No. 19-1414

IN THE

Supreme Court of the United States

UNITED STATES,
Petitioner,
v.
COOLEY,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER, THE CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, FORT PECK ASSINIBOINE AND SIOUX TRIBES, THE PASCUA YAQUI TRIBE, AND THE QUINAULT INDIAN NATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF THE *AMICI CURIAE*[1]

The National Indigenous Women's Resource Center ("NIWRC") is a national organization working to end domestic violence and sexual assault against Native women. NIWRC's work to eliminate domestic violence against Native women and children is directly implicated by the Ninth Circuit Court of Appeal's decision eliminating the authority of tribal law enforcement to conduct a reasonable suspicion *Terry* stop on a non-Indian traveling within reservation borders. According to the new standard now articulated by the Ninth Circuit, until or unless tribal law enforcement witness an "obvious" or "apparent" violation of state or federal law, tribal law enforcement remains without the requisite authority to briefly stop and conduct a limited investigation of a non-Indian when there is reasonable suspicion they have committed a crime.

The introduction of this vague and ambiguous standard will significantly impede the ability of tribal law enforcement to fully effectuate the restored tribal criminal jurisdiction that Congress passed in its Violence Against Women Reauthorization Act of 2013 ("VAWA" or "VAWA 2013"), Pub. L. No. 113-4, § 904(a)(3), 127 Stat. 54, 121 (2013) (codified at 25 U.S.C. § 1304(a)(3)). The NIWRC *Amici*, therefore, offer a unique perspective on the relationship between Congress's plenary power over Indian affairs, the inherent sovereign authority of tribal governments to prosecute crimes committed

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel for Respondent expressed consent for this *amicus* brief on July 9, 2020. On July 10, 2020, counsel for Petitioner provided consent.

against tribal citizens, and safety for Native women and children.

The leading signatory, the NIWRC, is a Native non-profit organization whose mission is to ensure the safety of Native women by protecting and preserving the inherent sovereign authority of American Indian and Alaska Native Tribes to respond to domestic violence and sexual assault. The NIWRC's Board of Directors consists of Native women leaders from Tribes across the United States. Collectively, these women have extensive experience in tribal courts, tribal governmental process, and programmatic and educational work to end violence against Native women and children, including domestic violence and sexual assault.

NIWRC is joined by five Tribal Nations located within the Ninth Circuit that have invested significant resources, time, and effort to ensure that their prosecutions of non-Indian perpetrated domestic violence crimes serve to increase the safety of their tribal communities, while simultaneously working to ensure that the rights of the domestic violence defendants in tribal criminal proceedings are respected and enforced.

The Confederated Tribes of the Chehalis Reservation is located in southwest Washington in an area that is poor and mostly rural with limited county or state services, and law enforcement rarely reaches the Chehalis Reservation. The word "Chehalis" means people of the sand, referring to the close proximity that the Upper and Lower Chehalis people lived to the river which empties into Grays Harbor. For centuries, the Upper and Lower Chehalis people lived in villages along the river. In October 2018, the Confederated Tribes of the Chehalis Reservation implemented a revised domestic violence code, including all necessary

provisions of VAWA § 904's special domestic violence criminal jurisdiction ("SDVCJ"), and was approved in March 2019 by the United States to exercise authority to prosecute non-Indians for acts of domestic violence on Tribal Lands.

The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") is a union of three Tribes—Cayuse, Umatilla, and Walla Walla—located on a 172,000-acre reservation in Oregon. The Umatilla Indian Reservation was subject to allotment and is heavily allotted, and as a result, contains a large percentage of non-Indian fee land. The CTUIR has more than 3,100 citizens, nearly half of whom live on the Reservation alongside approximately 1,500 non-Indians. The CTUIR was the first Tribe in the nation, and the first jurisdiction in the country, to implement the Adam Walsh Act in 2009. In March of 2011, the CTUIR implemented felony sentencing under the Tribal Law and Order Act of 2010 ("TLOA") and has since prosecuted numerous felony cases. In July of 2013, the CTUIR implemented all necessary provisions of VAWA § 904's SDVCJ, and was approved by the United States for early exercise of that authority in February of 2014. Since implementing § 904 of VAWA, the CTUIR has prosecuted SDVCJ cases for acts of domestic violence committed by non-Indians against Indian women on the Umatilla Indian Reservation while according those defendants the full panoply of protections called for under VAWA.

The Fort Peck Assiniboine and Sioux Tribes ("Fort Peck Tribes") are located on the Fort Peck Indian Reservation, and are comprised of the Dakota, Lakota and Nakota bands. Located on 2.1 million acres in the extreme northeast corner of Montana bordering the Missouri River, the land base is 110 miles long and 40

miles wide. There are over 10,000 enrolled tribal members with about 6,000 residing on or near the Reservation. The population of the Reservation is 50% Native and 50% non-Native. U.S. Highway 2 and Amtrak cut through the Reservation, creating a major transportation route. The Fort Peck Tribes implemented felony sentencing under TLOA in 2012, and implemented VAWA's SDVCJ on March 7, 2015, prosecuting cases for acts of domestic violence committed by non-Indians against Indians. Since the implementations, the Fort Peck Tribes have hired two law-trained attorneys for the prosecutor's office that also serve as SAUSA's (Special Assistant United States Attorneys) and one law-trained attorney for the public defender's office. The Fort Peck Tribes have maintained a Cross Deputization agreement with tribal, city, state and county law enforcement officials since 1999.

The Pascua Yaqui Tribe of Arizona is a sovereign Tribal Nation and was one of the first three Tribal Nations to exercise enhanced jurisdiction under VAWA § 904 by successfully implementing all necessary provisions of VAWA § 904's SDVCJ. The Pascua Yaqui Tribe's Reservation consists of 2,200 acres situated approximately 10 miles southwest of Tucson, Arizona. Since VAWA implementation in February 2014, the Tribe has experienced the most investigations, cases, and convictions of non-Indian perpetrators utilizing SDVCJ across the country. The Tribe has conducted 73 criminal investigations of 43 different defendants. The Tribe has criminally charged 59 cases resulting in 28 convictions. Pascua Yaqui Tribe has been a trailblazing Tribe in exercising expanded criminal jurisdiction and has been the source of many firsts under VAWA's SDVCJ authority. On July 2, 2014, the Tribe became the first to convict a non-Indian defendant in tribal court since the 1978 U.S. Supreme

Court decision in *Oliphant*, by way of plea agreement. On November 14, 2014, the Tribe successfully conducted the first jury trial under VAWA's SDVCJ authority, which resulted in an acquittal. Then, on May 9, 2017, the Pascua Yaqui Tribe became the first Tribe to secure a jury trial conviction of a non-Indian defendant in a Tribal Court since the *Oliphant* decision under VAWA SDVCJ authority. The defendant in that case had been previously convicted under VAWA SDVCJ authority and returned to Tribal Court after failing probation and rehabilitation services for strangling the same victim. Finally, the Pascua Yaqui Tribe is also the only known Tribe to successfully extradite two non-Indian defendants back to Tribal Court on Tribal Court warrants for failing to comply with the terms of their plea agreements in their VAWA convictions.

The Quinault Indian Nation, with a population of around 3,200 people, is comprised of Native Quinault and Queets Tribes and also represents descendants of outlying Tribes of the Pacific Coast: Chinook, Cowlitz, Quileute, Hoh, and Chehalis. The Reservation itself covers 208,150 acres in Grays Harbor and Jefferson counties. Quinault Nation employs over 700 people, both Indian and non-Indian. Two major highways cross the Reservation, SR 109 and US 101, and are traveled daily by non-Indians. The Quinault Indian Nation has implemented both felony sentencing under the Tribal Law and Order Act of 2010 and all necessary provisions to accommodate VAWA's SDVCJ. Quinault Indian Nation has been approved to exercise felony jurisdiction and criminal jurisdiction over non-Indians committing acts of domestic violence against Indian women.

The depth of the NIWRC *Amici*'s experience in working to end domestic violence and sexual assault

renders them uniquely positioned to offer their views on the harm that will result from raising the bar from the reasonable suspicion *Terry* stop standard to a newly created and unworkable "probable-cause-plus" standard for tribal law enforcement.

SUMMARY OF THE ARGUMENT

"'[C]ompared to all other groups in the United States,' Native American women 'experience the highest rates of domestic violence.' 151 Cong. Rec. 9061 (2005) (remarks of Sen. McCain)." *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016). The crisis of violence against Native women has been decried by Members of Congress, the President of the United States, and tribal leaders from Nations across the United States. Recent efforts to turn the tides of this crisis have resulted in the re-authorization of the Violence Against Women Act in 2013, wherein Congress restored three categories of tribal criminal jurisdiction over non-Indians related to domestic violence, often referred to as special domestic violence criminal jurisdiction ("SDVCJ"). *See* Violence Against Women Reauthorization Act of 2013 ("VAWA" or "VAWA 2013"), Pub. L. No. 113-4, § 904, 127 Stat. 54, 121 (2013) (codified at 25 U.S.C. § 1304 (2018)). As a result, many Tribes across the United States now detain, arrest, investigate, and prosecute *anyone* who commits certain domestic violence crimes arising in Indian country—regardless of whether the perpetrator is Indian or not, or the illegal conduct takes place on land held in trust or in fee.

The Ninth Circuit, however, has concluded that Tribal Nations are without the authority to effectuate a reasonable suspicion *Terry* stop on a non-Indian located on non-Indian fee land, within a reservation. The panel's "probable-cause-plus" standard constitutes a requirement that is difficult to understand, particularly

for on-the-ground law enforcement officers, and will be nearly impossible to consistently implement. Ultimately, if left unturned, this standard will preclude tribal law enforcement from fully and effectively implementing the criminal jurisdiction over non-Indians that Congress purposefully restored in 2013.

In the decision below, the panel concluded that tribal law enforcement officers "act outside of [their] jurisdiction as a tribal officer when [they] detain[] . . . a non-Indian, and search[] his vehicle without first making any attempt to determine whether [he] was in fact an Indian." *United States v. Cooley*, 919 F.3d 1135, 1141 (9th Cir. 2019). The Ninth Circuit reached this conclusion, in large part, by reasoning that "[a] tribe has no power to enforce tribal criminal law as to non-Indians, even when they are on tribal land." *See id.* (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978)). Accordingly, the panel concluded that on non-Indian fee land located within a reservation, "tribal authorities may stop those suspected of violating tribal law . . . as long as the suspect's Indian status is unknown." *Id.* at 1142. "In such circumstances, tribal officials' initial authority is limited to ascertaining whether the person is an Indian." *Id.* This first part of the Ninth Circuit's new "probable-cause-plus" standard for tribal law enforcement is flawed for three reasons.

First, this particular conclusion directly contradicts this Court's clear statement that "[t]ribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them" by transferring them, if they are non-Indian, "to the proper authorities," including the state and/or federal government. *Duro v. Reina*, 495 U.S. 676, 697 (1990).

Second, requiring tribal law enforcement to always ascertain the identity of anyone law enforcement may suspect of committing a crime will directly undermine the health, safety, and welfare of those who live in tribal communities. In 2001, the International Association of Chiefs of Police issued a report concluding that "[w]henever tribal law enforcement officers are forced to make on-the-spot determinations as to whether a suspect is Indian or non-Indian and whether the victim is Indian or non-Indian, public safety in Indian country is severely compromised."[2] To be clear, this new standard will merely encourage criminals to lie about their identity, as a simple statement that an individual is non-Indian, regardless of whether it is the truth, will now strip law enforcement of any authority to detain them for suspected illegal conduct.

Third, the underlying legal premise behind the Ninth Circuit's holding—namely, that after *Oliphant*, Tribal Nations exercise *no* criminal jurisdiction over non-Indians—is patently wrong. In 2013, Congress restored Tribes' criminal jurisdiction over non-Indians who abuse Native women on tribal lands. *See* VAWA, 25 U.S.C. § 1304; *see also* 159 Cong. Rec. 1033 (2013) (statement of Sen. Tom Udall) ("Native women should not be abandoned to a jurisdictional loophole. In effect, these women are living in a prosecution-free zone. The tribal provisions in VAWA will provide a remedy."). The unfortunate irony of the Ninth Circuit's decision is that it will, if left unturned, re-open a portion of the jurisdictional loophole that Congress worked hard to close.

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[2] Int'l Ass'n of Chiefs of Police, *Improving Safety in Indian Country: Recommendations from the IACP 2001 Summit*, https://www.theiacp.org/sites/default/files/2018-08/ACF1295.pdf (2001). The IACP is the largest law enforcement organization in the world.

In the wake of the panel's decision, much confusion abides. Take for instance a tribal law officer working on the Pascua Yaqui Reservation, where tribal law enforcement has the authority to arrest and prosecute non-Indians who commit domestic violence crimes. If a Pascua Yaqui law officer has reasonable suspicion that the driver of a vehicle on the reservation is committing a crime of domestic violence, must the officer ascertain the citizenship of the suspect before effectuating the *Terry* stop, despite the fact that Congress has passed a law restoring that officer's full authority to arrest non-Indians who commit domestic violence crimes on the Pascua Yaqui Reservation?

Equally confounding is the Ninth Circuit's articulation of this new "probable-cause-plus" standard for routine traffic stops effectuated by tribal law enforcement. In the decision below, the panel concluded that if, in the course of ascertaining the identity of a non-Indian suspect to determine whether the officer has jurisdiction to detain in the first place, it becomes "apparent" or "obvious" to tribal law enforcement that a violation of federal or state law has been committed, "the [tribal] officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities." *United States v. Cooley*, 919 F.3d 1135, 1142 (9th Cir. 2019) (citations and quotations omitted). Unfortunately, the Ninth Circuit has "not elaborated on when it is 'apparent' or 'obvious' that state or federal law is being or has been violated." *Id.* Such a rule does not exist under any state or federal doctrine, and is not taught in any law enforcement training academies. It is unworkable, inarticulate, and inappropriate to uniquely expect tribal law enforcement officers, many of whom are new recruits fresh out of state law enforcement academies, to implement.

Under this vague and ambiguous "obvious" or "apparent" standard, if a law enforcement officer is patrolling Fort Peck's Reservation—where the Tribe has implemented VAWA's SDVCJ—and he sees a Native woman with severe bruising on her face and extremities, does that make the situation sufficiently "apparent" or "obvious" to detain her non-Indian husband for questioning? Or must the law officer wait until the Native woman suffers a more severe injury, such as a stab wound or broken leg, or a homicide, before the commission of the crime becomes sufficiently "obvious" to justify detainment or an investigation? According to the Department of Justice, "calls related to domestic disputes and domestic related incidents represented the highest number of fatal types of calls for service and were also the underlying cause of law enforcement fatalities for several other calls for service."[3] Forcing tribal law enforcement to wait to intervene until domestic violence becomes "obvious" or "apparent" will cost lives.

For the Tribes that have implemented VAWA 2013's restoration of tribal criminal jurisdiction, the Ninth Circuit's decision threatens to unconstitutionally remove what Congress has decided to restore. Congress's decision to restore tribal criminal jurisdiction over non-Indian-perpetrated crimes constitutes a constitutional exercise of Congress's exclusive power over Indian affairs—one with which this Court should not interfere. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (The Court has "consistently described [Congress's authority] as plenary and exclusive to

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[3] Nick Breul & Mike Keith, Nat'l Law Enforcement Officers Memorial Fund, *Deadly Calls and Fatal Encounters, Analysis of U.S. law enforcement line of duty deaths when officers responded to dispatched calls for service and conducted enforcement* 4 (2010-2014), https://www.hsdl.org/?view&did=794863.

legislate [with] respect to Indian tribes.") (quotations omitted). Congress's considered judgment in this execution of the federal government's trust responsibility should not be disturbed. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-75 (2011).

Truly solving the crisis of violence in Indian Country requires significant collaboration among tribal, state, and federal authorities. The Ninth Circuit's "probable-cause-plus" standard, if left in place, will preclude the ability of tribal law enforcement to effectively partner with state and federal authorities to truly address the high rates of crime on reservations.

As Judge Collins perceptively noted in his dissent, "[r]aising the bar for tribal investigations of non-Indian misconduct on fee lands from reasonable suspicion to 'probable-cause-plus' is a very big deal, and one that literally may have life-or-death consequences for many of the hundreds of thousands of persons who live on Indian reservations located within this circuit. . . ." *United States v. Cooley*, 947 F.3d 1215, 1236 (9th Cir. 2020).

This Court should grant the United States' petition for *certiorari* and fully review the Ninth Circuit's decision.

ARGUMENT

I. Replacing Reasonable Suspicion with the Ambiguous "Obvious" or "Apparent" Standard Will Jeopardize the Lives of Native Women

This raising of the bar—from reasonable suspicion to "probable-cause-plus"—is particularly disastrous for Native women because, as described in greater detail below, Native women suffer the highest rates of violence in the United States, the majority of the perpetrators of these crimes are non-Indian, and many Reservations contain large populations of non-Indian residents and large swaths of non-Indian fee land. For Tribal Nations who seek to protect Native women in their own homes, the Ninth Circuit's decision is alarming.

A. On Reservations, Native Women Face the Highest Rates of Violent Crime in the United States, and the Majority of these Crimes are Committed by non-Indians

As acknowledged by this Court in *United States v. Bryant*, Native women are at high risk for violent victimization, particularly domestic violence and sexual assault. *See* 136 S. Ct. 1954, 1959 (2016). A 2016 report from the National Institute of Justice ("NIJ") concludes that more than 4 in 5 Native people have been victims of violence and over half (56.1%) of Native women have been victims of sexual violence.[4]

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[4] Andre B. Rosay, Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey* 44 (2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

"According to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner." *Bryant*, 136 S. Ct. at 1959 (citation omitted). Moreover, American Indian and Alaska Native women "are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general."[5] Finally, Native women experience battery "at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women," and Native women "experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women." VAWA 2005, Pub. L. 109-162, § 901, 119 Stat. 3077 (2006). The magnitude of the crisis cannot be questioned.

The majority of these violent crimes committed against Native women are committed by non-Natives. While there is no denying that Native people do commit a portion of these crimes, federal studies conclude that Native people suffer the highest rate of interracial violent crime in the nation. The most recent DOJ study concluded that over 90% of Native victims of crime have had a least one non-Native perpetrator.[6]

Accordingly, as a result of the Court's "probable-cause-plus" standard, tribal law enforcement will now lack the authority to briefly stop and question the

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[5] Dep't of Justice, *Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence: Ending Violence So Children Can Thrive* 38 (Nov. 2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf.

[6] Rosay, *supra*, at 56.

majority of violent criminals who live on, work on, or travel across tribal lands until or unless it becomes "obvious" or "apparent" (whatever those new standards mean) to tribal law enforcement that a crime was committed.

B. Many Reservations in the Ninth Circuit Consist Largely of non-Indian Fee Lands

The decision to limit the authority of tribal law enforcement to detain or investigate a non-Indian traversing non-Indian fee lands will have far-reaching implications for the simple reason that many of the reservations within the Ninth Circuit contain significant quantities of non-Indian fee land.

Take for example the Port Madison Indian Reservation near Seattle, Washington, where approximately 43% of the lands on the Reservation are owned by non-Indians.[7] And on the CTUIR Reservation, one of the first Tribes to implement VAWA, approximately 48% of the Tribe's reservation lands are currently owned by non-Indians.[8] On the Chehalis Reservation, approximately 36% of the lands on the Reservation constitute non-Indian fee lands.[9]

Thus, if left unturned, the ability of law enforcement to effectuate routine *Terry* stops within the borders of

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[7] *Frequently Asked Questions*, Suquamish Tribe, https://suquamish.nsn.us/home/about-us/faqs/ (last visited July 7, 2020).

[8] *Land Management*, Confederated Tribes of the Umatilla Indian Reservation, https://ctuir.org/tribal-services/economic-community-development/land-management (last visited July 17, 2020).

[9] Frazier Meyer, *Planning for the Future: Acquisition protects tribe's natural resources, way of life*, Chehalis Tribal Newsletter, March 2019, at 1, https://www.chehalistribe.org/newsletter/pdf/2019-03.pdf.

a Reservation will vary dramatically from Reservation to Reservation, complicating the implementation of VAWA's restored tribal criminal jurisdiction over non-Indians in many Tribal Nations, and leaving Native women *less* protected in most.

C. Many Reservations in the Ninth Circuit Are Home to Significant non-Indian Populations

Every reservation in the Ninth Circuit is home to a significant number of non-Indian residents, and, as a result of the panel's decision, tribal law enforcement will be unable to detain or investigate these reservation residents if and when reasonable suspicion arises that they are committing a crime.

For instance, on the CTUIR's Reservation, just over 51% of the residents are non-Indians.[10] On Chehalis's Reservation, non-Indians make up 43% of the total population.[11] And on Pascua Yaqui's Reservation, almost 12.7% of the population are non-Indians.[12] *See also Cooley*, 947 F.3d at 1236 ("the percentage of non-Indians residing on the reservation ranges from a high of 68%

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[10] *SDVCJ Today, The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in Oregon*, Nat'l Congress of American Indians, http://www.ncai.org/tribal-vawa/get-started/the-confederated-tribes-of-the-umatilla-indian-reservation-ctuir-in-oregon (last visited July 17, 2020).

[11] *SDVCJ Today, Confederated Tribes of the Chehalis Reservation*, Nat'l Congress of American Indians, http://www.ncai.org/tribal-vawa/sdvcj-today/confederated-tribes-of-the-chehalis-reservation (last visited July 17, 2020).

[12] *SDVCJ Today, Pascua Yaqui Tribe*, Nat'l Congress of American Indians, http://www.ncai.org/tribal-vawa/for-tribes/vawa-sdvcj-implementing-tribes/pascua-yaqui-tribe (last visited July 17, 2020).

on the Flathead Reservation in Montana to 1.2% on the Blackfeet Reservation in Montana.").

Following the Ninth Circuit's decision, therefore, tribal law enforcement will most likely be able to effectuate a *Terry* stop on the Blackfeet Reservation based on a law officer's reasonable suspicion, but on the Flathead Reservation, more often than not, tribal law enforcement will be without the authority to utilize a *Terry* stop to question a resident based on reasonable suspicion alone. It is precisely these arbitrary divisions in the application of law that render Native women the most vulnerable population to violent crime in the United States.

D. The Crisis of Murdered and Missing Indigenous Women/People Requires Tribal Authority to Undertake *Terry* Stops for Non-Indians Traveling Across Reservations

The fact that Native women are more likely to be murdered than any other American population further underscores the judicial inequities created by the Ninth Circuit's decision. Today, the third leading cause of death among American Indian and Alaska Native women is murder,[13] and the murder rates of Native women on some reservations is as much as ten times higher than the national average.[14]

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[13] 151 Cong. Rec. 9061-62 (2005) (statement of Sen. John McCain) ("[H]omicide was the third leading cause of death of Indian females between the ages of 15 to 34 . . . .").

[14] Ronet Bachman et al., U.S. Dep't of Justice, *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* 5 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

Murdered and Missing Indigenous Women ("MMIW") is such a concern that President Trump, on November 26, 2019, signed Executive Order 13898, creating a Task Force on Missing and Murdered American Indians and Alaska Natives.[15] President Trump also proclaimed that May 5th shall be Missing and Murdered American Indians and Alaska Natives Awareness Day.[16]

As Senator Murkowski has noted, at a fundamental level, the MMIW crisis has revealed a serious need for "greater partnerships between law enforcement at all levels."[17] Family members, advocates, experts, and tribal leaders working to address MMIW have likewise testified before Congress on the need for collaboration between federal, state, and tribal authorities to address the crisis. For instance, as *Amici*'s Counsel informed the House Subcommittee on Indigenous Peoples in March 2019, "because it's not unusual for Indian peoples to travel between urban areas and tribal lands, cross jurisdictional agreements [are necessary to] maximize efforts to prevent abductions and homicides" in Indian Country.[18]

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[15] Exec. Order 13,898, 84 Fed. Reg. 66,059 (Dec. 2, 2019).

[16] Proclamation No. 10,026, 85 Fed. Reg. 27,633 (May 8, 2020).

[17] Press Release, Sen. Lisa Murkowski, *Murkowski, Cortez Masto Reintroduce Savanna's Act Bill Calls for Law Enforcement Focus on Missing and Murdered Indigenous Women* (Jan. 28, 2019), https://www.murkowski.senate.gov/press/release/murkowski-cortez-masto-reintroduce-savannas-act.

[18] *Unmasking the Hidden Crisis of Murdered and Missing Indigenous Women (MMIW): Exploring Solutions to End the Cycle of Violence, Hearing Before the H. Subcomm. on Indigenous Peoples of the U.S.*, 116 Cong. 26 (2019) (written response of Mary Kathryn Nagle, Nat'l Indigenous Women's Resource Center), https://www.govinfo.gov/content/pkg/CHRG-116hhrg35582/html/CHRG-116hhrg35582.htm.

The need for cross-collaboration is likewise critical in addressing other violent crimes committed against Native women, such as sexual assault. As the Deputy U.S. Attorney General noted in recent years, "[m]any sexual assault cases arising in Indian Country require a team investigative effort involving FBI, tribal police, and BIA. Successful multijurisdictional investigations and prosecutions also require a collaborative working relationship."[19] This collaboration is key because investigations undertaken exclusively by the federal government, in Indian country, often take a long time. There are often very few FBI agents assigned to a particular reservation, and their office may be a considerable distance away. Some of the challenges FBI agents may face have been explained by Dean Washburn:

> On rural parts of reservations that are accessed by dirt roads without street signs or visible addresses on the homes, however, effective investigation may require significant local knowledge of homes and other locations. It may also require some knowledge of family ties and social networks in the community. Because Indian communities are often relatively closed to strangers, federal law enforcement officers such as FBI agents face a significant handicap. . . .[20]

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[19] David W. Ogen, Deputy Att'y Gen., U.S. Dep't of Justice, *Memorandum For United States Attorneys With Districts Containing Indian Country* 5 (Jan. 11, 2010), https://www.justice.gov/sites/default/files/dag/legacy/2010/01/11/dag-memo-indian-country.pdf.

[20] Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709, 720-21 (2006), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1543&context=mlr.

Nor can Native women rely on the federal BIA police to exercise federal jurisdiction and protect them since, as the Director of BIA has stated, "[o]n many reservations, there is no 24-hour police coverage. [Federal] Police officers often patrol alone and respond alone to both misdemeanor and felony calls."[21]

It is clear that relying on federal authorities, alone, to exercise their jurisdiction will never solve this crisis of violence on tribal lands. Instead, a real partnership is necessary to protect the lives of Native women living in tribal communities. And yet, any effective partnership between federal, state, and tribal law enforcement is impossible when tribal law enforcement are without the authority to stop, detain, or investigate a crime on a reservation simply because the crime was committed by a non-Indian. Without commensurate authority to effectuate a *Terry* stop, tribal law enforcement officers are left with little to nothing to contribute to any cross-jurisdictional partnership. There can be no question that the Ninth Circuit's decision, if left in place, will directly undermine the collaboration necessary to address the MMIW crisis.

This is alarming considering that the epicenter of the MMIW crisis is currently situated along the very same highway where Crow law enforcement detained Mr. Cooley, the defendant in this case. In Big Horn County, on the Crow Nation's Reservation, at least 32 American Indian women or girls have gone missing or have been murdered.[22] Of those 32 cases, 26 of them

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[21] *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 6 (May 17, 2007) (statement of W. Patrick Ragsdale, Director, Bureau of Indian Affairs).

[22] Letter from Families and Allies of Missing and Murdered Indigenous Peoples to County, State and Federal Officials (Feb.

have occurred within the last 20 years.[23] With this many cases, Big Horn County has one of the highest rates of Missing and Murdered Indigenous Women and Girls in the United States.[24]

If left unturned, this "probable-cause-plus" standard will only exacerbate the MMIW crisis that both Congress and the President are working to resolve.

II. The Ninth Circuit's Decision Unconstitutionally Intrudes on Congress's Exclusive Authority over Indian Affairs

In addition to jeopardizing the safety of Native women in their own homes, the Ninth Circuit's decision unconstitutionally infringes on Congress's exclusive authority over Indian affairs. If the authority of tribal law enforcement to effectuate a *Terry* stop on tribal lands should be limited, that is a question for Congress—and not the courts—to address.

A. Only Congress can Limit a Tribe's Authority to Police and Protect Lives on Tribal Lands

This Court has repeatedly, and consistently, affirmed its "respect both for tribal sovereignty [] and for the plenary authority of Congress" over Indian affairs. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and

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24, 2020), https://2a840442-f49a-45b0-b1a1-7531a7cd3d30.filesusr.com/ugd/6b33f7_6c8263241726421799288 1a7a78b1f00.pdf.

[23] *Id.* at 2.

[24] *Id.*

exclusive'") (internal quotation marks and citations omitted); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) ("Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.").

The assignment of this authority to Congress is due, in part, to the unique relationship of Indian Nations with the U.S. Constitution. *See Lara*, 541 U.S. at 205 ("[T]he Constitution does *not* dictate the metes and bounds of tribal autonomy. . .") (emphasis added). That is, "Indian nations ha[ve] always been considered as distinct, independent political communities . . . ." *Talton v. Mayes*, 163 U.S. 376, 383 (1896) (citation and quotation marks omitted).

Moreover, "[a]s 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." *Bryant*, 136 S. Ct. at 1962 (internal quotation marks and citations omitted). And one attribute of sovereignty that Tribal Nations maintain today is the "power to prescribe and enforce internal criminal laws." *United States v. Wheeler*, 435 U.S. 313, 326 (1978); *see also Lara*, 541 U.S. at 204 (affirming Tribal Nations' "authority to control events that occur upon the tribe's own land").

States and federal courts, however, do not have the authority to place limitations on tribal authority absent congressional authorization since, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Wheeler*, 435 U.S. at 323).

B. Congress is Currently Embracing Tribal Authority—Not Restricting It

The Ninth Circuit's infringement on Congress's exclusive authority is not without consequence. For the past fifty years, Congress has consistently taken action to affirm tribal authority—not restrict it. The panel's decision comes as a setback to the important work Congress has sought to achieve.

In 2013, in direct response to the crisis of non-Indian perpetrated violence against Native women, Congress "recogniz[ed] and affirm[ed] the inherent power" of Tribal Nations to arrest and prosecute non-Indians who commit crimes of domestic violence, dating violence, or violations of protective orders on tribal lands. *See* 25 U.S.C. § 1304(c); 25 U.S.C. § 1304(d)(4). In re-authorizing VAWA in 2013, Congress specifically identified the loss of tribal criminal jurisdiction over non-Indian crimes on tribal lands as a major contributing factor to the incredibly high rates of violence against Native women, stating that "[u]nfortunately, much of the violence against Indian women is perpetrated by non-Indian men. According to Census Bureau data, well over 50 percent of all Native American women are married to non-Indian men, and thousands of others are in intimate relationships with non-Indians." S. Rep. No. 112-153, 9. As Senator Tom Udall explained:

> Here is the problem: Tribal governments are unable to prosecute non-Indians for domestic violence crimes. They have no authority over these crimes against Native American spouses or partners within their own tribal lands. . . .

> Non-Indian perpetrators often go unpunished. Yet over 50 percent of Native women are married to non-Indians, and 76 percent of the overall population living on tribal lands is non-Indian.

159 Cong. Rec. 1033 (2013) (statement of Sen. Tom Udall).

Congress took great care to ensure that VAWA's restoration of tribal jurisdiction would not be limited to only those lands held in trust, but instead, would extend to the bounds of the reservation, including all lands—even non-Indian fee land—located inside the reservation. Congress defined the "where" to be "Indian country," as previously defined in 18 U.S.C. § 1151, "Indian country defined." 25 U.S.C. § 1304(a)(3) ("The term 'Indian country' has the meaning given the term in section 1151 of Title 18."). Thus, although Congress made clear that VAWA's restored tribal jurisdiction "would not cover off-reservation crimes," 159 Cong. Rec. 1940 (2013), Congress selected the legal term "Indian country" to make certain that VAWA 2013 would restore tribal jurisdiction over domestic violence crimes occurring on "all private lands and rights-of-way within the limits of every Indian reservation." *Id.* at 1999 (statement of Rep. Doc Hastings). This includes state highways, including the one at issue in this case.

In addition to VAWA, just ten years ago, Congress passed the Tribal Law and Order Act of 2010 ("TLOA"). In passing the TLOA, Congress restored and expanded tribal authority to address the problem of crime in Indian Country by, among other things, increasing the length of sentences that tribal courts may impose for crimes committed within their Indian Country jurisdictions. 25 U.S.C. § 1302. In addition to expanded sentencing authority, TLOA mandates cooperation

between federal, state, tribal and local governments for the purpose of reducing crime in Indian Country—precisely the sort of cooperation that occurred in the arrest of Defendant Cooley. In fact, one of the primary purposes of TLOA was "to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies." TLOA, Pub. L. 111-211, § 202, 124 Stat. 2258 (2013); 25 U.S.C. § 2815; 21 U.S.C. § 873.

In this regard, the panel's decision undermines Congress's goal both of enhancing and expanding tribal authority on reservations, as well as encouraging the collaboration between federal, state, and tribal authorities necessary to curb the crisis of violence against Native people.

CONCLUSION

The United States' petition for *certiorari* should be granted.

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