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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,)
 Petitioner,)
 v.) No. 19-1414
 JOSHUA JAMES COOLEY,)
 Respondent.)

Washington, D.C.
 Tuesday, March 23, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

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 Department of Justice, Washington, D.C. ;
 on behalf of the Petitioner.

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 on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-1414, United
5 States versus Cooley.

6 Mr. Feigin.

7 ORAL ARGUMENT OF ERIC J. FEIGIN

8 ON BEHALF OF THE PETITIONER

9 MR. FEIGIN: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 Indian tribes, like other sovereigns,
12 have the core inherent authority to investigate
13 and detain suspects within their borders for the
14 violation of another sovereign's law.

15 Every single source that this Court
16 looks to in assessing inherent tribal authority
17 confirms that limited ability. The executive
18 has entered into numerous treaties that
19 presuppose it, Congress has ratified those
20 treaties and passed affirmative legislation that
21 reflects it, courts have repeatedly upheld it,
22 and on-the-ground law enforcement practice has
23 long depended on it.

24 The Ninth Circuit's decision here
25 upsets all of those understandings. Its tribal

1 sovereignty analysis would logically suggest
2 that tribes are reduced to no more than private
3 citizens in policing rights-of-way and
4 non-Indian land on their reservations. And I
5 think that's the position Respondent's taking.

6 But even the Ninth Circuit realized
7 how untenable that would be, so it created a
8 novel, complicated, and ultimately unworkable
9 law enforcement regime. The decision below
10 replaces familiar Fourth Amendment standards
11 codified in the Indian Civil Rights Act with an
12 unprecedented standard that nobody is going to
13 know how to apply, officers or courts.

14 It will also force tribal officers to
15 curtail otherwise reasonable policing activities
16 when a suspect claims to be non-Indian or the
17 officer isn't sure about Indian status or the
18 status of the land that he's on.

19 The holding lacks any meaningful
20 support, substantially chills tribes' ability
21 even to enforce their own laws against their own
22 members, and endangers everyone on Indian
23 reservations. It should be reversed.

24 CHIEF JUSTICE ROBERTS: Mr. Feigin,
25 you -- you got my attention when you said --

1 began by saying every single source says that
2 tribes have this inherent authority.

3 I would have thought Montana said the
4 exact opposite. You know, you do argue at the
5 outset there's this inherent authority and
6 nothing took it away.

7 But, as we said in South Dakota versus
8 Bourland, describing Montana, and this is a
9 quote, it said, "After Montana, tribal
10 sovereignty over non-members cannot survive
11 without express congressional delegation and is,
12 therefore, not inherent."

13 So I would have described that as at
14 least one source that says the opposite of what
15 you said.

16 MR. FEIGIN: Well, Your Honor, I -- I
17 do think this Court has recognized inherent
18 authority without express congressional
19 authorization. And as we discuss in our brief,
20 we think the overall standard is the one
21 announced in Colville and in cases before and
22 after, which is that --

23 CHIEF JUSTICE ROBERTS: Well,
24 Montana -- Montana came after Colville. And --
25 and I'm not saying that we haven't recognized

1 some inherent authority, but this is a question
2 of tribal sovereignty over non-members, and I
3 assume that would -- would extend to criminal
4 jurisdiction.

5 MR. FEIGIN: Well, let me make a
6 couple points directly about Montana, Your
7 Honor. I think Montana is how Colville shakes
8 out in the civil, regulatory, and adjudicatory
9 contexts.

10 But even if Your Honor were inclined
11 to apply Montana in these circumstances, which
12 don't involve criminal jurisdiction but
13 on-the-ground policing, nobody is -- is trying
14 or punishing crimes here, I think it would fit
15 within the second Montana exception because it
16 interferes with self-governance.

17 CHIEF JUSTICE ROBERTS: No, I
18 understand that -- that.

19 MR. FEIGIN: Okay.

20 CHIEF JUSTICE ROBERTS: I understand
21 that as an alternative theory, and -- and, you
22 know, we can -- we can talk about that. But you
23 -- you say Montana applies to legislative and
24 civil and regulatory. On what basis would you
25 suggest that executive power, such as is being

1 exercised here, is subject to a different rule
2 than legislative and judicial power?

3 MR. FEIGIN: Well, I think the Court
4 essentially recognized that there's a
5 distinction or at least nodded at such a
6 distinction in both Strate and Atkinson when it
7 expressly noted that it wasn't questioning this
8 particular power that we're discussing here
9 today, which is the power to stop and detain
10 someone on public rights-of-way that run through
11 a reservation, that the --

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas.

15 JUSTICE THOMAS: Thank you, Mr. Chief
16 Justice.

17 Mr. Feigin, the -- the Ninth Circuit
18 analogized the police officer here to a private
19 citizen. And if we accept that, that the police
20 officer is actually a private citizen here, then
21 why does the statute, the Indian Civil Rights
22 Act, even apply?

23 MR. FEIGIN: Well, Your Honor, the
24 Indian Civil Rights Act contains a very broad
25 definition of the governmental activities of the

1 tribe, and I think it probably would still
2 apply, but I think that's another inconsistency
3 in the Ninth Circuit's opinion that I think
4 makes its conclusion ultimately untenable, which
5 is that they recognize some sovereign authority
6 in one respect, as you note, and then deprive
7 the tribal officer of it in another respect.

8 And I don't think that citizens arrest
9 authority is at all workable or at all what
10 anyone has ever contemplated. Among other
11 things, I don't think citizens arrest authority
12 by anyone's likes would include the ability to
13 do a Terry stop based on reasonable suspicion,
14 which is what traffic stops are, let alone a
15 frisk for weapons.

16 And I think everyone's assumed that
17 tribes can do much more than that, as the
18 treaties reflect, as the statutes reflect, and
19 as on-the-ground practice reflects.

20 JUSTICE THOMAS: So, if we -- if -- if
21 we find that -- that the officer here was within
22 his jurisdiction to engage in this stop, do we
23 have to -- should we ultimately reverse here, or
24 should we send it back to have it analyzed to
25 determine whether or not Terry is satisfied?

1 MR. FEIGIN: I think, if you
2 ultimately agree with -- with us, Justice
3 Thomas, I do think this needs to go back for a
4 Fourth Amendment analysis -- for a Fourth
5 Amendment analysis, if that's your question.

6 JUSTICE THOMAS: Do you, in your
7 discussion with the Chief Justice with respect
8 to Montana, do you think that -- you know, Lara
9 was decided after that and it seemed to undercut
10 Montana. Could you discuss that just a bit?

11 MR. FEIGIN: Well, Your Honor, I -- I
12 -- I don't think that Montana no longer applies
13 to the situations that it applied.

14 After Lara, you have Plains Commerce
15 Bank, which very clearly applies Montana in the
16 contexts to which I -- I think it's clearly
17 applicable, namely, civil, regulatory, and
18 adjudicatory legislation.

19 And we're not asking this Court to say
20 that Montana's curtailed in any way because I
21 don't think the Court needs to say that. I
22 think it's pretty clear from Strate and I -- I
23 believe Your Honor's opinion in Atkinson that
24 the authority we're talking about today is
25 meaningfully different.

1 The main logic of not subjecting
2 non-Indians to tribal adjudication or
3 legislation is that they have no say in making
4 those laws. Here, this is about the enforcement
5 of laws to which they're -- the non-Indians are
6 indubitably subject --

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 MR. FEIGIN: -- namely, state and
10 federal law.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

13 JUSTICE BREYER: Do you -- would you
14 like to and could you help explain to me an
15 ordinary state policeman has certain authority
16 to make arrests or to investigate situations on
17 an interstate highway. How -- how in your view
18 does the tribal policeman have the same or a
19 lesser authority and why?

20 MR. FEIGIN: So, Your Honor, I think,
21 if the -- at the outset, it's just an inherent
22 sovereign authority that sovereigns can
23 investigate and detain at least briefly and
24 reasonably for violations of other sovereigns'
25 laws.

1 In the context of states, for example,
2 you have the Interstate Rendition Clause of the
3 Constitution that presupposes states can enforce
4 each other's laws. You have this Court's
5 decisions in Di Re and Miller that make, I
6 think, fairly clear that states can enforce
7 federal law.

8 That reflects, Justice Breyer,
9 well-accepted international law principles that
10 allow this. I -- I point you to the Court's
11 decision in United States against Raucher, which
12 is in 117 of the U.S. Reports.

13 And if you look at page 218 of Neil
14 Boister's "Introduction to Transnational
15 Criminal Law," you'll see that the procedural
16 law that's usually applied is -- the procedural
17 law that's understood to apply when there's a --
18 a hand-over of someone is the procedural law of
19 the state that's doing the handing over, not the
20 state that's accepting delivery, that that
21 nation is only applying its substantive law.

22 And the authority that we're asking
23 for here for tribes and that we think tribes
24 have always had and that everyone's always
25 assumed that they had is a -- a -- a more

1 limited authority than even the courts recognize
2 the states have.

3 It's not the authority to do a
4 full-blown arrest. It's not an arrest in their
5 own authority that kicks off an adjudicatory
6 process. It's just investigation and detention
7 in a complementary role. If the state or the
8 federal government says, no, we don't want this
9 person, the tribe has to let him go.

10 JUSTICE BREYER: Why do they have the
11 authority to, say, enforce or arrest anyway or
12 hold people who they believe reasonably are
13 violating Montana law, but then they can't try
14 that person for violating the Indian tribe law?

15 MR. FEIGIN: Well, the logic that this
16 Court's applied for not having non-Indians
17 subject to the tribe's criminal adjudicatory
18 authority is that they have no say in making
19 those laws.

20 That's really not the case here. This
21 is just complementary enforcement. And, Your
22 Honor, it's practically necessary.

23 As this Court has recognized and as
24 Congress has recognized, these -- these areas
25 are policed primarily often by tribal officers.

1 And if they lack this authority, it's going to
2 endanger everyone on the reservation.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Alito.

6 JUSTICE ALITO: Mr. Feigin, do you
7 think you could offer us a general test for
8 distinguishing between those aspects of
9 sovereignty that tribes retained and those that
10 they did not?

11 So, if you -- if I gave you this
12 partial sentence, I wonder if you could complete
13 it: Tribes retain those aspects of sovereignty
14 that -- fill in the rest.

15 MR. FEIGIN: That are -- I mean, I
16 don't think I can do a better job than the Court
17 did in -- in Colville and in, after that, San
18 Carlos reiterating this and in -- in other
19 cases, which is they retain the inherent
20 authority so long as it's not inconsistent with
21 the overriding interests of the federal
22 government.

23 And the Court gave three examples of
24 things that would be inconsistent, namely,
25 foreign relations or control over the alienation

1 of tribal land to non- -- non-Indians or the
2 adjudication of various matters against
3 non-Indians. But, as I've said, I -- I think
4 this is meaningfully different for -- for a
5 number of reasons.

6 JUSTICE ALITO: Does the authority you
7 claim the tribes retain go further than simply
8 detaining a non-Indian on reasonable suspicion?
9 I think you -- you just said in answer to
10 Justice Breyer that a tribal officer could not
11 actually make an arrest.

12 Could the -- could the officer make a
13 -- the kind of search incident to arrest that
14 would otherwise be possible? For example, if a
15 non-Indian was in the car -- in a car, could the
16 officer search areas of the car that the person
17 could grab and might have -- where there might
18 be a weapon hidden?

19 MR. FEIGIN: Yes, an officer could
20 certainly do that. I mean, that's sort of part
21 of the -- recognized as an ordinary part of a
22 traffic stop.

23 To -- to the extent your question
24 encompasses this, we also think an officer could
25 do a search of the car pursuant to the post-Gant

1 rationale.

2 JUSTICE ALITO: Well, suppose a --
3 suppose a tribal officer is -- is -- is not --
4 is not stopping a car on the highway but is
5 driving around the reservation and sees through
6 the window of a house owned by a non-Indian on a
7 parcel of land that this individual owns and see
8 that there is drugs in plain view.

9 Could -- what can the officer do under
10 those circumstances?

11 MR. FEIGIN: I -- I do think that the
12 officer can go in and -- and do a detention
13 there, and then he -- he has to obviously act
14 reasonably when he does so, and part of acting
15 reasonably is recognizing that he's in a
16 complementary role and he needs to, as Officer
17 Saylor did here, contact state and federal
18 authorities as quickly as is reasonably possible
19 under --

20 JUSTICE ALITO: Thank you. Thank you,
21 Mr. Feigin.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Mr. Feigin,
25 basically, you -- in your briefs, you've argued

1 that this Court should look to whether the
2 exercise of tribal sovereignty would be
3 consistent with the overriding interests of the
4 federal government.

5 I'm not quite sure what that has to do
6 with much. Shouldn't we be looking at what
7 rights the Indians, the tribal Indians, have
8 been given? And, here, it seems to me that
9 inherent in a detention-and-hold right is the
10 right to investigation.

11 The Ninth Circuit basically said that
12 they can investigate to find out if someone's an
13 Indian or not. And if they're an Indian,
14 presumably, they would have all the rights of
15 further investigation. But I don't know why the
16 Ninth Circuit's limited view of what the right
17 of detention means should control us.

18 MR. FEIGIN: Well, Justice Sotomayor,
19 it --

20 JUSTICE SOTOMAYOR: And -- and -- and
21 isn't that a simpler argument than all the
22 arguments that -- about sovereignty that
23 everyone's been having? If it's a contractual
24 right the Indians have been given, there's no
25 constitutional violation in just being held for

1 the police to determine whether or not you're
2 guilty of a crime sufficient to be arrested.

3 Why can't we just go in -- on that
4 simple basis?

5 MR. FEIGIN: Well, Your Honor, to the
6 extent that you would reach the -- the same
7 result that we're urging today that would
8 preserve traditional understandings of a tribe's
9 authority, I don't -- I don't know that we have
10 a huge interest in -- in deterring you from
11 reaching that by the analytical path that you've
12 described.

13 But I do think that, as a general
14 matter, we do have some interest in this Court
15 reaffirming the existence of inherent tribal
16 authority, which I think pervades this Court's
17 cases. And I think this encompasses the
18 authority that we're talking about today. And I
19 do think that's actually the most
20 straightforward and -- and the best way to reach
21 this result.

22 I -- I -- I'm not here contending that
23 Congress affirmatively granted the authority
24 here. I think that tribes have always had it.
25 They've always been understood to have it. If

1 you look at the reports, for example, the law
2 professors' historical brief, they've exercised
3 it and --

4 JUSTICE SOTOMAYOR: So, if one of my
5 colleagues thinks that Montana controls, you
6 lose?

7 MR. FEIGIN: No, Your Honor. As I was
8 explaining to the Chief Justice, if Montana
9 controls, and we don't think it does, but, if it
10 does, I think this fits under self-governance
11 because it chills enforcement even of tribal law
12 against tribal members because it's difficult to
13 tell --

14 JUSTICE SOTOMAYOR: Counsel, my time
15 is out, but I'm not sure --

16 MR. FEIGIN: Okay.

17 JUSTICE SOTOMAYOR: -- that this is
18 the extreme impact on sovereignty that Montana
19 references.

20 CHIEF JUSTICE ROBERTS: Justice Kagan.

21 JUSTICE KAGAN: Mr. Feigin, if you
22 could continue with this point. I guess what
23 I'd like to know is, if there are these two
24 alternative ways that you could have written
25 your brief, and one is the inherent authority

1 way, which you, in fact, used, and the other is
2 the Montana exception 2 way, what are the
3 different consequences of the Court proceeding
4 along either of these paths? And why did you
5 make the choice that you did?

6 MR. FEIGIN: Well, Your Honor, just to
7 be clear, I -- I do think the Montana exception
8 2 choice is an exercise of inherent authority,
9 so I don't know that we're saying anything
10 terribly different.

11 The -- the reason we didn't make the
12 argument that this fits into Montana exception
13 2, our primary argument is because we just don't
14 think Montana applies. I -- I think it really
15 only governs civil, adjudicatory, and regulatory
16 jurisdiction.

17 But if -- I take Your Honor's question
18 to want me to continue my answer to Justice
19 Sotomayor, which is that this chills
20 self-governance because it's difficult to tell
21 what kind -- as this Court is familiar with,
22 what kind of land you're on, first of all, and I
23 think the Ninth Circuit's ruling would probably
24 apply to non-Indian fee land. This Court's
25 decided numerous cases in which that issue, the

1 issue of land status, reaches this Court.

2 It's also --

3 JUSTICE KAGAN: I guess, Mr. Feigin, I
4 really was just asking about -- you said we just
5 don't think Montana applies. But, other than
6 sort of analytic purity in your mind, you have
7 no -- you don't see any real difference between
8 the two approaches?

9 MR. FEIGIN: Well, I do think it has
10 broader implications for Indian sovereignty, and
11 I -- I would urge the Court to keep Montana
12 where -- where I think it has always been. And
13 I do think Strate and Atkinson reflect an
14 understanding by the Court that this isn't a
15 Montana situation, but --

16 JUSTICE KAGAN: I -- I guess what I'm
17 really asking is, like, what -- what are these
18 different implications? I mean, I'm just sort
19 of not understanding why you're pushing down one
20 road rather than the other and -- and thought
21 I'd just ask you, why are you pushing down one
22 road rather than the other?

23 MR. FEIGIN: Your Honor, I'm not --
24 I'm not sure it may ultimately make a difference
25 in the outcome in this case, but the federal

1 government does have a very strong interest in
2 preserving tribal authority and -- and tribal
3 sovereignty where appropriate. And I wouldn't
4 want the Court to take this occasion to restrict
5 it even further by suggesting that Montana is
6 the controlling test in -- in all circumstances.
7 I'm not sure that this Court's precedents really
8 support that result.

9 And the Court could -- could leave
10 that for another day and simply -- if -- if the
11 Court prefers, simply assume that Montana
12 exception 2 applies and explain why this fits
13 into Montana exception 2.

14 JUSTICE KAGAN: Thank you, Mr. Feigin.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch.

17 JUSTICE GORSUCH: Good morning,
18 counsel. I -- I -- I guess I would have
19 approached this thinking that tribal sovereignty
20 remains until and unless Congress has withdrawn
21 it in some fashion and that the relevant
22 question here is, what -- what does the Major
23 Crimes Act do to Indian sovereignty? And,
24 there, it's clear that Congress has withdrawn
25 jurisdiction to try certain non-native people in

1 certain locations within Indian country. Fine.

2 My question approaching it that way,
3 Mr. Feigin, is, where is the line? The Major
4 Crimes Act clearly precludes states or -- or
5 tribes from trying certain individuals,
6 non-native persons, for -- for major crimes in
7 Indian country.

8 But you say it's okay, on the other
9 hand, to -- for a tribal officer to conduct a
10 Terry stop. There's a long distance between a
11 Terry stop and a trial. Where does -- where
12 does the Major Crimes Act kick in to reduce
13 tribal sovereignty?

14 MR. FEIGIN: I -- I'm not actually
15 certain that I would identify the Major Crimes
16 Act as necessarily what -- what draws the
17 jurisdiction here, but if you --

18 JUSTICE GORSUCH: I -- I understand
19 that, but if you could address it based on the
20 premise I've given you.

21 MR. FEIGIN: Certainly, Your Honor. I
22 think where the Major Crimes Act would kick off
23 is -- is something that is considered the
24 beginning of the adjudicatory process. So we're
25 not urging here that tribes have full-blown

1 arrest authority, which I think would be
2 understood as the beginning of the adjudicatory
3 process.

4 So I think the line would be around
5 where we have described it in our briefs, which
6 is a limited detention and investigatory
7 authority that's simply for the purpose of
8 allowing state or federal authorities at some
9 point to take over and conduct an arrest.

10 I think that's confirmed by the
11 statutes in -- in 25 U.S.C. 2804 and -- and
12 surrounding it, which contemplate
13 cross-designation if the federal government
14 wants someone -- wants a tribal officer to be
15 able to conduct an arrest.

16 JUSTICE GORSUCH: Well, if -- if
17 you're going to look to the deputization
18 statute, why doesn't that just foreclose even a
19 Terry stop?

20 MR. FEIGIN: Well, if you --

21 JUSTICE GORSUCH: You say it
22 forecloses an arrest. Why wouldn't it go so far
23 as to foreclose a Terry stop?

24 MR. FEIGIN: Well, Your Honor, if you
25 look at 25 U.S.C. 2806(d), it expressly

1 preserves the investigatory and -- and other
2 relevant powers that tribes possessed before.

3 JUSTICE GORSUCH: Oh, yeah, but you're
4 saying they -- they possessed that authority
5 antecedent to any statute. And -- and -- and I
6 guess my question, again, is, where does that
7 sovereign authority end that's been preserved?
8 And why would it stop at Terry as opposed to an
9 arrest?

10 MR. FEIGIN: Your Honor, if you think
11 it continues fully through an arrest, we
12 wouldn't oppose that result. But I think that
13 might be close -- I do think the arrest is
14 normally understood to kick off an adjudicatory
15 process.

16 I don't think that tribes have been
17 understood to have the authority to conduct
18 arrests on their own. For example, if you look
19 at page 99 of the Indian Law and Order
20 Commission's report, which is cited in the
21 former U.S. Attorneys' amicus brief, they do
22 draw --

23 JUSTICE GORSUCH: Thank --

24 MR. FEIGIN: -- the distinction --

25 JUSTICE GORSUCH: -- thank you,

1 counsel. My -- my time's expired, I'm afraid.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you, Chief
5 Justice.

6 Good morning, Mr. Feigin. Does the
7 authority here come from the Constitution?

8 MR. FEIGIN: The authority here comes
9 from the inherent tribe's -- the inherent
10 sovereign authority that tribes possessed before
11 they were incorporated into the United States
12 that they've never lost.

13 JUSTICE KAVANAUGH: And I guess my
14 question remains, does that come from the
15 Constitution, or how does that fit within the
16 Constitution?

17 MR. FEIGIN: I think, within the
18 Constitution, we have the -- you know, the power
19 to conduct commerce with Indian tribes, which
20 recognizes that tribes are separate sovereigns
21 in -- in a sense, and it comes from this Court's
22 cases construing inherent tribal authority,
23 which I think reflect that tribes do retain some
24 authority.

25 I think the Constitution simply

1 recognizes that. I don't think it's -- I don't
2 think the authority we're discussing today is --
3 is affirmatively granted by the Constitution.

4 JUSTICE KAVANAUGH: And I -- it's not
5 affirmatively granted by the Constitution. You
6 also said it's not affirmatively granted by
7 Congress, I think you said in response to
8 Justice Sotomayor. Correct?

9 MR. FEIGIN: That's right. I -- I --
10 I would just emphasize, Justice Kavanaugh, that
11 I do think it is recognized by both of those
12 sources, but I don't think that it is -- we're
13 not looking to some specific provision of either
14 of them as the source of the authority.

15 I -- I think the way the Court has
16 looked at this kind of question is whether it's
17 been withdrawn, as Justice Gorsuch was just
18 saying, and nothing has withdrawn it.

19 JUSTICE KAVANAUGH: The other side
20 says this is, in effect, a separation of powers
21 case and that Congress has given the executive
22 the authority to enter into cross-deputization
23 and that hasn't been done here and that, instead
24 of the courts jumping in, we should let Congress
25 and the Executive Branch fill any public policy

1 holes that may exist. Your response?

2 MR. FEIGIN: I think I have three
3 responses.

4 One is 25 U.S.C. 2806(d), as I was
5 just mentioning to Justice Gorsuch, which
6 preserves the preexisting authority.

7 The second is, as we lay out in our
8 reply brief, the cross-designation authority is
9 great -- contemplated as a greater authority
10 here and requires agreements that have
11 monitoring and compliance requirements for
12 tribes that present difficulties.

13 And, third, the current
14 cross-designation statutes don't address the
15 issue of steam law, for example, and so we're
16 left with, if we really were trying to solve
17 this problem by cross-designation, it would take
18 some new acts of Congress. And that could be
19 said in any inherent authority case.

20 JUSTICE KAVANAUGH: Thank you, Mr.
21 Feigin.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett.

24 JUSTICE BARRETT: Mr. Feigin, I'd like
25 to go back to your interchange with Justice

1 Gorsuch. You said that the authority -- the
2 investigative authority doesn't extend past
3 Terry stops into arrests because arrests mark
4 the beginning of the adjudicatory process.

5 We -- I -- I didn't quite follow
6 whether you were saying to Justice Gorsuch that
7 the reason why tribes lack authority to arrest
8 is because they are implicitly divested of that
9 authority under the Constitution, so even under
10 the Colville rationale or whether it's the
11 cross-deputization statutes or whether it's our
12 prior cases making clear that tribes lack the
13 authority to finally adjudicate the rights,
14 criminally or civilly, of non-members.

15 So could you just explain to me what
16 it is that takes away that authority, or is it
17 that they never possessed it in the first place?

18 MR. FEIGIN: I think they did possess
19 it in the first place, Justice Barrett, just the
20 same way the Court recognized in *Di Re* and
21 *Miller* that states have that authority.

22 I -- I mean, if the Court wants to say
23 that they have that authority, I wouldn't resist
24 it necessarily, but I do think that this Court's
25 decisions primarily that recognize that

1 non-Indians cannot be subject to tribal
2 adjudication is one line of demarcation.

3 And, also, as I suggested to Justice
4 Gorsuch and I think fleshed out a little bit
5 more with Justice Kavanaugh, I think the
6 cross-designation statutes at least contemplate
7 that there will be some kind of affirmative
8 conferral of authority if tribal officers are to
9 conduct arrests that effectively stand in the
10 shoes of federal officer arrests.

11 So I would probably draw the line
12 before we reach that point. And I think, you
13 know, the -- the authority that we're urging
14 here today does stop short of that point because
15 it requires immediately, as soon as reasonable,
16 contacting state and federal authorities.

17 JUSTICE BARRETT: Well, this is my
18 problem, and I'm not suggesting that I think we
19 should say that it stretches that far, but I'm
20 trying to figure out what rationale says that
21 the tribes would retain the authority to do a
22 Terry stop but not to arrest, particularly when
23 you think about the fact that, I mean, one --
24 one reason for the practical problems that you
25 identify is that it's difficult for federal or

1 state authorities to police the public
2 rights-of-way that go through reservations.

3 So, if a tribal officer does a Terry
4 stop, I mean, a Terry stop's supposed to be
5 temporary, who knows how long it might take for
6 a state or federal officer to get there.

7 And then, at some point, you know, as
8 you -- I don't know, at some point, it seems
9 like that would mature into an arrest.

10 MR. FEIGIN: Well, Your Honor, let me
11 -- let me just try to clarify this. I -- I
12 think, in some sense, we're having a little bit
13 of just a terminological debate about what an
14 arrest means. There may be some things that
15 would be colloquially considered an arrest but
16 not formally considered an arrest, and we do
17 think the tribe can do that.

18 As our brief makes clear, we do think
19 they can hold a suspect on probable cause for a
20 reasonable period of time for hand-over, unless
21 and until state and federal authorities tell the
22 tribe that they don't want the person.

23 JUSTICE BARRETT: Well, my time is up,
24 but I'll just say it seems to me that under the
25 Fourth Amendment that is an arrest, but thank

1 you, Mr. Feigin.

2 CHIEF JUSTICE ROBERTS: A minute to
3 wrap up, counsel.

4 MR. FEIGIN: Thank you, Your Honor.

5 I just want to emphasize how
6 unworkable the regime that the Ninth Circuit and
7 Respondent contemplate would be. It would
8 require an uncertain on-the-spot determination
9 of someone's tribal status or Indian status,
10 which is often impossible to do, land status,
11 which is often impossible to do.

12 I don't really think there have been
13 any cases fleshing out the apparent or obvious
14 standard contemplated by the Ninth Circuit or
15 really exploring the mere authority of private
16 citizens arrests, which is what Respondent would
17 leave them with.

18 And it would curtail policing activity
19 that everyone depends on, the ability to respond
20 to a 911 call, like in Navarette, the ability to
21 stop and frisk someone who's casing a jewelry
22 store on non-tribal fee land, like in Terry
23 against Ohio itself.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Henkel.

3 ORAL ARGUMENT OF ERIC R. HENKEL

4 ON BEHALF OF THE RESPONDENT

5 MR. HENKEL: Thank you, Mr. Chief
6 Justice, and may it please the Court:

7 This case is resolved by the
8 fundamental propositions that Indian tribes do
9 not possess sovereign authority over non-Indians
10 and that Congress has plenary authority over
11 Indian affairs.

12 The decision below should be affirmed
13 because the detention, search, and arrest of a
14 non-Indian by a tribal officer exceeds tribal
15 self-government authority. I have three basic
16 points to make today.

17 First, Indian tribes do not have
18 inherent police power over non-Indians,
19 especially on non-tribal lands.

20 Second, Congress addressed this issue
21 by giving the Executive Branch broad authority
22 to cross-deputize tribal officers to investigate
23 and police federal crime in Indian country.

24 Finally, no matter why the tribal
25 officer in this case was not cross-deputized,

1 that fact is not a basis to find inherent tribal
2 police power over non-Indians. Instead, it is a
3 basis to respect separation of powers and defer
4 to Congress's plenary authority.

5 The government disregards the unique
6 and limited character of inherent tribal
7 sovereignty. It not only asks this Court to
8 find inherent tribal authority to regulate and
9 police the conduct of non-Indians; it insists
10 that tribes have unlimited authority to police
11 all persons and to enforce all tribal, state,
12 and federal laws governing Indian country.

13 And the government claims this
14 sweeping police authority over U.S. citizens is
15 consistent with overriding federal interests,
16 even though tribes exercise that authority
17 outside the structure of the Constitution, free
18 of political accountability, and cloaked with
19 immunity from civil liability.

20 The government's position is
21 untenable. It ignores that tribal sovereignty
22 is confined to managing tribal land, protecting
23 tribal self-government, and controlling internal
24 relations. In this case, because the exercise
25 of police authority over Mr. Cooley was

1 unrelated to any of these limited interests, the
2 Crow Tribe exceeded its sovereign authority.

3 The decision below should be affirmed.

4 CHIEF JUSTICE ROBERTS: Counsel, I --
5 I think, as Justice Kagan summarized, there's a
6 very important distinction with -- of broader
7 applicability than this case over how you should
8 look at it.

9 Your friend on the other side says
10 there's inherent authority and it hasn't been
11 taken -- the question is whether it's been taken
12 away. He cites Colville. I understand your
13 argument to be that, under Montana and
14 subsequent cases interpreting it, there is no
15 inherent authority.

16 But even under Montana, there are
17 exceptions, exceptions in which we've recognized
18 that there is continuing inherent authority, and
19 I wonder why the second exception doesn't apply
20 here. That exception is when the conduct at
21 issue threatens tribal self-governance,
22 self-rule, which we've talked about in terms of
23 political integrity, economic security, health
24 and welfare.

25 What could threaten that more than the

1 idea that you can't do anything about somebody
2 within the reservation that you have good reason
3 to believe is violating criminal law? It would
4 seem to me that's the prototypical case for the
5 exception.

6 MR. HENKEL: Well, Mr. Chief Justice,
7 I think we need to start by looking at what this
8 Court said about the second Montana exception in
9 Atkinson Trading Company and Plains Commerce
10 Bank. Those two decisions severely limit the
11 application of the second Montana exception.

12 CHIEF JUSTICE ROBERTS: Right. I
13 think that's a fair -- fair description, but
14 those were, as has been pointed out, regulatory,
15 civil, adjudicatory, and you can certainly argue
16 it makes sense to have a very limited view in --
17 in that context.

18 But, when you're talking about
19 on-the-ground criminal activity, I wonder if the
20 exception should not be as narrow as it is in
21 those other contexts?

22 MR. HENKEL: Well, I think, here, it's
23 important to look at the status of the land.
24 This is a state highway running through a
25 reservation. There is no landowner's right to

1 exclude. Mr. Cooley was parked on the shoulder.
2 He -- nothing about what he was doing when he
3 was parked there had anything to do with, you
4 know, tribal internal relations or tribal
5 self-government.

6 And so I think it's important to start
7 from the general proposition about what the --
8 what tribal sovereignty is, which it's confined
9 to managing tribal land, protecting tribal
10 self-government, and controlling internal
11 relations.

12 And, here, none of that was
13 implicated. Officer Saylor was enforcing
14 non-tribal laws against a non-Indian. That has
15 nothing to do with the internal relations of the
16 tribe or tribal self-governance.

17 CHIEF JUSTICE ROBERTS: Justice
18 Thomas.

19 JUSTICE THOMAS: Thank you, Mr. Chief
20 Justice.

21 I'd like to continue along that line,
22 counsel. The -- let's change the -- the facts
23 in this case just a bit so that rather than the
24 police officer looking and determining that the
25 Respondent was nervous and that he may -- had

1 bloodshot eyes; rather, he fit the description
2 of a serial killer that the police officer was
3 alerted to, a serial killer who did not commit
4 any of the crimes on the reservation but
5 happened to be exactly where Respondent was.

6 How would you -- would you make the
7 exact same argument in that case?

8 MR. HENKEL: Well, I -- Justice
9 Thomas, I think it would be important to know
10 how the tribe came to know about the -- the
11 serial killer being --

12 JUSTICE THOMAS: No, I just -- the
13 only facts I've changed in your case, in this
14 case, is that rather than the Respondent being
15 there with bloodshot eyes and sleepy, et cetera,
16 he fit the description that the police officer
17 heard over his radio of a serial killer, but,
18 other than that, all the facts are the same.

19 MR. HENKEL: I -- I think, in that
20 circumstance, the tribal officer could detain.

21 JUSTICE THOMAS: Why?

22 MR. HENKEL: It -- it sounds like he
23 has reliable information coming from,
24 presumably, state or federal law enforcement
25 about this wanted individual.

1 But I do not think that the tribal
2 officer would have authority to investigate and
3 -- and search beyond just trying to determine
4 the person's identity and whether they fit the
5 description.

6 JUSTICE THOMAS: So why does he have
7 the authority to -- to detain there but not here
8 when he has suspicions about possibly, not
9 entirely, weapons and drugs?

10 MR. HENKEL: Well, because I think
11 that in -- in the hypothetical that you posed,
12 again, I am assuming that state or federal law
13 enforcement is the one who put out a BOLO for a
14 -- for a serial killer, and that circumstance,
15 to me, is far different from what we had here,
16 where, after an initial welfare check, Officer
17 Saylor launched into a full-fledged criminal
18 investigation, where he proceeded to ultimately
19 pull Mr. Cooley out of the car at gunpoint and
20 investigate him for suspected drug activity and
21 -- and put him in the back of the patrol unit
22 and then went and searched the vehicle.

23 I think, there, there is -- there's
24 nothing there -- there was -- there was
25 certainly no apparent or obvious crime, as the

1 Ninth Circuit found, and I think that's a
2 critical difference between what happened here
3 and your hypothetical, where there's presumably
4 state or federal law enforcement putting out
5 some sort of notice instructing tribes to look
6 for this person.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer.

10 JUSTICE BREYER: Well, I'd like to
11 continue. What -- what -- what exactly do you
12 think the tribal officer can do and what can't
13 he do and why?

14 MR. HENKEL: Under the facts of this
15 case?

16 JUSTICE BREYER: Well, just in
17 general. I mean, what is the rule? What are
18 the rules that you're -- you're advocating?

19 MR. HENKEL: That the tribal officer
20 needs to first ascertain Indian status when
21 we're -- when we're on non-tribal lands, like we
22 are --

23 JUSTICE BREYER: And so how does he do
24 that? I mean --

25 MR. HENKEL: I think there's a -- I

1 think -- yeah, I think there's a number of ways
2 that he or she could do that.

3 JUSTICE BREYER: But he's not an
4 Indian. It turns out he's not an Indian tribe
5 member. I mean, you know, people look -- you
6 can't just look at them and see whether --
7 whether they're Indians or not or -- people look
8 different, so I think that would be a tough one
9 to do. But -- but suppose he turns out --
10 doesn't look like a member of the tribe. Then
11 what?

12 MR. HENKEL: Well, as the Ninth
13 Circuit concluded, you could -- the officer --
14 officer could start by asking. If the officer
15 is concerned about the truthfulness --

16 JUSTICE BREYER: He's drunk.

17 MR. HENKEL: Well, if -- if we're
18 talking about being in Montana, for example, we
19 have eight federally recognized tribes in
20 Montana, all of whom issue tribal identification
21 cards and all of whom --

22 JUSTICE BREYER: Doesn't have one.

23 MR. HENKEL: Then -- then he could go
24 radio in -- he could get a driver's license and
25 go radio in to tribal dispatch to have the

1 tribal --

2 JUSTICE BREYER: It looks like he's
3 going to take off as soon as you get out of the
4 car or stop or go away from the car. You can
5 detain him there. You can detain him there
6 while you radio. Who do you radio?

7 MR. HENKEL: You could radio tribal
8 dispatch or state dispatch.

9 JUSTICE BREYER: They all have that
10 and they know everybody who's in the tribe and
11 they say, yes, we have a man named Mr. Smith in
12 this tribe. Then what?

13 MR. HENKEL: Then they can come out to
14 the scene.

15 JUSTICE BREYER: Oh, they can come out
16 to the scene, but they might be busy. Maybe --

17 MR. HENKEL: Well --

18 JUSTICE BREYER: -- it's a long way
19 away.

20 MR. HENKEL: -- and -- and that's
21 exact -- I think all of these problems that are
22 being posed are -- is exactly why Congress
23 provided for cross-deputization, because it
24 eliminates all of these problems.

25 JUSTICE BREYER: And how does that

1 work?

2 MR. HENKEL: How does
3 cross-deputization work?

4 JUSTICE BREYER: Yeah.

5 MR. HENKEL: Cross-deputization works
6 by the BIA cross-deputizing tribal officers to
7 police and investigate federal crime in Indian
8 country. So they have to enter into agreement
9 with the BIA.

10 JUSTICE BREYER: And how does that --
11 how many of them have done that?

12 MR. HENKEL: I -- the last statistics
13 that I was able to find were a 2002 report by
14 the Bureau of Justice Statistics, which
15 indicated that 99 percent of tribal law
16 enforcement agencies have cross-deputization
17 agreements with either the BIA, neighboring
18 state authorities, or neighboring tribal
19 authorities.

20 JUSTICE BREYER: So, in your opinion,
21 this is a non-problem? All they have to do is
22 get the right paper?

23 MR. HENKEL: In my opinion, this is --
24 this -- this situation is in the minority of
25 situations. I think, in the vast majority of

1 situations, there is going to be a duly
2 cross-commissioned tribal officer.

3 JUSTICE BREYER: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Alito.

5 JUSTICE ALITO: Counsel, it does seem
6 to me that determining whether a person is an
7 Indian, which can mean a member of any tribe,
8 not just the particular tribe whose land is at
9 issue, may be more difficult than you suggest.

10 But what is the tribal officer
11 supposed to do after determining pretty clearly
12 that a person is not an Indian?

13 So consider the situation where the
14 tribal officer has reasonable suspicion that a
15 driver is driving under the influence and would
16 present a danger if allowed to continue to
17 drive, but the officer is pretty certain this
18 person is not an Indian.

19 Let's say the -- the person has a -- a
20 -- a European Union driver's license and shows
21 plane tickets showing that the person arrived in
22 San Francisco two days ago. So it's pretty
23 clear that this person is not an Indian but
24 would present a danger if allowed to continue.

25 What can the tribal officer do there?

1 Just let the person go?

2 MR. HENKEL: I -- I think, if the
3 conduct rises to the level of a potential, you
4 know, ongoing active breach of the peace where
5 public safety is in jeopardy, I think, in that
6 circumstance, that would fit under the Ninth
7 Circuit's apparent standard.

8 But -- but, again, it's going to be
9 fact-dependent. Like here, in this case,
10 Officer Saylor said, well, Mr. Cooley's eyes
11 were bloodshot, but, as he acknowledged, that
12 wasn't nearly enough for him to determine
13 whether or not he was, in fact, drunk.

14 JUSTICE ALITO: All right. Well, so
15 this person -- the person is not so drunk that
16 it's plain that alcohol is above the level, but
17 the officer has reasonable suspicion. Can the
18 officer ask the person to come out of the car
19 and perform a field sobriety test?

20 MR. HENKEL: I don't believe so. No,
21 he can't.

22 JUSTICE ALITO: So he just has to let
23 that person go?

24 MR. HENKEL: He can call and radio in
25 to state or federal authorities to come to the

1 scene.

2 JUSTICE ALITO: Well, I thought you
3 said that the person can't be detained during
4 that interim period.

5 MR. HENKEL: Well, if he's assess --
6 if he's trying to ascertain Indian status.

7 JUSTICE ALITO: Well, the person is
8 not an Indian, 99 percent clear not an Indian.

9 MR. HENKEL: He -- he -- he could
10 certainly ask the individual to stay there while
11 he contacts law enforcement. But can he
12 officially detain? No, I do not think so.

13 JUSTICE ALITO: It's voluntary. All
14 right. So does it depend on the severity of the
15 offense? What if it is a situation where he has
16 reasonable suspicion that this person had -- is
17 a murderer?

18 MR. HENKEL: If he's got reasonable
19 suspicion that this person's a murderer?

20 JUSTICE ALITO: Yes.

21 MR. HENKEL: No, I don't think he has
22 enough because reasonable suspicion is such a
23 low threshold. I mean, what -- what is that --
24 what are -- what are the surrounding facts that
25 -- that -- I think that, ultimately, if this --

1 if there's information that somebody is a serial
2 killer and they're about to run into a school,
3 again, when -- when there's some sort of active
4 breach of the peace, some sort of imminent
5 threat of violence, there is -- there's a reason
6 at that point to step in and just detain. And I
7 think that comports with the Ninth Circuit's
8 standard.

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor.

12 JUSTICE SOTOMAYOR: Counsel, if
13 they're not authorized by law to make -- to do
14 investigations, why are they subject to the
15 Fourth Amendment --

16 MR. HENKEL: Well, they're not
17 strictly --

18 JUSTICE SOTOMAYOR: -- to the Fourth
19 Amendment's exclusionary rule?

20 MR. HENKEL: Well, they're not
21 strictly subject to the Fourth Amendment. It's
22 the Fourth Amendment counterpart under the
23 Indian Civil Rights Act.

24 JUSTICE SOTOMAYOR: Why is that
25 subject to the exclusionary rule? Meaning,

1 assuming for the sake of argument that the
2 Indians have a patrol or any neighborhood group
3 has a patrol in their neighborhood and a -- they
4 see someone who they have reasonable suspicion
5 about and detain them for arrest. Would that
6 security -- would that -- any items seized by
7 that person be subject to suppression?

8 MR. HENKEL: Yes, they would.

9 JUSTICE SOTOMAYOR: Why?

10 MR. HENKEL: Because --

11 JUSTICE SOTOMAYOR: It's a private
12 security force on my private land.

13 MR. HENKEL: Well --

14 JUSTICE SOTOMAYOR: Or even on the
15 street around my private land. Why are they
16 subject to the Fourth Amendment?

17 MR. HENKEL: Well, the government --

18 JUSTICE SOTOMAYOR: It's not the
19 government acting.

20 MR. HENKEL: The government concedes
21 that the exclusionary rule --

22 JUSTICE SOTOMAYOR: I know they --

23 MR. HENKEL: -- applies to violations
24 that --

25 JUSTICE SOTOMAYOR: -- helped you out

1 by -- I know they helped you out by that. But
2 it seems to me they should have argued in the
3 alternative, but that would have been my
4 litigation strategy. I'm asking you a question.

5 MR. HENKEL: Sure. So --

6 JUSTICE SOTOMAYOR: That question is,
7 why are they subject to the Fourth Amendment,
8 outside of the government's concession?

9 MR. HENKEL: I guess let me answer it
10 by explaining what I think the deterrent effect
11 is. I think that recognizing a tribal --

12 JUSTICE SOTOMAYOR: The Fourth
13 Amendment -- that -- that has to do with you
14 asking us to create another rule.

15 I'm asking you, under the rules as
16 they exist right now, if you don't consider them
17 sovereign and you don't consider them acting on
18 behalf of the government because they're not
19 deputized, why are they subject to the Fourth
20 Amendment? Why is anything they found subject
21 to the Fourth Amendment suppression rule?

22 MR. HENKEL: Because the Indian Civil
23 Rights Act includes a Fourth Amendment
24 counterpart, and it -- it -- it equals --

25 JUSTICE SOTOMAYOR: Whether it's a

1 counterpart or not, it's not the Fourth
2 Amendment.

3 MR. HENKEL: Right, there's no --

4 JUSTICE SOTOMAYOR: The Fourth
5 Amendment says only private actors. Putting --

6 MR. HENKEL: The Fourth Amendment --

7 JUSTICE SOTOMAYOR: -- that aside,
8 counsel, what would happen if I, as a private
9 citizen, had reasonable suspicion that someone
10 was a danger, Justice Alito's hypothetical?
11 Would I be justified -- of a drunken driver --
12 would I be justified in holding that person?

13 MR. HENKEL: That would be pure
14 citizens arrest analysis. You could potentially
15 be subject to a civil claim for false
16 imprisonment, but, certainly, any evidence that
17 you seize isn't going to be subject to
18 suppression for a private act --

19 JUSTICE SOTOMAYOR: Is it false
20 imprisonment if it turns out that the other side
21 -- well, you would say just the detention itself
22 would subject me to liability. Okay. Thank
23 you, counsel.

24 MR. HENKEL: Right. Right.

25 CHIEF JUSTICE ROBERTS: Justice Kagan.

1 JUSTICE KAGAN: Mr. Henkel, the
2 government relies in some significant measure on
3 the idea of cross-enforcement authority, in
4 other words, the belief that sovereigns
5 generally have the power to respond to potential
6 violations of another sovereign's laws.

7 Are you contesting that that authority
8 generally exists, in other words, outside the
9 Indian context, or are you accepting that but
10 just saying it's -- it's different in the Indian
11 context?

12 MR. HENKEL: I -- I'm not accepting
13 that, no. I -- I think the first place to start
14 is a line of analysis that this Court gave in
15 Plains Commerce Bank, where the Court expressly
16 rejected, you know, drawing some sort of
17 parallel between tribal authority and what state
18 and federal authorities they can do.

19 Those -- that line of argument, this
20 Court said, completely overlooks the very
21 reasons that cases like Montana and Oliphant and
22 this one even exist, which is that the sovereign
23 authority of Indian tribes is limited in ways
24 state and federal authority is not.

25 And the -- and the way that it's more

1 limited is because they are not full territorial
2 sovereigns. They do not have authority over all
3 who come within their borders.

4 So I think, when you start from that
5 proposition and then you're -- any analysis --
6 any analogy to, you know, state authority to
7 enforce federal law and -- and vice versa, I
8 mean, there's -- there's no comparison right out
9 of the gate because states and federal
10 authorities are full territorial sovereigns.

11 JUSTICE KAGAN: Okay. So --

12 MR. HENKEL: They have sovereign
13 authority.

14 JUSTICE KAGAN: -- so -- so you're
15 really -- I mean, on the -- the two alternatives
16 I gave you, you're really resting on the idea
17 that tribal authority is just different from
18 state authority, so that even if we were to find
19 a lot of cross-enforcement as between state
20 officers or as between state officers and the
21 federal government, that doesn't carry over?
22 That's what you're saying?

23 MR. HENKEL: Yes.

24 JUSTICE KAGAN: And -- and --

25 MR. HENKEL: That is what I'm --

1 JUSTICE KAGAN: But you don't contest
2 the premise?

3 MR. HENKEL: No, not generally, I do
4 not. I think that -- no, I -- I don't -- I
5 don't contest it.

6 JUSTICE KAGAN: Because, for example,
7 you cite Professor Kerr in your brief, and
8 Professor Kerr contests the premise very --
9 pretty strongly, that there's a whole lot of
10 cross-enforcement -- clear cross-meant --
11 cross-enforcement authority.

12 MR. HENKEL: I -- I -- it -- I think
13 that the issue on -- with cross-enforcement is
14 potentially this: I mean, right now, many state
15 arrests lead to federal prosecutions. It
16 happens all the time. But, usually, the -- the
17 initial state investigation is investigating
18 state crime, violations of state law, which
19 makes sense because the police power is in -- in
20 the state, there's more criminal laws that --
21 that -- that states adopt. And then -- so
22 there's a legitimate state investigation, and
23 then they ultimately work with the federal
24 government on handing over the evidence, and
25 there's a federal prosecution.

1 I think a more interesting question is
2 posed when a state doesn't actually punish
3 particular conduct and they're acting purely to
4 enforce federal law. I think there's a
5 potential problem there. I don't think it has
6 anything to do with this case.

7 JUSTICE KAGAN: Thank you, Mr. Henkel.

8 MR. HENKEL: That would just --

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch.

11 JUSTICE GORSUCH: Good morning,
12 counsel. A question for you that I actually
13 would have liked to have gotten to with
14 Mr. Feigin, but time didn't permit. Hopefully,
15 you have some thoughts on it as well.

16 Let's say -- just work with me for the
17 moment and suppose that there is some
18 permissible role here for tribal authorities,
19 and also suppose that in the course of a stop,
20 that the tribal authority engages in some
21 conduct that would violate the Constitution and
22 that your client wanted to pursue a civil claim
23 for that violation if -- if -- of course, in --
24 in the state context, there would be 1983; in
25 the federal officer context, there would be

1 Bivens.

2 What -- what remedy would be available
3 -- perhaps you haven't given this thought, but,
4 if you have, I'm curious what remedy you think
5 might be available against a tribal officer.
6 Would there be a state law remedy? Would there
7 be some federal remedy? What -- what thoughts
8 do you have there?

9 MR. HENKEL: I don't think there would
10 be any remedy in terms of a private cause of
11 action for civil damages. Certainly, tribal
12 officers aren't mentioned in 1983. You can't
13 bring a claim -- claim against a tribe because
14 they have sovereign immunity.

15 You could potentially try to sue the
16 tribe in tribal court, but the likelihood of
17 that being successful is -- is not very good.
18 And, ultimately, in that -- in that situation,
19 even if you could sue them in tribal court, you
20 can't get it into state or federal court, so
21 this Court doesn't sit at the end of the line
22 there.

23 So I think there's very -- there's
24 virtually no remedy other than exclusion of
25 evidence in this circumstance.

1 JUSTICE GORSUCH: Have you thought --
2 and -- and you agree, though, that there would
3 be exclusion under IRCA, right?

4 MR. HENKEL: Yes.

5 JUSTICE GORSUCH: Okay. And then, on
6 -- on -- on the -- on the tort front, have you
7 thought about a state law remedy, a state tort
8 suit, state court --

9 MR. HENKEL: I --

10 JUSTICE GORSUCH: -- for something
11 that happens on the -- either fee-simple land
12 or, as here, a -- you know, a right-of-way?

13 MR. HENKEL: Oh, so -- well, the
14 Montana Supreme Court has found, I believe, that
15 tribal officers are under tribal sovereign
16 immunity --

17 JUSTICE GORSUCH: All right.

18 MR. HENKEL: -- for police activity --

19 JUSTICE GORSUCH: All right.

20 MR. HENKEL: -- when it comes to
21 non-Indians, so at least not in Montana.

22 JUSTICE GORSUCH: Okay. Thank you,
23 counsel. Perhaps --

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh.

1 JUSTICE GORSUCH: -- Mr. Feigin can
2 help with that.

3 JUSTICE KAVANAUGH: Thank you, Chief
4 Justice.

5 And good morning, Mr. Henkel. You
6 make what I think are forceful
7 separation-of-powers arguments, particularly
8 that Congress has provided for
9 cross-deputization, and that was not taken
10 advantage of here. So I take that point, and
11 that's an important one for me.

12 But, at the same time, a couple other
13 thoughts that I'll throw out there, and then you
14 can react to them.

15 The amicus brief from the former U.S.
16 Attorneys says that "criminal jurisdiction in
17 Indian country is an indefensible morass of
18 complex, conflicting, and illogical commands
19 layered in over decades via congressional
20 policies and court decisions and without the
21 consent of tribal nations."

22 And I don't think you're going to
23 disagree with that description necessarily, and
24 so that leads me to think that one of the things
25 we should be trying to do here is -- is to do no

1 harm because there's lots of ripple effects from
2 a broad decision.

3 And with that in mind, there are
4 statements in our decisions in Duro and Strate
5 that really cut directly against you, as you're
6 -- you're well aware. And you can say those are
7 dicta, and that might be correct, but those have
8 guided the law -- law enforcement for several
9 decades. I think Congress and the executive
10 could reasonably rely on those statements in the
11 Court's decision. Certainly, the Cohen treatise
12 treats those statements as authoritative in
13 terms of guidance.

14 So why isn't the best thing we can do
15 here just to stick with what we said in those
16 cases? It's not very analytically satisfying,
17 but it's a narrow result. It does not make a
18 morass, as it was described, any worse. What do
19 you think?

20 MR. HENKEL: You mean stick with the
21 -- the statements about detaining and ejecting
22 from the reservation?

23 JUSTICE KAVANAUGH: Yes.

24 MR. HENKEL: I -- I -- I think those
25 statements are -- the problem with those beyond

1 -- you're -- you're right, I -- I think they're
2 dicta, and I think that they -- Duro, for
3 example, was talking about the exclusion power,
4 which we don't have here. But the biggest
5 problem I see under your proposal is that the
6 Court has not defined the source or the scope of
7 what this detain-and-eject power is.

8 JUSTICE KAVANAUGH: Well, that's why
9 -- that's why I said it's not analytically all
10 that satisfying, but it's been out there for 30
11 years, and as described in the Cohen handbook,
12 which is useful, as you -- you're well aware, it
13 says, "The Supreme Court has consistently
14 reaffirmed the authority of tribal police to
15 arrest offenders within Indian country and
16 detain them until they can be turned over to the
17 proper authorities, even if the tribe itself
18 would lack criminal jurisdiction."

19 That's the black-letter description.

20 MR. HENKEL: I -- I think the terms
21 "arrest," "detain," and "turn over" are being
22 used fairly loosely. I think we -- what --
23 what's happening -- look at what happened here.
24 There was a detention, an investigation, pulling
25 Mr. Cooley out of the car, putting him in the

1 back of the patrol unit, which I would argue is
2 an arrest, and then going back to his vehicle
3 multiple times to search it for, you know,
4 evidence of crime.

5 And that is far -- I -- I don't think
6 this Court was saying anything like that in Duro
7 or in Strate. It was just they have a general
8 power to eject outsiders from reservations. So
9 I think that it would be more problematic to
10 just stand on those statements going -- going
11 forward.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: I'd like to pick up
16 where Justice Kavanaugh left off. I mean, on
17 the one hand, as Justice Kavanaugh points out,
18 it's not very analytically satisfying to rely on
19 the dicta, particularly from the footnote in
20 Strate.

21 But I want to try this on -- you know,
22 you say one problem with our -- you know, or the
23 government's approach or an approach saying that
24 there is some sort of retained authority to
25 police here is that we haven't identified its

1 scope or its source.

2 But, you know, Montana and those cases
3 that followed it relied pretty heavily on the
4 unfairness of imposing tribal law on those who
5 didn't participate in its creation. And in that
6 respect, Strate's footnote is perfectly
7 consistent with that because, as the United
8 States pointed out in argument and in its brief,
9 you know, Cooley and -- and other non-members of
10 the tribe are represented in the creation of
11 federal law.

12 And so it doesn't pose that same
13 problem here. It's -- it's far less of an
14 unfairness, and Strate's footnote can be seen to
15 be consistent with that principle, particularly
16 if the United States is right that one way to
17 understand Montana is that that is an instance
18 of implied preemption that cashes out when you
19 consider the assertion of authority to
20 adjudicate finally civil or criminal liability
21 or the imposition of regulations on those who
22 didn't participate in its exercise.

23 So can you explain to me why that
24 would not be a way to reconcile the Strate
25 footnote and the United States' proposed

1 authority here?

2 MR. HENKEL: Well, certainly, Mr.
3 Cooley participates in the federal government,
4 but Mr. Cooley does not participate in tribal
5 government. He has no say in the laws and
6 regulations. He has no way --

7 JUSTICE BARRETT: Well -- well, I
8 under -- I understand that. That was the
9 premise of my question. But why is it unfair,
10 on that rationale, simply to submit him to the
11 authority of a police officer in a temporary
12 stop?

13 MR. HENKEL: Because it's all
14 happening outside the structure of the
15 Constitution. And as my discussion with Mr. --
16 or Justice Gorsuch revealed, there's -- there's
17 no remedy, there's no recourse here if something
18 goes wrong, that if Mr. Cooley's civil rights
19 are violated here, there -- there -- there's
20 nothing he can do because of tribal sovereign
21 immunity and this all occurring outside the
22 structure of the Constitution. And --

23 JUSTICE BARRETT: Okay. Well, let me
24 -- let me just stop you there so I can ask this
25 question too. Justice Thomas was asking you,

1 you know, the same hypothetical as Mr. Cooley's
2 stop but substituting in a serial killer. And
3 -- and you said, well, if he fits the
4 description, then maybe there might be able to
5 be detention. And I assume that that might be
6 an exercise of what the Ninth Circuit described
7 as the apparent or obvious violation of law.

8 That -- that's a new phrase, right?
9 We have reasonable suspicion. We have probable
10 cause. How do you tell if something's an
11 apparent and obvious violation of the law?

12 MR. HENKEL: I -- I -- I think that
13 the obvious and apparent standard is a product
14 of the -- the rule at common law, which is that
15 -- for private citizens arrests, which also
16 apply to officers and territory --

17 JUSTICE BARRETT: But how do you apply
18 it?

19 MR. HENKEL: Yeah, so I think that it
20 -- you apply it in terms of -- I forget who
21 posed the hypothetical before of drugs being
22 visible. Certainly, if drugs are visible, there
23 is an apparent crime.

24 But I also think there is a breach of
25 the peace aspect when there's something imminent

1 about to occur, when there's public safety
2 that's, you know, in jeopardy and it's in
3 jeopardy now, then there can -- there's
4 authority to step in and detain.

5 JUSTICE BARRETT: Thank you, counsel.

6 MR. HENKEL: Thank you.

7 CHIEF JUSTICE ROBERTS: A minute to
8 wrap up, counsel.

9 MR. HENKEL: Thank you, Mr. Chief
10 Justice.

11 The issue here is about inherent
12 tribal authority over non-Indians. Through
13 decades of consistent opinions, this Court has
14 delineated the scope of that authority to
15 exclude police power over non-Indians,
16 especially on non-tribal lands such as the
17 public right-of-way here, where Officer Saylor
18 seized and searched Mr. Cooley.

19 Moreover, to the extent this absence
20 of tribal police authority creates a
21 jurisdictional gap in reservation law
22 enforcement, Congress has already filled the gap
23 by providing for cross-deputization of tribal
24 officers.

25 The fact that relevant officials did

1 not avail themselves of cross-deputization in
2 this case does not justify usurping Congress's
3 plenary authority with a judicial finding of
4 inherent tribal authority.

5 Mr. Cooley does not challenge tribal
6 sovereignty. He simply asks that the boundaries
7 of tribal sovereignty be respected as this Court
8 has previously defined them.

9 The court of appeals decision should
10 be affirmed. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Rebuttal, Mr. Feigin?

14 REBUTTAL ARGUMENT OF ERIC J. FEIGIN
15 ON BEHALF OF THE PETITIONER

16 MR. FEIGIN: Thank you, Your Honor.

17 I just want to make four relatively
18 quick points. One is just to touch on remedies
19 for potentially unlawful action.

20 Beyond the exclusionary rule, there
21 would be a suit in tribal court, I think the
22 tribes have every incentive to be solicitous of
23 such a suit because they don't want to get
24 cross-wise with the other authorities.

25 If the officer is a non-Indian, he can

1 be -- which a surprising number of them are --
2 he can be sued in state court. If they -- if
3 tribes -- if a tribal officer really exceeds his
4 boundaries, the federal government could come in
5 and prosecute.

6 And then there -- there could be
7 legislative or executive action that simply
8 precludes these hand-overs if Congress actually
9 perceived a problem. But no one's identified
10 any history of abuses.

11 Second, cross-designation is simply
12 not a solution. If you look at our brief and
13 the Cayuga Nation brief, they detail the
14 problems with that. Just because someone has
15 a -- in particular, they're fickle and you need
16 them with multiple agencies. You can't just
17 have one with the federal government. You'd
18 need one with state or local authorities as
19 well.

20 The third point I -- I wanted to make
21 was to just reinforce why this would be an
22 example of Montana exception 2, assuming that it
23 applies. It's because of the chilling effect on
24 enforcement against even Indians.

25 I -- I take it that if someone were

1 driving around with a bumper sticker that said,
2 "I am not an Indian," they couldn't be stopped.
3 The indeterminacy problems are not solvable by a
4 quick radio call. Issues like tribal status and
5 land status are frequently litigated.

6 They have to at least be resolved back
7 at the station. And under the Ninth Circuit's
8 rule, Officer Saylor, who is a member of the
9 tribe, couldn't even protect himself from what
10 he thought was a potential attack by -- by the
11 Respondent here.

12 And then, finally, I'd just like to
13 emphasize, I think, the incoherence of the
14 approach that the other side is urging. They
15 say that you can detain someone who matches the
16 description of a serial killer.

17 Well, how sure do you have to be that
18 he matches the description of the serial killer?
19 Where is that authority coming from?

20 So what if he's not 100 percent sure,
21 or what if he, instead of knowing he matches the
22 description of a serial killer, he simply sees a
23 bloody knife on the passenger seat and he knows
24 that a woman on the reservation has recently
25 been brutally murdered by knife?

1 He has to have the authority to
2 detain. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. The case is submitted.

5 (Whereupon, at 11:09 a.m., the case
6 was submitted.)

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