No. 19-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSHUA JAMES COOLEY, RESPONDENT

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

BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae are 8 current and former Members of the United States Senate and the United States House of Representatives, which have plenary authority to legislate in Indian affairs and a duty to ensure public safety in Indian country. Amici (listed in the Appendix) include members and leaders of the Senate Committee on In-

[1] Counsel for all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

dian Affairs and the House Natural Resources Subcommittee for Indigenous Peoples of the United States, and advocates for public safety in Indian country. Amici are committed to combating and preventing crime on Indian reservations, and to ensuring that gaps in enforcement do not compromise these efforts. Amici submit this brief to provide the Court context for the resolution of the question presented, including a history of significant legislative efforts in this area, particularly those efforts over the last decade that the Ninth Circuit's new rule severely compromises. Congress has recognized, relied upon, and even set limits on tribal investigative authority over non-Indians that are incompatible with the decision below.

Amici also have an interest in preserving Congress's plenary authority to legislate over Indian affairs, which includes the exclusive authority to divest Tribes of aspects of their sovereignty. The decision below intrudes on Congress's role and on tribal sovereignty by divesting an inherent aspect of sovereignty without identifying any clear manifestation of Congressional intent to do so.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below articulates a novel standard restricting the authority of a tribal police officer to temporarily detain and search a non-Indian on a public reservation right-of-way absent an "apparent" violation of state or federal law. This Court should reject that standard as inconsistent with history, precedent and legislation. This brief addresses three aspects of the Ninth Circuit's approach that are of special concern to amici.

First, the mode of reasoning employed in the decision below marginalizes the plenary and exclusive authority of Congress to legislate in Indian affairs. Courts should take care not to find divestment of a retained aspect of

inherent tribal sovereignty in the absence of a clear indication that Congress intended such a divestment.

Second, Congress has expressed its intent on the subject of tribal search and seizure. In particular, Congress recognized and limited tribal search and seizure authority by including a Fourth Amendment analogue in the Indian Civil Rights Act of 1968 (ICRA). Moreover, Congress has acknowledged that ICRA governs a Tribe's treatment of non-Indians. Congress has amended other parts of ICRA concurrently with its recent affirmations of tribal regulatory and adjudicatory authority over non-Indians, but notably has left the statute's search and seizure provision undisturbed since its adoption. This history strongly supports the conclusion that, within a Tribe's proper geographic reach, tribal search and seizure authority over non-Indians is properly considered under a standard parallel to the Fourth Amendment.

Finally, this Court should bear in mind the fundamental duty of the United States to provide for public safety in Indian country, and the extensive efforts of Congress to combat and prevent crime on Indian reservations. With the benefit of over a century of experience legislating in this area, Congress has determined that empowering local law enforcement is essential to the success of such initiatives, because nonlocal agencies have historically failed to combat—and have even contributed to—lawlessness in Indian country. Over the last decade, Congress has affirmed tribal regulatory and adjudicative authority and supported the growth of tribal institutional capacity. Congress's efforts in this area bespeak a clear and consistent understanding that Tribes possess inherent investigative authority; recent legislation both presumes and relies upon that power.

Where gaps in jurisdiction and enforcement have contributed to lawlessness in Indian country, Congress has supported Tribes' efforts to fill those gaps. By depriving Tribes of the authority to investigate violations of state and federal law on a public reservation right-of-way absent an "apparent" violation, the decision below creates the sort of gap that Congress has sought to eliminate. Indeed, the fact that this supposed gap went unmentioned amidst years of active legislative efforts shows how badly out-of-step the decision below is with Congress's prevailing understanding of tribal authority.

ARGUMENT

I. Requiring a Clear Expression of Congressional Intent to Divest Tribes of an Inherent Aspect of Sovereignty Preserves Congress's Preeminent Role in Indian Affairs

The decision below relies on the "limited" authority of Indian Tribes to try and punish non-Indians for criminal offenses, Pet. App. 7a (citing, *inter alia*, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978)), and to hear in tribal court civil cases involving non-Indians arising on a public right-of-way across the reservation, Pet. App. 7a–8a (citing *Strate* v. *A-1 Contractors*, 520 U.S. 438, 454–456 (1997)). From those decisions, the Ninth Circuit inferred that Tribes also lack a separate aspect of inherent sovereignty: the authority to stop, investigate and detain non-Indians on public rights-of-way within a reservation based on a potential violation of state or federal law. Pet. App. 8a (characterizing investigative authority as "ancillary").

But Congress alone enjoys the power to recognize, modify, or eliminate aspects of tribal sovereignty. *United States* v. *Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to

legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"); *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."). A judicial inference about what aspects of sovereignty have been divested is an intrusion into the plenary and exclusive authority that the Legislative Branch possesses in Indian affairs.

1. Tribes possess inherent authority to stop and investigate a non-Indian for a potential violation of state or federal law, and to detain that individual until he or she can be turned over to the appropriate state or federal authorities for charging and prosecution. See *State* v. *Schmuck*, 850 P.2d 1332 (Wash. 1993) (en banc); *Strate*, 520 U.S. at 456 n.11 (acknowledging "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"). "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987).

Congress surely possesses the power to divest Tribes of this inherent investigative authority. This Court has "consistently described" Congress's powers as "plenary and exclusive." *Lara*, 541 U.S. at 200. But the corollary of that power is that, absent Congressional action to divest a Tribe of an aspect of sovereignty, Tribes retain their inherent authority. See *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). Accordingly, for a court to hold that an inherent aspect of tribal sovereignty has been divested, it must find "clear indications" of Congress's

intent to do so. See*, e.g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978) ("[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.").

This Court consistently has applied that "clear statement" rule when considering limitations on tribal sovereignty, including reservation disestablishment or diminishment, *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1078–1079 (2016) ("Only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear" (quotation marks and citation omitted)); abrogation of tribal sovereign immunity, *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) ("The baseline position, we have often held, is tribal immunity; and '[t]o abrogate [tribal] immunity, Congress must 'unequivocally' express that purpose.'" (quoting *C & L Enters., Inc.* v. *Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (quoting, in turn, *Martinez*, 436 U.S. at 58)); or abrogation of treaty rights, *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1696 (2019) ("Congress 'must clearly express' any intent to abrogate Indian treaty rights." (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999))). Like other clear statement rules designed to ensure clear lines of political accountability in a system were power is divided both horizontally and vertically, these rules ensure that the United States Congress alone retains plenary authority over Indian affairs—and that it remains accountable for its choices in the field.

2. Here, there are no "clear indications of legislative intent," *Martinez*, 436 U.S. at 60, to divest or restrict tribal investigative authority in the manner described by the Ninth Circuit. The Ninth Circuit's approach of

finding divestment-by-analogy fails to show "proper respect both for tribal sovereignty itself and for the plenary authority of Congress," *id*.

Indeed, the mode of analysis in *Strate* and *Oliphant* themselves—the cases on which the Ninth Circuit relied—shows the error of the Ninth Circuit's approach. Each of those cases undertakes a particularized inquiry into how and when a divestment of inherent authority occurred. See*, e.g., Strate*, 520 U.S. at 455–456 (analyzing the impact of a right-of-way granted in 1970 on the Tribe's sovereign authority to occupy and exclude, and concluding that "the Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right-of-way" other than the right for Indian landowners to construct and maintain crossings); *Oliphant*, 435 U.S. at 197–206 (analyzing the impact of 200 years of history, legislation, and precedent on a Tribe's inherent authority to assert criminal jurisdiction over non-Indian offenders).

By contrast, none of the decisions below analyzes or even notes the nature of the grant of the particular right-of-way at issue here.[2] Absent such an analysis, and absent a clear Congressional intent to divest Tribes of their investigatory authority over non-Indians, the decision below usurps Congress's plenary power. *Cf. United States* v. *Mazurie*, 419 U.S. 544, 558 (1975) ("If this power is to be taken away from [Indian Tribes], it is for Congress to do it." (quoting *Williams* v. *Lee*, 358 U.S. 217, 223 (1959)).

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[2] Given the undeveloped state of the record, Amici take no position on whether the conditions under which the public right-of-way in question was established reflect a divestment of the tribal investigative authority that would otherwise exist.

II. Congress Has Established a Standard for the Exercise of Tribal Investigative Authority over Non-Indians

The decision below adopts a *sui generis* standard to govern tribal investigative authority over non-Indians:

> [T]ribal authorities may stop those suspected of violating tribal law on public rights-of-way as long as the suspect's Indian status is unknown. In such circumstances, tribal officials' initial authority is limited to ascertaining whether the person is an Indian. The detention must be a brief and limited one; authorities will typically need to ask one question to determine whether the suspect is an Indian. If, during this limited interaction, it is apparent that a state or federal law has been violated, the tribal officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities.

Pet. App. 8a (internal citations and quotation marks omitted). That standard contradicts Congress's clear expression that an entirely different—and quite familiar—standard supplied by the Fourth Amendment should apply.

1. In 1968, Congress enacted the Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, §§ 201 et seq., 82 Stat. 73, 77 (codified as amended at 25 U.S.C. §§ 1301–1303, 1321–1326, 1331, 1341). ICRA "imposes certain protections and limitations on the exercise of tribal authority" similar to the guarantees of the Bill of Rights, *Duro* v. *Reina*, 495 U.S. 676, 681 n.2 (1990), which does not of its own force apply to Indian Tribes, *Talton* v. *Mayes*, 163 U.S. 376 (1896).

Among ICRA's protections and limitations is a provision that closely parallels the guarantees of the Fourth

Amendment. See 25 U.S.C. § 1302(a)(2) ("No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized").

ICRA's guarantees apply to exercises of tribal governmental authority toward Indians and non-Indians alike. See *Iowa Mut. Ins. Co.*, 480 U.S. at 19 (recognizing that ICRA "provides non-Indians with various protections against unfair treatment in the tribal courts"); see also *Oliphant*, 435 U.S. at 212 (recognizing that ICRA "extends certain basic procedural rights to *anyone* tried in Indian tribal court" (emphasis in original)).

2. Congress has amended ICRA to respond to, or coordinate with, other changes in the law, particularly where those changes involve the exercise of tribal authority over non-members and non-Indians. See*, e.g.*, *Lara*, 541 U.S. at 222 (discussing Congress's amendment to ICRA to recognize and affirm "the existence of 'inherent power . . . to exercise criminal jurisdiction over all Indians'").

But Congress has never amended ICRA's Fourth Amendment analogue. For example, Congress did not amend Section 1302(a)(2) in 2013 when it recognized and affirmed tribal jurisdiction over non-Indians for certain crimes of domestic violence, despite otherwise amending ICRA to provide additional due process protections to such prosecutions. See Violence Against Women Reauthorization Act of 2013 ("VAWA"), Pub. L. No. 113-4, §§ 901–910, 127 Stat. 54, 118 (codified in scattered sections of 25 and 34 U.S.C.).

Likewise, Congress did not amend ICRA's search and seizure provision when it adopted the Tribal Law and Order Act of 2010 ("TLOA"), Pub. L. No. 111-211, 124 Stat. 2258 (codified in scattered sections of 25 and 42 U.S.C.) to combat "a sense of lawlessness" on Indian reservations. S. Rep. No. 111-93, at 9 (2009). TLOA otherwise amended ICRA to relax restrictions on the sentencing authority of tribal courts, provided that tribal courts observe certain due process protections.

Congress's decision not to amend ICRA's Fourth Amendment analogue as part of TLOA is especially telling because the Congress that enacted TLOA was attuned to both tribal authority over roadways and the need to investigate and detain non-Indians. TLOA's legislative history recognizes that "the lack of prosecution of misdemeanor crimes," specifically including traffic violations, created a "gap in the system" and resulted in "a sense of lawlessness" on Indian reservations. S. Rep. No. 111-93, at 9. Likewise, during a hearing prior to the introduction of TLOA, a tribal elected official and former tribal police officer testified about some of the challenges faced on the Colorado River Indian Reservation. The witness offered a hypothetical in which a non-Indian steals a vehicle belonging to an Indian. The witness acknowledged that "our officers can detain such an individual once they go through the determination that it's a non-Indian. They can detain, they can call the State Police, and they can refer the case." *Law and Order in Indian Country, Field Hearing before the S. Comm. on Indian Affairs,* 110th Cong. 21 (2008) (statement of Eldred Enas, vice-chairman, Colorado River Indian Tribes). Senate Indian Affairs Committee Chairman Byron Dorgan engaged with the witness by asking spe-

cific questions about the likelihood of the State to *prosecute* such an offense, but raised no questions about the breadth of, or restrictions on, the Tribe's authority to *investigate and detain* demonstrated by the hypothetical.

3. These statutes and history teach three things of significance for this case. First, the very existence of ICRA—which *limits* the authority of tribal government with respect to non-Indians (as well as Indians)—shows that Congress has long understood that Tribes presumptively possess inherent sovereign authority to investigate non-Indians.

Second, Congress's choice to mirror the Fourth Amendment in ICRA shows that Congress intended that exercises of tribal authority be judged by the familiar Fourth Amendment standard, not the novel standard announced in the decision below. *Compare* 25 U.S.C. § 1302(a)(2), *with* U.S. Const. amend. IV. This choice has led the lower courts to analyze issues arising under Section 1302(a)(2) under the standards applicable to the Fourth Amendment. See*, e.g., United States* v. *Lester*, 647 F.2d 869, 872 (8th Cir. 1981). Although the court below recognized the "parallelism" between the two guarantees, Pet. App. 13a, it unaccountably failed to apply the standard Congress actually set forth in ICRA. That standard was, moreover, a considered decision on Congress's part. In ICRA, Congress rejected a wholesale extension of the Bill of Rights to tribal governments, and instead "selectively incorporated and in some instances modified" the guarantees afforded "to fit the unique political, cultural, and economic needs of tribal governments." *Martinez*, 436 U.S. 49, 62–63 (1978).

Third, Congress was not insensitive to the need for tribal authority to investigate non-Indians, or to exercise that authority on roads within reservations. And

yet Congress saw no need to amend ICRA to supply a different standard to govern tribal searches and seizures of non-Indians. This Court has found amendment history probative in other contexts of Congressional intent with respect to tribal authority. See *Iowa Mut. Ins. Co.*, 480 U.S. at 18 (declining to hold that the diversity statute represented a limit on tribal sovereignty in part because "Congress has amended the diversity statute several times since the development of tribal judicial systems, but it has never expressed any intent to limit the civil jurisdiction of the tribal courts" (footnote omitted)).

III. Limiting Tribal Authority Here Would Impede Congress's Efforts to Combat a "Crisis of Violent Crime" on Indian Reservations

"[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country[.]" TLOA § 202(a)(1) (codified at 25 U.S.C. § 2801 note (Findings; Purposes)); see also S. Rep. No. 111-93, at 4 (observing that "along with the authority that the United States imposed over Indian Tribes, it incurred significant legal and moral obligations to provide for public safety on Indian lands"). Yet "American Indian and Alaska Native communities and lands are frequently less safe—and sometimes dramatically more dangerous—than most other places in our country." Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States*, at v (2013). Congress has repeatedly identified a "complex and often overlapping matrix of federal, tribal, and in certain circumstances, state jurisdiction" which "has contributed to a crisis of violent crime on many Indian reservations that has persisted for decades." S. Rep. No. 111-93, at 1 (footnote omitted);

see also *Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women, Hearing Before the S. Comm. on Indian Affairs,* 110th Cong. 1 (2007) (Opening Statement of Chairman Byron Dorgan) (recognizing "a severe public safety crisis in Indian country").

A. Congress's Historical Efforts in this Area Relied on Nonlocal Resources to the Detriment of Public Safety in Indian Country

The "jurisdictional mess" compromising public safety in Indian country is the result of "[o]ne hundred and twenty-plus years of court decisions and stop-gap legislation." S. Rep. No. 111-93, at 4. Until fairly recently, Congress sought to fill gaps in enforcement and adjudication with expanded federal and state authority, rather than supporting tribal institutions in the development of necessary capacity. See*, e.g.,* Act of Aug. 15, 1953, Pub. L. No. 280 ("Public Law 280"), ch. 505, 67 Stat. 588 (ceding federal authority in Indian country to select States); Indian Law Enforcement Reform Act, Pub. L. No. 101-379, 104 Stat. 473 (1990) (codified primarily at 25 U.S.C. §§ 2801–2809) (providing additional resources for, and delocalizing, federal law enforcement on reservations). Notably, even these efforts never presumed that Tribes lacked the authority at issue here.

These "stop-gap" efforts were largely unsuccessful, disproving the notion that, in the absence of tribal authority, federal and state law enforcement will step in. In the years since, Congress has repeatedly found that federal and state resources have failed to ensure public safety in Indian country. Those nonlocal law enforcement agencies have historically lacked the "institutional support or incentive" to combat crime in Indian country.

Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405, 1418 (1997). And worse, reliance on federal and state authority "displaced and diminished the very institutions that are best positioned" to provide for public safety in Indian country by imposing "a wholly nonlocal justice system." Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer*, at v; see also Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. at 1418 (Public Law 280 itself became "a source of lawlessness on reservations"); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709, 717 (2006) (limited penalties available under ICRA prevented Tribes from addressing serious crimes with felony sentences and had "the effect of elevating the importance of the federal criminal justice regime in Indian country and giving it primacy").

Limiting tribal authority to investigate non-Indians would mark a disappointing reversion to those failed efforts. With the benefit of its experience, Congress has made significant strides over the last decade by embracing a local approach to public safety in Indian country. Those efforts focus on empowering tribal law enforcement, encouraging interagency cooperation, and restoring tribal adjudicative and regulatory jurisdiction over non-Indians in limited instances. Recent legislation both presumes that Tribes possess inherent investigative authority and relies on that authority to effect Congress's objectives. The Court should respect those efforts and decline to endorse the investigative jurisdictional gap that the defendant seeks here.

B. Congress Relied upon Tribal Authority to Fill Enforcement Gaps when it enacted the Tribal Law and Order Act of 2010

TLOA is a prime example of Congress's contemporary approach to combating crime in Indian country. Designed to "improve the efficiency and effectiveness of the justice system on Indian lands," TLOA "provide[s] tribal justice officials with additional tools to better combat violent crime." S. Rep. No. 111-93, at 3. TLOA "reauthorize[s] and improve[s] federal programs that strengthen tribal justice systems," restores the authority of tribal courts to levy enhanced penalties, and provides for cooperation, data collection and information sharing among law enforcement agencies. *Id.*

In crafting TLOA, Congress engaged in years of fact-gathering and deliberation, including holding twelve hearings on various aspects of the criminal justice system on Indian reservations during the 110th and 111th Congresses alone. S. Rep. No. 111-93, at 4. Notably, despite these sweeping efforts to identify and respond to challenges to public safety on reservations, nowhere in the legislative history did Congress identify a lack of tribal authority to stop and detain non-Indians on public reservation rights-of-way absent an "apparent" violation of state or federal law. The solutions to the problems Congress did identify, however, directly implicate such authority, showing that restricting that authority would be fundamentally incompatible with Congress's understanding of tribal investigative authority.

1. Congress determined that shortfalls in capacity hamper investigative efforts within Indian country, which includes "all land within the limits of any Indian reservation . . . including rights-of-way running through

the reservation." 18 U.S.C. § 1151(a). Congress specifically found that "less than 3,000 tribal and Federal law enforcement officers patrol more than 56,000,000 acres of Indian country, which reflects less than 1/2 of the law enforcement presence in comparable rural communities nationwide." TLOA § 202(a)(3) (codified at 25 U.S.C. § 2801 note (Findings; Purposes)). Furthermore, "[t]he lack of police on the ground in Indian country often results in delayed responses to criminal activity, which prevents officers from securing the crime scene and gathering evidence." S. Rep. No. 111-93, at 14. This delay can be particularly consequential because "tribal law enforcement officers are often the first responders to crimes on Indian reservations[.]" TLOA § 202(a)(2)(A) (codified at 25 U.S.C. § 2801 note (Findings; Purposes)). Nowhere in the statute or in TLOA's voluminous legislative history did Congress anticipate that these first responders lacked the necessary investigative authority to effectively respond to crimes in any part of Indian country, including on public reservation rights-of-way.

This silence is particularly telling because Congress knew that no other law enforcement agency could or would reliably fill a vacuum of tribal authority. As discussed above, Congress's historical efforts in this area reveal that nonlocal resources were insufficient to meet Indian country's public safety needs. For example, after Public Law 280 shifted regulatory and adjudicative jurisdiction over major crimes on several Indian reservations to the States in which those reservations were located, the legislation itself became "a source of lawlessness on reservations." Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. at 1418. Public Law 280

created "jurisdictional vacuums or gaps" where "no government ha[d] authority," or "the government(s) that may have [had that] authority in theory ha[d] no institutional support or incentive for the exercise of that authority." *Id.*

The creation of a jurisdictional vacuum also shows why *Strate* cannot sensibly be extended to the present context. *Strate* considered tribal civil adjudicative authority, and the viability of the *Strate* plaintiff's suit did not depend on the Tribe's authority to exercise jurisdiction over the matter. See *Strate*, 520 U.S. at 445 n.4 (noting that the plaintiff also commenced a lawsuit in state court, and that the defendants were ready to proceed in the state forum). By contrast, here, a non-Indian suspect transporting guns and drugs across Indian lands may escape prosecution by any government—an outcome without parallel outside of Indian country.

2. The Ninth Circuit's rule threatens to exacerbate threats to public safety specifically targeted in TLOA. In particular, Congress identified the prevention of drug trafficking in Indian country as a purpose of the statute. TLOA § 202(b)(5) (codified at 25 U.S.C. § 2801 note (Findings; Purposes)). To address these concerns, TLOA amends the Controlled Substances Act to authorize tribal law enforcement to make warrantless arrests based upon probable cause to believe that a federal felony offense has been committed. TLOA § 232(d) (codified at 21 U.S.C. § 878(a)). The statute does not limit the exercise of this arrest authority based on the identity of the suspect, nor does the statute specify a higher standard to apply to tribal officers than to any other law enforcement agency also authorized to perform such functions. TLOA § 232(d) (codified at 21 U.S.C. § 878(a)(3)) (authorizing "any State, tribal, or local law enforcement

officer designated by the Attorney General" to "make arrests without warrant . . . if he has probable cause to believe that the person to be arrested has committed or is committing a felony"). Additionally, as relevant here, neither the statute nor its legislative history acknowledges any limitations on the investigative authority likely to be wielded by tribal officers before making such arrests on public reservation rights-of-way. The statute neither anticipates that state or federal officers would make initial investigatory stops of non-Indians, nor imposes an "apparent violation" standard for the exercise of that authority by tribal officers. Instead, Congress assumed and relied upon tribal authority to investigate and detain non-Indians.

Drug trafficking, and the impact of the rule on efforts to combat this particular threat, provide a particularly illustrative example of why the Ninth Circuit's rule is incompatible with TLOA. Drug trafficking typically involves use of the public roads, and relies on the ease of concealment of illegal activity in a moving vehicle. As a result, such crimes are not likely to constitute an "apparent" violation of state or federal law. Under the new standard, tribal law enforcement offers are all but prohibited from effecting Congress's purpose, articulated in TLOA, of combating drug trafficking in Indian country.

3. Congress also identified in TLOA "a significant negative impact on the ability to provide public safety to Indian communities" resulting from complicated jurisdictional rules which are "increasingly exploited by criminals." TLOA §§ 202(a)(4)(A)–(B) (codified at 25 U.S.C. § 2801 note (Findings; Purposes)). To combat that exploitation, TLOA mandates cooperation between federal, state, tribal and local governments. TLOA § 202(a)(4)(C) (codified at 25 U.S.C. § 2801 note (Findings;

Purposes)). While cooperation may be necessary to stem the impacts of complex overlapping regulatory and adjudicative schemes, nothing in the statute or its extensive legislative history indicates that Congress believed such cooperation necessary to remedy a lack of tribal investigative authority over any portion of Indian country.

Yet criminal abuse of complicated jurisdictional rules is not merely likely but may be encouraged under the rule announced below. As Judge Collins' dissent from the denial of rehearing en banc notes, a rule limiting an officer's investigation of a suspect's Indian status to a single question provides a suspect significant incentive to lie to law enforcement. Pet. App. 64a. By providing such an easily exploited loophole, the Ninth Circuit's rule not only exacerbates problems Congress has sought to solve, it also has the practical effect of outright encouraging criminals to travel on reservation highways.

4. With TLOA, Congress intended to support meaningful local law enforcement on reservations, as "tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country." TLOA § 202(a)(2)(B) (codified at 25 U.S.C. § 2801 note (Findings; Purposes)). Nothing in the text of the statue or in the legislative history reflects any doubt that Tribes retain the inherent authority necessary for tribal law enforcement officers patrolling vast swaths of Indian country to investigate and detain non-Indians. The statute most naturally indicates that Congress understood there to be no rule limiting that authority, other than what Congress itself has provided in ICRA.

C. Relying upon Tribal Investigative Authority, Congress Recognized and Affirmed Tribal Authority over Non-Indians in the 2013 Violence Against Women Reauthorization Act

Empowering Tribes to meet public safety needs in Indian country was again front of mind for Congress in crafting legislation responsive to a crisis of sexual violence against native women. *Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women, Hearing Before the S. Comm on Indian Affairs*, 110th Cong. 1 (2007) (Opening Statement of Chairman Byron Dorgan) (observing that "the maze of jurisdiction that exists on Indian lands today" contributes to "a severe public safety crisis in Indian country" and contrasting this with Indian Tribes' historic exercise of authority "over anyone who entered their lands").

1. In the Violence Against Women Reauthorization Act of 2013 ("VAWA"), Congress sought to "remedy" these "jurisdictional loophole[s]" by recognizing and affirming Tribes' inherent power to exercise concurrent criminal *adjudicatory* jurisdiction over non-Indians for certain crimes of domestic violence. 159 Cong. Rec. 1033 (2013) (statement of Sen. Tom Udall) ("Native women should not be abandoned to a jurisdictional loophole. In effect, these women are living in a prosecution-free zone. The tribal provisions in VAWA will provide a remedy."); see VAWA §§ 901–910 (codified in scattered sections of 25 and 34 U.S.C.).

2. The consequences to VAWA are much larger than those the court acknowledged below. See Pet. App. 33a (Berzon and Hurwitz, JJ. concurring in denial of rehearing en banc) ("This case involves an unusual factual scenario and a technical issue of Indian tribal authority . . . the practical implications are limited."). Although the

Ninth Circuit stated that its decision addressed "the authority of a tribal officer on a public, nontribal highway crossing a reservation," Pet. App. 11a, its reliance on *Strate* points to a much broader divestment of authority. *Strate* held that the right-of-way there at issue was, "for nonmember governance purposes," analogous to "alienated, non-Indian land," 520 U.S. at 454. The logical reach of the rule adopted below is that tribal officers may exceed their authority when they conduct an investigative stop of a non-Indian on *any* alienated, non-Indian land.

That result would be plainly incompatible with VAWA's objectives. The statute provides that a Tribe may exercise adjudicative jurisdiction over non-Indians committing certain crimes of domestic and dating violence, provided such conduct occurs in Indian country. VAWA § 904(c) (codified at 25 U.S.C. 1304). As in TLOA, the statute adopts the definition of Indian country found within Title 18, which explicitly includes "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). Domestic and sexual violence is logically more likely to occur at a residence and to be encountered by tribal officers responding at a residence—and if that residence is non-Indian owned, it is almost certainly located on "alienated, non-Indian land."

Furthermore, nothing in the statutory text or the legislative history suggests that Congress had an expectation that state authorities would, by default, serve as first responders or investigate VAWA crimes and then refer them to Tribes for prosecution. To the contrary, the

legislative history frames the VAWA jurisdictional provisions as an extension of existing tribal authority into the adjudicatory phase, not as creating an alternative forum for prosecuting crimes that were investigated in the first instance by state authorities. And, as noted above, Congress did not amend ICRA's Fourth Amendment analogue when it specifically reaffirmed tribal authority to exercise enhanced jurisdiction over non-Indians. See Part II, *supra*. Like TLOA, VAWA presupposes that Tribes possess the authority to meaningfully increase public safety on reservations, which includes investigative authority limited only by the standard Congress set in ICRA in 1968.

3. Additionally, VAWA's legislative history shows Congress's interest in addressing sex trafficking in Indian country. *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters, Hearing before the S. Comm. on Indian Affairs*, 112th Cong. at 62 (2011) (Questions to Second Panel) (asking a witness, "[c]an you tell the Committee what you think needs to be done to stop the trafficking of Native women?"). Sex trafficking was a specific threat identified by Congress in enacting TLOA, see TLOA § 264 (codified at 34 U.S.C. § 20701 note (Recommendations to Prevent Sex Trafficking of Indian Women)), and remains a priority for Congress. Most recently, Congress acted to address sex trafficking on Indian reservations in 2020 when it passed Savanna's Act, Pub. L. No. 116-165, 134 Stat. 760 (2020), "to empower Tribal governments with the resources and information necessary to effectively respond to cases of missing or murdered Indians." 25 U.S.C. § 5701(3). As discussed above, efforts to combat sex trafficking, a crime which involves reservation roads and generally would not provide "apparent

violation" cause to stop and detain a non-Indian, are necessarily compromised by the rule announced by the lower court.

D. Congress's Presumption that Tribes Possess Inherent Investigative Authority Carries Considerable Weight

1. The legislative histories and statutory text of VAWA and TLOA all demonstrate Congress's understanding that Tribes possess investigative authority. The statutes uniformly contemplate that, with sufficient institutional capacity and manpower, Tribes can fill gaps and provide effective law enforcement necessary to ensure public safety in Indian country. Put another way, the only body with the authority to divest a Tribe its inherent authority, see Part I, *supra*, has consistently presumed that such authority has been retained. Congress's presumption that such authority exists "carries considerable weight." *Oliphant*, 435 U.S. at 206.

Moreover, the complete absence of discussion of the question presented here in the extensive legislative history of either statute strongly supports that Congress did not believe such anomalous limits on tribal investigative authority existed. Although "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark," *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 591–592 (1980), silence in the legislative history may be probative of Congress's intent. Particularly where, as here, Congress engaged in "lengthy deliberations" which provided an opportunity for discussion of such a "potentially disastrous" issue, yet no "hint" of the issue is found, that silence can reinforce the statutory text. *City of Rancho Palos Verdes* v. *Abrams*,

544 U.S. 113, 132 (2005) (Stevens, J., concurring in judgment) (citing cases). Here, the lack of any support in either VAWA or TLOA for respondent's position reinforces a definition of Indian country that explicitly encompasses public rights-of-way on the reservation.

2. Congress's understanding of the reach of tribal investigative authority is confirmed by a comprehensive study undertaken at Congress's direction. TLOA created an Indian Law and Order Commission to "conduct a comprehensive study of law enforcement and criminal justice in tribal communities." TLOA § 235(d) (codified at 25 U.S.C. § 2812). The statute specifically directed the Commission to study "jurisdiction over crimes committed in Indian country and the impact of that jurisdiction on . . . the investigation and prosecution of Indian country crimes; and . . . residents of Indian land." *Id.* The Commission completed its study and produced a final report in 2013. Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer*. The study concluded that tribal governments are the institutions "best positioned to provide trusted, accountable, accessible, and cost-effective justice in Tribal communities." *Id.* at v. The Commission's report discusses jurisdictional issues at length but notably does not discuss any impediments to tribal investigatory authority on rights of way.

Instead, the Commission's findings parallel Congress's understanding that Tribes possess inherent investigative authority. The report recognized that "[w]hen crimes involve non-Indians in Indian country, and as discussed elsewhere in this report, *Tribal police have only been able to exercise authority to detain a suspect,* not to make a full arrest. This lack of authority jeopardizes the potential for prosecution, the security of

evidence and witnesses, and the Tribal community's confidence in effective law enforcement." *Id.* at 99 (emphasis added). Not only does this finding reflect the understanding of tribal authority shared by Congress, but it portends exacerbated public safety issues in Indian country if the decision below were affirmed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

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Congressman Raúl M. Grijalva

Congresswoman Gwen Moore

Former Senator Ben Nighthorse Campbell

Former Senator Byron Dorgan

Former Senator Tim Johnson

Former Senator Mark Udall

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