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 for Dennis K. Burke, Former United States Attorney, District of Arizona; Paul K. Charlton, Former United States Attorney, District of Arizona; Thomas B. Heffelfinger, Former United States Attorney, District of Minnesota; David C. Iglesias, Former United States Attorney, District of New Mexico; Troy A. Eid, Former United States Attorney, District of Colorado; Barry R. Grissom, Former United States Attorney, District of Kansas; Michael W. Cotter, Former United States Attorney, District of Montana; Wendy J. Olson, Former United States Attorney, District of Idaho; Brendan V. Johnson, Former United States Attorney, District of South Dakota; and Timothy Q. Purdon, Former United States Attorney, District of North Dakota, as *Amici Curiae* Supporting Petitioner

Eric B. Boettcher
Counsel of Record
Eric J. Magnuson
ROBINS KAPLAN LLP
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
(612) 349-8500
EBoettcher@RobinsKaplan.com
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae Dennis K. Burke, Paul K. Charlton, Thomas B. Heffelfinger, David C. Iglesias, Troy A. Eid, Barry R. Grissom, Michael W. Cotter, Wendy J. Olson, Brendan V. Johnson, and Timothy Q. Purdon[2] are former presidentially appointed United States Attorneys with experience in the prosecution of crimes in "Indian country," as defined by 18 U.S.C. § 1151. Specifically:

- Dennis K. Burke was appointed by President Barack Obama as United States Attorney for the District of Arizona and served from 2009 to 2011. During his time as U.S. Attorney, he was a member of the Attorney General's Advisory Committee's ("AGAC") Native American Issue Subcommittee ("NAIS").[3]

---

[1] Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici curiae* join this brief solely in their personal capacities. They do not represent or advise the Petitioner in this or any matter, and they have not been involved in this case apart from joining this brief as *amici curiae*.

[3] The AGAC was created in 1973 to serve as the voice of the U.S. Attorneys and to advise the Attorney General of the United States on policy, management, and operational issues impacting the offices of the U.S. Attorneys. The NAIS is made up of U.S. Attorneys from across the United States whose districts contain Indian country of one or more federally recognized tribes. The NAIS focuses exclusively on Indian country issues, both criminal

- Paul K. Charlton was appointed by President George W. Bush as United States Attorney for the District of Arizona and served from 2001 to 2007. During his time as U.S. Attorney, he was a member of the AGAC's NAIS.

- Thomas B. Heffelfinger was appointed by both President George H.W. Bush and President George W. Bush as United States Attorney for the District of Minnesota and served from 1991 to 1993 and from 2001 to 2006. During a portion of his time as U.S. Attorney, he served as the Chair of the AGAC's NAIS.

- David C. Iglesias was appointed by President George W. Bush as United States Attorney for the District of New Mexico and served from 2001 to 2007. During his time as U.S. Attorney, he was a member of the AGAC's NAIS.

- Troy A. Eid was appointed by President George W. Bush as United States Attorney for the District of Colorado and served from 2006 to 2009. During his time as U.S. Attorney, he was a member of the AGAC's NAIS. In 2010, Mr. Eid was appointed by the United States Senate to the Indian Law and Order

---

and civil, and is responsible for making policy recommendations to the Attorney General of the United States.

Commission ("ILOC" or "Commission"), a nine-member independent advisory board to Congress and the President created by the Tribal Law and Order Act of 2010, Public Law 111-211, and charged with developing recommendations for strengthening public safety and criminal justice for all federally recognized Native American tribes and nations. Mr. Eid was elected Chair of the ILOC by its members and served in that role from its inception until the Commission's legislative sunset in 2014.

- Barry R. Grissom was appointed by President Barack Obama as United States Attorney for the District of Kansas and served from 2010 to 2016. During his time as U.S. Attorney, he was a member of the AGAC's NAIS.

- Michael W. Cotter was appointed by President Barack Obama as United States Attorney for the District of Montana and served from 2009 to 2017. During a portion of his time as U.S. Attorney, he served as Chair of the AGAC's NAIS.

- Wendy J. Olson was appointed by President Barack Obama as United States Attorney for the District of Idaho and served from 2010 to 2017. During

her time as U.S. Attorney, she was a member of the AGAC's NAIS.

- Brendan V. Johnson was appointed by President Barack Obama as United States Attorney for the District of South Dakota and served from 2009 to 2015. During a portion of his time as U.S. Attorney, he served as Chair of the AGAC's NAIS.

- Timothy Q. Purdon was appointed by President Barack Obama as United States Attorney for the District of North Dakota and served from 2010 to 2015. During a portion of his time as U.S. Attorney, he served as Chair of the AGAC's NAIS.

During their terms as United States Attorneys, the *amici curiae* led United States Attorney's Offices that prosecuted federal crimes in Indian country under the Indian Country Crimes Act, 18 U.S.C. § 1152, the Major Crimes Act, 18 U.S.C. § 1153, and federal criminal statutes of general applicability. Department of Justice statistics establish that the U.S. Attorney's Offices in Arizona, Minnesota, New Mexico, Colorado, Montana, Idaho, South Dakota, and North Dakota—offices the *amici* led—prosecute substantially higher numbers of Indian country

criminal cases than most other U.S. Attorney's Offices.[4]

During their service as U.S. Attorneys, the *amici* prioritized the reduction of crime on reservations, dependent Indian communities, and tribal trust land within their jurisdictions and are all deeply familiar with the jurisdictional challenges facing federal, state, and tribal law enforcement officers and prosecutors as they endeavor to reduce crime in Indian country and deliver public safety.

SUMMARY OF ARGUMENT

Criminal jurisdiction over offenses committed in Indian country is exceptionally complex and unwieldy. Which of federal, state, and tribal authorities can prosecute a crime depends on (1) whether the crime occurred in Indian country; (2) the Indian status of the perpetrator and victim (if one exists); and (3) the nature of the crime. Matters become highly complicated when these variables are analyzed in detail. The indeterminate nature of what constitutes "Indian country" and who is an "Indian," combined with widely varying potential sources of substantive criminal law and byzantine rules for their application, make Indian country criminal jurisdiction a

---

[4] *See* U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions 2018*, https://www.justice.gov/otj/page/file/1231431/download; U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions 2017*, https://www.justice.gov/tribal/page/file/1113091/download; U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions 2016*, https://www.justice.gov/tribal/page/file/1032116/download.

confounding morass for tribal, federal, and state authorities.

The complexity of Indian country criminal jurisdiction and the highly cumbersome and impractical framework it creates make delivering public safety to Indian country more difficult than most anywhere else. The bewildering rules of Indian country criminal jurisdiction can prove challenging for courts to apply, even with the benefit of briefing and time for reflection. It can be tremendously difficult, approaching impossibility in some situations, for tribal officers, federal agents, or state officers to apply these rules on the spot while in the field.

Moreover, different federal, state, and tribal law enforcement agencies must cooperate and sort out their respective roles within the jurisdictional scheme. The scheme's impenetrability leads to occurrences of criminal activity where no law enforcement agency intervenes because none is confident that it has jurisdiction. These challenges create substantial gaps in law enforcement, resulting in criminals avoiding apprehension and prosecution, and in savvy criminals from outside Indian country relocating their conduct to Indian country to lessen chances of detection and prosecution.

The Ninth Circuit panel's ruling—that tribal officers' authority to detain non-Indians on public highways on reservations is limited to determining whether a suspect is non-Indian, with continued detention appropriate only where it is "apparent" or "obvious" that state or federal law has been violated—is at odds with decades of well-settled law and practice. The ILOC's final report to the President and

Congress emphasizes the critical importance of ensuring that tribal police officers are recognized as having the same authority to detain criminal suspects and make arrests as their counterparts in state and local government. Ironically, the Ninth Circuit panel's decision does not even recognize the universal understanding among all concerned—as reflected in the Commission's November 2013 report—that tribal officers already have the unquestioned authority to detain non-Indian suspects.

The decision below also cannot be squared with Congress's purpose in enacting the Tribal Law and Order Act of 2010 ("TLOA"), Public Law 111-211. Tribal police officers' longstanding practice of detaining non-Indians for criminal offenses arising on reservations was assumed by Congress prior to the panel's decision. TLOA recognizes that tribal police officers are almost always the first responders to address crimes of all kinds on Indian reservations, detaining Indian and non-Indian suspects alike as circumstances warrant. The panel's decision turns this approach on its head by requiring tribal officers to release suspects based on their apparent political status as non-Indians (whether real or imagined) without even waiting for the appropriate jurisdiction to respond, and regardless of how dangerous they might be.

The panel's decision also clashes with the longstanding federal policy of recognizing tribal sovereignty. Forbidding tribes from taking action against suspected criminals on reservation highways would effectively allow these criminals to violate the law with impunity on reservations, a direct affront to

the sovereignty tribes possess on reservation lands. Moreover, Congress, and not any court, has plenary authority to alter the standards for criminal jurisdiction in Indian country.

If allowed to stand, the Ninth Circuit's ruling will also further complicate the already labyrinthine law underlying Indian country criminal jurisdiction and will seriously degrade justice and public safety both in Indian country and the areas surrounding it.

The former United States Attorney *amici curiae* urge the Court to reverse the ruling of the Ninth Circuit.

ARGUMENT

I. THE COMPLEX OVERLAP OF FEDERAL, STATE, AND TRIBAL CRIMINAL JURISDICTION IN INDIAN COUNTRY MAKES THE PREVENTION AND PROSECUTION OF CRIME EXCEEDINGLY DIFFICULT

A. Criminal Jurisdiction in Indian Country

Criminal jurisdiction over offenses committed in "Indian country," as defined in 18 U.S.C. § 1151, "is governed by a complex patchwork of federal, state, and tribal law." *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (quotation marks omitted). So complex and unwieldy is Indian country criminal jurisdiction that the Indian Law and Order Commission unanimously concluded "that criminal jurisdiction in Indian country is an indefensible morass of complex, conflicting, and illogical commands, layered in over

decades via congressional policies and court decisions and without the consent of Tribal nations." ILOC, A ROADMAP FOR MAKING NATIVE AMERICA SAFER, Report to the President and Congress of the United States, at ix (November 2013), available at https://www.aisc.ucla.edu/iloc/report/ (hereinafter "ILOC Report").[5]

In broad terms, which of federal, state, and tribal authorities can prosecute a crime depends on (1) whether the crime occurred in Indian country; (2) the Indian status of the perpetrator and victim (if one exists); and (3) the nature of the crime. Although intricate enough even when generally stated, these variables governing Indian country jurisdiction become thoroughly confounding when examined in detail.

---

[5] The complexity of Indian country criminal jurisdiction has led other observers to also describe it in strong terms, such as it being a "jurisdictional maze," Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976); a "welter of rules," Alex Treiger, *Thickening the Thin Blue Line in Indian Country: Affirming Tribal Authority to Arrest Non-Indians*, 44 Am. Indian L. Rev. 163, 170 (2019); a "crazy quilt," Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. Kan. L. Rev. 387, 387 (1974); and even as akin to "solving a Rubik's cube while blindfolded and underwater," David Harper, *Justice Department Prosecuting More Indian Country Crimes*, Tulsa World (Nov. 4, 2013), https://www.tulsaworld.com/news/local/ justice-department-prosecuting-more-indian-country-crimes/article _f66f7c27-48a9-5051-8bb8-54fc69302411.html (statement of R. Trent Shores, now U.S. Attorney for the Northern District of Oklahoma).

1. "Indian country"

The starting point of any analysis is determining whether the offense in question occurred in Indian country. If it did not, the normal standards for the exercise of federal or state criminal jurisdiction apply. Title 18 U.S.C. § 1151 broadly defines "Indian country" and provides in full:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Subsection 1151(a) includes all land within an Indian reservation, including land owned by non-Indians in fee simple. *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962). Although perhaps seemingly straightforward, determining what is reservation land is complicated by Congress's ability to disestablish a reservation or diminish its size, a topic that has engendered substantial disputes and litigation over the years. *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020);

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); *Solem v. Bartlett*, 465 U.S. 463 (1984).

The "dependent Indian communities" covered by subsection 1151(b) are Indian lands that are neither reservations nor allotments and that (1) have been set aside by the federal government for Indian use as Indian land and (2) are under federal superintendence. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). Dependent Indian communities are by definition outside the geographical boundaries of Indian reservations.

Finally, subsection 1151(c)'s coverage of "Indian allotments" refers to "land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation." *See* 1 *Cohen's Handbook of Federal Indian Law* § 3.04 (Nell Jessup Newton ed., 2019) (hereinafter "*Cohen*"). Subsection 1151(c)'s "major impact is on allotments not within a reservation or a dependent Indian community." *Id.*

Because subsections 1151(b) and (c) include land outside of reservations, Indian country can be intermixed with state, federal, or privately owned land. In some instances, this results in a non-contiguous, alternating patchwork of Indian country and non-Indian country parcels of land. *See Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1158 (10th Cir. 2010) (en banc) (Gorsuch, J.) (observing that subsections 1151(b) and (c) permit "checkerboard" Indian country jurisdiction outside reservation boundaries).

2. Who is an "Indian"

Who is an "Indian" is a matter of federal common law and turns on a two-prong test that considers whether the person (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government. *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc) (describing test as "generally accepted"); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (citing *United States v. Rogers*, 45 U.S. 567, 572-73 (1845)).

Because the first prong considers only whether the person has "some" Indian blood, "a person may be classified as an Indian despite a very low quantum of Indian blood." William C. Canby, Jr., *American Indian Law in a Nutshell* 9 (6th ed. 2015); *see also Stymiest*, 581 F.3d at 762 (noting that the parties agreed that the first prong was satisfied because the defendant had three thirty-seconds Indian blood).

The second prong requires that the person be a member of, or affiliated with, a federally recognized tribe. *Zepeda*, 792 F.3d at 1114. This turns on several criteria: (1) enrollment in a federally recognized tribe; (2) government recognition through receipt of assistance reserved only to Indians; (3) enjoyment of benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in the social life of a federally recognized tribe. *Id.*; *see Stymiest*, 581 F.3d at 763 (including additional factor of whether a tribe recognizes the person as an Indian).

Given the highly factual but indeterminate nature of this two-prong test, "[t]he definition of exactly who

is and who is not an Indian is very imprecise." *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976).

3. Specific criminal conduct and potentially applicable law

Finally, determining which sovereign has jurisdiction becomes a matter of applying the definitional elements of "Indian country" and "Indian" in the context of the specific criminal conduct at issue and the sources of potentially applicable criminal law.

a. Federal criminal jurisdiction

Primary responsibility for law enforcement in Indian country resides in tribal governments and the federal government.[6] The Major Crimes Act ("MCA"), 18 U.S.C. § 1153, provides for federal jurisdiction over an enumerated list of serious crimes committed by an Indian in Indian country "against the person or property" of an Indian or non-Indian, including murder, kidnapping, sexual abuse, arson, and robbery, among other crimes. The MCA by definition does not apply to crimes committed by non-Indians.

Another major source of federal jurisdiction in Indian country is the Indian Country Crimes Act ("ICCA," also known as the General Crimes Act), 18 U.S.C. § 1152. The ICCA provides that the "general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States" apply in

---

[6] This is generally not the case in the several states in which Public Law 280 (1953) mandates that federal criminal jurisdiction over offenses involving Indians in most tribes' Indian country be transferred to the state governments.

Indian country, except to offenses committed by an Indian against the person or property of another Indian, offenses committed by an Indian that have already been punished by the tribe under tribal law, or offenses that by treaty are exclusively within tribal jurisdiction. *Id.* The "general laws of the United States" referenced by the ICCA are "federal enclave laws," *i.e.*, "laws passed by the federal government in exercise of its police powers in areas of exclusive or concurrent federal jurisdiction as defined in 18 U.S.C. § 7" and that include the situs of the offense as an element of the crime. *United States v. Smith*, 925 F.3d 410, 418 (9th Cir. 2019). Federal enclaves include national parks, military bases, and federal prisons, among other areas. *Id.* Of the federal enclave laws made applicable to Indian country by the ICCA, the Assimilative Crimes Act ("ACA"), 18 U.S.C. § 13, is particularly important. The ACA provides that within federal enclaves, state criminal law is assimilated into federal law if there is no federal law covering the conduct at issue. The ACA therefore incorporates a wide array of state-law offenses (including misdemeanors) as federal offenses.

Synthesis of the ICCA's various components shows that it applies to several general species of crime committed in Indian country. Where the perpetrator is Indian and the victim is non-Indian, or the crime is victimless,[7] the ICCA provides for federal prosecution

[7] Traffic offenses, disorderly conduct, and prostitution are examples of "victimless" crimes for purposes of Indian country criminal jurisdiction. U.S. Dep't of Justice, *Criminal Resource Manual* § 683 (updated Jan. 22, 2020),

of offenses that are specifically enumerated by the federal enclave laws or incorporated as federal law by virtue of the ACA, except where the Indian has already been punished by the tribe for his offense or where the offense is by treaty exclusively within tribal jurisdiction. The ICCA does not cover crimes committed by one Indian against another.

Where the perpetrator is non-Indian and the victim is Indian, the ICCA provides for federal prosecution of offenses that are specifically enumerated by the federal enclave laws or incorporated as federal law by virtue of the ACA. Although not stated in its text, the ICCA does not apply where the perpetrator is non-Indian and the victim is also non-Indian, or where the crime is victimless. States have jurisdiction to prosecute these types of crimes. *See McGirt*, 140 S. Ct. at 2460 (citing *United States v. McBratney*, 104 U.S. 621, 624 (1882)); *Solem*, 465 U.S. at 465 n.2.

Beyond the MCA and ICCA, federal criminal statutes of general applicability still apply against all persons in Indian country. *See, e.g.*, *United States v. Wadena*, 152 F.3d 831, 841 & nn. 15-16 (8th Cir. 1998). Thus, federal authorities may prosecute Indians and non-Indians in Indian country the same as anywhere else for drug offenses, firearms offenses, mail fraud, and other federal crimes that do not require any particular location for their commission.[8]

---

https://www.justice.gov/archives/jm/criminal-resource-manual-683-victimless-crimes.

[8] There also exist a limited number of criminal statutes that apply specifically to Indians and tribes or to those whose conduct

b. Tribal criminal jurisdiction

As "domestic dependent nations that exercise inherent sovereign authority," *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (quotation marks omitted), Indian tribes have the inherent power to establish a tribal criminal code and prosecute both member and non-member Indians for violations of the code that occur on the reservation, *United States v. Lara*, 541 U.S. 193, 201-07 (2004); *United States v. Wheeler*, 435 U.S. 313, 322-24 (1978). Nevertheless, in the exercise of its plenary power over tribes, Congress has placed limits on the length of sentences that tribes may impose. Pursuant to the Indian Civil Rights Act, tribes may not impose sentences longer than one year, although under TLOA, tribes may now apply sentences of up to three years for offenses that would constitute felonies under federal or state law. *See* 25 U.S.C. § 1302(a)(7)(B)-(C), (b). Therefore, although tribes hold concurrent jurisdiction with the federal government over Indians' on-reservation commission of crimes that would be covered by the MCA or ICCA, they lack the ability to impose lengthy sentences, even for the worst of offenses.

The most salient limitation on tribal criminal jurisdiction, however, is the lack of jurisdiction over non-Indians who commit crimes in Indian country. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191

---

affects Indians and tribes. *Cohen* § 9.02; *see, e.g.*, 18 U.S.C. § 1156 (unlawful possession of intoxicating liquors in Indian country); 18 U.S.C. § 1167 (theft from gaming establishments on Indian lands).

(1978), the Court concluded that Indian tribes lack inherent criminal jurisdiction to prosecute non-Indians and cannot exercise such jurisdiction unless they are specifically authorized to do so by Congress. *Id.* at 212. Since *Oliphant*, the only law passed by Congress authorizing tribal exercise of any criminal jurisdiction over non-Indians is the Violence Against Women and Department of Justice Reauthorization Act of 2013 ("VAWA"). VAWA provides that where a non-Indian has "ties" to a tribe and commits acts of domestic violence against an Indian in Indian country, the tribe may prosecute the non-Indian for those acts. 25 U.S.C. § 1304.

c. State criminal jurisdiction[9]

States' criminal jurisdiction in Indian country is limited to crimes that involve only non-Indians. Thus, where a non-Indian perpetrator commits a crime against a non-Indian victim or commits a victimless crime, the state may prosecute the non-Indian for any

[9] States take a much larger role in the several states where Public Law 280 applies. In those states, federal criminal jurisdiction over offenses involving Indians in most tribes' Indian country is transferred to the state governments. But even where Public Law 280 applies, jurisdictional complexity, when combined with a lack of cooperation between state and tribal law enforcement officials, can contribute to dysfunctional delivery of law enforcement services and increased criminal activity. *See Mille Lacs Band of Ojibwe v. County of Mille Lacs*, No. 17-cv-5155, 2020 WL 7489475 (D. Minn. Dec. 21, 2020) (discussing how county law enforcement officials' formal refusal to recognize jurisdiction of tribal police officers led to concerns that tribal police could face criminal or civil liability for detentions and arrests, a resulting reduction in tribal police morale and activity, and a subsequent increase in criminal activity on the reservation).

applicable state-law offense. *See Solem*, 465 U.S. 463 at n.2.

In summary, the indeterminate nature of what constitutes "Indian country" and who is an "Indian," combined with widely varying potential sources of substantive criminal law and byzantine rules for their application, make Indian country criminal jurisdiction a confounding morass for tribal, federal, and state authorities. *See* ILOC Report at ix.[10]

B. The Complexity of Indian Country Criminal Jurisdiction Impairs Justice and Public Safety in Indian Country

The *amici curiae* know firsthand that the quagmire of Indian country criminal jurisdiction, with its maze of overlapping federal, state, and tribal jurisdiction and law enforcement agencies, makes delivering public safety to Indian country more difficult than most anywhere else.

The federal government has a "historic and continued role as a significant player in ensuring criminal justice in Indian country," Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. Rev. 1564, 1578 (2016), a role that has taken on even more significance following *Oliphant*'s ruling that tribes lack the ability to criminally prosecute non-

[10] The U.S. Attorney's Office for the Western District of Oklahoma maintains an informal chart to assist in understanding Indian country criminal jurisdiction. Arvo Q. Mikkanen, *Indian Country Criminal Jurisdiction Chart*, U.S. Dep't of Justice (2020), https://www.justice.gov/usao-wdok/page/file/1300046/download.

Indians. *See* Timothy Q. Purdon, *The North Dakota United States Attorney's Office's Anti-Violence Strategy for Tribal Communities: Working to Make Reservations Safer Through Enforcement, Crime Prevention and Offender Reentry Programs*, 88 N.D. L. Rev. 957, 961 (2012) (stating that the Department of Justice's "role as the primary prosecutor of serious crimes makes [its] responsibility to citizens in Indian Country unique and mandatory"). Yet "[t]he sheer jurisdictional complexity of federal Indian law . . . seriously impedes the effective administration of justice." Troy A. Eid, *Beyond Oliphant: Strengthening Criminal Justice in Indian Country*, The Federal Lawyer, at 3 (April 2007), https://www.fedbar.org/wp-content/uploads/2007/03/
/feature1-0307-pdf-1.pdf.

"[T]he delivery of criminal justice to Indian country depends on each identified government being able and willing to fulfill its Indian country responsibilities." ILOC Report at 9. "Any delays, miscommunications, service gaps, or policy gaps—unintentional or otherwise—threaten public safety." *Id.* Unfortunately, "[j]uridictional gaps are hardly foreign to" Indian country criminal jurisdiction. *McGirt*, 140 S. Ct. at 2478. Although in theory all crimes in Indian country are covered by one or more of federal, state, or tribal jurisdiction, the complexity of the criminal jurisdiction scheme and the cumbersome and impractical framework it establishes make it so substantial gaps exist.

To start, it is not easy for authorities to ascertain exactly what land within their jurisdiction is and is not Indian country. Subsection 1151(b) of the

definition of "Indian country" covers "dependent Indian communities," which are outside of reservation boundaries. The test for determining whether land is a dependent Indian community—whether the land has been set aside by the government for Indian use and whether it is under federal superintendence, *Venetie*, 522 U.S. at 527—is inexact and can be particularly difficult to apply where the land in question is interspersed with non-Indian land holdings. *See Hydro Res.*, 608 F.3d 1131; *Cohen* § 3.04. Subsection 1151(c), covering Indian allotments, requires individualized analysis for specific parcels of land. In rural areas, it may take weeks or months for law enforcement to determine whether land is Indian country, as this determination can require attorneys reviewing court and title records. *See* Amnesty Int'l, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA*, at 34 (2007), https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf (hereinafter "*Maze of Injustice*").

The true status of land, moreover, may be misunderstood or disputed by federal and local authorities, only to be settled by courts or Congress after substantial argument and deliberation. *See, e.g.*, *McGirt*, 140 S. Ct. 2452; *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255 (10th Cir. 2016) (Gorsuch, J.) (issuing seventh opinion by Tenth Circuit in 40-year dispute between Ute Indian Tribe and Utah regarding bounds of Indian country in state); Pueblo Lands Act of 1924, 43 Stat. 636 (resolving conflicting claims to Pueblo land). In the meantime, justice and public safety in the disputed lands can greatly suffer.

For instance, during *amicus curiae* Iglesias's tenure as U.S. Attorney for the District of New Mexico, conflicting state and federal court decisions led to substantial confusion about whether non-Indian fee lands located within the historic boundaries of Indian pueblos were "Indian country." Multiple New Mexico state courts had ruled that these fee lands were part of "dependent Indian communities" for purposes of subsection 1151(b), but a federal district court had reached the opposite conclusion.[11] Because state prosecutors were highly uncertain that there was state jurisdiction over crimes involving Indians on these lands, and federal prosecutors believed there was no federal jurisdiction, these areas resultingly became "prosecution-free-zones" for these crimes. Jeremy Pawloski, *Murky Rules Create Lawless Lands*, Albuquerque Journal (Apr. 18, 2004), https://www.abqjournal.com/news/state/163841nm04-18-04.htm. The untenable situation was remedied only when Congress passed the Indian Pueblo Lands Act Amendments of 2005, Pub. L. No. 109-133, 119 Stat. 2573, *codified at* 25 U.S.C. § 331 Note, which provided for federal and tribal criminal jurisdiction over offenses involving Indians committed anywhere within the historic boundaries of a pueblo.

Even where a law enforcement agency has an accurate understanding of what specific land is Indian country and what is not, it can be very difficult for officers to remember the precise geographic layout and pinpoint themselves in it as they perform their duties.

---

[11] Pueblos are not reservations under subsection 1151(a). *See Venetie*, 522 U.S. at 528.

For example, where an area is a patchwork of Indian country and non-Indian country parcels of land, officers will cross between jurisdictions many times during the course of a day. *See Maze of Injustice* at 34. A patchwork scheme also increases the likelihood that a crime is committed partially within and partially outside Indian country, requiring that federal, state, and tribal jurisdiction over the crime be determined by analyzing the elements of the charged offenses and establishing the location of each element. Restatement (Third) of the Law of American Indians § 100 cmt. d (Tentative Draft No. 3, Mar. 19, 2019); *see also DeCoteau v. Dist. Cnty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 429 n.3 (1975) (observing that where an area is a checkerboard of Indian country and non-Indian country tracts of land, "there will obviously arise many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory").

What is more, Indian country is far from static. Reservations may be created or expanded, *see, e.g.*, Bureau of Indian Affairs, *Proclaiming Certain Lands as Reservation for the Cowlitz Indian Tribe*, 80 Fed. Reg. 70250 (Nov. 13, 2015) (creating reservation), or disestablished or diminished, *see, e.g.*, *Yankton Sioux Tribe*, 522 U.S. 329. Areas of land or individual parcels may phase out of "dependent Indian community" status if federal superintendence over them recedes. *See Venetie*, 522 U.S. at 527. Allotted trust land outside of reservations may be sold to non-Indians, and former reservation lands or allotments may be taken into trust. It is therefore a colossal task

for authorities to keep up their understanding of what land in their jurisdiction is and is not Indian country.

The sprawling geographic expanse of Indian country, and the remote parts of the country in which much of it lies, present additional challenges. Federal agents "handling Indian country investigations often work alone in rural settings and may travel hundreds of miles of reservation roads in the course of a week's work." Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709, 719 (2006). This also means that the federal government does not take on the duties of local policing, and tribal police are often the first responders to crimes occurring on reservations, even where federal or state authorities ultimately have jurisdiction over the crimes. *State v. Kurtz*, 249 P.3d 1271, 1279 (Or. 2011); *Cohen* § 9.07.

Apart from the difficulties in ascertaining what is Indian country, determining whether a person is an Indian can be extraordinarily challenging for law enforcement officers. Indian country is the only place within the United States where the political status of the perpetrator and victim affect which sovereign may exercise jurisdiction in a particular situation. Riley, *supra*, at 1581. The nuanced and amorphous federal common law test for determining who is an Indian, *see Zepeda*, 792 F.3d at 1110; *Stymiest*, 581 F.3d at 762, can be challenging for courts to apply, even with the benefit of briefing and time to thoroughly consider the issue. It is significantly more difficult for law enforcement officers to correctly apply this test on the spot while in the field.

In addition, the issue of Indian status may be particularly vexing in situations where authorities

seek to investigate a crime, but the identities of the perpetrators or victims are at least initially unknown. For example, during *amicus curiae* Purdon's tenure as U.S. Attorney for the District of North Dakota, four non-Indians were murdered during a home invasion on the Fort Berthold Reservation. Because it was not known whether the unidentified shooter was Indian or non-Indian, state police officers and FBI agents struggled to determine which of them had authority to move forward with investigating the crime. *See* Sari Horwitz, *Dark Side of the Boom: North Dakota's Oil Rush Brings Cash and Promise to Reservation, Along with Drug-Fueled Crime*, Washington Post (Sept. 28, 2014), https://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/.

It is likewise unclear what should happen when a non-Indian commits a crime in Indian country that has both Indian and non-Indian victims. "[T]he ICCA does not anticipate a crime with multiple victims," and no cases have addressed this issue. *Cohen* § 9.02.

Furthermore, law enforcement officers routinely encounter non-Indians in Indian country. The most recent census report provides that in 2010, of the 4.6 million people who lived in "American Indian areas,"[12] 3.5 million were non-Indians. Tina Norris et al., *The American Indian and Alaska Native Population: 2010*, 2010 Census Briefs, at 13-14 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

---

[12] This term includes reservations, off-reservation trust lands, and other tribal areas.

Finally, law enforcement officers must know by rote the substantive federal, state, and tribal criminal law that may apply in Indian country and precisely how the location of the crime, the Indian status of the perpetrator and victim, and the nature of the crime affect these laws' application. Law enforcement officers are called upon, in the heat of the moment, to accurately recall and apply what a U.S. Attorney's Office has dedicated a complicated multipage chart to. *See* Mikkanen, *supra*.

Collectively, these jurisdictional difficulties cause substantial gaps in the enforcement of criminal laws. To say the least, the "complex rules governing criminal jurisdiction in Indian country present great challenges to law enforcement enforcers." *Cohen* § 9.07. The jurisdictional analysis "can sometimes be so confusing that no one intervenes, leaving victims without legal protection or redress and resulting in impunity for the perpetrators." *Maze of Injustice* at 27-28; *see also Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country?*, Hearing Before the S. Comm. on Indian Affairs, 112th Cong. 69 (2011) (statement of Jacqueline Johnson-Pata, Executive Director, National Congress of American Indians) (stating that the "cloudiness" of Indian country criminal jurisdiction leads to inaction by law enforcement "because it is easier sometimes not to have those questions"); Riley, *supra*, at 1635 ("The current system creates perverse incentives, and actually encourages tribal police to ignore scenarios in which they cannot confirm either the race or membership of the perpetrator . . . ."). Where law enforcement officers do intervene, it can be

tremendously difficult, approaching impossibility in some situations, for them to apply the Indian country criminal jurisdiction rules on the spot while in the field. These challenges, along with a failure of the various law enforcement agencies to properly coordinate with each other, can allow criminals to avoid apprehension and prosecution.

Compounding matters is the fact that non-Indian criminals may come from outside Indian country to exploit the perceived gaps in Indian country law enforcement. "Because tribal nations lack criminal jurisdiction over non-Indians, legal-savvy predators are attracted to Indian lands because there is less likelihood of being caught and prosecuted." *Unmasking the Hidden Crisis of Murdered and Missing Indigenous Women (MMIW): Exploring Solutions to End the Cycle of Violence*, Oversight Hearing Before the H.R. Comm. on Natural Resources, 116th Cong. 14 (2019) (statement of Sarah Deer); *see also* Eid, *supra*, at 5 ("[T]he word is out that people can get off the hook, so to speak, if they are not Indian and they do something on Indian land." (quoting 2002 statement of then U.S. Senator Ben Nighthorse Campbell (R-Colo.))).

In short, the complicated overlap of federal, state, and tribal jurisdiction and law enforcement agencies makes delivering public safety to Indian country more difficult than most anywhere else.

II. THE NINTH CIRCUIT'S RULING, IF ALLOWED TO STAND, WOULD CONTRADICT WELL-SETTLED LAW AND PRACTICE REGARDING TRIBAL OFFICERS' AUTHORITY AND MAKE IT EVEN MORE DIFFICULT FOR LAW ENFORCEMENT TO PREVENT AND PROSECUTE CRIME IN INDIAN COUNTRY

The Ninth Circuit's ruling—that tribal officers' authority to detain non-Indians on public highways on reservations is limited to determining whether a suspect is non-Indian, with continued detention appropriate only where it is "apparent" or "obvious" that state or federal law has been violated—is at odds with well-settled law and practice and also with the longstanding federal policy of promoting tribal sovereignty, reiterated in recent legislation. If allowed to stand, it will also further complicate the already labyrinthine law underlying Indian country criminal jurisdiction and will seriously degrade justice and public safety both in Indian country and the areas surrounding it.

A. The Ninth Circuit's Ruling Contradicts Decades of Well-Settled Law and Practice Concerning the Authority of Tribal Officers

The Indian Law and Order Commission's final report to the President and Congress emphasizes the critical importance of ensuring that Native American tribal police officers are recognized as having the same authority to detain criminal suspects and make

arrests as their counterparts in state and local government.

"When crimes involve non-Indians in Indian country," the ILOC Report concludes, "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." ILOC Report at 99.

Ironically, the Ninth Circuit panel's decision does not even recognize the universal understanding among all concerned—as reflected in the Commission's November 2013 report—that tribal officers already have the unquestioned authority to detain non-Indian suspects, even when those same tribal officers may or may not be legally empowered by intergovernmental agreement or legislation, to arrest non-Indians. *See Cohen* § 9.07 ("[T]he Supreme Court has consistently reaffirmed the authority of tribal police to arrest offenders within Indian country and detain them until they can be turned over to the proper authorities, even if the tribe itself would lack criminal jurisdiction." (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997); *Duro v. Reina*, 495 U.S. 676, 697 (1990)).

The decision below also cannot be squared with Congress's purpose in enacting TLOA in 2010. Tribal police officers' longstanding practice of detaining non-Indians for criminal offenses arising on reservations under tribal law, as well as their practice of detaining Indians and non-Indians under applicable federal or state law depending on the suspect's Indian status,

was assumed by Congress prior to the panel's decision. This is not surprising because the alternative threat to public safety was unthinkable. TLOA recognizes that tribal police officers are almost always the first responders to address crimes of all kinds on Indian reservations, detaining Indian and non-Indian suspects alike as circumstances warrant. *See, e.g.*, TLOA, § 202 (Findings and Purposes). The panel's decision turns this approach on its head by requiring tribal officers to release suspects based on their apparent political status as non-Indians (whether real or imagined) without even waiting for the appropriate jurisdiction to respond, and regardless of how dangerous they might be. Nothing in federal Indian law as it was understood before the Ninth Circuit's decision justifies such extreme results in the field by tribal officers making life-and-death decisions for themselves and the surrounding communities.

B. The Ninth Circuit's Ruling Also Clashes with the Longstanding Federal Policy of Promoting Tribal Sovereignty

Recognition of tribal sovereignty and encouragement of tribal independence has long been the overarching policy of the federal government in its relations with Indian tribes. *See, e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) (observing that the Court has construed ambiguities in federal law "generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence"). The Ninth Circuit's ruling is a decided step in the opposite

direction. This Court "has repeatedly emphasized that there is a significant geographical component to tribal sovereignty," *Bracker*, 448 U.S. at 151, and has held that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," *Iowa Mutual*, 480 U.S. at 18. Forbidding tribes from taking action against suspected criminals on reservation highways would effectively allow these criminals to violate the law with impunity on reservations, a direct affront to the sovereignty tribes possess on reservation lands.

Moreover, Congress, and not any court, "has plenary authority to alter [the] jurisdictional guideposts" for criminal jurisdiction in Indian country. *Negonsott*, 507 U.S. at 103. No act of Congress even suggests that tribal officers' authority on public highways is limited to that described by the Ninth Circuit. In fact, Congress's most recent major legislation regarding Indian country expresses its continuing commitment to promoting tribal sovereignty and increasing tribes' autonomy. TLOA, enacted in 2010, increased the criminal sentences that tribal courts may impose. VAWA, enacted in 2013, restored tribal jurisdiction to prosecute certain non-Indians that commit acts of domestic violence against Indians in Indian country.

C. The Ninth Circuit's Ruling Will Impair Justice and Public Safety in Indian Country and the Areas Surrounding It

The Ninth Circuit's ruling, if allowed to stand, will have significant negative effects on justice and public safety both in Indian country and the areas surrounding it.

As the ILOC concluded, "the delivery of criminal justice to Indian country depends on each identified government being able and willing to fulfill its Indian country responsibilities." ILOC Report at 9. "Any delays, miscommunications, service gaps, or policy gaps—unintentional or otherwise—threaten public safety." *Id.* The Ninth Circuit's ruling creates just such a gap by severely curtailing tribal officers' authority to detain suspected non-Indian criminals until state or federal authorities arrive and adding confusion to an already complex area of the law, making it substantially more difficult for the parties to fulfill their onerous criminal justice responsibilities in Indian country.

The Ninth Circuit's ruling complicates Indian country criminal jurisdiction in many ways. Now, tribal officers must be aware not only of the specific demarcations between Indian country and non-Indian country land, but also of the specific roads on which they are driving and factor in their effective inability to perform *Terry* stops, *Terry v. Ohio*, 392 U.S. 1 (1968), of non-Indians on public highways. And, as observed by Judge Collins in his dissent from the Ninth Circuit's denial of the government's petition for rehearing en banc, the Ninth Circuit's limitation of tribal officers' investigatory and detention powers on public highways naturally leads to the conclusion that these limitations also apply on non-Indian fee land in a reservation, which is the jurisdictional equivalent of a public highway. 947 F.3d 1215, 1222-23, 1237 (9th Cir. 2020). Thus, even though all land within a reservation counts as "Indian country" for purposes of criminal jurisdiction, 18 U.S.C. § 1151(a), tribal officers must now also know whether a specific parcel

of land within the reservation is non-Indian fee land or not.

The negative effects of the Ninth Circuit's ruling may reverberate beyond *Terry* stops, as the Ninth Circuit's logic could impair tribal officers' authority to take actions within other well-recognized exceptions to the Fourth Amendment.[13] Consider the exigent circumstances exception, where "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (quotation marks omitted). Tribal officers may no longer be able to avail themselves of this exception where the situation is transpiring on non-Indian fee land and it is not "apparent" or "obvious" that a crime is occurring. Thus, if a tribal officer patrolling the streets of a reservation community comes across a residence with fresh blood in its driveway, broken house windows, and screaming coming from within the house, but the officer knows that the house is on non-Indian fee land and that the resident is a non-Indian, the Ninth Circuit's ruling leads to the conclusion that the officer lacks authority to enter the house and should instead sit idly by while waiting for state or county police to arrive to stop the mayhem. *Cf. Michigan v. Fisher*, 558 U.S. 45 (2009) (per curiam).

Further, in addition to being doctrinally wrong about the scope of tribal officers' authority, the Ninth

---

[13] Tribes are not directly bound by the Fourth Amendment, but the Indian Civil Rights Act imposes on them a Fourth Amendment analogue. 25 U.S.C. § 1302(a)(2).

Circuit prescribes a protocol that in many cases will not accurately identify the facts it deems to be jurisdictionally determinative. The Ninth Circuit ruled that a tribal officer's investigatory authority on public highways should hinge on the suspect's answer of whether he is an Indian. But as Judge Collins again correctly noted, an Indian suspect has a significant incentive to falsely state that he is a non-Indian. 947 F.3d at 1230. Beyond that, even a truthful suspect's understanding of whether he or she is an Indian will sometimes differ from the conclusion a court would reach through application of the nuanced and amorphous federal common law test for determining who is an Indian. *See* Treiger, *supra*, at 191.

Not only will tribal officers find themselves in increased danger because of the Ninth Circuit's ruling, but they may also suffer more adverse legal consequences. Tribal officers already perform their duties with the realization that their interactions with non-Indians, whether wrongful or not, could result in criminal prosecution by county authorities. *See Bishop Paiute Tribe v. Inyo County*, No. 1:15-cv-00367, 2018 WL 347797, at *1-2 (E.D. Cal. Jan. 10, 2018) (describing county's decision to charge tribal officer with three felonies and a misdemeanor for deploying his Taser and detaining belligerent non-Indian suspect on reservation land). The Ninth Circuit's ruling curtailing tribal officers' ability to perform *Terry* stops places them in an even more precarious position.

Finally, the facts of this case also illustrate the significant negative effects the Ninth Circuit's ruling will have on Indian country and the areas surrounding

it. If, as the Ninth Circuit would have it, Officer Saylor had instead asked Cooley whether he was an Indian and then ended the interaction upon Cooley's response that he was not an Indian, the result would be that an individual who violated several major federal laws is released without consequence, where he is unlikely to be picked up by the authorities with proper jurisdiction over him. Cooley would be free to later sell the methamphetamine in a nearby community or use the firearm he had with him, as well as to engage in other criminal conduct in the future. Many others would elude law enforcement in ways similar to Cooley, with the net result being a striking degradation of justice and public safety both in Indian country and the areas surrounding it.

CONCLUSION

Criminal jurisdiction in Indian country is inordinately complex and unwieldy. The Ninth Circuit's repudiation of tribal officers' ability to perform *Terry* stops of non-Indians on reservation public highways or non-Indian fee land and its replacement of *Terry* with the novel "apparent" or "obvious" crime standard compounds the complexity, contradicts well-settled law and practice, and impedes authorities in apprehending criminals, to the serious detriment of justice and public safety. The former United States Attorney *amici curiae* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

Eric B. Boettcher
Counsel of Record
Eric J. Magnuson
ROBINS KAPLAN LLP
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
(612) 349-8500
EBoettcher@RobinsKaplan.com
EMagnuson@RobinsKaplan.com

Counsel for Amici Curiae

January 15, 2021