No. 19-1414

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOSHUA JAMES COOLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 counting affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Accordingly, NACDL has a particular interest in ensuring that non-Indian citizens who interact with tribal law-enforcement officers are afforded all the

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[1] No counsel for any party authored this brief either in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. This brief is filed pursuant to the written consent of counsel for the petitioner and the respondent obtained on February 4, 2021, and February 14, 2021, respectively.

rights that they enjoy when interacting with federal, state, and local law-enforcement officers.

INTRODUCTION AND SUMMARY OF ARGUMENT

For two centuries, this Court has said that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014); *see also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Due to this "unique situation," Indian tribes "cannot exercise the full measure of their sovereign powers." *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring). This arrangement gives rise to a dilemma.

On the one hand, because they are "separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). For this reason, tribes have retained *inherent* power to "punish tribal offenders," to "determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana v. United States*, 450 U.S. 544, 564 (1981). But on the other hand, "tribal autonomy is not sovereignty in the ordinary sense." *United States v. Enas*, 255 F.3d

662, 666 (9th Cir. 2001) (en banc). "It exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). "Congress can limit tribal power and, conversely, can add to it." *Enas*, 255 F.3d at 666. When a tribe exercises a power that is "inconsistent with" its dependent status, that power only can come "by *delegation* from Congress, subject to the constraints of the Constitution." *Duro v. Reina*, 495 U.S. 676, 686 (1990) (emphasis added).

In this case, an officer empowered to enforce only tribal law detained and searched a non-Indian on tribal land, and uncovered evidence of criminal activity that later became the subject of a prosecution in federal court. The encounter began as a welfare check; the officer had no indication when the encounter began that there was any criminal activity afoot. The court of appeals suppressed the evidence that the tribal officer uncovered because the officer was acting outside the scope of the tribe's authority to enforce the law against non-Indians. But Congress has allowed tribes to affirmatively request and obtain the authority to enforce generally applicable federal criminal law against all persons on the reservation, Indian and non-Indian alike. Because these agreements delegate power to the tribes to enforce federal law, they enhance tribal law-enforcement authority without undermining tribal sovereignty in any way. For want of such a cross-deputization agreement here, this Court should affirm the decision of the court of appeals.

ARGUMENT

1. Congress has authorized the Secretary of the Interior to enter into agreements with tribal governments under which tribal law-enforcement officers are certified to enforce generally applicable federal criminal laws in Indian country.

"The enforcement of federal criminal statutes . . . on tribal lands has traditionally been the responsibility of the Department of the Interior's Bureau of Indian Affairs." *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067, 1072 (N.D. Cal. 2004). "In 1990, Congress enacted the Indian Act Law Enforcement Reform Act . . . in response to many of the concerns with the system of justice in place on Indian lands." Byron Dorgen, *The Tribal Law and Order Act of 2009*, S. Rep. No. 111-93, at 10 (2009). This Act authorized the Bureau of Indian Affairs "to enter into deputation agreements with tribes to enforce federal law, maintain a qualified force and to deputize qualified tribal police officers to enforce federal law on Indian lands." *Hopland Band of Pomo Indians*, 324 F. Supp. 2d at 1072. However, as of 2009 the BIA had not "established specific criteria, timeframes for approval, or provided training opportunities or technical assistance to tribal officers to obtain" the authority to enforce federal law in Indian country. Dorgen, *supra*, at 11.

The Tribal Law and Order Act of 2010 "generally sought to improve cooperation between federal law enforcement and tribes." *Los Coyotes Band of Cahuilla &*

Cupeño Indians v. Jewell, 729 F.3d 1025, 1032 (9th Cir. 2013) (citation omitted). This effort grew out of a federal-tribal "pilot program to train tribal, state, and local law enforcement officers on-site in Southwestern Colorado in the enforcement of federal criminal laws." Dorgen, *supra*, at 11. Ultimately the pilot program "grew into 14 separate training sessions throughout Indian country, attended by more than 400 officers representing 35 tribes and 17 states." *Id.* Because of the success of these programs, Congress included in the Tribal Law and Order Act provisions that required the Secretary of the Interior to codify a certification program in regulations and expand the opportunities available to tribal law-enforcement officers to obtain permission to enforce federal law. *Id.* at 12.

Specifically, Congress authorized the Secretary of the Interior to "establish procedures to enter into memoranda of agreement" for tribal law-enforcement personnel to aid in the enforcement of federal law in Indian country. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 231(b), 124 Stat. 2261, 2273 (2010) (codified at 25 U.S.C. § 2804(a)(1)).[2] Under these memoranda, the Secretary may authorize employees of a tribal law-enforcement agency to carry out the same

[2] Congress also authorized the DEA to "provide grants and technical assistance to tribal police to address drug trafficking in Indian country." Dorgan, *supra*, at 23; Pub. L. No. 111-211, § 232, 124 Stat. 2261, 2278–79 (2010) (codified at 21 U.S.C. § 872(a)(1)). It also required the DEA to "place tribal officers on the advisory panel to develop and coordinate educational programs to fight drug trafficking." Dorgan, *supra*, at 23; Pub. L. No. 111-211, § 232, 124 Stat. at 2278–79 (2010) (codified at 21 U.S.C. § 873(a)).

law-enforcement duties as the law-enforcement agents of the BIA. *See* 25 U.S.C. § 2804(a)(2). Those duties are set forth in § 2803, and include making warrantless felony arrests for an offense against the laws of the United States committed in Indian country. 25 U.S.C. § 2803(3)(B) ("the offense is a felony and the employee has probable cause to believe that the person to be arrested has committed, or is committing, the felony"). These memoranda must identify individual tribal officers who have met "minimum requirements to be included in special law enforcement commission agreements" and are thus authorized to enforce federal law in Indian country. 25 U.S.C. § 2804(a)(3)(B). "Once a deputation agreement is in place, a tribal police officer, if found on a case-by-case basis to be qualified, may be commissioned by the BIA, which would allow him or her to carry firearms and make warrantless arrests." *Hopland Band of Pomo Indians*, 324 F. Supp. 2d at 1072.

The Department of the Interior promulgated regulations to implement the directives in the Tribal Law and Order Act. Under 25 C.F.R. § 12.21, the BIA "may issue law enforcement commissions to other Federal, State, local and tribal full-time certified law enforcement officers to obtain active assistance in enforcing applicable Federal criminal statutes, including Federal hunting and fishing regulations, in Indian country." The BIA "will issue commissions to other Federal, State, local and tribal full-time certified law enforcement officers only after the head of the local government or Federal agency completes an agreement with

the Commissioner of Indian Affairs asking that BIA issue delegated commissions. The agreement must include language that allows the BIA to evaluate the effectiveness of these special law enforcement commissions and to investigate any allegations of misuse of authority." *Id.* § 12.21(a). Tribal officers who hold these special law-enforcement commissions have "the same law enforcement authority as officers of the BIA, and tribal police officers carrying Commissions are authorized to enforce all Federal criminal law applicable to Indian country." *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 695 (9th Cir. 2004) (cleaned up). This includes the authority to investigate "violations of federal criminal laws of general, nationwide applicability." *United States v. Mitchell*, 502 F.3d 931, 946 (9th Cir. 2007) (citing *United States v. Anderson*, 391 F.3d 1083, 1085–86 (9th Cir. 2004); *United States v. Errol D.*, 292 F.3d 1159, 1164–65 (9th Cir. 2002); *United States v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994)).

2. By extending to tribal governments the power to enforce generally applicable federal criminal law in Indian country, Congress has exercised its power to delegate law-enforcement authority to the tribes without undermining tribal sovereignty.

This Court has drawn a distinction between the *inherent* authority that tribal officers rely on to enforce tribal law and the *delegated* authority tribal officers rely on under a special law enforcement commission to enforce federal law. The statutory scheme that the

Tribal Law and Order Act put in place fits comfortably within this scheme to delegate federal authority to tribal law-enforcement agencies, not to expand the inherent authority of those agencies. Such a delegation need not—and does not—undermine tribal sovereignty.

The power to enforce generally applicable federal criminal laws in Indian country lies primarily with the federal government. "The BIA is in charge of enforcing federal criminal statutes on tribal lands. The BIA provides this law enforcement service directly unless it transfers the authority to do so to someone else." *Hopland Band of Pomo Indians*, 324 F. Supp. 2d at 1075. The statute that authorizes the Secretary of the Interior to issue special law-enforcement commissions, 25 U.S.C. § 2804(a)(1), "differentiates between authorizing Tribal law enforcement agencies to enforce United States laws and authorizing Tribal law enforcement agencies to enforce Tribal laws." *United States v. Cleveland*, 356 F. Supp. 3d 1215, 1286 (D.N.M. 2018). Without a commission, an officer may only exercise inherent tribal authority. *See Boney v. Valline*, 597 F. Supp. 2d 1167, 1181 (D. Nev. 2009) ("Defendant was enforcing the Tribe's laws against the Tribe's members. As a result, Defendant would not qualify as an investigative or law enforcement officer of the United States Government."). The commission allows a tribal officer to exercise delegated federal authority. *See*, *e.g.*, *Cleveland*, 356 F. Supp. 3d at 1287 (noting that Navajo tribal law-enforcement officers with commissions may enforce "all federal laws applicable within Indian

country," including violations involving 18 U.S.C. §§ 1152 and 1153).

This Court has said that Congress knows how to adjust the contours of inherent tribal sovereignty. In *Duro v. Reina*, this Court held that inherent tribal powers in the criminal sphere did not permit a tribe to try a non-member Indian in its courts. 495 U.S. 676, 688, 693 (1990). This Court also added that its holding would not leave a "jurisdictional void" because Congress could allow states to step in by amending Public Law 280,[3] because "tribal governments that share law enforcement concerns" could "enter into reciprocal agreements giving each jurisdiction over the other's members," and because 18 U.S.C. § 1152 "could be construed" to reach the crimes committed by a non-member Indian against an Indian on the latter's reservation. 495 U.S. at 697. "If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement," the Court added, "then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs." *Id.* at 698.

Shortly after this Court decided *Duro*, Congress amended the Indian Civil Rights Act of 1968 to overturn the result in that case by allowing "a tribe to prosecute Indian members of a different tribe." *United States v. Lara*, 541 U.S. 193, 198 (2004) (citing Act of

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[3] "In what is commonly known as Public Law 280, 67 Stat. 588, Congress gave five (later six) states extensive criminal and civil jurisdiction over Indian country, and permitted all other states to acquire it at their option." William C. Canby, Jr., *American Indian Law* 265 (6th ed. 2015).

Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93 (1990); Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, 646 (1991)). This new statute, the Court said, "does not purport to delegate the Federal Government's own *federal* power. Rather, it enlarges the *tribes'* own powers of self-government to include the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians, including nonmembers." *Id.* (quoting 25 U.S.C. § 1301(2)) (cleaned up). In the context of a double-jeopardy challenge to a federal prosecution that followed a tribal prosecution arising out of the same criminal episode, in *Lara* this Court was called on to decide whether the "source of the power to punish nonmember Indian offenders" was "inherent *tribal* sovereignty or delegated *federal* authority." *Id.* at 199. It held that the tribal prosecution was an exercise of inherent tribal sovereignty under the auspices of Congress's *Duro*-fix legislation. *Id*. at 210.

By passing the *Duro*-fix statute, Congress expressly recognized the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 132 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2)). The Court in *Lara* said that Congress could properly "adjust the tribes' status" in this way. *Lara*, 541 U.S. at 200. The "Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive." *Id.* (citing *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–71 (1979); *Wheeler*, 435 U.S. at 323). This plenary power allows

Congress to "enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." *Id.* at 202. Congress's expansion in 1986 of a tribal court's "inherent law enforcement authority (in respect to tribal members)" to impose a maximum sentence of a year in custody and a fine of $5,000 was one example of an exercise of this plenary power. *Id.* at 203 (citing Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207, 3146 (1986) (then codified at 25 U.S.C. § 1302(7)). Giving the tribes the additional inherent authority to prosecute non-member Indians, this Court said, was similar to the inherent power recognized in *Duro* itself to prosecute tribal members, and thus "consistent with our traditional understanding of the tribes' status as domestic dependent nations." *Id.* at 204 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). Finally, the Court said, *Duro* itself did not address any constitutional limitation on Congress's ability to adjust the tribes' status. *Lara*, 541 U.S. at 205. Nor did *Duro* say that the Constitution dictates the "metes and bounds of tribal autonomy." *Lara*, 541 U.S. at 205. For all these reasons, this Court said, the *Duro*-fix legislation was a proper exercise of Congress's power to adjust the tribes' inherent authority to include the power to prosecute non-member Indians. *Lara*, 541 U.S. at 210.

In addition to approving Congress's adjustment of the contours of inherent tribal sovereignty, this Court has also sanctioned Congress's delegation of federal authority to the tribes. For instance, in *United States v. Mazurie*, this Court said that a tribe's "independent authority over matters that affect the internal and

social relations of tribal life" was "quite sufficient" to sustain Congress's decision to delegate "its authority to control the introduction of alcoholic beverages into Indian country" to a particular tribe. 419 U.S. 544, 557 (1975). And in *Duro*, when this Court held that tribal courts had no inherent jurisdiction over non-member Indians, it said that the power to do that could "come to the Tribe by delegation from Congress." 495 U.S. at 686. Although Congress overruled *Duro* by adjusting the inherent sovereignty of the Indian tribes, when this Court upheld the *Duro*-fix legislation in *Lara* it did not foreclose future delegations of federal power to the tribes that are otherwise constitutional. *See* 541 U.S. at 207 (explaining that *Duro* was "not determinative" of the propriety of "relaxing the bounds of the inherent tribal authority that the United States recognizes").

So delegations of federal power remain a valid mechanism for Congress, exercising its plenary authority over Indian tribes, to enhance their law-enforcement powers. This delegation, through the Secretary of the Interior, extends to tribal law-enforcement officers the power to enforce federal law in Indian country so long as the Secretary is satisfied that those officers are trained and thus properly qualified to do so. *See* 25 U.S.C. § 2804(a)(3); 25 C.F.R. § 12.35. Nothing in 25 U.S.C. § 2801 *et seq.*, either before or after the amendments made by the Tribal Law and Order Act of 2010, mentions an intent to expand the inherent authority of tribal governments, with respect to either non-member Indians or non-Indians. The tribes are free to participate in the program or not, as their own resources or other funding may allow. *See* 25 U.S.C. § 2804(a)(1)

(allowing the Secretary of the Interior "to enter into memoranda of agreement for the use (with or without reimbursement) of" tribal governments to enforce federal law in Indian country); 25 U.S.C. § 2805 (allowing the Secretary of the Interior to promulgate "regulations relating to the applications for contracts awarded under the Indian Self-Determination Act" to provide federal law-enforcement services). Congress's "clear intent" was to "further the self-determination of Indian tribes" by giving them "the power to adequately enforce federal law and investigation violations thereof." *Hopland Band of Pomo Indians*, 324 F. Supp. 2d at 1074. Congress's policy of Indian self-determination encourages "maximum Indian participation" in the provision of federal services to Indian communities "so as to render such services more responsive to the needs and desires of these communities." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185–86 (2012) (quoting 25 U.S.C. § 450a(a)). Consistent with this policy, delegating federal power to enforce federal law by way of a special law-enforcement commission rests on a *quid pro quo* and does not affect the tribes' inherent sovereignty in any way. *See* Internal Law Enforcement Services Policies, 69 Fed. Reg. 6321, 6321 (notice issued Feb. 10, 2004) (explaining that special law-enforcement commissions "support the sovereignty of tribes by allowing tribal law enforcement officers to enforce Federal law, to investigate Federal crimes, and to protect the rights of people in Indian country").

In light of this policy, it cannot be the case that only an exercise of inherent tribal sovereignty can fill the supposed "jurisdictional void" of underenforcement of generally applicable federal criminal law in

Indian country. For one thing, there is no such void to fill—the federal government is ultimately responsible for enforcing general federal criminal law everywhere, including in Indian country. For another, this Court has consistently rejected the notion that failing to recognize inherent tribal law-enforcement authority will result in a "jurisdictional void," such that recognizing such inherent authority is the only mechanism available for complete law-enforcement in Indian country. It is always the case that where "jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Duro v. Reina*, 495 U.S. 676, 697 (1990); *accord United States v. Cooley*, 919 F.3d 1135, 1141 (9th Cir. 2019) (noting that the power to exclude persons from the reservation gives tribal law-enforcement officers the power to "deliver non-Indians who have committed crimes to state or federal authorities"). By issuing special law-enforcement commissions to tribal officers, the federal government is delegating the power to enforce federal law directly to them, rather than forcing them to simply wait for federal authorities to respond.

3. The government's fear that special law-enforcement commissions will undermine tribal sovereignty is misplaced.

While Congress meant for these special law-enforcement commissions to augment tribal law-enforcement powers in Indian country, the government sees them differently. The government characterizes these agreements not as a benefit to the tribes, but as an attack on their sovereignty. It says, "Tribes

should not have to sacrifice even *more* of their limited sovereignty merely to preserve law and order within reservation boundaries—an inherent aspect of sovereignty that they never lost in the first place." (U.S. Br. at 47) The government adds that "cross-deputization agreements often contain reciprocity provisions" that, it says, "tribes may view as an affront to their sovereignty." (U.S. Br. at 47) But that is not the case with respect to the BIA's special law-enforcement commissions, which do not diminish but rather augment tribal authority. Tribal police already have inherent authority to enforce tribal law against their own members. *See United States v. Wheeler*, 435 U.S. 313, 322–23 (1978). Their domestic dependent status necessarily divests them of the power to try non-Indians in their courts. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206–12 (1978). And federal agents enforce tribal law only with tribal consent. *See* 25 C.F.R. § 12.22. Rather than a diminishment of tribal sovereignty, these cross-deputization agreements instead represent an offer of expanded authority through a delegation of federal power.

"Tribes can contract around uncertainties in law enforcement authority by entering into cooperative agreements with federal, state, county, or city governments." *Developments in the Law—Indian Law*, 129 Harv. L. Rev. 1652, 1694 (2016). The Tribal Law and Order Act encourages the federal government to "provide technical and other assistance to State, tribal, and local governments that enter into cooperative agreements," including cross-deputization agreements, for the purpose of "reducing crime in Indian country and

nearby communities." Pub. L. No. 111-211, § 222, 124 Stat. 2261, 2272 (2010) (codified at 25 U.S.C. § 2815). "There are numerous examples of law enforcement agreements that have increased safety while promoting mutual respect and tribal sovereignty, and many advocates of agreements between tribes and nontribal governments have detailed their benefits." *Developments*, 129 Harv. L. Rev. at 1696 & nn.90–91.

Because Congress has expressly sanctioned the special law-enforcement commissions issued by the Bureau of Indian Affairs, the government's fear that cross-deputization agreements will undermine tribal sovereignty (U.S. Br. at 47) is misplaced. The government cites one commentator who asserts that the "biggest barriers" to cross-deputization agreements "can be narrowed down to the liability and immunity issue and the influence of local politics." Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. Rev. 65, 89 (2019). But this commentator focuses on what he characterizes as difficulties presented by such agreements between tribal and *local* governments, *id.*, and gives short shrift to the markedly different issues that a special law-enforcement commission from the BIA to enforce federal law might present.

In the context of special law-enforcement commissions, any concerns about uncertainty of liability are already addressed in the statute that authorizes them. The government's commentator notes that "[f]ormal cross-deputization agreements allow for certainty over tribal officer liability." Morrow, *supra*, at 90. Here, that

certainty is assured—certified tribal officers are deemed employees of the Department of the Interior for purposes of the Federal Tort Claims Act. *See* 25 U.S.C. § 2804(f)(1)(A) (pointing to 5 U.S.C. § 3374(c)(2), which makes an assigned officer an employee of the federal government under the FTCA); *see also Cabazon Band of Mission Indians*, 388 F.3d at 695–96; *Boney*, 597 F. Supp. 2d at 1181. Uncertified tribal officers are not federal employees in this way, nor are they "federal officers" under 18 U.S.C. § 1114. *See Cleveland*, 356 F. Supp. 3d at 1288 (federal officer); Order, *United States v. Tauz Abner Henderson*, No. 3:18-cr-8112-PCT-DJH (D. Ariz. Jun. 11, 2018) (Dkt. #50) (unpublished) (federal officer); *Vallo v. United States*, 298 F. Supp. 2d 1231, 1237 (D.N.M. 2003) (FTCA). The civil-liability issues that apply to special law-enforcement commissions are thus clear from the statute that authorizes those commissions.

As for the influence of "local politics" on special law-enforcement commissions under 25 U.S.C. § 2804, the government's commentator is silent on this point. Another commentator has suggested that the "infrequency of cross-deputization agreements" between tribal and local governments can be attributed to "the suspicion and lack of trust that reportedly prevails between tribal police and surrounding law enforcement agencies." *Developments*, 129 Harv. L. Rev. at 1697 (citation omitted). At the state level, the "troubling barriers to policing" that these local squabbles create can be ameliorated by "granting some level of state authority to tribal officers." *Id.* Arizona, for instance, grants to

tribal police officers who are "appointed by the Bureau of Indian Affairs or the governing body of an Indian tribe as a law enforcement officer and meet the qualifications and training standards" set by a state police certification agency the same powers that other state peace officers enjoy. *State v. Nelson*, 90 P.3d 206, 209 (Ariz. Ct. App. 2004) (citing Ariz. Rev. Stat. § 13-3874(A)). Statutes that empower tribal officers with the power to enforce state law "can solve the law enforcement gap over a certain area" and are "usually less subject to the whims of a small number of political actors." *Developments*, 129 Harv. L. Rev. at 1699.

Special law-enforcement commissions under 25 U.S.C. § 2804 similarly should be less subject to the vagaries of local squabbling. The "relationship between the federal government and the tribes has historically been much less hostile than the relationship between the states and the tribes." *Developments*, 129 Harv. L. Rev. at 1701 (citing *Hagen v. Utah*, 510 U.S. 399, 441 (1994) (Blackmun, J., dissenting)). Federal law-enforcement agents are already a familiar feature in Indian country, because they investigate crimes prosecutable under either 18 U.S.C. §§ 1152 or 1153 when the defendant or the victim is an Indian. The choice that the Bureau of Indian Affairs presents to tribes who seek special law-enforcement commissions for their tribal officers is whether those tribes should allow federal agents to enforce generally applicable federal law against non-Indians in Indian country, or whether they should take on that responsibility themselves.

The government's commentator says nothing about any "cultural tensions" between tribes and the federal government. *Cf.* Morrow, *supra*, at 92. And in this era of Indian self-determination, when it comes to an offer of expanded authority to stanch criminal activity that the tribes are free to accept or refuse, it is not immediately apparent why those "cultural tensions" should dissuade a tribe from accepting expanded authority to police its own territory. Cross-deputization agreements and special law-enforcement certification do not undermine tribal sovereignty—they enhance it by leveling the playing field on which tribes engage in law-enforcement activity.

CONCLUSION

Giving a special law-enforcement commission to tribal police would solve the problem that arose here when Mr. Cooley's car was searched by an officer acting outside of his lawful authority. Because that officer lacked such a commission, *amicus* respectfully urges

the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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