

No. 17-30022

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff-Appellant,

vs.

JOSHUA JAMES COOLEY,  
Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
D.C. NO. CR-16-42-BLG-SPW

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**DEFENDANT-APPELLEE'S RESPONSE TO  
UNITED STATES' PETITION FOR REHEARING EN BANC**

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## **I. Introduction**

The government's Petition for Rehearing *En Banc* should be denied.

Contrary to the government's contention, the panel's decision does not conflict with any binding Ninth Circuit precedent. Although the government maintains that the panel's decision is inconsistent with this Court's decision in *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975), *Ortiz-Barraza* is factually distinguishable from the present case and, in any event, is no longer binding precedent due to intervening Supreme Court authority.

Moreover, the government has a fundamental misunderstanding of the scope of tribal authority on a state highway running through a reservation. Indian tribes do not retain the sovereign power to stop, investigate, search and detain non-Indian offenders on a state right-of-way running through a reservation. Well-established Supreme Court precedent and recent Ninth Circuit precedent make clear that Indian tribes' authority over non-Indians on a state highway is much more limited. Tribes only possess the limited power to detain a non-Indian for a reasonable period of time in order to deliver him or her to state or federal authorities. But this limited power only exists when it is apparent or obvious that the non-Indian has committed or is committing a crime, and this limited power to detain does not include the power to investigate or search for evidence of a crime. For the reasons explained below, the government's Petition should be denied.

## II. Argument

**A. *Ortiz-Barraza* is factually distinguishable from the present case and, in any event, is no longer binding precedent due to intervening Supreme Court authority.**

The government argues that the panel's decision conflicts with this Court's prior decision in *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975).

The government further argues that the panel's decision creates "tension" with cases from other jurisdictions that have relied on *Ortiz-Barraza*. As explained below, the government's arguments should be rejected because *Ortiz-Barraza* is factually distinguishable from the present case and, in any event, is no longer binding precedent due to intervening Supreme Court authority.

In *Ortiz-Barraza*, a tribal officer was patrolling the streets of Sells, Arizona, which is within the boundaries of the Papago Indian Reservation. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1178 (9th Cir. 1975). The officer observed a pickup truck turn off the San Miguel Gate road onto the main street in Sells. *Id.* The truck was muddy and dirty. *Id.* The officer observed a young Mexican male in the driver's seat of the truck. *Id.* The officer was familiar with all non-Indian residents in the area and did not recognize the driver. *Id.* The town of Sells sits approximately 25 miles north of the Mexican border via the San Miguel Gate road. *Id.* at 1178 and n. 1. Between Sells and the border, the San Miguel Gate road is only intersected by two through roadways, both of which are ungraded and

unpaved. *Id.* Based on these facts, there was a “high probability” that a non-resident travelling north on the San Miguel Gate road had crossed the international border. *Id.* The officer decided to stop the truck to check the license of the driver. *Id.* at 1178. Accordingly, the officer followed the truck onto a state highway but before he initiated a stop, the driver of the truck pulled over on the shoulder of the highway and stopped of his own volition. *Id.* At that point, the officer activated his vehicle’s overhead lights and pulled up behind the truck. *Id.*

The officer approached the driver and asked for his license and registration. *Id.* The driver stated in Spanish that he did not speak English. *Id.* The officer then frisked the driver, looking for identification papers. *Id.* Finding neither a license nor registration, the officer placed the driver in the patrol car and then searched the cab of the truck for the requested identification papers. *Id.* Finding no identification papers in the truck, the officer believed that he had discovered an alien who was transporting either drugs or illegal aliens. *Id.* at 1178-1179. At that point, the officer searched the truck and discovered burlap sacks containing marijuana. *Id.* at 1179. The officer arrested the driver and transported him to the Papago detention facility, where he was held for transfer to the Drug Enforcement Administration. *Id.*

The driver subsequently filed a motion to suppress in United States District Court, arguing that the search of his truck was unlawful. *Id.* at 1177. In support,

the driver argued that the tribal officer acted in excess of his authority by conducting the search as part of an investigation of suspected crimes committed by a non-Indian. *Id.* at 1178. The driver further argued that the search violated constitutional prohibitions against unreasonable searches. *Id.* The district court denied the driver's motion to suppress and, on appeal, the Ninth Circuit affirmed, holding that the tribal officer acted within the scope of his authority because (1) the Papago tribe possesses the intrinsic power to exclude non-Indians from the reservation and (2) the power to exclude necessarily includes the power to detain and investigate non-Indians for suspected "on-reservation" crimes "where the exclusion of the trespassing offender from the reservation may be contemplated." *Id.* at 1179-1180. In so holding, the court expressly stated that "the fact that the events of interest here may have occurred within the right-of-way for a state highway avails the defendant nothing" because "[r]ights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police." *Id.* at 1180.

*Ortiz-Barraza* does not control in this case for two reasons. First, *Ortiz-Barraza* is factually distinguishable from the present case. In *Ortiz-Barraza*, the tribal officer observed suspicious activity by a driver on the reservation, followed him onto a state highway, stopped him, and then immediately undertook to obtain and locate the driver's identification papers. In this case, Officer Saylor did not

observe any suspicious activity by Mr. Cooley prior to approaching his vehicle and attempting to ascertain whether he was an Indian. Instead, having observed no suspicious activity, Officer Saylor approached Mr. Cooley's vehicle and began questioning him without ever attempting to ascertain his status. Thus, unlike *Ortiz-Barraza*, where the tribal officer ostensibly had the authority to exclude at the moment he initially observed a driver engaged in suspected criminal activity and at the moment he approached that driver in an attempt to ascertain his identity, Officer Saylor never possessed the authority to exclude because he never observed suspected criminal activity prior to approaching Mr. Cooley and he never attempted to ascertain whether Mr. Cooley was an Indian.

Second, and more importantly, *Ortiz-Barraza* was decided in 1975, 22 years before the United States Supreme Court decided *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). This is significant because, in *Strate*, the Supreme Court held that an Indian tribe's intrinsic power to exclude trespassers from the reservation does not extend to state highways running through the reservation. Indeed, the Supreme Court made clear that those portions of state highways running through reservations are akin to land alienated to non-Indians. Specifically, the Supreme Court reasoned and held as follows:

Forming part of the State's highway, the right-of-way is open to the public, and traffic on it is subject to the State's control. The Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway. ***They have retained no gatekeeping right.*** So long as the



stretch is maintained as part of the State's highway, ***the Tribes cannot assert a landowner's right to occupy and exclude***. We therefore align the right-of-way, for the purpose at hand, with ***land alienated to non-Indians***.

*Strate v. A-1 Contractors*, 520 U.S. 438, 455–56 (1997) (emphasis added) (internal citations omitted).

Where intervening Supreme Court authority undercuts the theory or reasoning underlying prior circuit precedent in such a way that the cases are “clearly irreconcilable,” the circuit court is bound by the intervening authority and must reject the prior circuit precedent as having been effectively overruled. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003).

The Supreme Court’s decision in *Strate* is intervening authority that undercuts the theory or reasoning underlying the decision in *Ortiz-Barraza*. Although the *Ortiz-Barraza* Court held that the tribal officer had the authority to investigate violations of law occurring within the right-of-way for a state highway, its holding was premised upon two beliefs: (1) that a state highway running through a reservation remains part of the reservation and (2) that an Indian tribe’s intrinsic power to exclude trespassers from the reservation includes the power to detain and investigate non-Indians for suspected crimes occurring on the reservation. *Ortiz-Barraza*, 512 F.2d at 1179-1180. Finding that the power to exclude would be meaningless if tribes were not empowered to detain and investigate a non-Indian suspected of criminal activity on a reservation, the *Ortiz-*

*Barraza* Court concluded that tribal officers necessarily possess the power to detain and investigate non-Indians “where the exclusion of the trespassing offender from the reservation may be contemplated.” *Id.* at 1180.

In other words, the central reasoning underlying *Ortiz-Barraza* was that Indian tribes necessarily possess the power to detain and investigate non-Indians on state highways running through reservations because tribes possess the power to exclude on those roadways. That reasoning is clearly irreconcilable with *Strate*, wherein the Supreme Court held that Indian tribes do not possess the power to exclude non-Indians from state highways running through reservations because those roadways are akin to alienated, non-Indian land. Thus, even if the panel’s decision conflicts with *Ortiz-Barraza*, the government’s argument incorrectly presupposes that *Ortiz-Barraza* is still good law. In fact, *Ortiz-Barraza* is no longer binding precedent because it is clearly inconsistent with *Strate*, which is binding authority. For this reason, *Ortiz-Barraza* does not control in this case and the panel’s decision is correct because it relies upon, and is consistent with, intervening Supreme Court authority holding that Indian tribes lack the power to exclude non-Indians from state highways running through reservations. *See Strate*, 520 U.S. at 455–56. The government’s argument regarding *Ortiz-Barraza* should be rejected.

**B. Tribal authority over non-Indians on a state right-of-way is limited.**

The government argues that Indian tribes retain the sovereign power to stop, investigate, search and detain non-Indian offenders on a state right-of-way running through a reservation. This argument is contrary to well-established Supreme Court precedent and recent Ninth Circuit precedent. The government’s Petition should be denied.

It is well-settled that an Indian tribe has no inherent sovereign authority to exercise criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191(1978) (*superseded by statute as stated in United States v. Lara*, 541 U.S. 193 (2004)). The “inherent sovereign powers” of an Indian tribe “do not extend to the activities of nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544, 565 (1981). In *Montana*, stressing that “Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns,” the Court quoted Justice Johnson’s words in his concurrence in *Fletcher v. Peck*, 10 U.S. 7 (1810)—the first Indian case to reach the Supreme Court—that the Indian tribes have lost any “right of governing every person within their limits except themselves.” *Montana*, 450 U.S., at 565 (citations omitted).

Indian tribes are not gatekeepers on public rights of way that cross reservations. *See Strate*, 520 U.S. at 455–56. Because a state highway is deemed

alienated land held in fee simple, the usual tribal power of exclusion of nonmembers does not apply there. *Id.* at 456.

A tribe does have full law enforcement authority over 1) its *members* and 2) *nonmember Indians* on the reservation. *See Lara*, 541 U.S. at 210. Accordingly, the tribe is authorized to stop and arrest Indian violators of tribal law traveling on a state highway that crosses a reservation. In the absence of some form of state authorization, however, tribal officers have no inherent power to arrest and book non-Indian violators.

The limitation on tribal authority has led to obvious practical difficulties. *See Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009). For example, a tribal officer who observes a vehicle violating tribal law on a state highway has no way of knowing whether the driver is an Indian or non-Indian. The solution given in *Bressi* was to permit the officer to stop the vehicle and to first determine whether the violating driver was Indian. *Bressi*, 575 F.3d at 895-96. If the driver is Indian, the tribe has the authority to prosecute both member and non-member Indians for traffic violations. *See Lara*, 541 U.S. at 210.

As to non-Indians, however, the tribe has no authority to prosecute or investigate offenders. *Bressi*, 575 F.3d at 896 (*citing Strate*, 520 U.S. at 456 and n. 11). The tribe's authority when dealing with a non-Indian violator is to detain the non-Indian for delivery to state or federal authorities. *Id.* at 897. The rule limiting

tribal authority over non-Indians on a public right-of-way is thus a concession to the need for legitimate tribal law enforcement against Indians in Indian country, including the state highways. *Bressi*, 575 F.3d at 896. Tribal officers may enforce tribal law as against member and nonmember Indians. As to non-Indians, the amount of intrusion or inconvenience is relatively minor. Ordinarily, there will be reasonable suspicion that a tribal law has been or is being violated, probably by erratic driving or speeding. The observed violation will justify the stop. After the stop, the amount of time it will take to determine whether the violator is Indian will not be long. At that point, “[i]f it is apparent that a state or federal law has been violated, the officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities.” *Id.* at 897.

Importantly, under the circumstances described above, the original stop is justified by a reasonable suspicion that a crime has occurred. After the justified stop, the tribal officer’s authority then depends upon whether the violator is Indian. While the tribal officer does not have to ignore obvious or apparent violations of the law by letting a non-Indian violator go free, his authority at that point is limited to detaining the violator for delivery to state or federal authorities. In the case of a non-Indian violator, the tribal officer does not have the authority to search for evidence of other crimes. The tribal officer’s authority is limited to detaining the non-Indian violator for delivery to state or federal authorities.

### **III. Conclusion**

For the foregoing reasons, the government's Petition for Rehearing *En Banc* should be denied.

Respectfully submitted this 2<sup>nd</sup> day of August, 2019.

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By: /s/ Eric R. Henkel

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 11. Certificate of Compliance for Petitions for Rehearing or Answers**

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CHRISTIAN SAMSON, PLLC

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