

Supreme Court Report

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This *Report* summarizes opinions issued on December 10, 2020 (Part I); and cases granted review on November 20 and December 4, 2020 (Part II).



I. Opinions

- *Rutledge v. Pharmaceutical Care Mgmt. Ass'n*, 18–540. By an 8–0 vote, the Court held that an Arkansas statute regulating pharmacy benefit managers’ drug–reimbursement rates is not preempted by ERISA. Pharmacy benefit managers (PBMs) “serve as intermediaries between prescription–drug plans and the pharmacies that beneficiaries use.” “When a beneficiary of a prescription–drug plan goes to a pharmacy to fill a prescription, the pharmacy checks with a PBM to determine that person’s coverage and copayment information.” The PBM reimburses pharmacies for prescriptions, though in an amount not necessarily tied to how much the pharmacy paid the wholesaler for the drug. PBMs instead enter contracts with pharmacies that “typically set reimbursement rates according to a list specifying the maximum allowable cost (MAC) for each drug.” Meanwhile, prescription–drug plans reimburse PBMs based on contractual prices. PBMs’ profit is the difference between their reimbursement from plans and their reimbursement to pharmacies. Arkansas adopted Act 900 in response to concerns that PBMs were reimbursing pharmacies at rates too low to cover pharmacies’ costs, which especially harmed rural and independent pharmacies. “In effect, Act 900 requires PBMs to reimburse Arkansas pharmacies at a price equal to or higher than that which the pharmacy paid to buy the drug from a wholesaler.” It does that by (1) requiring PBMs to update their MAC lists when drug wholesale prices increase; (2) requiring PBMs to provide administrative appeal procedures that allow pharmacies to challenge MAC reimbursement prices when they are below pharmacies’ acquisition costs; and (3) permitting pharmacies to decline to sell a drug if the PBM reimbursement is below the wholesale cost. Respondent Pharmaceutical Care Management Association (PCMA), a national trade association of the largest PBMs, filed suit alleging (among other things) that Act 900 is preempted by ERISA. Based on an Eighth Circuit decision holding that ERISA preempts a similar Iowa statute, the district court and Eighth Circuit ruled that Act 900 is preempted because it makes “implicit reference” to ERISA plans and is impermissibly “connected with” ERISA plans. In an opinion by Justice Sotomayor, the Court reversed and remanded.

Citing its precedent, the Court stated that “a state law has an ‘impermissible connection’ with an ERISA plan” if it “require[s] providers to structure benefit plans in

particular ways, such as requiring payment of specific benefits, or by binding plan administrators to specific rules for determining beneficiary status.” (Citation omitted.) By contrast, ERISA does not preempt a state law merely because it “causes some disuniformity in plan administration” or “affects costs.” For example, observed the Court, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), the Court upheld a New York law that imposed a surcharge of up to 13% on hospital billing rates for patients covered by insurers other than Blue Cross/Blue Shield—even though it gave ERISA plans an incentive to choose Blues over other insurers. The Court held here that “[t]he logic of *Travelers* decides this case. Like the New York surcharge law in *Travelers*, Act 900 is merely a form of cost regulation.” “ERISA plans may pay more for prescription-drug benefits in Arkansas than in, say, Arizona. But ‘cost uniformity was almost certainly not an object of pre-emption.’”

The Court next held that Act 900 does not impermissibly “refer to” ERISA. “A law refers to ERISA if it acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law’s operation.” (Quotation marks omitted.) Act 900, however, “applies to all PBMs whether or not they manage an ERISA plan. Indeed the Act does not directly regulate health benefit plans at all, ERISA or otherwise. It affects only plans insofar as PBMs may pass along higher pharmacy rates to plans with which they contract.” Nor, found the Court, are ERISA plans essential to Act 900’s operation. That is because “Act 900 regulates PBMs whether or not the plans they service fall within ERISA’s coverage.” Finally, the Court rejected PCMA’s arguments for why Act 900 has an impermissible connection with ERISA plans. To PCMA’s claim that “Act 900 affects plan design by mandating a particular pricing methodology for pharmacy benefits,” the Court said this “is just a long way of saying that Act 900 regulates reimbursement rates.” But that “does not require plans to provide any particular benefit to any particular beneficiary in any particular way.” Nor, held the Court, does “Act 900’s appeal procedure . . . govern central matters of plan administration.” Although the law imposes a “particular process,” with deadlines and a substantive standard that could require recalculating amounts owing, “any contract dispute implicating the cost of a medical benefit would involve similar demands and could lead to similar results.” Next, PCMA contended that “Act 900 interferes with central matters of plan administration by allowing pharmacies to decline to dispense a prescription.” But, ruled the Court, “[w]hen a pharmacy declines to dispense a prescription, the responsibility lies first with the PBM for offering the pharmacy a below-acquisition reimbursement.” Finally the Court rejected PCMA’s argument that Act 900 will create “operational inefficiencies.” The Court noted that “creating inefficiencies alone is not enough to trigger ERISA preemption,” and “ERISA does not pre-empt a state law that merely increases costs.”

Justice Thomas filed a concurring opinion. He agreed that the Court's opinion properly interpreted the Court's ERISA precedents. But, as he wrote in a concurring opinion in *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. 312, 327 (2016), he "doubt[s]" the Court's ERISA preemption jurisprudence and would replace it with a test that asks: "(1) do any ERISA provisions govern the same matter as the state law at issue, and (2) does that state law have a meaningful relation to ERISA plans?" He noted that Act 900 would survive preemption under the first prong of his proposed test.

- *Carney v. Adams*, 19-309. The Court held that plaintiff Adams lacked standing to maintain his First Amendment challenge to Delaware's requirements that its judiciary be politically balanced. "Delaware's Constitution states that no more than a bare majority of members of any of its five major courts"—the Supreme Court, the Chancery Court, the Superior Court, the Family Court, and the Court of Common Pleas—"may belong to any one political party. Art. IV, §3. It also requires, with respect to three of those courts"—the Supreme Court, the Chancery Court, and the Superior Court—"that the remaining members belong to 'the other major political party.'" In February 2017, plaintiff-respondent James Adams, a newly registered political independent, sued Delaware's Governor, John Carney, claiming "that both of Delaware's political balance requirements violated his First Amendment right to freedom of association by making him ineligible to become a judge unless he rejoined a major political party." Governor Carney moved to dismiss for lack of standing, but after discovery the district court denied the governor's summary judgment motion. It then granted summary judgment to Adams on the merits. The Third Circuit affirmed in part and reversed in part. It agreed that Adams had standing to challenge the major party requirement, but ruled he lacked standing to challenge the bare majority requirement. On the merits, the Third Circuit ruled that the major party requirement applicable in three courts violates the First Amendment by excluding independents and members of third parties from becoming judges in those courts. It then held that the major party requirement is not severable from the bare majority requirement, meaning both requirements are invalid. Through an opinion by Justice Breyer, the Court vacated and remanded.

The Court concluded that, based on the summary judgment record before the district court, Adams failed to show the required "injury in fact." In particular, Adams failed to show that he is "able and ready" to apply "to become a judge in the reasonably foreseeable future if Delaware did not bar him because of political affiliation." To be sure, found the Court, Adams said in a deposition, "I would apply for any judicial position that I thought I was qualified for, and I believe I'm qualified for any position that would come up . . . [o]n any of

the courts.” But the Court found that, in context, Adams failed to show that he was “able and ready” to apply. Of particular relevance: (1) Adams did not apply for any of the 14 judicial openings between 2012 and 2016 when he was a practicing lawyer and registered Democrat; (2) he only returned to “Active” status in January 2017, following his retirement at the end of 2015, after he read a law review article contending that Delaware’s political balancing rules were unconstitutional; (3) he changed his political affiliation from Democrat to unaffiliated independent a month later; (4) he filed this lawsuit eight days after he became a political independent; and (5) “other than the act of filing the lawsuit itself, the summary judgment record contains no evidence of conversations or other actions taken by Adams suggesting he was ‘able and ready’ to apply for a judgeship.”

Given those facts the Court found that “three considerations” convinced it that Adams was not “able and ready” to apply for a judgeship in the reasonably foreseeable future. First, he failed to show past injury, an “anticipated timeframe” for applying, any past judicial applications, or any “other preparations or investigations” into becoming a judge. Second, “Adams’ failure to apply previously when he was eligible, his reading of the law review article, his change of party affiliation, and his swift subsequent filing of the complaint show a desire to vindicate his view of the law, as articulated in the article he read.” And third, to rule for Adams would “significantly weaken the longstanding legal doctrine preventing this Court from providing advisory opinions at the request of one who, without concrete injury, believes that the government is not following the law.” The Court added that its conclusion is supported by its precedent, both cases finding no standing and cases finding standing.

Justice Sotomayor filed a concurring opinion. She wrote to “highlight two important considerations that may inform” the answer to the merits, should the merits again come before the courts. First, the major-party requirement is rarer than the bare-majority requirement and “arguably impose[s] a greater burden on First Amendment associational rights.” Second, should courts face the issue of severability, this may well be an appropriate issue to certify to the Delaware Supreme Court.

- *Tanzin v. Tanvir*, 19–71. By an 8–0 vote, the Court held that the Religious Freedom Restoration Act permits suits seeking money damages against individual federal employees. Congress enacted RFRA to “restore” the law as it existed prior to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), and place a “compelling interest test” on neutral, generally applicable laws that burden religious acts. RFRA creates a right of action that enables a person to “obtain appropriate relief against the government.” 42 U.S.C. §2000bb(b)–1(c). And it defines “government” to include “a branch, department, agency,

instrumentality, and official (or other person acting under color of law) of the United States.” *Id.* §2000bb(b)–2(1). Respondents are three practicing Muslims who claim that FBI agents placed them on the No Fly List in retaliation for their refusal to act as informers against their religious communities. They sued several agents in their official capacities seeking removal from the No Fly List and money damages for airline tickets wasted and income from lost job opportunities. More than a year later, the Department of Homeland Security took respondents off the No Fly List, mooting their claim for injunctive relief. The district court then dismissed their individual-capacity claims for money damages, holding that RFRA does not permit such relief. The Second Circuit reversed, holding that RFRA’s phrase “appropriate relief” encompasses money damages against officials. In an opinion by Justice Thomas, the Court affirmed.

The Court first held that under RFRA injured parties can sue government officials in their personal capacities. RFRA authorizes suit “against a government,” and defines “government” to include an “official (or other person acting under color of law).” Thus, found the Court, “Congress supplanted the ordinary meaning of ‘government’ with a different, express definition” that includes officials. Plus, RFRA uses the same terminology as 42 U.S.C. §1983, which the “Court has long interpreted [] to permit suits against officials in their individual capacities.”

The Court next addressed whether “appropriate relief” encompasses monetary damages. It noted that the definition of “appropriate” is “open-ended,” meaning that the answer to the question is “inherently context dependent.” (Quotation marks omitted.) And “[i]n the context of suits against Government officials, damages have long been awarded as appropriate relief.” The Court pointed to writs issued in the early days of the nation allowing for money damages against government officials; and found “[t]hese common-law causes of action remained available through the 19th century and into the 20th.” Further, through the Westfall Act, “damages against federal officials remain an appropriate form of relief today.” The Court added that “[d]amages are also commonly available against state and local government officials,” such as in suits under §1983. Plus, noted the Court, damages are sometimes “the *only* form of relief that can remedy some RFRA violations.” (The Court added in a footnote that both sides agreed that government officials may assert a qualified immunity defense when sued for damages under RFRA.) Nor, found the Court, is its decision in *Sossamon v. Texas*, 563 U.S. 277 (2011), to the contrary. *Sossamon* found that sovereign immunity barred suits for damages against states under the Religious Land Use and Institutionalized Persons Act of 2000—but “this case features suit against individuals who do not enjoy sovereign immunity.” Finally, the Court declined the government’s request that

it “create a new policy-based presumption against damages against individual officials,” finding that “Congress is best suited to create such a policy.”

- *United States v. Briggs*, 19–108. At issue was whether, “under the Uniform Code of Military Justice (UCMJ), a prosecution for a rape committed during the period from 1986 to 2006 had to be commenced within five years of the commission of the charged offense or whether such a prosecution could be brought at any time, as is the rule at present.” By an 8–0 vote, the Court held that such a prosecution could be brought at any time. During the relevant time period, “Article 120(a) of the UCMJ provided that rape could be ‘punished by death,’ and Article 43(a), as amended in 1986, provided that an offense ‘punishable by death’ could be tried and punished ‘at any time without limitation.’” (Citations omitted.) A five-year statute of limitations generally governed non-capital offenses. In 1977, the Court held in *Coker v. Georgia*, 433 U.S. 584, that the Eighth Amendment prohibits imposition of the death penalty on a civilian defendant convicted of raping an adult woman. The Court of Appeals for the Armed Forces held that the statute of limitations was therefore five years during the applicable time period and barred the rape convictions of respondents, three members of the military. In an opinion by Justice Alito, the Court reversed.

The Court explained that the key issue “is the meaning of the phrase ‘punishable by death’ in” Article 43(a). Respondents contend, and the Court of Appeals for the Armed Services held, “that the phrase means capable of punishment by death *when all applicable law is taken into account*”—including *Coker*. They say they couldn’t have been sentenced to death, and that their crimes were therefore not “punishable by death” within the meaning of Article 43(a). The government, by contrast, argues that “punishable by death” “means capable of punishment by death *under the penalty provisions of the UCMJ*, and since Article 120(a) provided (despite *Coker*) that rape could be punished by death, it follows that there was no time limit for filing rape charges against respondents.” The Court found the government’s interpretation to be, “[o]n balance,” “more persuasive” for three reasons.

“First, a natural referent for a statute of limitations provision within the UCMJ is other law in the UCMJ itself.” The UCMJ authorized the death penalty for various offenses. Congress presumably adopted Article 43(a)’s language simply to spare “itself the trouble of maintaining a long list of such offenses.” Second, statutes of limitations are intended to “provide clarity,” and the government’s interpretation provides more clarity. “[I]f all applicable law is taken into account, the deadline for filing rape charges would be unclear” because the Court has not definitively resolved whether *Coker* extends to rape committed by a service member. Plus, the Eighth Amendment generally looks to “evolving standards of decency,” meaning the test could lead to a different result at some later time. Third, the

Court found that Congress may well not have wanted to tie its limitation period to the Eighth Amendment, which is premised on different considerations than limitations periods. For example, “[o]ne factor that legislators may find important in setting the statute of limitations for a crime is the difficulty of gathering evidence and mounting a prosecution for that offense”—a factor that “obviously plays no part in [the Court’s] Eighth Amendment analysis.” It is there “unlikely,” said the Court, “that lawmakers would want to tie a statute of limitations to judicial interpretations of [the Eighth Amendment].”



II. Cases Granted Review

- *Azar v. Gresham*, 20–37; *Arkansas v. Gresham*, 20–38. The Court will review a D.C. Circuit decision holding unlawful Medicaid demonstration projects in Arkansas and New Hampshire “requiring certain working-age, nondisabled adults to engage in work or skill-building activities (such as job-skills training or general education) as a condition of continued eligibility for Medicaid benefits.” Section 1115 of the Social Security Act authorizes the Secretary of Health and Human Services to “waive compliance” with particular requirements of the Medicaid Act for “any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives” of the Act. (The remainder of this summary will for simplicity’s sake focus on the Arkansas demonstration project.) In 2018, the Secretary approved an amendment to a Section 1115 waiver it had granted Arkansas. Under this amendment to the “Arkansas Works” program, “[t]o receive Medicaid expansion coverage, non-exempt, able-bodied beneficiaries under the age of 50 were required to report 80 hours of work, work-related activities, education, or volunteering per month.” (“Beneficiaries with minor dependents, full-time students, pregnant women, the medically frail, and many others were exempted.”) In approving the waiver, the Secretary concluded that the work requirement would likely promote two Medicaid objectives. First, it would “improve health and wellness” because work and other forms of community engagement are correlated with improved health. Second, it would “help[] individuals and families attain or retain capability for independence or self-care.” The Secretary predicted that “the overall health benefits to the effected population through community engagement outweigh the health risks to those who fail to [comply] and who fail to seek exemption.”

A group of Arkansas Works beneficiaries filed suit in the U.S. District Court for the District of Columbia claiming that the Secretary’s approval of the Arkansas Works amendment was arbitrary and capricious. Arkansas intervened to defend its program. The district court ruled for the plaintiffs. The district court ruled that providing healthcare coverage to eligible beneficiaries was a Medicaid objective, and that the Secretary “had

“fail[ed] to address whether coverage loss would occur.” The D.C. Circuit affirmed. 950 F.3d 93. The court held that Medicaid has just “one primary purpose, which is providing health care coverage without any restriction geared to healthy outcomes, financial independence or transition to commercial coverage.” Thus, “the alternative objectives of better health outcomes and beneficiary independence are not consistent with Medicaid.” The court concluded that the Secretary acted arbitrarily and capriciously because he failed to address loss of coverage and thereby “prioritize[d] non-statutory objectives [over] the statutory purpose.”

The Secretary in his petition insists that, even “[a]ssuming arguendo that providing such coverage is the exclusive objective of the Medicaid program, the Secretary has appropriately determined that testing measures designed to help States stretch their Medicaid dollars—in turn enabling States to expand or maintain coverage for needy individuals—is “likely to assist in promoting” that objective. (Citation omitted.) The Secretary concluded that work and skills-building requirements help stretch Medicaid dollars in two ways: (1) they would “enable non-exempt adults in the expansion population” to “transition from Medicaid to financial independence and commercial insurance”; and (2) jobs and skills-training “may lead to increased health and wellness of beneficiaries, which in turn reduces the cost of providing them health-care coverage.” Arkansas, for its part, emphasizes its view that the Medicaid Act is not limited to one, sole purpose, and that the D.C. Circuit erred in looking to 42 U.S.C. § 1396-1 to conclude that it has the one purpose of providing health care coverage. Arkansas notes that that provision is not a purposes section; rather it authorized appropriations for Medicaid. And while that provision “might state Congress’s purposes for authorizing itself to make Medicaid appropriations more than 50 years ago, it doesn’t tell the Secretary what purposes to pursue.” Further, says Arkansas, the provision couldn’t possibly speak to the purposes of the Affordable Care Act’s Medicaid expansion.

- *Caniglia v. Strom*, 20-157. At issue is “[w]hether the ‘community caretaking’ exception to the Fourth Amendment’s warrant requirement extends to the home.” The First Circuit below held that it does, but the lower courts are divided on the issue, with many limiting the exception to automobiles. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), the Court recognized the exception, stating that “police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” The Court thus upheld a warrantless caretaking search of an automobile’s trunk for a firearm.

The Court will now resolve whether the exception extends beyond automobiles and authorizes warrantless searches of homes.

When an argument between petitioner Edward Caniglia and his wife Kim escalated, petitioner retrieved a handgun, put the gun on a table, and said to her, “why don’t you just shoot me and get me out of my misery.” Mrs. Caniglia spent the night at a motel and tried to call her husband the next morning. She became worried when he didn’t answer and so called the police and asked them to check on petitioner. After she told them what happened the day before, officers escorted her home and took petitioner to a hospital, where he was examined by a nurse and a social worker. He was released that day. Meanwhile, the officers entered the Caniglias’ home and seized petitioner’s guns, believing “it was reasonable to do so based on [petitioner’s] state of mind,” and fearing that “[petitioner] and others could be in danger” if the guns remained in the home. After the police refused to return the guns to him, petitioner filed a §1983 suit against the city and the officers, alleging that they violated a variety of his rights, including his Fourth Amendment rights. As relevant here, the district court granted summary judgment for the defendants on the Fourth Amendment claim, finding that the community caretaking exception extends to the home and that the officers’ actions were reasonable. The First Circuit affirmed. 953 F.3d 112.

The First Circuit noted that the officers did not “invoke either the exigent circumstances or emergency aid exceptions to the warrant requirement.” They relied solely on the community caretaking exception to justify their warrantless entry into petitioner’s home and the resulting seizures. The court recognized that the Supreme Court has applied the “community caretaking exception” only “in the motor vehicle context.” But it agreed with those lower courts that applied the exception to the home, noting the “‘special role’ that police officers play in our society.” “[A] police officer,” said the court, “must act as a master of all emergencies, who is ‘expected to . . . provide an infinite variety of services to preserve and protect community safety.’” And the “community caretaking” exception “is designed to give police elbow room to take appropriate action when unforeseen circumstances present some transient hazard that requires immediate attention.” Because “[t]hreats to individual and community safety are not confined to the highways” and in light of “the practical realities of policing,” the court held that the “community caretaking doctrine may, under the right circumstances, have purchase outside the motor vehicle context”—including inside the home. The court concluded that the officers acted reasonably here in availing themselves of the exception.

Petitioner argues that the federal courts of appeal and state high courts are deeply divided on the question presented. On the merits, petitioner contends that the First

Circuit's ruling "threatens to replace the Fourth Amendment's warrant requirement with a reasonableness regime that would balance away the sanctity of the home and fundamentally alter the relationship between the citizenry and the police." Petitioner says that the Court in *Cady* repeatedly emphasized its automobile context and the lessened privacy individuals have in their vehicles. And he maintains that "[c]abining the 'community caretaking' exception to vehicle searches is consistent with the special protections afforded to the home under the Fourth Amendment." In that regard, he notes that the Court has "declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home." In the end, argues petitioner, "it is the role of the courts—not the police—to decide whether and when an intrusion into the home is justified."

- *United States v. Cooley*, 19-1414. The question presented is "[w]hether the lower courts erred in suppressing evidence on the theory that a police officer of an Indian tribe lacked authority to temporarily detain and search respondent, a non-Indian, on a public right-of-way within a reservation based on a potential violation of state or federal law." At about 1 a.m. on February 26, 2016, Officer James Saylor of the Crow Tribe of Montana was driving on the section of U.S. Route 212 that lies within the boundaries of the Crow Reservation. He pulled up behind a pickup truck parked on the shoulder, with its engine running and headlights on. When Officer Saylor shined his flashlight into the truck he saw that the driver, respondent, had "watery, bloodshot eyes" and, based on his appearance, "seemed to be" a non-Indian. Respondent provided what Officer Saylor thought was an implausible story about why he was there and whose truck he was in. When respondent lowered the window, Officer Saylor saw two semi-automatic rifles in the front passenger seat. Officer Saylor then requested identification. Respondent pulled several wads of cash out of his pocket, then placed his hand near his pocket area again and looked like he might be about to use force. Officer Saylor opened the passenger-side door, where he noticed a loaded semiautomatic pistol in the area near respondent's right hand. After respondent "vaguely mentioned that somebody might be coming to meet him at the side of the road," Officer Saylor ordered respondent to exit the truck, conducted a pat-down, and escorted both him and his young child to the patrol car. Officer Saylor then called for backup, including from county police, because respondent "seemed to be" a non-Indian. "While awaiting assistance, and in light of respondent's vague suggestion that someone else might soon be arriving, Officer Saylor took steps to secure the area, including returning to the truck to take possession of the firearms in the cab. In the course of securing the cab, Officer Saylor noticed in plain view a glass pipe and a plastic bag that appeared to contain methamphetamine, wedged between the driver and middle seats." (Citation omitted.) Officers from the county and the Bureau of Indian Affairs later arrived on the scene. Respondent was eventually arrested by the county officer and charged with one count of

possessing with intent to distribute methamphetamine and one count of possessing a firearm in furtherance of a drug-trafficking crime.

“Respondent moved to suppress the evidence obtained as a result of his interaction with Officer Saylor, on the theory (as relevant here) that Officer Saylor had acted outside the scope of his authority as a tribal law enforcement officer in detaining respondent and conducting a search.” The district court granted the motion. Relying on Ninth Circuit precedent, the court held that a tribal officer’s authority to detain a non-Indian stopped on a public highway “for the reasonable time it takes to turn the person over to state or federal authorities” is limited solely to circumstances in which “‘it is apparent that a state or federal law has been violated.’” The court concluded that Officer Saylor’s observations before the seizure—including respondent’s “bloodshot and watery eyes,” “wads of cash,” and “answers to questions that seemed untruthful”—did not establish an “‘apparent’” violation of law. The Ninth Circuit affirmed. 919 F.3d 1135. “The court of appeals recognized that although an Indian tribe’s sovereign authority to charge and punish wrongdoers under its own criminal laws is limited to Indians, a tribe retains the power to ‘investigate crimes committed by non-Indians on tribal land’—including reservation land held by the tribe or its members (or in trust for them)—‘and deliver non-Indians who have committed crimes to state or federal authorities.’ The court also recognized that a tribe could help to enforce state and federal law against non-Indians on non-tribal reservation lands as well. Like the district court, however, the court of appeals held that in the latter circumstance, a tribe’s authority depends upon the existence of an ‘apparent’ or ‘obvious’ violation of state or federal law.” (Citations omitted). And like the district court, the Ninth Circuit found that standard not met here.

The United States argues that “[t]he decision below erroneously diminishes the inherent sovereign authority of Indian tribes and unjustifiably impedes the enforcement of state and federal law on Indian reservations throughout the Ninth Circuit. The panel recognized that Indian tribes must retain some authority to assist in the enforcement of the state and federal laws applicable to non-Indians on rights-of-way or alienated land within the boundaries of a tribe’s reservation. But in limiting such authority solely to detention for ‘apparent’ or ‘obvious’ violations of those laws, the Ninth Circuit imposed an unprecedented, indeterminate, and unworkable standard that appears to be significantly more stringent than the traditional legal standards of reasonable suspicion and probable cause. The Ninth Circuit’s *sui generis* framework disrupts long-held understandings, reflected in decisions of th[e] [Supreme] Court and others, about law enforcement on reservation land. And its curtailment of meaningful tribal policing authority creates gaps in law enforcement that state and federal governments cannot practically fill, thereby threatening the safety and welfare of everyone on Indian reservations.” (Citation omitted.) More specifically, the United

States argues that, although “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians” for criminal offenses under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held in *Duro v. Reina*, 495 U.S. 676 (1990), that “[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.” And in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court stated that “[w]e do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.” Based on those principles, says the United States, “[n]o heightened level of suspicion, above and beyond probable cause, should be required for [a] reasonable detention, simply because it is carried out by a tribal officer.”

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