-related crimes prior to initiating the traffic stop. *Schmuck*, 850 P.2d at 1333-1334. The driver attempted to elude the tribal officer, who was forced to pursue the fleeing vehicle through multiple streets within the reservation as the driver disregarded a stop sign and continued accelerating. *Id.* at 1334. Moreover, once the truck stopped, the tribal officer smelled alcohol emanating from the driver while attempting to ascertain his Indian status. *Id.* at 1334.

Simply put, the facts in *Schmuck* bear no resemblance to those present here, and because the Supreme Court of Washington did not address any arguments concerning the *scope* of tribal detention authority, the unique facts in *Schmuck* were *not* analyzed or tested to determine whether they exceeded the *scope* of Indian tribes' detention authority over a non-Indian on a public right-of-way.

The government also argues that the Ninth Circuit's decision is in tension with the decision in *State v. Ryder*, 649 P.2d 756, (N.M. Ct. App. 1981), aff 'd, 648 P.2d 774 (N.M. 1982). In *Ryder*, an officer of the United States Bureau of Indian Affairs ("Officer Rocha") observed a pickup truck run a stop sign on a public highway that was located within the exterior boundaries of the Mescalero Apache Reservation in New Mexico. *Ryder v. State*, 648 P.2d 774, 775 (N.M. 1982). Officer Rocha initiated a traffic stop and immediately determined that the driver ("Pressing") was non-Indian. *Id.* Believing that he was not commissioned to issue a traffic citation under New Mexico law, Officer Rocha contacted another BIA officer who was cross-commissioned under New Mexico law ("Officer Chino"). *Id.* While waiting for Officer Chino to arrive, Officer Rocha noticed that Pressing smelled of marijuana. *Id.* When Officer Chino arrived on scene ten minutes later, he issued a state traffic citation to Pressing and searched his vehicle due to the odor of marijuana. *Id.* That search uncovered 270 pounds of marijuana. *Id.* The state of New Mexico charged Pressing and his passengers with drug distribution. *Id.*

The *Ryder* case eventually reached the Supreme Court of New Mexico, which addressed the question of "[w]hether a non-cross-commissioned Bureau of Indian Affairs (BIA) police officer had the legal authority to detain the defendants so that a cross-commissioned BIA police officer could arrive and

issue the driver of the pick-up truck a state traffic citation." *Ryder*, 648 P.2d at 775.

The Supreme Court of New Mexico ultimately determined that Officer Rocha had been operating under a mistaken belief about his lack of authority over non-Indians. *Ryder*, 648 P.2d at 776-777. Under the Assimilative Crimes Act, 18 U.S.C. § 13, the court explained how Congress had vested the BIA with authority to enforce state substantive law. *Id.* at 776. Consequently, the court held that Officer Rocha did, in fact, have the authority to issue Pressing "a federal traffic citation based on state law." *Id.* The court also noted how the scope of Pressing's detention was not rendered unreasonable by Officer Rocha's mistaken belief about his authority because it only prolonged the detention by ten minutes. *Id.* at 776-777.

The government's reliance on *Ryder* is misplaced. Notably, the government reviews the intermediate appellate court's decision in *Ryder*, as opposed to the subsequent and controlling decision of the Supreme Court of New Mexico. (Pet. 22-23) (citing *State v. Ryder*, 649 P.2d 756 (N.M. Ct. App. 1981), aff 'd, 648 P.2d 774 (N.M. 1982)). This is important because although the Supreme Court of New Mexico affirmed the intermediate appellate court's decision, it did so on other grounds. *Ryder*, 648 P.2d at 775, 777. The intermediate appellate court confusingly based its decision on notions of tribal sovereignty and overlooked Officer Rocha's authority under federal law as a BIA agent. *Ryder*, 649 P.2d at 756-760 (N.M.

Ct. App. 1981), aff 'd, 648 P.2d 774 (N.M. 1982)). Consequently, the Supreme Court of New Mexico disregarded the lower court's analysis, explained how Officer Rocha's authority derived under federal law by an act of Congress, and affirmed the lower court's decision on this basis. *Ryder*, 648 P.2d at 775, 777. For this reason, *Ryder* is clearly not in tension with the Ninth Circuit's opinion in this case because the Supreme Court of New Mexico—*i.e.*, the court of last resort in New Mexico—did not address any questions relating to tribal sovereignty and, instead, based its holding on a congressional grant of authority to federal officers under United States law.

The government's reliance on *State v. Pamperien*, 967 P.2d 503 (Or. Ct. App. 1998), is similarly misplaced. It, too, is an intermediate appellate court decision. Moreover, the suspect in *Pamperien* was exceeding the posted speed limit by 20 miles per hour, did not have a driver's license, and had an outstanding warrant. *Pamperien*, 967 P.2d at 504. Furthermore, in that intermediate appeal, the defendant's *sole* argument was that "[the tribal officer] could not lawfully stop him for speeding." *Id.* That is not the issue here.

Finally, the government argues that the Ninth Circuit's decision is in tension with the Supreme Court of Wyoming's decision in *Colyer v. State*, 203 P.3d 1104 (Wyo. 2009). Like *Ryder*, the detention in *Colyer* did not involve any tribal officers. Instead, *Colyer* involved two BIA officers' pursuit of a reported

drunk driver on a public highway within the boundaries of the Wind River Indian Reservation. *Colyer*, 203 P.3d at 1105-1106. The BIA officers observed the vehicle driving "all over the road," drifting over the fog line, and exceeding the posted speed limit by 20 miles per hour. *Id.* at 1106. One of the BIA officers eventually stopped the vehicle and detained the driver, a non-Indian, until a state deputy sheriff arrived. *Id.* The deputy sheriff arrested the driver for driving under the influence. *Id.*

Colyer eventually reached the Supreme Court of Wyoming, which addressed the question of "whether the appellant's detention by the B.I.A. officers rendered the subsequent arrest [by the deputy sheriff] unlawful." *Colyer*, 203 P.3d at 1106. Concluding that "neither the B.I.A. officer nor the deputy sheriff left his respective territorial jurisdiction," the Supreme Court of Wyoming held that the BIA officers had the authority to stop the driver and detain him pending arrival of the deputy sheriff for investigation and prosecution under state law. *Id.* at 1107, 1109-1111.

Colyer is not in conflict with the Ninth Circuit's opinion here. Unlike this case, no tribal officers were involved in *Colyer*. Instead, *Colyer* involved two BIA officers and a state deputy sheriff, all of whom were within their respective jurisdictions. Moreover, the factual scenario in this case bears no resemblance to the factual scenario in *Colyer*, where the BIA officers observed traffic-related criminal activity prior to

stopping the driver and detaining him pending the arrival of a state officer.

Simply put, there is no tension, let alone "serious" tension, between the Ninth Circuit's opinion and the state court decisions cited by the government. The Petition should be denied.

III. The "Bad Men" treaty argument was not raised below and should not be addressed here.

The government does not press the treaty right issue presented by the *amici*. *See Turner v. Rogers*, 564 U.S. 431, 456-57 (2011) (Thomas, J., dissenting) ("Accordingly, it is the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an amicus.") (citations omitted). The Crow Tribe of Indians, along with other *amici*, raises this new issue, arguing the plain meaning of the "bad men" text in the Second Treaty of Fort Laramie between the United States and the Crow Tribe, 15 Stat. 649 ("1868 Treaty"), recognizes the police power exercised by the Crow Tribe here.

That issue was not raised, let alone considered, in either of the lower courts. (Pet'r App. 1a-31a). Consequently, this Court should not consider it because neither Mr. Cooley nor the government developed evidence or arguments on this issue in the lower court proceedings. *Singelton v. Wulff*, 428 U.S.

106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

CONCLUSION

This case does not present any compelling questions of exceptional importance. It involves a technical issue of Indian tribal authority and a unique factual scenario. The unexceptional nature of the legal issue and the unusual nature of the factual scenario are underscored by the government's attempt to demonstrate "serious tension" by citing to four examples between 1981 and 2009 wherein state courts addressed distinct issues based on facts distinct from those present here.

The Ninth Circuit's opinion adheres to fundamental Indian law and is entirely consistent with this Court's jurisprudence. The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Eric R. Henkel, hereby certify that the document contains 3,732 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted this 15th day of October, 2020.

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CERTIFICATE OF SERVICE

I, Eric R. Henkel, hereby certify that on the 15th day of October, 2020, I served the attached Brief in Opposition on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via United States Postal Service first-class mail. The Solicitor General and other persons named below were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

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