No.

In the Supreme Court of the United States

JESSICA TAVARES,

Petitioner,

v.

GENE WHITEHOUSE, CALVIN MOMAN, BRENDA ADAMS, JOHN WILLIAMS, DANNY REY, in their official capacity as members of the Tribal Council of the United Auburn Indian Community,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §1303, provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

For more than 20 years, federal courts have construed the "detention" requirement for habeas jurisdiction under the ICRA as synonymous with the "custody" requirement for jurisdiction under other federal habeas statutes. In a divided panel decision, the Ninth Circuit below held, contrary to "every other federal appellate court to have addressed the question," Pet. App. 38a, that "detention" under the ICRA presents a far stricter standard than "custody" under other federal habeas statutes. Applying this heightened standard, the panel majority held that federal courts lacked subject matter jurisdiction to consider a tribe member's challenge to an order banishing her from all tribal land for 10 years without any process.

This case presents a question that divides the circuits: Should the "detention" requirement for habeas review under the ICRA be construed "more narrowly than" the "custody" showing required under other federal habeas statutes?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, also party to the proceedings below were Donna Caesar, Dolly Suehead, and Barbara Suehead, each of whom were dismissed by the Court of Appeals for the Ninth Circuit, and none of whom is filing a petition for certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jessica Tavares respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The divided panel decision of the United States Court of Appeals for the Ninth Circuit is published at 851 F.3d 863 and reproduced at Petition Appendix (Pet. App.) 1a-52a. The Ninth Circuit's order denying rehearing and rehearing en banc is reprinted at Pet. App. 78a. The decision of the district court is available at 2014 WL 1155798 (Mar. 21, 2014) and is reprinted at Pet. App. 53a-77a.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2016. The court of appeals' order denying the petition for rehearing and rehearing en banc was entered on April 24, 2017. Justice Kennedy extended the time to file a petition for certiorari to September 21, 2017. No. 17A60 (July 14, 2017). Jurisdiction in this Court rests on 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1303 of the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §1303, provides:

> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Section 1302 of the ICRA extends many of the civil rights protections contained in the Bill of Rights to members of Indian tribes. As relevant to petitioner's claims here, 25 U.S.C. §1302(a) provides:

> No Indian tribe in exercising powers of self-government shall—
>
> **(1)** make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> * * *
>
> **(8)** deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; * * *

STATEMENT OF THE CASE

The decision below breaks from more than 20 years of precedent—including decisions from several federal Courts of Appeals—on the scope of the habeas corpus remedy available under the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §1303. Since the Second Circuit's decision in *Poodry* v. *Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), federal courts have consistently treated "detention"—a requirement for habeas jurisdiction under §1303—as synonymous with "custody," the term used in other federal habeas statutes. See 28 U.S.C. §§2241, 2254, 2255. Indeed, as the dissent recognized, courts have become so used to treating the two standards as identical that "the bodies of law construing the 'detention' and 'custody' requirements" have become "interdependent"—"[j]ust as habeas courts applying the ICRA rely on authorities construing 'custody' in general habeas contexts, courts in general habeas contexts rely on authorities construing 'detention' under the ICRA." Pet. App. 32a-33a.

The panel majority below put an end to that equivalence by holding that courts must construe "detention" under §1303 far "more narrowly" than "custody" in all other federal habeas provisions. *Id.* at 26a. Accordingly, in the Ninth Circuit alone, a petitioner seeking federal habeas review of a tribal sanction under the ICRA must show a greater liberty deprivation (the Ninth Circuit strongly implies that only physical incarceration will suffice) than petitioners seeking review under any other habeas statute, who may challenge any "severe restraint[] on individual liberty," including parole and other limitations short of physical custody. *Id.* at 32a. The dissent below correctly observed that the majority's new rule "splits from every other federal appellate court to have addressed this question," *id.* at 38a, and at least one district court has already remarked on the Ninth Circuit's about-face. See *Napoles* v. *Rogers*, No. 16-CV-01933, 2017 WL 2930852, at *3 (E.D. Cal. July 10, 2017) (after acknowledging traditional *Poodry* rule, noting that "[t]he Ninth Circuit, however, has recently interpreted the 'detention' requirement under §1303 in a more restrictive manner than the 'in custody' requirement found in other federal habeas statutes").

Moreover, because habeas review under §1303 is the only federal remedy available for civil rights violations under the ICRA, *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 57-58 (1978), the scope of that remedy is of extraordinary practical importance. Petitioner is a tribal elder banished from all tribal land for 10 years—without process or right to appeal—for exercising her free speech rights under the ICRA. Outside the Ninth Circuit, she would be entitled to federal habeas review of the tribe's banishment order, relief that the Ninth Circuit's new rule forecloses. More

broadly, the Ninth Circuit's decision presents a recurring issue of national importance as banishment from tribal lands, already a centuries-old tribal sanction, is swiftly "becom[ing] the prevalent means of social control and punishment within tribal jurisdictions." Patrice H. Kunesh, *Banishment As Cultural Justice in Contemporary Tribal Legal Sys.*, 37 N.M. L. REV. 85, 145 (2007). This is distinct from tribal disenrollment, which implicates the tribe's right to define its membership, and is not at issue in this case. As a result of the new standard articulated by the court of appeals, tribal members such as petitioner may now be severely punished, even banished from their tribe for years, for exercising the very civil rights that the ICRA exists to protect.

A. The Indian Civil Rights Act of 1968

Congress enacted the ICRA in response to a series of cases, beginning in the late Nineteenth Century, foreclosing constitutional challenges in federal court to actions by Indian tribal authorities. See, *e.g.*, *Talton* v. *Mayes*, 163 U.S. 376, 384 (1896) (holding that habeas petitioner could not maintain federal court, Fifth Amendment challenge to tribal conviction, because tribal authority was "not operated upon by the fifth amendment"). In 1968, Congress exercised its "plenary authority" over Indian affairs "to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo*, 436 U.S. at 56, 57. The ICRA prohibits any tribe "exercising powers of self-government" from "mak[ing] or enfor[ing] any law * * * abridging the freedom of speech * * * or [the right] to petition for a redress of grievances" and "depriv[ing] any person of liberty or

property without due process of law." 25 U.S.C. §1302(a)(1), (8).

In *Santa Clara Pueblo*, this Court held that the ICRA did not create a civil cause of action in federal courts against tribal officials. 436 U.S. at 52. Instead, the ICRA's habeas corpus provision, "the only remedial provision expressly supplied by Congress," constitutes the sole means of enforcing the rights guaranteed by the ICRA in federal court. *Id.* at 58. This provision ensures that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. §1303.

B. Factual Background

Petitioner Jessica Tavares is a member of the United Auburn Indian Community ("UAIC" or "Tribe"), a federally recognized Indian tribe in California. Petitioner was a longtime leader of the UAIC, chairing the Tribal Council (the UAIC's primary governing body) from 1998 to 2010. Together with others in the Tribe, Tavares circulated a petition in 2011 to recall several Tribal Council members. Pet. App. 5a. The recall petition made serious allegations, including financial mismanagement, electoral misconduct, suppression of free expression, and denial of due process. *Ibid.* The Tribe's Election Committee rejected the petition based on procedural technicalities, including a newly drafted ordinance (that had not been provided to Tavares) requiring signatures on the petition to be notarized. *Id.* at 5a-6a.

Four days after the recall petition was rejected, the Tribal Council sent petitioner a notice of "discipline" that, among other sanctions, "'banned [her] from tribal lands and facilities, for a period of ten (10) years,'"

effective immediately.[1] Pet. App. 6a, 29a. She received no right to a hearing or an appeal to challenge her banishment. *Id.* at 7a. Under the Tribal Council's sentence, Tavares, who is a tribal elder, will not be allowed to return to tribal land until November 15, 2021. *Ibid.*

C. Proceedings Below

District Court. After exhausting her tribal administrative remedies for those elements of her sentence subject to appeal—including the withholding of economic benefits but *not* the 10-year banishment, for which no review process was available—petitioner sought federal habeas corpus relief from the banishment order under 25 U.S.C. §1303. She challenged the order as a violation of her rights guaranteed under §1302 of the ICRA, including her entitlement to due process, free speech, and to petition the tribal government for redress. Petition for Writ of Habeas Corpus Under Indian Civil Rights Act, *Tavares* v. *Whitehouse*, No. 13-CV-2101 (E.D. Cal. Oct. 10, 2013), ECF No. 1. With regard to jurisdiction, petitioner argued that "banishment is a sufficient restraint on liberty to constitute 'detention' within the meaning of §1303." Pet. App. 66a.

The district court acknowledged that the habeas petition "raise[d] troubling questions about the

[1] The other sponsors of the recall petition and petitioners below, Donna Caesar, Dolly Suehead, and Barbara Suehead, were banished for only two years. Their terms of banishment expired before the Ninth Circuit issued its decision below, and so they were dismissed from this litigation on mootness grounds. Pet. App. 13a n.8.

fundamental fairness of [petitioner's] continuing expulsion from her tribal homelands." Pet. App. 54a. And the court further recognized that, under then-existing Ninth Circuit law, which followed the Second Circuit's decision in *Poodry*, 85 F.3d 874 (2d Cir. 1996), "[t]he term 'detention' in the [ICRA] must be interpreted similarly to the 'in custody' requirement in other habeas contexts," meaning "actual physical custody is not a jurisdictional prerequisite for federal habeas review." Pet. App. 66a (alteration in original; internal quotation marks omitted). In the end, however, the district court dismissed the habeas petition for lack of subject matter jurisdiction, reasoning that petitioner's banishment did not rise to that level. Pet. App. 72a.

Ninth Circuit. A divided Ninth Circuit panel affirmed in a lengthy, published decision that revisited the established legal standard that petitioners must satisfy to qualify for habeas review under the ICRA. Unlike the district court, the panel majority rejected the rule that "detention" in the ICRA is synonymous with the "in custody" requirement in other federal habeas laws. Pet. App. 13a. Recognizing that "some provisions of the federal habeas statutes appear to use the terms ['detention' and 'custody'] synonymously," *id.* at 17a n.11, the court nevertheless concluded that "Congress's choice of 'detention' rather than 'custody' in §1303" signals "a meaningful restriction on the scope of habeas jurisdiction under the ICRA." *Id.* at 25a.

The court reasoned that, "[a]t the time Congress enacted the ICRA, 'detention' was generally understood to have a meaning distinct from and, indeed, narrower than 'custody.'" *Id.* at 14a. "'[D]etention' was commonly defined to require physical confinement." *Ibid.* In contrast, in the years leading up to the ICRA's passage

in 1968, "the Supreme Court had begun to expand the scope of 'custody' in the federal habeas statutes" beyond the traditional requirement of "physical custody, confinement, or detention." *Id.* at 15a. Specifically, in *Jones* v. *Cunningham*, 371 U.S. 236 (1963), the Court "expansively interpreted 'custody' to include continued oversight by criminal justice authorities with the prospect of revocation of parole and return to incarceration," and *Hensley* v. *Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, California*, 411 U.S. 345, 351 (1973), then defined "custody" for habeas purposes as any "severe restraint[] on individual liberty." Pet. App. 15a-16a (internal quotations omitted). The Ninth Circuit concluded that Congress, by using the word "detention" rather than "custody" in §1303, intended to reject this expansion on the traditional, physical custody prerequisite to habeas review in the ICRA. Pet. App. 16a. The panel majority found further support for this idea in a House committee memo that, in the court's view, "equated detention in the ICRA context with imprisonment." *Id.* at 17a.

The majority acknowledged that the Second Circuit took a contrary view in *Poodry*, which—far from limiting §1303 to cases involving physical custody—expressly adopted *Hensley*'s far broader, "severe restraints on [individual] liberty" test in allowing a tribal member to challenge her permanent banishment in federal habeas proceedings. Pet. App. 19a (internal quotations omitted). Whereas *Poodry* thus treated "detention" under the ICRA as synonymous with "custody" under other federal habeas laws, the Ninth Circuit rejected that approach, refusing to import "analysis from the ordinary habeas context" and "reading detention more narrowly than custody." Pet.

App. 24a, 26a. The court suggested grounds to distinguish *Poodry* but ultimately concluded that *Poodry*'s analysis failed on multiple levels, and the majority therefore "rejected" and took "issue with *Poodry*'s assertion[s]" and its "flawed analysis." *Id.* at 23a, 25a n.16.

Having interpreted §1303 not to reach beyond the "histor[ic]" restriction of habeas corpus to "physical custody, confinement, or detention," Pet. App. 15a, the panel majority turned to the facts of the case before it. While recognizing the "significance" of petitioner's 10-year banishment and the great "personal impact" it would have on her, the court concluded that "temporary exclusion is not tantamount to a detention." *Id.* at 25a, 27a. Therefore, petitioner could not challenge her banishment in federal court.

In dissent, Judge Wardlaw observed that the majority's "novel holding that an American Indian may be in 'custody' for purposes of the general habeas statues, but not in 'detention' for purposes of the ICRA's habeas statute," "splits from every other federal appellate court to have addressed this question." *Id.* at 37a-38a (citing decisions from Second, Sixth, and Tenth Circuits). Indeed, "[j]ust as habeas courts applying the ICRA rely on authorities construing 'custody' in general habeas contexts, courts in general habeas contexts rely on authorities construing 'detention' under the ICRA." *Id.* at 32a-33a.

And this until-now universally accepted position is correct, the dissent reasoned. As the Ninth Circuit itself previously held, "'[t]he term 'detention' in the [ICRA] statute must be interpreted similarly to the 'in custody' requirement in other habeas contexts.'" Pet. App. 32a (quoting *Jeffredo* v. *Macarro*, 599 F.3d 913,

918 (9th Cir. 2009)). Indeed, the dissent continued, in addition to the word "custody," "the word 'detention' *also* appears frequently throughout other sections of the federal habeas statutes," and "[t]here is no indication in any part of any section that the terms might have distinct meanings." Pet. App. 33a. "[I]f anything, the statutes suggest, as a whole, that 'detention' and 'custody' are interchangeable," which is "why the *Poodry* court declined to differentiate between" them. *Ibid.*

Under the rule applied outside the Ninth Circuit, the dissent concluded, petitioner's 10-year banishment would qualify easily for habeas review under the ICRA. In *Jones*, "the Supreme Court made clear that a habeas petitioner is in 'detention' or 'custody' when she is subjected to severe restraints on liberty that need not rise to the level of physical confinement." Pet. App. 38a-39a. Rather, "[a]s with 'custody,' the restraint on physical liberty is the essence of 'detention' under the ICRA," *id.* at 41a, and the dissent concluded that petitioner easily satisfies that standard. "Banishment is a uniquely severe punishment," and, accordingly, it "has generally been held to satisfy the 'in custody' requirement of the general habeas laws." *Id.* at 42a (quoting *Cohen's Handbook of Federal Indian Law* §9.09, 780-81 (Nell Jessup Newton ed., 2012)).

The dissent followed the Second Circuit's decision in *Poodry*, specifically, for its holding—contrary to the majority decision here—"that the scope of §1303 is equivalent to that of the general federal habeas statutes, and that therefore the petitioner's banishment orders" in that case "satisfied the 'detention' requirement of §1303." Pet. App. 45a. The dissent recognized the majority's emphasis on the fact that petitioner's banishment is not permanent. *Id.* at

45a-47a. "But the majority's opinion does not explain why the duration of [her] banishment is legally relevant," for "[t]he writ of habeas corpus addresses the fact of detention, not its duration," and "habeas relief is available to a prisoner no matter the length of his sentence." *Id.* at 48a (emphasis omitted). Indeed, the dissent continued, citing specific federal habeas decisions, "[i]f fourteen hours of mandatory attendance at an alcohol rehabilitation program, or five hundred hours of mandatory community service, is long enough to severely restrain an individual's liberty" for habeas purposes, "then surely ten years—more than eighty thousand hours—of banishment is, too." *Ibid.* (citations omitted). In short, "[w]hether under the law of our circuit or that of any other to consider the issue, Tavares's banishment places her in 'custody,'" and, under the until-now universal rule treating the two as synonymous, she is therefore "in 'detention.'" *Id.* at 42a.

The Ninth Circuit denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Creates A Split In The Circuits.

By holding that courts must read "detention" in §1303 of the ICRA "more narrowly than custody" in other habeas laws, the decision below breaks sharply from 20 years of federal precedent, including settled law in the Second, Third, Sixth, and Tenth Circuits. The difference in legal standards is significant, moreover. In *Jones*, 371 U.S. at 243, this Court held that individuals need not be physically incarcerated to be in "custody * * * within the meaning of the federal habeas corpus statute," 28 U.S.C. §2241, but that it is

"enough to invoke the help of the Great Writ" that the sentence or other conditions imposed "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." The cases that followed *Jones* have reinforced its holding that the writ of habeas corpus provides "a remedy for" all "severe restraints on individual liberty" and that physical custody therefore is not a prerequisite for relief. *Hensley* v. *Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cty., California*, 411 U.S. 345, 351 (1973).

1. Prior to the Ninth Circuit's decision here, federal courts across the country interpreted the "detention" requirement of the ICRA's habeas corpus provision like other federal habeas provisions, applying the rule from *Jones* and its progeny. Indeed, the leading treatise on federal Indian law states unequivocally that courts addressing the scope of §1303 have unanimously "held that the 'detention' language should be interpreted the same as the 'in custody' requirement in other habeas contexts." 1-9 *Cohen's Handbook of Federal Indian Law* §9.09 (2017).

The first federal court of appeals to address this issue was the Second Circuit in *Poodry*, which considered "whether the habeas corpus provision of the Indian Civil Rights Act of 1968, 25 U.S.C. §1303, allows a federal court to review punitive measures imposed by a tribe upon its members, when those measures involve 'banishment' rather than imprisonment." 85 F.3d at 879. The petitioners were members of a tribe of Seneca Indians who, like petitioner did here, raised serious allegations of misconduct among tribal leaders. *Id.* at 877. Tribal officials retaliated by declaring the petitioners guilty of "treason" and (among other sanctions) permanently

banishing them from the reservation. *Id.* at 876. The petitioners in *Poodry* challenged their banishment by filing a habeas petition under §1303 of the ICRA. *Ibid.*

The district court dismissed the petition for lack of subject matter jurisdiction, holding that "the banishment orders failed to give rise to a sufficient restraint on liberty to satisfy the traditional test for the availability of habeas relief." *Id.* at 890. Petitioners appealed, arguing that the ICRA's habeas provision is "more expansive" than other federal habeas provisions and, in the alternative, that their banishment "satisf[ied] the jurisdictional prerequisites of analogous habeas statutes." *Ibid.*

The Second Circuit declined to recognize *any* difference in scope between the ICRA and other federal habeas provisions, holding that it "must conduct the same inquiry under §1303 as required by other habeas statutes." *Poodry*, 85 F.3d at 890. In sharp contrast to the Ninth Circuit majority here, see Pet. App. 14a-17a, the Second Circuit attached no significance to the ICRA's use of the word "detention" instead of "custody," observing that other federal habeas laws used the two terms interchangeably:

> We find the choice of language unremarkable in light of references to "detention" in the federal statute authorizing a motion attacking a federal sentence, see §2255, as well as in the procedural provisions accompanying §2241, see §§2242, 2244(a), 2245, 2249. Congress appears to use the terms "detention" and "custody" interchangeably in the habeas context.

Id. at 890-91.

The Second Circuit also reviewed the ICRA's legislative history and drew the opposite conclusion

from the majority below. *Poodry* observed that the "language of §1303—permitting any person 'to test the legality of his detention by order of an Indian tribe'—was first introduced by the Department of the Interior at the 1965 Senate subcommittee hearings, and closely tracks the language of *Colliflower* v. *Garland,* 342 F.2d 369 (9th Cir. 1965), a case frequently invoked with approval during the 1965 hearings." *Ibid.* (citation omitted). And *Colliflower*, in turn, used the word "detention" in interpreting §2241, without any suggestion that the decision to use this term in lieu of "custody" had any significance. *Ibid.*; see also *Colliflower,* 342 F.2d at 379. Indeed, the *Colliflower* court itself used the two words interchangeably, thus confirming the lack of differentiation between them. See *id.* at 373.

Accordingly, the Second Circuit concluded that the ICRA's habeas corpus provision was "no broader than analogous statutory provisions for collateral relief," and thus, "[a]s with other statutory provisions governing habeas relief, one seeking to invoke jurisdiction of a federal court under §1303 must demonstrate, under *Jones* * * * and its progeny, a severe actual or potential restraint on liberty." *Poodry*, 85 F.3d at 880, 893. Applying that principle, the court held that "petitioners have surely identified severe restraints on their liberty." *Id.* at 895. "Indeed," the court held, petitioners' "permanent banishment alone * * * would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus." *Ibid.* "[B]anishment is a fate 'universally decried,'" the court continued, and the "severity of banishment as a restraint on liberty is well demonstrated by" this Court's precedent. *Id.* at 895-96.

2. Other federal courts have consistently agreed with *Poodry* that §1303's "detention" requirement is coextensive with "custody" in other federal habeas statutes.

a. The Tenth Circuit, in *Dry* v. *CFR Court of Indian Offenses for Choctaw Nation*, 168 F.3d 1207 (10th Cir. 1999), applied *Poodry* to habeas petitions under the ICRA. The court "read the 'detention' language [of §1303] as being analogous to the 'in custody' requirement contained in 28 U.S.C. §2241" and held that the petitioners "must meet the custody requirement * * * whether the district court bases its jurisdiction on 25 U.S.C. §1303 or 28 U.S.C. §2241." *Id.* at 1208 n.1 (citing *Poodry*). Invoking the rule from *Jones* and its progeny that a habeas "petitioner need not show actual, physical custody to obtain relief" but need only demonstrate "severe restraints on [his or her] individual liberty," the court held that the release of the petitioners on their own recognizance was "sufficient to meet the 'in custody' requirement" because, though "ostensibly free to come and go as they please, [petitioners] remain[ed] obligated to appear for trial at the court's discretion." *Id.* at 1208.

The Tenth Circuit has since reaffirmed the point, holding squarely that the "'detention' language in §1303 is analogous to the 'in custody' requirement contained in the federal habeas statute." *Walton* v. *Tesuque Pueblo*, 443 F.3d 1274, 1279 nn.1-2 (10th Cir. 2006) (dismissing a §1303 habeas petition in part because the petitioner could not demonstrate actual banishment from tribal lands, and citing *Poodry* for the proposition that a "tribe member's banishment from tribal lands [was] sufficient to confer jurisdiction under §1303"); see also *Valenzuela* v. *Silversmith*, 699 F.3d 1199, 1203 (10th Cir. 2012) ("We have recognized

that the 'detention' language in §1303 is analogous to the 'in custody' requirement contained in the other federal habeas statutes.") (brackets and internal quotation marks omitted).

b. Law in the Sixth Circuit is the same. In *Kelsey* v. *Pope*, 809 F.3d 849, 854 (6th Cir. 2016), the court applied the standard of review for §2241 petitions to §1303, citing *Poodry* for its rule that "habeas claims brought under the Indian Civil Rights Act, 25 U.S.C. §1303, are most similar to habeas actions arising under 28 U.S.C. §2241."

c. The Third Circuit likewise treats "detention" in §1303 as synonymous with "custody" in other habeas statutes. Indeed, that circuit offers an example of the "interdependen[ce]" that the dissent below described, wherein, "[j]ust as habeas courts applying the ICRA rely on authorities construing 'custody' in general habeas contexts"—as the Second, Sixth, and Tenth Circuits have done—"courts in general habeas contexts rely on authorities construing 'detention' under the ICRA." Pet. App. 32a-33a. In *Barry* v. *Bergen Cty. Prob. Dep't*, 128 F.3d 152, 160-61 (3d Cir. 1997), the Third Circuit held that a sentence to 500 hours of community service met the "in custody" requirement of §2254(a), relying on the Second Circuit's analysis of "detention" under the ICRA in *Poodry*.[2]

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[2] In addition to decades of clear law from the courts of appeals, district courts across the country have followed *Poodry* and consistently applied the habeas standard from *Jones* to §1303 petitions. See, *e.g.*, *Stymiest* v. *Rosebud Sioux Tribe*, No. CIV. 14-3001, 2014 WL 1165925, at *2-3 (D.S.D. Mar. 21, 2014) (drawing from precedent applying other federal habeas corpus statutes and applying *Jones* and its progeny to hold that petitioner could

3. The ruling below conflicts squarely with these authorities.[3] The Ninth Circuit rejected the principle in other circuits that courts "must conduct the same inquiry under §1303 as required by other habeas statutes." *Poodry*, 85 F.3d at 890. Instead, the Ninth

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challenge tribal conviction under §1303 despite completing his sentence because the fact of his tribal conviction had been used to enhance other sentences); *Quitiquit* v. *Robinson Rancheria Citizens Bus. Council*, No. 11-CV-0983, 2011 WL 2607172, at *6 (N.D. Cal. July 1, 2011) ("The term 'detention' in §1303 is interpreted similarly to the 'in custody' requirement in other habeas contexts. For purposes of habeas corpus, a person is 'in detention' or 'in custody' when severe restraints are imposed upon the person's liberty.") (citations omitted); *Payer* v. *Turtle Mountain Tribal Council*, No. A4-03-105, 2003 WL 22339181, at *4-5 (D.N.D. Oct. 1, 2003) (adopting *Poodry*'s analysis and "construe[ing] the terms 'custody' and 'detention' coextensively," then applying *Jones* to hold that "steps resembling an adverse employment action" did not qualify as a "sufficiently severe restraint on [] liberty" to be cognizable under §1303); see also *Kanivets* v. *Riley*, 286 F. Supp. 2d 460, 463-64 (E.D. Pa. 2003) (relying in part on *Poodry* to interpret §2241's "in custody" requirement); *May* v. *Guckenberger*, No. C-1-00-794, 2001 WL 1842462, at *2 (S.D. Ohio Apr. 26, 2001) (same).

[3] The decision below even rejects the Ninth Circuit's own prior rule that "[d]etention [under §1303] is interpreted with reference to custody under other federal habeas provisions." *Boozer* v. *Wilder*, 381 F.3d 931, 934 n.2 (9th Cir. 2004) (citing *Poodry* and *Moore* v. *Nelson*, 270 F.3d 789, 791-92 (9th Cir. 2001), which "rel[ied] on habeas cases interpreting custody to analyze detention under ICRA"); see also *Lewis* v. *White Mountain Apache Tribe*, 584 F. App'x 804, 804 (9th Cir. 2014) ("court could not grant [petitioner] habeas relief unless he was in 'detention,' §1303, or its functional equivalent, 'custody'"). Indeed, in *Jeffredo* v. *Macarro*, 599 F.3d 913 (9th Cir. 2010), the Ninth Circuit expressly adopted *Poodry*'s holding that *Jones* applies to §1303. *Id.* at 919.

Circuit rule is now that "Congress's use of" the word "'detention' * * * narrow[ed] the scope of federal habeas jurisdiction over ICRA claims" and that courts therefore must "read[] detention more narrowly than custody," as the latter term is used in other habeas statutes. Pet. App. at 17a, 26a. More specifically, unlike other circuits to address the issue, the Ninth Circuit now affirmatively rejects the application of *Jones* and its progeny to §1303, holding that the "ICRA's habeas provision" should not be "read in light of that jurisprudence." *Id.* at 16a. As a result, the decision below did not address the merits of Tavares's argument that her banishment was a significant restraint on her liberty and affirmed the district court's dismissal of her petition, despite acknowledging the "significance" of the banishment order and the great "personal impact" it would have on her. *Id.* at 27a. The majority opinion below thus openly rejects *Poodry*'s legal standard—although the opinion fails to acknowledge its break from law in the three other circuits as well—"reject[ing]" and taking "issue with *Poodry*'s assertion[s]" and its "flawed analysis." *Id.* at 23a, 24a-25a n.16.

At times, the opinion below also makes an effort to describe *Poodry*'s holding as more limited (although, even if successful, this effort overlooks the Ninth Circuit's break with law in other circuits). To be sure, at times *Poodry* says "that 'detention' should not be construed more *broadly* than 'custody,'" but this does not suggest that the Second Circuit leaves open the possibility of reading §1303 more *narrowly*, as the majority below suggests. Pet. App. 16a.

The petitioners in *Poodry* argued that "detention" should be read "more expansive[ly]" than "custody," *Poodry*, 85 F.3d at 889-91; accordingly, it is no surprise

that the Second Circuit phrased its rejection of that argument by noting that "detention" is "no broader" than "custody." Pet. App. 19a. Moreover, the Ninth Circuit's crabbed reading is not how other courts read *Poodry*, and it is not the holding these courts have reached. As the dissent observed, see Pet. App. 32a-36a, and as set forth immediately above, the Third, Sixth, and Tenth Circuits follow *Poodry* in holding that "detention" and "custody" are synonymous. Cf. *Vega* v. *Schneiderman*, 861 F.3d 72, 74 (2d Cir. 2017) (interpreting the "in custody" requirement of §2254 and citing *Poodry* for the principle that "[t]he focus is not so much on actual physical custody, but 'the severity of an actual or potential restraint on liberty'").

Nor is there anything to the notion, also raised by the majority below, that the Second Circuit modified its holding in *Poodry* with its later decision in *Shenandoah* v. *U.S. Department of the Interior*, 159 F.3d 708 (2d Cir. 1998). In fact, *Shenandoah* expressly applied *Poodry*'s holding that the scope of §1303 is synonymous with that of other federal habeas corpus statutes and that individuals therefore may bring habeas petitions under the ICRA if they can show "a 'severe actual or potential restraint on their liberty.'" *Id.* at 714 (quoting *Poodry*, 85 F.3d at 880) (brackets omitted). It is thus no surprise that the many courts that have adopted *Poodry*'s rule recognize no limitation on its holding.

Finally, the Ninth Circuit attempted to distinguish *Poodry* factually, suggesting that the Second Circuit had confined its decision to cases of "permanent banishment." Pet. App. at 43a. Of course, whether the cases are distinguishable factually does nothing to change the Ninth Circuit's decision to split with four other circuits in rejecting their *legal* rule. In fact,

however, *Poodry* nowhere suggests that its holding rests on the *duration* of the banishment in that case, and Second Circuit cases applying *Poodry* are clear that the inquiry focuses on "the nature, rather than the duration, of the restraint." *Nowakowski* v. *New York*, 835 F.3d 210, 216 (2d Cir. 2016) ("courts have considered even restraints on liberty that might appear short in duration or less burdensome than probation or supervised release severe enough because they required petitioners to appear in certain places at certain times * * * or exposed them to future adverse consequences on discretion of the supervising court") (collecting cases). Likewise, other federal courts have applied *Poodry* to hold that "temporary banishment" from tribal lands is subject to federal habeas challenge under §1303. See, *e.g.*, *Colebut* v. *Mashantucket Pequot Tribal Nation Tribal Elders Council*, No. 05-CV-00247, 2007 WL 174384, at *2-3 (D. Conn. Jan. 19, 2007) (finding subject matter jurisdiction over petitioner's §1303 petition challenging "temporary banishment" before ultimately dismissing petition as moot once banishment was lifted).

In sum, if petitioner had challenged her banishment in the Second, Third, Sixth, or Tenth Circuit, the district court would have exercised jurisdiction over her habeas petition. And the significance of the decision below is already being felt, as district courts in the Ninth Circuit are recognizing that, unlike under the *Poodry* rule that prevailed for 20 years, "the decision in *Tavares* now makes it abundantly clear that any extension of 'detention' under §1303 beyond actual physical custody must be narrowly construed by courts of this circuit." *Napoles*, 2017 WL 2930852, at *5. This Court should grant

certiorari review to restore uniformity among the federal courts on this issue.

II. The Issue Is Important And Recurring.

The circuits are divided over a recurring and important question of federal law. Interpreting §1303 more narrowly than all other federal habeas statutes frustrates a key purpose of the ICRA and creates an unjust disparity. Moreover, as banishment becomes an increasingly prevalent form of tribal punishment, the Ninth Circuit rule will have a particularly severe impact on those seeking to challenge this extraordinary sanction.

1. With the ICRA, Congress sought to combat "the most serious abuses of tribal power," *Santa Clara Pueblo*, 436 U.S. at 71, by granting many of the substantive protections from the Bill of Rights and the Fourteenth Amendment to members of Indian tribes. See 25 U.S.C. §1302. The only means for enforcing those rights in federal court, however, is the habeas provision in §1303. *Santa Clara Pueblo*, 436 U.S. at 57-58. The Ninth Circuit's decision drastically circumscribes that sole federal remedy, effectively limiting the rights Congress enumerated in the ICRA to petitioners in actual, "physical custody." Pet. App. 15a.

The circumstances of petitioner's banishment illustrate the importance of protecting the vitality of §1303 as the only available remedy for an Indian tribe's violations of its members' civil rights. Tavares circulated a petition to recall members of elected tribal government as an exercise of her right to free speech. Pet. App. 5a. The tribal government responded by quashing the petition and banishing her for 10 years—all without holding a hearing or providing any forum

for appealing or otherwise challenging her punishment. *Ibid.* In short, Tavares has had no means to vindicate the free speech and due process rights that the ICRA guarantees. See 25 U.S.C. §1302(a)(1), (8). The Ninth Circuit's rule would deprive her of the only federal outlet for review as well. *Santa Clara Pueblo*, 436 U.S. at 57.

The impact of the court of appeals' decision below is already being felt. In *Napoles* v. *Rogers*, decided after the Ninth Circuit's opinion issued in this case, the district court dismissed a §1303 petition stemming from a tribe's attempts to expel some of its members from their family land "for the purpose of expanding a casino, adding parking, and constructing a hotel." 2017 WL 2930852, at *1. As the court recognized, "*Tavares* now makes it abundantly clear that any extension of 'detention' under §1303 beyond actual physical custody must be narrowly construed by courts of this circuit." *Id.* at *5. Applying that principle, the district court dismissed the habeas petition because the petitioners were "not currently detained, have never been in physical custody, and cannot face such confinement as a result of the" tribal sanctions. *Id.* at *6. "Even to the extent petitioners fear the issuance of additional trespass citations or *exclusion from the disputed land*," the court continued, under *Tavares* "their allegations are nonetheless simply insufficient to support a finding that a 'detention' has occurred within the meaning of §1303." *Ibid.* (emphasis added).

Limiting habeas corpus under §1303 to cases involving "physical custody" will strip tribal members of their ability to challenge sentences of probation, suspended sentences, community service, and other non-custodial sanctions that put severe restraints on their liberty—sentences long recognized as sufficient to

trigger habeas jurisdiction for anyone sentenced in a non-tribal court. See *Poodry*, 85 F.3d at 894 (collecting authority).

2. Critically, the Ninth Circuit's new rule also forecloses habeas review for those, like petitioner here, who are banished from tribal land. Indeed, commentators have observed that banishment is "becom[ing] the prevalent means of social control and punishment within tribal jurisdictions." Patrice H. Kunesh, *Banishment As Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 145 (2007):

> [S]ince the [*Santa Clara* v. *Martinez*, 436 U.S. 49, 71 (1978)] opinion in 1978, (but coinciding most directly with the emergence of high stakes gambling operations authorized under the Indian Gaming Regulatory Act of 1988 and with the dramatically increasing levels of criminal activity in Indian country) a number of indigenous governments in over a dozen states have been * * * initiating either banishment proceedings or disenrollment procedures * * *.

David E. Wilkins, *A Most Grievous Display of Behavior: Self-Decimation in Indian Country*, 2013 MICH. ST. L. REV. 325, 330 (2013) (hereinafter, "Wilkins, *Grievous Display*").[4] *Id.* at 331.

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[4] Indian communities across the country are employing banishment with increasing frequency. In the Fond du Lac Reservation in Minnesota alone, for instance, at least 77 people were banished between 2001 and 2014 in a community of only about 4,200. Donna Ennis, *The High Cost of Tribal Banishment*,

And it is difficult to overstate the personal impact of banishment. One observer from the Fond du Lac Reservation described "[b]anishment [a]s another form of cultural genocide and an example of internalized oppression." Donna Ennis, *The High Cost of Tribal Banishment*, INDIAN COUNTRY TODAY (Oct. 7, 2014), https://indiancountrymedianetwork.com/news/opinions/the-high-cost-of-tribal-banishment/. "[B]anishment has been called cruel and unusual punishment, a violation of one's right to travel, and a violation of substantive due process." Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 457 (1998). As the Second Circuit observed in *Poodry*, the "severity of banishment as a restraint on liberty is well demonstrated by" Supreme Court precedent. 85 F.3d at 895 (citing *Trop* v. *Dulles*, 356 U.S. 86, 102 (1958)).

INDIAN COUNTRY TODAY (Oct. 7, 2014), https://indiancountrymedianetwork.com/news/opinions/the-high-cost-of-tribal-banishment/; see Fond du Lac Band of Lake Superior Chippewa, www.fdlrez.com. Other "tribes [that] have or are in the process of banishing or disenrolling tribal citizens" in recent years include, without limitation: "the Las Vegas Paiutes (Nevada); the Sauk-Suitattle (Washington state); the Oneida Nation (New York); the Tonawanda Band of Seneca (New York); the Lummi (Washington state); the Mille Lacs Band, Grand Portage Band and Boise Forte Band of Ojibwe (Minnesota); the Sac and Fox (Iowa); and the Narragansett Tribe (Rhode Island)." David Wilkins, *Self-Determination or Self-Decimation? "Banishment and Disenrollment in Indian Country*," INDIAN COUNTRY TODAY (Aug. 30, 2006), http://indiancountrytodaymedianetwork.com/ictarchives/2006/08/30/self-determination-or-self-decimation-banishment-and-disenrollment-in-indian-country-127773.

The Ninth Circuit offers that the remedy for banished members like petitioner "is with the Tribe, not in the federal courts." Pet. App. 28a. Yet the ICRA was passed precisely to provide a *federal* forum to enforce the civil rights of tribe members where, as here, a tribe offers no means to challenge criminal sentences imposed on its members for exercising those rights.

3. Further, the Ninth Circuit's decision is likely to have a disproportionately large practical impact, for the "greatest concentration of disenrollments are occurring within the small nations of California." David Wilkins, *Self-Determination or Self-Decimation? "Banishment and Disenrollment in Indian Country*," INDIAN COUNTRY TODAY (Aug. 30, 2006), http://indiancountrytodaymedianetwork.com/ictarchives/2006/08/30/self-determination-or-self-decimation-banishment-and-disenrollment-in-indian-country-127773.

In fact, the Ninth Circuit is home to roughly 58 percent of all Indian reservations in this country.[5] Accordingly, the Circuit's new rule affects a huge share of the population eligible to seek redress under the ICRA.

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[5] Approximately 190 of the 326 Indian reservations in the United States are located in the Ninth Circuit. See *Frequently Asked Questions, Bureau of Indian Affairs*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/frequently-asked-questions; Geographic Identifiers, 2010 Census Summary File 1, American Factfinder, available at https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml; see also Reservations by State, AAANATIVEARTS.COM, https://www.aaanativearts.com/reservations-by-state.

III. The Ninth Circuit's Decision Is Erroneous.

Contrary to the decision below, the "term 'detention' in the [ICRA] must be interpreted similarly to the 'in custody' requirement in other habeas contexts." *Jeffredo*, 599 F.3d at 918. The Ninth Circuit based its decision on Congress's use of the term "detention" rather than "custody" in §1303, asserting that "custody" appears in "every" other federal habeas statute. Pet. App. 13a n.9. In fact, however, "detention" *also* appears in most sections of the other federal habeas laws. See, *e.g.*, 28 U.S.C. §§2242, 2243, 2244, 2255 (referring to "detention" and "custody" interchangeably). And "custody" does not appear in "every" federal habeas statute, as the majority below insisted. See, *e.g.*, 28 U.S.C. §§ 2245, 2249, 2253 (using "detention" but not "custody").

At the same time, nothing in the ICRA's legislative history suggests that Congress intended to "narrow the scope of federal habeas jurisdiction over ICRA claims," as the Ninth Circuit determined. Pet. App. 17a. Congress does not appear to discuss the scope of the "detention" requirement, much less address this Court's then-recent application of habeas corpus beyond cases of physical confinement. In fact, to the extent that the legislative history says anything about the intended scope of the ICRA's habeas corpus provision, it "suggests that §1303 was to be read coextensively with analogous statutory provisions." *Poodry*, 85 F.3d at 891.

In short, the Ninth Circuit's decision not only creates a split in the Circuits on a critical issue, but the legal rule it adopts is in error.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-15814

Jessica Tavares; Dolly Suehead; Donna Caesar; Barbara Suehead
Petitioners–Appellants

v.

Gene Whitehouse; Calvin Moman; Brenda Adams; John Williams; Danny Rey, in their official capacity as members of the Tribal Council of the United Auburn Indian Community

Respondents-Appellees.

Filed March 14, 2017

Before McKEOWN, *Circuit Judge*.

Opinion

This appeal tests the limits of federal court jurisdiction to hear a habeas petition brought under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301–1303, where the underlying claim arises not from an

actual detention or imprisonment, but instead from a tribe's temporary exclusion of its own members.[1]

Congress enacted the ICRA in 1968 in response to a "long line" of federal court decisions exempting Indian tribes from constitutional restraints. *See* Cohen's Handbook of Federal Indian Law § 1.07, at 97 (Nell Jessup Newton ed., 2012) [Cohen's]; *see also Michigan v. Bay Mills Indian Cmty.*, —U.S.—, 134 S. Ct. 2024, 2030, 2037, 188 L. Ed. 2d 1071 (2014) (noting that Indian tribes possess a "special brand of sovereignty" that predates, and is consequently not bound by, the Constitution). The Act extended to tribes most (but not all) of the civil protections in the Bill of Rights. *See* David H. Getches et al., Federal Indian Law 380–81 (6th ed. 2011). The ICRA created a new federal habeas remedy "to test the legality of ... detention by order of an Indian tribe." 25 U.S.C. § 1303. Because § 1303 provides the exclusive federal remedy for tribal violations of the ICRA, unless a petitioner is in "detention by order of an Indian tribe," the federal courts lack jurisdiction over an ICRA challenge and the complaint must be brought in tribal court. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 67, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

The question here is whether a temporary exclusion from tribal land, but not the entire reservation,

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[1] The parties dispute whether the petitioners were temporarily "banished" or temporarily "excluded." We use the term "exclusion," but ascribe no special significance to the word. *See* Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. Rev. 85, 88 n.17 (noting that "exclusion" and "banishment" are often used interchangeably).

constitutes a detention under the ICRA. Reading the ICRA's habeas provision in light of the Indian canons of construction and Congress's plenary authority to limit tribal sovereignty, we hold that the district court lacked jurisdiction under § 1303 of the ICRA to review this temporary exclusion claim.

BACKGROUND

Before the first Europeans arrived in California, as many as 350,000 Indians lived within the state's borders, speaking up to eighty different languages. S. Rep. No. 103-340, at 1 (1994). By the time Mexico ceded California to the United States in 1848, the indigenous population had dropped to approximately 150,000 people; by 1900, it had plummeted to about 15,000. *Id.* at 1–2. This decline was not, of course, unique to California, but instead mirrored the effects of disease, war, and removal policies on tribes across the country.

One of the indigenous groups still in California at the turn of the century was the Auburn Band, "a small, cohesive band of Indians" that lived about forty miles outside of Sacramento. *Id.* at 4. By 1953, the federal government had acquired forty acres of land (the "Auburn Rancheria" or "Rancheria") in trust on the Band's behalf. *Id.* But by the mid-1950s, Congress adopted a policy of "assimilation through termination," Cohen's § 1.06, at 85, and the Auburn Rancheria was ultimately terminated in 1967. S. Rep. No. 103-340, at 5. As a result, "[R]ancheria lands formerly held in tribal or community ownership" were divided and distributed. H.R. Rep. No. 103-812, at 22 (1994).

The Tribe's history is a micro reflection of congressional seesawing on tribal governance over the

past century. The so-called Termination Era of the 1950s saw Congress end the "historic relationships" between specified tribes and the federal government, defund federal tribal assistance programs, and give named states civil and criminal jurisdiction over individual Indians with an option for other states to assume such jurisdiction. Cohen's § 1.06, at 91. It was in this context that the Rancheria was terminated.

But blowback to the "disastrous results" of termination came swiftly, and by the 1960s, the federal government had adopted a policy of strengthening tribal self-government and self-determination. *Id.* § 1.07, at 94. This shift in focus led Congress to "enact[ ] special acts restoring a substantial number of previously terminated tribes," *Id.* § 1.07, at 97, including the Auburn Indian Restoration Act in 1994, 25 U.S.C. § 1300*l* –1300*l*-7.

Today, the historic Band is known as the United Auburn Indian Community ("UAIC" or "Tribe"). The UAIC owns twelve parcels of land on the historic Rancheria, including a preschool, a community service center, foster homes, and recreational facilities. It also owns off-Rancheria facilities, including the Thunder Valley Casino Resort. The remaining twenty-one parcels of land on the Rancheria are privately owned, not tribally owned or controlled.

In keeping with the goals of current federal Indian policy, the Tribe is self-governing. It is run by an elected five-member Tribal Council, which enacts legislation and takes executive action. The Council also disciplines tribal members for civil violations of the Tribe's constitution and ordinances. Like many tribes today, the UAIC does not have a criminal code

and does not exercise criminal jurisdiction over its members.

The Tribe adopted a constitution and bylaws, three of which are particularly implicated by this appeal. Ordinance 2004-001 III(B) imposes a duty on all tribal members "to refrain from damaging or harming tribal programs or filing of false information in connection with a tribal program." Ordinance 2004-001 III(I) requires members to "refrain from defaming the reputation of the Tribe, its officials, its employees or agents outside of a tribal forum[.]" And the Enrollment Ordinance provides that a Tribe member can be punished—up to and including disenrollment—for making misrepresentations against the Tribe.

This appeal arises out of actions taken by the Tribal Council in 2011. Petitioners Jessica Tavares, Dolly Suehead, Donna Caesar, and Barbara Suehead (collectively, "the petitioners") disagreed with how the Council was governing internal tribal affairs and, on November 7, 2011, they submitted a recall petition to the Tribe's Election Committee.[2] The recall petition raised a litany of allegations against the members of the Council: financial mismanagement, retaliation, electoral irregularity, denial of due process, denial of access to an audit, and restrictions on access to Tribe members' mailing addresses. The Election Committee rejected the recall petition after determining that it did not have signatures from for-

[2] Under the Tribe's constitution, "[u]pon receipt of a petition signed by at least forty percent (40%) of the qualified voters of the [UAIC], it shall be the duty of the Election Committee established by this Constitution to call and conduct within thirty (30) days an election to consider the recall of an elected official."

ty percent of tribal members, some of the signatures were not notarized, and some signatories did not provide a date and address, as required by a tribal ordinance.[3]

Around the same time, the petitioners circulated to mass media outlets two press releases detailing their complaints. The first press release stated that the Council had engaged in "questionable financial practices" and "cover-ups of financial misdealings," that the Council had "fraudulently" refused to conduct a financial audit of the Tribe's resources, and that the Tribe's elections were "dishonest and rigged." After the Election Committee denied the recall petition, the petitioners circulated the second press release, which alleged that the Council had "scuttle[d]" the petition.

Four days after the recall petition was rejected, the Council sent each petitioner a Notice of Discipline and Proposed Withholding of Per Capita. The Notices stated that the petitioners' press releases "contained numerous inaccurate, false and defamatory statements" that wound up being published in non-tribal news outlets like the *Sacramento Bee*. The Notices informed the petitioners that, through the press releases, the petitioners had "[r]epeatedly libel[ed] and slander[ed] the Tribe and its agents maliciously and in disregard of the truth in non-tribal forums" and had taken "[h]armful and damaging actions to tribal programs, specifically our tribal businesses and government, and provid[ed] outsiders

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[3] The petitioners claim that the petition did in fact have signatures from forty percent of the Tribe and that they had no notice of the other requirements. This dispute is not before us; we take no position on which version of the facts is true.

with false information about tribal programs," in violation of tribal law. The Notices also stated that the Council had voted to withhold the petitioners' per capita distributions and to ban them temporarily from tribal lands and facilities.

The exclusion orders were effective immediately. The petitioners were barred from tribal events, properties, offices, schools, health and wellness facilities, a park, and the casino. During their terms of exclusions, the petitioners could not run for tribal office, but they could vote in tribal elections through absentee ballots. They were not excluded from the twenty-one privately owned parcels of land, including their own homes and land owned by other members of the Tribe, and they retained their tribal health care benefits. Tavares was excluded for ten years, while the others were excluded for two years. None of the petitioners had a right to a hearing or an appeal on the exclusion orders.

The Notices also stated that the Council intended to withhold the petitioners' "per capita distributions and all other financial benefits and membership privileges," excluding health care benefits, for four years (as to Tavares) and six months (as to the others). Unlike the exclusion orders, the withholding orders were not effective immediately. Instead, the petitioners were entitled to a hearing before the Council and to an appeal. The Council confirmed the proposed suspension of the petitioners' per capita distributions after a hearing.

On appeal, the Appeals Board affirmed the Council's findings and actions in a thirty-page thoroughly-reasoned decision. It rejected the petitioners' constitutional challenge to the Tribe's anti-defamation ordinance on three grounds: (1) the peti-

tioners' arguments "ignore[d] entirely federal Indian law," (2) the ordinance "d[id] not violate the Tribe's Constitution," and (3) the ordinance satisfied federal constitutional standards. The Appeals Board affirmed the Council's finding that the petitioners had violated tribal law, concluding that the press releases "sounded a loud (and inaccurate) warning bell to [local businesses and governments] that decisions made by our Tribe and casino may not be reliable, and even illegal, and that our Tribe and casino may not be a stable partner for business or even accepting a donation." According to the Appeals Board, the petitioners' "sensationalized publicity stunt ... harms the Tribe, its government infrastructure, its business activities ..., and the future of tribal members. It has been our tribal custom and tradition to protect this Tribe and its institutions from the harm caused by this type of defamation outside the tribal forum. Our ability to be taken seriously as a tribal government and business partner depends on it."

The Appeals Board concluded that the length of the original withholding orders was fair, but acknowledged the unique cultural factors at play: "We, as tribal members, have distrust of authority bred into us, after centuries of broken promises. We also are concerned about each individual appellant here, who all have families. We are a Tribe composed of a few extended families. Each of us has dependents who we care for. The culture and tradition of this Tribe has been to take care of each other." Thus, "after reflection on and discussion about our tribal customs and traditions and values," the Appeals Board reduced Tavares' per capita withholding by six months (making her ultimate withholding sanction total three-and-a-half years) and the other petition-

ers' per capita withholding by one month (making their withholding sanctions total five months).[4]

The petitioners filed a petition for a writ of habeas corpus in federal court under 25 U.S.C. § 1303 of the ICRA against the members of the Council.[5] The district court dismissed the petition for lack of subject matter jurisdiction, concluding that the petitioners' punishment was not a "detention" sufficient to invoke federal habeas jurisdiction.

ANALYSIS

I. Principles Animating Habeas Jurisdiction Under § 1303 of the Indian Civil Rights Act

We ground our opinion in two foundational principles in the Indian law canon—tribal sovereignty and congressional primacy in Indian affairs. We have long recognized that Indian tribes are "distinct, independent political communities, retaining their original natural rights." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L. Ed. 483 (1832). While tribes lack "the full attributes of sovereignty," they retain the power of self-government. *United States v. Kagama*, 118 U.S. 375, 381–82, 6 S. Ct. 1109, 30 L. Ed. 228 (1886). Tribal sovereignty offers "a backdrop against which the applicable ... federal statutes must be read." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973). In other words, to the extent a statute is

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[4] As to petitioners Dolly Suehead, Donna Caesar, and Barbara Suehead, the exclusion orders expired on November 15, 2013 and the per capita withholding orders expired on May 1, 2012.

[5] Gene Whitehouse, Brenda Adams, and Calvin Moman were members of both the 2011 and 2013 Councils. John Williams and Danny Rey were members only of the 2013 Council.

ambiguous, we construe it liberally in favor of the tribes' inherent authority to self-govern. *See, e.g.*, *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 846, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes ... must be 'construed generously in order to comport with ... traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'" (first alteration added) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980))).

A second well-recognized principle is Congress's "constitutionally prescribed primacy in Indian affairs." Cohen's § 2.01[1], at 110; *see also Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470–71, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979) (describing Congress's authority over Indian affairs as "plenary and exclusive"). Because Congress's jurisdiction is plenary, our jurisdiction is correspondingly narrow. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S. Ct. 216, 47 L. Ed. 299 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."). Hence, we refrain from interpreting federal statutes in a way that limits tribal autonomy unless there are "clear indications" that Congress intended to do so. *Santa Clara Pueblo*, 436 U.S. at 60, 98 S. Ct. 1670.

Because Indian tribes have sovereignty that predates the Constitution, they are not subject to the constitutional restraints that bind the federal government and the states. *See Talton v. Mayes*, 163

U.S. 376, 382–84, 16 S. Ct. 986, 41 L. Ed. 196 (1896). Congress can, however, impose such restraints by statute as part of its plenary authority over tribal affairs. In 1968, Congress exercised this authority and enacted the ICRA, which extends much of the Bill of Rights to tribes by statute.[6] The ICRA also contains an explicit federal habeas remedy: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303.

The Supreme Court first analyzed the scope of federal court jurisdiction under the ICRA in *Santa Clara Pueblo*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106. The Court held that the ICRA's substantive rights (contained in § 1302 of the statute) did not imply a federal remedy; instead, § 1303 set out the exclusive remedy for violations of the ICRA—a writ of habeas corpus "in a Court of the United States." *Id.* at 69–72, 98 S. Ct. 1670. As part of its analysis, the Court noted that one of the primary purposes in enacting the ICRA was to "promote the well-established federal policy of furthering Indian self-government." *Id.* at 62, 98 S. Ct. 1670 (citations and internal quotation marks omitted). Although the Court recognized that Congress also intended to "strengthen[ ] the position of individual tribal members vis-à-vis the tribe," it concluded that finding an implied cause of action would strengthen this goal only at the expense of tribal sovereignty. *Id.* In sum,

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[6] The rights in the ICRA are similar, but not identical, to those contained in the Bill of Rights. For example, the statute has no requirement that tribes provide free counsel for indigent criminal defendants in tribal court. *See United States v. Bryant*, — U.S.—, 136 S. Ct. 1954, 1958–59, 195 L. Ed. 2d 317 (2016).

federal remedies beyond habeas were "not plainly required to give effect to Congress' objective[s]." *Id.* at 65, 98 S. Ct. 1670. With these principles in mind, we address whether the district court had habeas jurisdiction over the per capita withholding or the temporary exclusion orders.

II. Per Capita Withholding Orders

As a threshold matter, we quickly dispose of the argument that the petitioners' per capita withholding orders created habeas jurisdiction under the ICRA.[7]

In *Shenandoah v. U.S. Department of the Interior*, the Second Circuit explained that the loss of quarterly distributions paid to all tribal members is "insufficient to bring plaintiffs within ICRA's habeas provision," 159 F.3d 708, 714 (2d Cir. 1998), a determination that we cited with approval in *Jeffredo v. Macarro,* 599 F.3d 913, 919 (9th Cir. 2009). This conclusion falls squarely within the "general rule" that "federal habeas jurisdiction does not operate to remedy economic restraints." *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004); *see also United States v. Thiele*, 314 F.3d 399, 402 (9th Cir. 2002) (writing that cognizable claims "do not run interference for non-cognizable claims"). Any disputes about per capita payments must be brought in a tribal forum, not through federal habeas proceedings. *See* 25 C.F.R. § 290.23; *Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005).

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[7] Although it is not entirely clear in their briefs, the petitioners appear to argue that withholding of distributions creates habeas jurisdiction in whole or part. To the extent they raise this argument, we address it here.

III. Temporary Exclusion Orders

We now turn to the crux of this appeal—whether the petitioners, who were temporarily excluded from tribal lands, were in "detention" under § 1303 for purposes of federal habeas jurisdiction.[8]

We start with the words Congress used in § 1303, focusing on a difference between the language used in that provision and the language used in the general federal habeas statutes. When Congress enacted the ICRA in 1968, it was legislating against a well-established habeas framework: the federal courts have habeas jurisdiction whenever a petitioner is "in custody." *See* 28 U.S.C. §§ 2241, 2255;[9] *see also Jones*

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[8] The two-year exclusion orders applicable to Dolly and Barbara Suehead and Donna Caesar expired before briefing in this appeal was completed and hence there is no longer a live controversy. *Chafin v. Chafin*, 568 U.S. 185, 133 S. Ct. 1017, 1023, 185 L. Ed. 2d 1 (2013). Even assuming habeas jurisdiction were proper, petitioners' suggestion that the expired orders had continuing consequences in a habeas sense is totally speculative. Thus, we dismiss their appeals on mootness grounds, and also affirm the district court's dismissal of their claims on jurisdictional grounds.

[9] The requirement that a petitioner be "in custody" is stated in every section of the statutory provisions for state and federal habeas jurisdiction. *See* 28 U.S.C. §§ 2241(c)(1)–(4) ("The writ of habeas corpus shall not extend to a prisoner unless— 1) He is *in custody* under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is *in custody* for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is *in custody* in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is *in custody* for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign

v. Cunningham, 371 U.S. 236, 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963) (quoting 28 U.S.C. § 2241); Judiciary Act of Sept. 24, 1789, § 14, 1 Stat. 73, 82. Yet Congress chose not to incorporate this language into the ICRA. Instead, under § 1303, habeas corpus is available only to a person who wishes to "test the legality of his detention by order of an Indian tribe." In addition to the usual rule that different words in a statute ordinarily convey different meanings, *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003), we think Congress's use of "detention" instead of "custody" when it created habeas jurisdiction over tribal actions is significant in multiple respects.

At the time Congress enacted the ICRA, "detention" was generally understood to have a meaning distinct from and, indeed, narrower than "custody." Specifically, "detention" was commonly defined to require physical confinement. *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 484–85, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973) (equating "detention" and "physical confinement"); *see also* Ballentine's Law Dictionary 343 (3d ed. 1969) (defining "detention" as "[h]olding one arrested on a charge of crime"). By contrast, "custody" had a more fluid definition: while it meant "physical control of the person," it did not require physical confinement or imprisonment. *Id.* at 300. Instead, a person was in custody for habeas purposes if there was "restraint of [that] person by another [such] that the latter can produce the body of

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state, or under color thereof...." (emphases added)), 2254(a) (rendering habeas relief available to "a person in custody pursuant to the judgment of a State court"), 2255(a) (rendering motions to "vacate, set aside or correct the sentence" available to "[a] prisoner in custody under sentence of a court established by Act of Congress").

the former at a hearing as directed by writ or order." *Id.* In other words, at the time of the ICRA's enactment, detention was understood as a subset of custody. *See also* Black's Law Dictionary 460 (4th ed. 1968) (defining "custody" as encompassing "[d]etention; charge; control; possession" and noting that "[t]he term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession").

It is also notable that Congress used "detention" at the same time that the Supreme Court had begun to expand the scope of "custody" in the federal habeas statutes. Courts "normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co. v. Reynolds*, 559 U.S. 633, 648, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010). The history and precedent here are informative.

Under English common law, and for much of our history, physical custody, confinement, or detention was required as a prerequisite to habeas relief. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 437, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004) (recognizing that "we no longer require physical detention as a prerequisite to habeas relief"); *Preiser*, 411 U.S. at 486, 93 S. Ct. 1827 (collecting cases in which the petitioner complained of "being unlawfully subjected to physical restraint"); *Wales v. Whitney*, 114 U.S. 564, 569, 5 S. Ct. 1050, 29 L. Ed. 277 (1885) (finding no habeas jurisdiction where "petitioner [wa]s under no physical restraint"); 3 William Blackstone, Commentaries *129–37. Beginning in 1963, however, the Supreme Court expansively interpreted "custody" to include continued oversight by criminal justice authorities with the prospect of revocation of parole and return

to incarceration. *See Jones*, 371 U.S. at 243, 83 S. Ct. 373 (holding that parolee was in custody, in part because he remained subject to the custody and control of the state parole board); *see also Hensley v. Mun. Court*, 411 U.S. 345, 351, 93 S. Ct. 1571, 36 L. Ed. 2d 294 (1973) (formulating the "severe restraint[ ] on individual liberty" test for custody, and holding that petitioner was in custody when he was released on personal recognizance pending execution of his sentence).[10]

By the time Congress enacted the ICRA in 1968, this expansion of "custody" was well under way. The Supreme Court had already explained that "custody" should not be construed unduly narrowly because habeas "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones*, 371 U.S. at 243, 83 S. Ct. 373. Congress could have used the parallel "in custody" language or indicated that ICRA's habeas provision was to be read in light of that jurisprudence by using "custody" rather than "detention," but it did not do so.[11]

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[10] Neither *Jones* nor *Hensley* mention, much less discuss, "detention." *See generally Hensley*, 411 U.S. 345, 93 S. Ct. 1571, 36 L. Ed. 2d 294; *Jones*, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285.

[11] The only other court that has analyzed whether "detention" and "custody" should be interpreted differently determined only that "detention" should not be construed more *broadly* than "custody." *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 890–93 (2d Cir. 1996); *see also Jeffredo*, 599 F.3d at 918 (citing the adoption of *Poodry*'s analysis by *Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001)). The Second Circuit ex-

Our conclusion that we should credit Congress's use of "detention" to narrow the scope of federal habeas jurisdiction over ICRA claims is bolstered by the limited legislative history. During deliberations in the House of Representatives, House Minority Leader Gerald Ford submitted a memorandum from the House Committee on the Judiciary that equated detention in the ICRA context with imprisonment: under § 1303, the "habeas corpus application for release from tribal detention shall be made in the Federal courts (under present Constitutional practice, non-Indian citizens, if imprisoned under state law, must first seek habeas corpus by exhausting available state court remedies before applying to Federal courts.)." 114 Cong. Rec. 9611 (1968). Representative Reifel similarly explained that habeas corpus under the ICRA "would assure effective enforcement of ... fundamental [trial] rights" that arise in the criminal context, including the prohibition on double jeopardy,

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amined the federal habeas statutes, 28 U.S.C. § 2241 *et seq.*, and concluded that they "appear[ ] to use the terms 'detention' and 'custody' interchangeably." *Poodry*, 85 F.3d at 890–91. However, while some provisions of the federal habeas statutes appear to use the terms synonymously, others treat "detention" as a subset of "custody." *Compare, e.g.*, 28 U.S.C. § 2245 (last amended June 25, 1948) ("On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment ... shall be admissible in evidence."), *with id.* § 2242 (last amended June 25, 1948) (stating that an "[a]pplication for a writ of habeas corpus ... shall allege the facts concerning the applicant's *commitment or detention*" (emphasis added)). Even if these provisions create ambiguity as to the meaning of the ICRA's use of "detention," such ambiguities must be resolved in favor of the tribes' inherent authority to self-govern. *Ramah Navajo Sch. Bd., Inc.*, 458 U.S. at 846, 102 S. Ct. 3394; Cohen's § 2.02[1], at 113.

the privilege against self-incrimination, and the right to confront witnesses. *Id.* at 9553. As the Supreme Court in *Santa Clara Pueblo* recognized, Congress's "legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice. In light of this finding, ... Congress chose at this stage to provide for federal review only in habeas corpus proceedings." 436 U.S. at 71, 98 S. Ct. 1670 (internal citation omitted); *see also id.* at 67, 98 S. Ct. 1670 (describing "habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings"); William C. Canby, Jr., American Indian Law in a Nutshell 422 (6th ed. 2014) (concluding that, post–*Santa Clara Pueblo*, "the effectuation of the non-criminal portions of the Indian Civil Rights Act lies exclusively with [the tribal courts]").[12]

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[12] We need not decide whether § 1303 applies only in the criminal context. We merely note that Congress was concerned with a narrower subset of tribal activity than would be covered under the current-day "custody" standard. On this point, the dissent argues that "detention" and "custody" should be understood as synonymous because the language of § 1303 tracks that of *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), a pre-ICRA case extending general habeas jurisdiction over a tribe's incarceration of a tribal member that was cited with approval during 1965 Senate subcommittee hearings on the ICRA. Dissent —. But *Colliflower* extended general habeas jurisdiction for a reason not applicable here: because the tribe's courts, having been developed under the supervision and the guidelines of the Department of the Interior's Bureau of Indian Affairs, functioned "in part as a federal agency and in part as a tribal agency." *Id.* at 379. Importantly, *Colliflower* did not have occasion to consider the scope of "detention" because the court used the term to refer to a situation within the traditional confines of habeas corpus jurisdiction: Colliflower's incarceration pursuant to a criminal conviction. *See id.* at 371.

Three cases that involve the limits of detention under § 1303 inform our analysis. We begin with *Poodry*, the first case to address this issue. 85 F.3d 874. The petitioners, members of the Tonawanda Band, were convicted of treason after they accused the tribal council of misconduct. *Id.* at 877–78. As punishment, the tribe disenrolled them and permanently banished them from the whole of the tribe's 7,500 acre reservation. *Id.* at 878. The disenrollment and banishment orders were served on the petitioners at their homes by up to twenty-five people, who attempted to take the petitioners "into custody and eject them from the reservation." *Id.* Although the initial ejection attempts failed, the respondents "continued to harass and assault the petitioners and their family members," attacking one petitioner on Main Street and "stoning" a second petitioner. *Id.* The tribe also denied the petitioners home electrical services and health services and medications. *Id.*

The Second Circuit held that the ICRA created federal habeas jurisdiction over the tribal actions. Construing ICRA's "detention" requirement as "no broader" than the "custody" requirement of other federal habeas statutes, the Second Circuit concluded that the facts alleged—including the manner in which the banishment orders were served, the attempts at removal, the threats and assaults, and the denial of electrical services—constituted "severe restraints on [individual] liberty" under *Hensley*'s custody test. *Id.* at 893–95.

The Second Circuit did not clearly distinguish between whether it was the disenrollment or banishment of the petitioners that constituted the severe restraint on liberty, although it focused on the disenrollment. *See id.* at 895 ("Indeed, we think the exist-

ence of the orders of permanent banishment alone ... would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus. We deal here ... with the coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation." (emphasis added)); see also id. at 897 (characterizing the question at issue as "whether a federal court has jurisdiction to examine the scope of and limitations on the Tonawanda Band's power to strip the petitioners of their tribal membership"); *Id.* at 901 (rejecting argument that "membership determinations [are] committed to the absolute discretion of the tribe").

Two years later, in *Shenandoah*, the Second Circuit revisited jurisdiction under the ICRA. 159 F.3d 708. The petitioners in *Shenandoah*, like the petitioners in *Poodry*, were members of a tribe who challenged tribal leadership. The petitioners alleged that, because of these activities, they lost their jobs, their "voice[s]" in tribal governance, their health insurance, their access to the tribe's health center, and their quarterly per capita distributions; were banished from tribal businesses and recreational facilities; were stricken from tribal membership rolls; were prohibited from speaking with some tribe members; and were not sent tribal mailings. *Id.* at 714.

Significantly, the Second Circuit stepped back from *Poodry* and limited its reach. It clarified that *Poodry* had only recognized federal habeas jurisdiction for cases involving permanent banishment. *Id.* at 714 (citing *Poodry* in support of the proposition that "[h]abeas relief does address more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing

or trial, and permanent banishment"). The Second Circuit then concluded that the tribe's misconduct at issue in *Shenandoah*, while "serious," was not a sufficiently severe restraint on liberty to create habeas jurisdiction. *Id.*

Notably, the Second Circuit again conflated disenrollment and banishment in its analysis. The court characterized the punishment in *Poodry* as considerably more severe than the punishment in *Shenandoah* because in *Poodry*, "the petitioners were convicted [ ] of treason, sentenced to permanent banishment, and stripped of ... Indian citizenship; their names were removed from the Tribal rolls; and they permanently [lost] any and all rights afforded [tribal] members." *Id.* (internal quotation marks omitted). By contrast, the petitioners in *Shenandoah* "[did] not allege[ ] that they were banished from the Nation, deprived of tribal membership, convicted of any crime, or that defendants attempted in anyway [sic] to remove them from [tribal land]." *Id.*

In 2010, our court addressed the scope of habeas jurisdiction under § 1303 of the ICRA in *Jeffredo,* 599 F.3d 913. The Pechanga Band of the Luiseño Mission Indians disenrolled a number of its members following a dispute about their lineage. *Id.* at 915. As a result of their disenrollment, the petitioners lost access to the tribe's senior citizen center, health clinic, and schools. *Id.* at 918–19. Although they were not excluded from the reservation, the petitioners contended that, because of their new status as nonmembers, they were "under a continuing threat of banishment/exclusion." *Id.* at 919. They filed a habeas petition under the ICRA, arguing that their disenrollment "was tantamount to an unlawful detention." *Id.* at 915.

We held that the district court lacked jurisdiction because the petitioners were not detained under § 1303. *Id.* We engaged in a factual inquiry about the severity of the restrictions the petitioners faced, noting that the petitioners "have not been banished from the Reservation," "have never been arrested, imprisoned, fined, or otherwise held by the Tribe," "have not been evicted from their homes or suffered destruction of their property," have not had "personal restraint (other than access to [certain] facilities)" imposed on them, and have not had their movements on the Reservation subject to restriction. *Id.* at 919.

Unlike the Second Circuit, we distinguished between disenrollment and banishment, and recognized that there is no federal habeas jurisdiction over tribal membership disputes. *Id.* at 920 (citing *Santa Clara Pueblo*, 436 U.S. at 72 n.32, 98 S. Ct. 1670) (observing that "[w]e cannot circumvent our lack of jurisdiction over [tribal decisions regarding disenrollment of members] by expanding the scope of the writ of habeas corpus to cover exactly the same subject matter").[13]

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[13] The dissent's claim that *Jeffredo* is "binding precedent" that dictates the result is not borne out by an examination of the analysis. Dissent —. Notably, *Jeffredo* relied on *Moore* as the sole authority supporting the proposition that detention "must be interpreted similarly" to custody, 599 F.3d at 918, and as *Jeffredo* itself acknowledges, *Moore* stated merely that "[t]here is no reason to conclude that the requirement of 'detention' set forth in ... § 1303 is *any more lenient* than the requirement of 'custody' set forth in the other habeas statutes," 270 F.3d at 791 (emphasis added). In stating that "an ICRA habeas petition is only proper when the petitioner is in custody," *Jeffredo* correctly recognized that being "in custody" is a necessary condition for jurisdiction under the ICRA. 599 F.3d at 918. However, because the panel subsequently determined that the petitioners were

Looking at the statute and these cases, several principles emerge. First, we do not need to decide whether to adopt *Poodry*'s conclusion that tribal banishment orders amount to "detention" under § 1303, because even under *Poodry*'s logic, the Second Circuit limited habeas jurisdiction only to permanent banishment orders, not temporary exclusion orders like those in this case. *Poodry*, 85 F.3d at 901; *see also Shenandoah*, 159 F.3d at 714. In addition, we have already rejected *Poodry*'s assertion of federal habeas jurisdiction over tribal membership disputes. *Compare Poodry*, 85 F.3d at 901 (rejecting argument that "membership determinations [are] committed to the absolute discretion of the tribe"), *with Jeffredo*, 599 F.3d at 920 ("We find ... nothing in the legislative history of § 1303 that suggests the [habeas] provision should be interpreted to cover disenrollment proceedings."). We also have taken issue with *Poodry*'s assertion that a tribe's interference with "an individual's social, cultural, and political affiliations" can create custody. *Compare Poodry*, 85 F.3d at 897, *with Jeffredo*, 599 F.3d at 921.[14]

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not in custody, it did not have occasion to determine (as we do here) whether custody is a *sufficient* condition to create habeas jurisdiction under the ICRA.

[14] The dissent places great weight on *Poodry*, describing the case as the "leading authority" on banishment orders. *See* Dissent — n.9. Not only is *Poodry* inapposite for the reasons we have already outlined, but also, *Poodry* has been extensively criticized for disrupting the balance Congress struck in the ICRA between preserving tribal sovereignty and upholding the rights of individual tribe members. *See, e.g.*, Cohen's § 14.04[2], at 986–87 (observing that *Poodry*'s "attempt[ ] to circumvent exclusive tribal jurisdiction disrupt[s] the delicate balance of tribal and federal interests established by Congress" and risks "insert[ing] the federal courts into precisely the types of internal tribal decisions that most implicate tribal sovereignty");

Second, the federal courts lack jurisdiction to review direct appeals of tribal membership decisions because they fall within the scope of tribes' inherent sovereignty. *Jeffredo*, 599 F.3d at 915. In many cases, a tribe's decision to temporarily exclude a member will be another expression of its sovereign authority to determine the makeup of the community.[15] *See* Kunesh, *supra* note 1, at 86. Because exclusion orders are often intimately tied to community relations and membership decisions, we cannot import an exclusion-as-custody analysis from the ordinary habeas context. *See Santa Clara Pueblo*, 436 U.S. at 72 n.32, 98 S. Ct. 1670 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." (citations omitted)).[16]

Kunesh, *supra* note 1, at 124 (criticizing *Poodry* for "unabashedly substitut[ing] its own legal and cultural bias for the U.S. legal system and the rights and protections established under federal law").

[15] The use of exclusion as a tool of social control is by no means unique to the tribes. *See* Nan Goodman, *Banished: Common Law and the Rhetoric of Social Exclusion in Early New England* 1–2 (2012) (noting that "inclusion and exclusion are paired" because they both help define the community).

[16] The dissent asserts that "[b]anishment has generally been held to satisfy the 'in custody' requirement of the general habeas laws." Dissent — (alteration in original) (quoting Cohen's § 9.09, at 780–81) (internal quotation marks omitted). But the only authority the dissent cites for this proposition is Cohen's Handbook of Federal Indian Law, which in fact states only that "banishment has been generally held to satisfy the 'in custody'

Third, tribes have the authority to exclude non-members from tribal land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982) (recognizing tribes' authority to exclude non-members); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (same). If tribal exclusion orders were sufficient to invoke habeas jurisdiction for tribal members, there would be a significant risk of undercutting the tribes' power because "any person," members and nonmembers alike, would be able to challenge exclusion orders through § 1303. Thus, tribal sovereignty vis-à-vis exclusion of non-members would collide with habeas jurisdiction.

With this framework in mind, we return to the principles animating habeas jurisdiction under § 1303 of the ICRA. We view Congress's choice of "detention" rather than "custody" in § 1303 as a meaningful restriction on the scope of habeas jurisdiction under the ICRA. *See Merck & Co.*, 559 U.S. at 648, 130 S. Ct. 1784. But to the extent that the statute is ambiguous, we construe it in favor of tribal sovereignty. *Ramah Navajo Sch. Bd., Inc.*, 458 U.S. at 846, 102 S. Ct. 3394; Cohen's § 2.02[1], at 113. A temporary exclusion is not tantamount to a detention. And recognizing the temporary exclusion orders at issue here as beyond the scope of "detention" under the ICRA bolsters tribes' sovereign authority to determine the makeup of their communities and best preserves the rule that federal courts should not entangle themselves in such disputes.

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requirement" *read into* the ICRA by *Poodry* and two district court cases. *See* Cohen's § 9.09, at 780–81 & n.16. Again, this broad statement circles back to *Poodry*'s flawed analysis.

Petitioners' contrary reading of the statute cannot be reconciled. They make much of the fact that their cases do not involve disenrollment and argue that we should distinguish *Jeffredo* on this basis. We agree that it is significant that the petitioners have only been temporarily excluded, but we disagree with the conclusion they draw. If we adopted the petitioners' proposed rule that exclusion of any duration creates habeas jurisdiction, it would create a perverse incentive for tribes to first disenroll and *then* banish a member. Because federal courts lack jurisdiction over membership decisions, and because tribes have authority to exclude non-members from tribal lands, this two-step dance could be a loophole to avoid federal jurisdiction under the ICRA. By incentivizing disenrollment, the petitioners' proposed construct runs counter to Congress's goal of "strengthening the position of individual tribal members vis-à-vis the tribe" by enacting the ICRA. *Santa Clara Pueblo*, 436 U.S. at 62, 98 S. Ct. 1670.

Nor is the dissent's interpretation of § 1303 persuasive. As we have explained, statutory interpretation and the legislative history support reading detention more narrowly than custody, but to the extent that the statute is ambiguous, we construe the statute in favor of Indian sovereignty in accord with the Indian canons of construction. *See Ramah Navajo Sch. Bd., Inc.*, 458 U.S. at 846, 102 S. Ct. 3394; Cohen's § 2.02[1], at 113. These canons seemingly play no role in the dissent's analysis. Instead, the dissent claims that to preserve the balance Congress struck "between the protection of tribal sovereignty and the vindication of civil rights," "we ought simply to apply the standard of federal habeas law." Dissent —.

The dissent fails to recognize that it is precisely the indiscriminate importation of an external body of law into the ICRA that risks trenching upon that balance. Under its reading, even if a tribe member was disenrolled from the tribe, the tribe's decision to exclude that former member would still be subject to judicial review, even while a decision to exclude a non-member would not be. *See* Dissent ——— – ———. The dissent argues that former tribe members should enjoy a special status because "[t]ribes' power to ban nonmembers from their land is rooted in their inherent power as separate sovereigns," while "tribes' power to ban tribal members from their land was explicitly 'limit[ed]' and 'modif[ied]' by Congress's use of its 'plenary authority' to provide individual rights to American Indians and to establish a narrow mechanism of review to protect those rights." Dissent 888–89 (second and third alterations in original). This reading of the ICRA cannot be reconciled with the statute itself: the ICRA does not "explicitly" address exclusion orders, and many of its provisions, including § 1303, apply to tribe members and non-members alike. *See also* 25 U.S.C. § 1302. Nor does the dissent explain why it would be an intrusion on tribal sovereignty to prevent a tribe from excluding non-members, but not an intrusion to prevent a tribe from excluding former or current tribe members. On the contrary: as we have observed, the ability to determine the membership of the community has long been regarded as an essential attribute of sovereignty.

Thus, we conclude that the district court lacked jurisdiction under § 1303 of the ICRA to review the challenge to the temporary exclusion orders. In so holding, we in no way minimize the significance of petitioners' allegations or the personal impact of the

exclusion orders. The petitioners raise free speech and due process claims that implicate the substantive protections Congress saw fit to grant Indians with respect to their tribes through the ICRA. *See Quair v. Sisco*, 359 F. Supp. 2d 948, 962 (E.D. Cal. 2004) ("Section 1302 [of the ICRA] provides that no Indian tribe in exercising powers of self-government shall do or fail to do the things set forth in Section 1302."). But the petitioners' remedy is with the Tribe, not in the federal courts. *Cf. Fisher v. Dist. Court*, 424 U.S. 382, 390–91, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976) ("[E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.").

APPEAL DISMISSED AS MOOT WITH RESPECT TO DOLLY AND BARBARA SUEHEAD AND DONNA CAESAR AND AFFIRMED FOR LACK OF JURISDICTION WITH RESPECT TO ALL PETITIONERS.

WARDLAW, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that we lack habeas jurisdiction over the UAIC's withholding orders, and that the expired two-year banishment orders against Dolly and Barbara Suehead and Dona Caesar should be dismissed as moot. However, I conclude that Jessica Tavares's ten-year banishment order severely restrains her liberty and constitutes "detention" under the Indian Civil Rights Act ("ICRA"). Therefore, I respectfully disagree with the majority's holding that we lack jurisdiction to entertain her habeas petition.

Tavares is a longtime leader of the UAIC. She served on the Tribal Council from approximately 1998 to 2010; for many of these years, she was Council Chair. In 2011, Tavares helped to organize a campaign to remove certain Tribal Council members from office for malfeasance, alleging financial misdealings and corruption related to tribal elections. Notwithstanding Tavares's right to free expression,[1] the tribe accused her of making "misrepresentations against the Tribe" and "defaming [its] reputation" in violation of tribal law.

In retaliation, the tribe informed Tavares that she was henceforth "banned from tribal lands and facilities, for a period of ten (10) years, due to [her] repeated and serious violations of tribal law, effective

[1] The ICRA's free expression clause reads in relevant part, "No Indian tribe in exercising powers of self-government shall ... (1) make or enforce any law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances...." 25 U.S.C. § 1302(a).

November 15, 2011."[2] The tribe's order further specified that Tavares was "banned from attending any tribally sponsored events and/or entering all Tribal properties and/or surrounding facilities, which includes, but is not limited to the Tribal Offices, Thunder Valley Casino, the UAIC School, Health and Wellness facilities at the Rancheria, and/or the Park at the Rancheria." The restraint on Tavares's individual liberty is obvious: she cannot set foot on her tribe's reservation.

The district court was correct to recognize that "the restraint in this case was severe." *Tavares v. Whitehouse*, No. 2:13–CV–02101–TLN, 2014 WL 1155798, at *10 (E.D. Cal. Mar. 21, 2014). Having so found, it should have exercised jurisdiction over her habeas petition pursuant to 25 U.S.C. § 1303.[3]

I.

A.

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). How-

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[2] The majority opinion avoids referring to the Petitioners' "banishment," using instead the euphemism "exclusion." Maj. Op. — . My use of the terms "banned" and "banishment" reflects the language the UAIC Tribal Council used to describe the punishment it meted out to Petitioners. The UAIC does not dispute that Petitioners were "banned."

[3] Section 1303 states, in full, "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

ever, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Id.* "Title I of the ICRA, 25 U.S.C. §§ 1301–1303, represents an exercise of that authority." *Id.* at 57, 98 S. Ct. 1670.

Congress enacted the ICRA in 1968 "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." S. Rep. No. 90-841, at 6 (1967). A "central purpose of the ICRA" was to "'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo*, 436 U.S. at 61, 98 S. Ct. 1670 (quoting S. Rep. No. 90-841, at 5–6). Accordingly, the ICRA "impos[es] certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Id.* at 57, 98 S. Ct. 1670; *see also* 25 U.S.C. § 1302. The rights enumerated in § 1302 do not contain implied causes of action. *Santa Clara Pueblo*, 436 U.S. at 51–52, 72, 98 S. Ct. 1670. But Congress provided an explicit cause of action to protect the rights that it chose to grant to the American Indian: the "privilege of the writ of habeas corpus." 25 U.S.C. § 1303.

Though narrow, this claim for relief is firmly established. *See Boe v. Fort Belknap Indian Cmty.*, 642 F.2d 276, 278–79 (9th Cir. 1981) (describing 25 U.S.C. § 1303 as "[t]he only avenue available to a party who seeks relief in the federal courts for an alleged violation of the ICRA"). Of course, recognizing the "well-established federal policy of furthering Indian self-government," *Santa Clara Pueblo*, 436 U.S. at 62, 98 S. Ct. 1670 (internal quotation marks omitted), we "should not rush to create causes of action" that would intrude upon tribes' inherent sovereignty,

id. at 72 n.32, 98 S. Ct. 1670. But we are not asked to "create causes of action" in this case; we are asked to apply the only law by which Indians may vindicate their ICRA rights—the congressionally granted right to petition for habeas relief.

Tavares presents us with precisely the kind of case over which Congress intended to establish federal jurisdiction: having exercised her right to free expression which Congress, through the ICRA, had explicitly guaranteed her, Tavares suffered retaliation from the UAIC in the form of "severe restraints on individual liberty" not shared by other members of her tribe. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 894 (2d Cir. 1996) (internal quotation marks omitted). "[R]estraints on a [person's] liberty ... not shared by the public generally ... have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones v. Cunningham*, 371 U.S. 236, 240, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963). This is the trigger for jurisdiction that Congress designed. We should acknowledge our congressionally mandated jurisdiction and exercise our duty to adjudicate Tavares's petition, as Congress intended when it balanced Indian sovereignty against individual rights in the ICRA. It is not our place to recalibrate that balance.

B.

"The term 'detention' in the [ICRA] statute must be interpreted similarly to the 'in custody' requirement in other habeas contexts." *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2009). Reflecting this principle, the bodies of law construing the "detention" and "custody" requirements are interdependent. Just as habeas courts applying the ICRA rely on authorities construing "custody" in general habeas

contexts, courts in general habeas contexts rely on authorities construing "detention" under the ICRA. For instance, the Third Circuit concluded in a non-ICRA case that a person sentenced to perform five hundred hours of community service was "in custody," relying in part on the Second Circuit's analysis of "detention" in an ICRA case. *Barry v. Bergen Cty. Prob. Dep't*, 128 F.3d 152, 161 (3d Cir. 1997) (discussing *Poodry*, 85 F.3d at 894–95).

The majority holds that "detention" as used in the ICRA is "understood as a subset of custody." Maj. Op.—. The majority suggests that the absence of the word "custody" from 25 U.S.C. § 1303 is significant because, by contrast, the word "custody" is used in "every section" of federal habeas statutes 28 U.S.C. §§ 2241(c)(1)–(4), 2254(a), and 2255(a). However, the word "detention" *also* appears frequently throughout other sections of the federal habeas statutes. *See* 28 U.S.C. §§ 2245, 2249, 2253 (referring to "detention" only); §§ 2241, 2242, 2243, 2244, 2255 (referring to both "detention" *and* "custody," apparently interchangeably); *cf.* §§ 2252, 2254 (referring to "custody" only). There is no indication in any part of any section that the terms might have distinct meanings: if anything, the statutes suggest, as a whole, that "detention" and "custody" are interchangeable. This is why the *Poodry* court declined to differentiate between "detention" and "custody," stating,

> We find the choice of language unremarkable in light of references to "detention" in the federal statute authorizing a motion attacking a federal sentence, *see* § 2255, as well as in the procedural provisions accompanying § 2241, *see* §§ 2242, 2243, 2244(a), 2245, 2249, 2253. Congress appears to use the terms "de-

> tention" and "custody" interchangeably in the habeas context. We are therefore reluctant to attach great weight to Congress's use of the word "detention" in § 1303.

85 F.3d at 890–91.

Reliance upon legislative history is unnecessary to supplement our statutory analysis. *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 830–31 (9th Cir. 1996), *as amended on denial of reh'g* (May 30, 1996) ("In interpreting a statute, we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress. Then, if the language of the statute is unclear, we look to its legislative history." (internal quotation marks omitted)). But to the extent that legislative history is relevant, it supports our exercise of jurisdiction to entertain Tavares's habeas petition.

The limited legislative history available suggests that "detention" and "custody" are interchangeable terms in the habeas context. The language of § 1303 "closely tracks the language of *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965)[, *overruled on other grounds by United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978), *as recognized by Davis v. Muellar*, 643 F.2d 521, 532 n.13 (8th Cir. 1981)]." *Poodry*, 85 F.3d at 891. In *Colliflower*, we relied on the broad scope of the general federal habeas statutes to conclude that "it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court." 342 F.2d at 379. Observing that Congress "frequently invoked [*Colliflower*] with approval during the 1965 [Sub-

committee on Constitutional Rights of the Senate Judiciary Committee] hearings" that preceded the ICRA's enactment, the Second Circuit concluded that Congress intended the ICRA's habeas provision to be as broad as, but "no broader than," its federal counterparts.[4] *Poodry*, 85 F.3d at 891, 893.

The majority opinion highlights two pieces of history from the ICRA's enactment to support its contrary position, but neither is persuasive. First, the majority contends that a memorandum prepared by the House of Representatives Committee on the Judiciary supports its conclusion because the memorandum describes the function of § 1303 with a single reference to "tribal detention," not "custody." 114 Cong. Rec. 9611 (1968). But the memorandum is not an analytical discussion of Congress's word choice of

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[4] The majority opinion contends that we ought to disregard this piece of legislative history in part because *Colliflower* involved a prisoner incarcerated due to a criminal conviction, and so did not consider the scope of "detention" beyond "the traditional confines of habeas corpus jurisdiction." Maj. Op. ——— – ——— n.12. Of course, an identical point can be made about *Preiser v. Rodriguez*, 411 U.S. 475, 484–85, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973), on which the majority relies to support its argument that "physical confinement" is a requirement of "detention," Maj. Op. ——— – ———, but there the majority seems unconcerned with this distinction.

My point is not that *Colliflower* is authoritative precedent for the exact issue before us. If it were, such a lengthy decision would be unnecessary. But given that there is, as the majority opinion notes, little other legislative history for us to consider, Maj. Op. —, *Colliflower* is relevant because it apparently guided Congress's understanding that the habeas provision it was enacting within ICRA would be as broad as the federal habeas statutes that had long been part of the nation's laws. The majority opinion does not respond to this point.

"detention" in the statute. It is merely a brief summary of § 1303; indeed it is unsurprising that the memorandum mirrors the statutory language. The *entirety* of the excerpt dedicated to the whole of the ICRA's provision of individual rights—of which § 1303 was but one part—is barely 150 words long. *See id.* Like the Second Circuit, I am "therefore reluctant to attach great weight to Congress's use of the word 'detention' in § 1303." *Poodry*, 85 F.3d at 891.

Second, the majority speculates that Representative Reifel's remarks on the floor of the House show that the ICRA's habeas provision was intentionally circumscribed to rights associated with criminal trials. Representative Reifel noted that the provision of a federal habeas forum in § 1303 would "assure effective enforcement of [the] fundamental rights" enumerated in the ICRA. 114 Cong. Rec. 9553 (1968). Those include not only protections associated with criminal trials, *see* 25 U.S.C. § 1302(a)(3)–(10), but also the ICRA's analogues to the First and Fourth Amendments, *see* § 1302(a)(1)–(2). Thus, Representative Reifel's commentary does not support the majority's argument that § 1303 is limited only to rights associated with criminal trials. In any case, Representative Reifel's brief remarks do not illuminate any purported nuances distinguishing "detention" from "custody"; his comments are irrelevant to our analysis of the language Congress chose when it enacted § 1303.

C.

To reach its holding that "detention" in the ICRA is narrower than "custody" in the general habeas statutes, the majority relies heavily upon *Poodry*'s phrasing that 25 U.S.C. § 1303 "is *no broader* than analogous statutory provisions for collateral relief."

85 F.3d at 893 (emphasis added). But *Poodry* used the phrase "no broader" specifically because two courts—including ours—had previously held that "detention" in the ICRA was *broader* than "custody" in the non-ICRA context. *See Settler v. Yakima Tribal Court* ("*Settler I*"), 419 F.2d 486, 489–90 (9th Cir. 1969), *abrogated by Santa Clara Pueblo*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106, and *Hensley v. Mun. Court*, 411 U.S. 345, 93 S. Ct. 1571, 36 L. Ed. 2d 294 (1973), *as recognized by Moore v. Nelson*, 270 F.3d 789, 791–92 (9th Cir. 2001); *Tracy v. Superior Court*, 168 Ariz. 23, 810 P.2d 1030, 1049 (1991) (en banc). In both cases, the courts noted that a person subjected to a fine only is under "detention" for purposes of § 1303, even though a fine alone would not bring that person within the jurisdiction of the general federal habeas statutes.[5] Thus *Poodry* reined in the meaning of "detention" to the outer limits of "custody," but it did not suggest that "detention" was any *narrower* than "custody." *Poodry* provides no support for the majority opinion's novel holding that an American Indian may be in "custody" for purposes of the general habeas statutes, but not in "detention" for purposes of the ICRA's habeas statute.

We actually have binding precedent to the contrary, which the majority opinion fails to acknowledge. It is the law of our Circuit that "[t]he term 'detention' in the [ICRA] statute must be interpreted similarly to the 'in custody' requirement in other habeas contexts." *Jeffredo*, 599 F.3d at 918; *see*

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[5] *See, e.g.*, *Bailey v. Hill*, 599 F.3d 976, 979 (9th Cir. 2010) ("We have repeatedly recognized that the imposition of a fine, by itself, is not sufficient to meet [28 U.S.C.] § 2254's jurisdictional requirements.").

also Boozer v. Wilder, 381 F.3d 931, 934 n.2 (9th Cir. 2004) ("Detention [as used in 25 U.S.C. § 1303] is interpreted with reference to custody under other federal habeas provisions."); *Moore*, 270 F.3d at 791–92 (9th Cir. 2001) (relying on habeas cases interpreting custody to analyze detention under the ICRA); *cf. Mills v. Taylor*, 967 F.2d 1397, 1400 (9th Cir. 1992) (affirming a grant of habeas corpus, in part because the panel "conclude[d] that Congress intended no change in meaning when it substituted 'detention' for 'custody' [in 18 U.S.C. § 3585]").

Morever, the majority splits from every other federal appellate court to have addressed this question. The Second Circuit recognizes that "Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context." *Poodry*, 85 F.3d at 891. The Tenth Circuit "read[s] the 'detention' language as being analogous to the 'in custody' requirement contained in 28 U.S.C. § 2241." *Dry v. CFR Court of Indian Offenses*, 168 F.3d 1207, 1208 n.1 (10th Cir. 1999); *see also Valenzuela v. Silversmith*, 699 F.3d 1199, 1203 (10th Cir. 2012); *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1279 n.1 (10th Cir. 2006). And the Sixth Circuit recognizes that "habeas claims brought under the Indian Civil Rights Act, 25 U.S.C. § 1303, are most similar to habeas actions arising under 28 U.S.C. § 2241," § 1303's "federal law analogue." *Kelsey v. Pope*, 809 F.3d 849, 854 (6th Cir. 2016), *cert. denied sub nom. Kelsey v. Bailey*, — U.S.—, 137 S. Ct. 183, 196 L. Ed. 2d 150 (2016).

II.

Half a century ago, the Supreme Court made clear that a habeas petitioner is in "detention" or "custody" when she is subjected to severe restraints on liberty that need not rise to the level of physical

confinement. The Court declared, "History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones*, 371 U.S. at 240, 83 S. Ct. 373. Ever since, the Court consistently has "very liberally construed the 'in custody' requirement for purposes of federal habeas." *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) (per curiam).[6] For our part, we faithfully have applied the Court's instructions to our cases, recognizing that a habeas petitioner need only show "that he is subject to a significant restraint upon his liberty" for our jurisdiction to obtain. *Wilson v. Belleque*, 554 F.3d 816, 822 (9th Cir. 2009).

In determining whether a habeas petitioner is "in custody," the Supreme Court has "rel[ied] heavily on the notion of a physical sense of liberty—that is, whether the legal disability in question somehow limits the putative habeas petitioner's movement." *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998). In *Jones v. Cunningham*, the Supreme Court

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[6] The Supreme Court's broad construction of the "custody" requirement reflects the wide scope of application that the writ has enjoyed for centuries. For example, William Blackstone explained that the writ is "efficacious ... in all manners of illegal confinement." 3 William Blackstone, *Commentaries on the Laws of England* 131 (Univ. of Chicago Press 1979) (1768); *see also Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325–26, 18 L. Ed. 816 (1867) (characterizing the writ of habeas corpus as the judicial remedy for "every possible case of privation of liberty contrary to the National Constitution, treaties, or laws," the scope of which is so broad that it is "impossible to widen").

held that conditions of parole satisfied the custody requirement where the parolee was required to remain in a particular community, make periodic reports to a parole officer, and refrain from visiting certain places. 371 U.S. at 242–43, 83 S. Ct. 373. The Court also has held that an individual released on his own recognizance pending sentencing after conviction is "in custody" because he must appear at times and places ordered by the court and "cannot come and go as he pleases." *Hensley*, 411 U.S. at 351, 93 S. Ct. 1571; *see also, e.g.*, *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 301, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984). Similarly, we have held that a petitioner required to log "fourteen hours of attendance at an alcohol rehabilitation program" was "in custody" because the sentence required the petitioner's "physical presence at a particular place," which "significantly restrain[ed] [his] liberty to do those things which free persons in the United States are entitled to do." *Dow v. Circuit Court*, 995 F.2d 922, 922–23 (9th Cir. 1993) (per curiam).[7] In these instances, the petitioner was "in custody" for purposes of habeas jurisdiction because the restraints on his physical liberty were "not shared by the public generally." *Jones*, 371 U.S. at 240, 83 S. Ct. 373. It is

[7] Likewise, in *Barry v. Bergen County Probation Department*, the Third Circuit held that court-ordered community service constituted "custody" because an "individual who is required to be in a certain place—or in one of several places—to attend meetings or to perform services, is clearly subject to restraints on his liberty not shared by the public generally." 128 F.3d at 161.

clear that such restraints need not rise to the level of actual confinement for habeas jurisdiction to attach.[8]

As with "custody," the restraint on physical liberty is the essence of "detention" under the ICRA. Thus, in *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005), we held that a petitioner was in "detention" for ICRA purposes when the conditions of pretrial release barred the petitioner from going within one hundred yards of his former father-in-law's home and required him to appear as scheduled before the trial court. *Id.* at 928 (citing *Lydon*, 466 U.S. at 300–02, 104 S. Ct. 1805, and *Hensley*, 411 U.S. at 351–52, 93 S. Ct. 1571). Similarly, in *Settler v. Lameer* ("*Settler II*"), 419 F.2d 1311, 1312 (9th Cir. 1969) (per curiam), we held that despite the lack of physical confinement, petitioners released on bail satisfied the ICRA's detention requirement. *See also Moore*, 270 F.3d at 791 ("Bail status clearly restricts liberty in a way that a purely monetary fine does not; the petitioner 'cannot come and go as he pleases.'" (quot-

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[8] The majority cites *Preiser v. Rodriguez*, 411 U.S. 475, 484–85, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973), for the proposition that physical confinement was once a prerequisite to habeas relief. Maj. Op. ——— – ———. Notwithstanding that it is now "well established that actual *physical* custody is not a jurisdictional prerequisite for federal habeas review," *Poodry*, 85 F.3d at 893 (citing *Jones*, 371 U.S. at 243, 83 S. Ct. 373), the circumstances of *Preiser* are not comparable to Tavares's banishment.

The *Preiser* petitioner was a state prisoner seeking release, which explains why the Court used "custody," "detention," and "physical confinement" interchangeably to describe Preiser's situation. *See* 411 U.S. at 483–87, 93 S. Ct. 1827. Contrary to the majority's suggestion, the Court never intimated that "detention" was somehow a subset of "custody." To the contrary: if *Preiser*, a non-ICRA case, stands for anything, it is that "detention" and "custody" are interchangeable in habeas law.

ing *Hensley*, 411 U.S. at 351, 93 S. Ct. 1571)). Consistent with the Supreme Court's construction of the "custody" requirement under federal habeas law, we have made physical liberty the focal point of our analysis of "detention" under the ICRA.

III.

A.

Banishment is a uniquely severe punishment. It does "more than merely restrict one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence." *Poodry*, 85 F.3d at 897. Tavares's ten-year banishment is not "a modest fine or a short suspension of a privilege ... but [rather] the coerced and peremptory deprivation of [her] membership in the tribe and [her] social and cultural affiliation." *Id.* at 895. For these reasons, "[b]anishment has generally been held to satisfy the 'in custody' requirement" of the general habeas laws. *Cohen's Handbook of Federal Indian Law* § 9.09, 780–81 (Nell Jessup Newton ed., 2012) ("Cohen's"). Whether under the law of our circuit or that of any other to consider the issue, Tavares's banishment places her in "custody"; thus, she is in "detention."

The majority asserts that three cases about the limits of detention under § 1303 inform its analysis: *Poodry v. Tonawanda Band of Indians*, 85 F.3d 874; *Shenandoah v. United States Department of Interior*, 159 F.3d 708 (2d Cir. 1998); and *Jeffredo v. Macarro*, 599 F.3d 913. But only one of these cases, *Poodry*, squarely addresses the legal principles animating this case. Neither *Shenandoah* nor *Jeffredo* pertains to banishment. To the contrary, they are explicitly *not* about banishment. The *Shenandoah* petitioners

did "not allege[ ] that they were banished from the Nation, ... or that defendants attempted in anyway [sic] to remove them from [tribal] territory." 159 F.3d at 714. Similarly, the *Jeffredo* petitioners "ha[d] not been banished" and "[t]heir movements ha[d] not been restricted on the Reservation." 599 F.3d at 919. Only *Poodry*'s holding bears upon the case before us, and it supports a finding of jurisdiction over Tavares's petition.

In *Poodry*, several members of the Tonawanda Band of Seneca Indians filed a petition for habeas relief under 25 U.S.C. § 1303 after they were ordered permanently banished from the tribe. The petitioners had accused members of the Tonawanda Council of Chiefs of misusing tribal funds, suspending tribal elections, burning tribal records, and other misconduct. *Poodry*, 85 F.3d at 877–78. Several months later, the petitioners were accosted at their homes by groups of fifteen to twenty-five persons, summarily convicted of "treason," and issued orders of permanent banishment. *Id.* at 878–79. The orders read in part, "You are to leave now and never return.... [Y]our name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members. YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY." *Id.* at 876 (alteration in original). When the petitioners refused to leave the reservation, they suffered continued harassment, were assaulted, and were denied electrical service to their homes and businesses. *Id*. at 878.

The *Poodry* petitioners filed for writs of habeas corpus under § 1303, claiming they had been denied several rights guaranteed under Title I of the ICRA. *Id.* at 879. The Western District of New York dismissed their petitions for lack of subject-matter jurisdiction, holding that banishment did not constitute "detention" for the purposes of § 1303. *Id.* The Second Circuit reversed, concluding that where a tribal member has been banished rather than imprisoned, "[T]he ICRA's habeas provision [nevertheless] affords the petitioners access to a federal court to test the legality of their 'convict[ion]' and subsequent 'banishment' from the reservation and ... therefore [the district court] erred in dismissing the petitions for writs of habeas corpus on jurisdictional grounds." *Id.* (second alteration in original).[9] In par-

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[9] Decided twenty years ago, *Poodry* has since become the leading authority on banishment as a basis for federal habeas jurisdiction. *See* 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 8.2[d], 449 & 449 n.53 (6th ed. 2011) (citing *Poodry*, 85 F.3d at 894–96); Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 Alaska L. Rev. 93, 147 (2015) (characterizing *Poodry* as the "seminal case addressing banishment"); *see also* William C. Canby, Jr., *American Indian Law in a Nutshell* 419 (6th ed. 2015) (discussing *Poodry*).

Notwithstanding *Poodry*'s significance, the majority opinion selectively quotes from an article by Professor Patrice Kunesh criticizing *Poodry* in an attempt to discount *Poodry*'s persuasive value. *See* Maj. Op. —n.14. But Kunesh's problem was not that *Poodry* applied "jurisdictional prerequisites under federal habeas corpus laws" to "ICRA's habeas corpus provision," which is the issue before us. Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. Rev. 85, 123. Rather, Kunesh's criticisms were aimed at "the reach of the court's decision to disenrollment actions;" the court's disregard for "tribal legal systems;" and the portions of *Poodry*'s

ticular, the Second Circuit held that the scope of § 1303 is equivalent to that of the general federal habeas statutes, and that therefore the petitioners' banishment orders satisfied the "detention" requirement of § 1303. *Id.* at 890–97. It follows from *Poodry* that Tavares's banishment also constitutes "detention" under the ICRA.

In contrast, *Jeffredo*, the only case until today to raise the scope of the meaning of the term "detention" in § 1303 before our Court, does not support the majority's holding. In *Jeffredo*, a tribe disenrolled several members "for failing to prove their lineal descent as members of the Tribe." 599 F.3d at 915. We held that the disenrollment of the petitioners, whose "movements [had] not been restricted on the Reservation," did not constitute "detention" under the ICRA. *Id.* at 919. Specifically, we noted that "[d]isenrollment does not mean that a person is banished from the [tribe's] Reservation," and that the habeas petitioners in that case "ha[d] not been banished from the Reservation." *Id.* at 916, 919. This case presents the inverse fact pattern: Tavares was not disenrolled from her tribe, but she has been banished—her movements are restricted on the reservation. *Jeffredo* was about membership, not physical liberty; this case is about physical liberty, not membership. Because *Jeffredo* is not a case about banishment, our decision to decline jurisdiction in that case does not govern us here. *See also Moore*, 270

holding that "extend[ed] far beyond federal habeas corpus jurisprudence," including to "potential and threatened restraints on an individual's liberty," general "harassment," and "interference" with the provision of utilities and health care services. *Id.* at 123–24. None of the targets of Kunesh's criticisms of *Poodry* is present in this case. And, of course, *Poodry* remains good law in the Second Circuit and persuasive authority in ours.

F.3d at 790–91 (recognizing that a tribal member who was "subjected to a fine" but who "ha[d] not been excluded or otherwise restricted in his movements on the Reservation" was not in detention under the ICRA).

The majority opinion extends *Jeffredo* from disenrollment decisions to temporary exclusion orders because, according to the majority, the latter are merely "another expression of [the tribe's] sovereign immunity to determine the makeup of the community." Maj. Op. — This reasoning sweeps too broadly and occludes the distinct driving principles behind *Jeffredo* and this case.

First, a tribe's decision to disenroll members based on their "lineal descent" implicates the "'tribe's right to define its own membership for tribal purposes,'" which "'has long been recognized as central to its existence as an independent political community.'" *Jeffredo*, 599 F.3d at 917–18 (quoting *Santa Clara Pueblo*, 436 U.S. at 72 n.32, 98 S. Ct. 1670). Here, because Tavares does not challenge any membership decision of her tribe, her petition does not raise *Jeffredo*'s animating concern of protecting "[a] tribe's right to define its own membership." *Id.* at 917; *see also Cohen's*, *supra*, at 175 n.25 (explaining that banishment and disenrollment must be analyzed differently, and "[w]here the tribe clearly separates the banishment and disenrollment decisions ... only the former is reviewable under the Indian Civil Rights Act's habeas corpus provision").

Second, by emphasizing that "[d]isenrollment does not mean that a person is banished from the [tribe's] Reservation" and that a disenrolled tribe member's "movements have not been restricted," *Jeffredo* acknowledged that banishment inherently

involves physical coercion that more severely restrains an individual's liberty, and thus is more likely to qualify as "detention." 599 F.3d at 916, 919. Although the *Jeffredo* petitioners were denied access to a senior citizens' center, a health clinic, and a tribal school, we were careful not to equate "the denial of access to certain facilities" with banishment from the reservation. *Id.* at 918–19. And for good reason: denying an individual access to certain government facilities is a far cry from denying her access to her homeland. Thus, *Jeffredo* undermines, rather than supports, the majority's determination that Tavares's banishment fails to satisfy the ICRA's "detention" requirement.[10]

B.

Tavares is banned from "all Tribal properties and/or surrounding facilities." This total physical exclusion affects Tavares's daily life in many ways: she cannot walk her grandchildren to school, attend tribal meetings, ceremonies, and events, or join her family and friends for any purpose on tribal land. A former leader of the UAIC, she no longer can "participate in the ceremonies and events of the Tribe's culture and heritage." Instead, she "ha[s] had to sit outside the fence and look on, as if [she] were [a]

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[10] *Jeffredo* also comports with federal habeas precedents holding that the revocation of certain privileges or licenses, without a concomitant restraint on an individual's physical liberty, does not satisfy the "custody" requirement of federal habeas jurisdiction. *See, e.g.*, *Lefkowitz v. Fair*, 816 F.2d 17, 19–21 (1st Cir. 1987) (revocation of medical license). *Jeffredo*'s analysis of disenrollment is likewise consistent with other courts' analysis of "[d]ignitary, reputation, 'moral,' or psychological harm," which generally are considered "noncustodial statuses." Hertz & Liebman, *supra*, at 451–53 & 452 n.66 (collecting cases).

criminal[ ] or untouchable [ ]."[11] Tavares has demonstrated a severe restraint on her liberty not shared by other members of the tribe, which satisfies her burden of showing that she is in "custody," and thus in "detention."

The majority makes much of the fact that Tavares was banished "only ... temporarily." Maj. Op. ——. But the majority's opinion does not explain why the duration of Tavares's banishment is legally relevant in determining whether she is in "detention" for habeas purposes. The writ of habeas corpus addresses the *fact* of detention, not its duration. An individual restrained for a day has no more freedom during the period of restraint than another restrained for a year. Thus, habeas relief is available to a prisoner no matter the length of his sentence.

Even if the duration of Tavares's banishment were relevant in determining whether she is in "detention," the ten-year term of her banishment is sufficient to severely restrain her liberty. If fourteen hours of mandatory attendance at an alcohol rehabilitation program, *Dow*, 995 F.2d at 922, or five hundred hours of mandatory community service, *Barry*, 128 F.3d at 161–62, is long enough to severely restrain an individual's liberty, then surely ten years—more than eighty thousand hours—of banishment is, too. Moreover, Tavares is an elderly woman. A ten-

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[11] Here, "both parties submitted declarations in connection with the motion to dismiss, [and] because no evidentiary hearing was held we must accept [Tavares's] version of events as true for the purposes of establishing jurisdiction and surviving a 12(b)(1) motion." *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1160 (9th Cir. 2007).

year period of banishment may constitute much of the remainder of her lifetime.

Nor is it clear how "temporary" non-permanent banishment orders are within the UAIC. The case of Tavares's daughter, Angelina ("Angie") Rey, is instructive. According to Tavares, the tribe banished Rey for one year for "defamation." During her year of banishment, Rey was photographed "stepp[ing] into [the tribe's] casino briefly" and was "banished for another year with her per capita payments and all membership privileges suspended for a year." As a result, Rey "was evicted from her home and, without a home, was unable to regain custody of her[ ] children." Given Tavares's advanced age and the UAIC's history of compounding "temporary" banishment orders, ten years of banishment is not a significantly less severe restraint on Tavares's liberty than if the banishment order were permanent.

C.

Undisputedly, Congress had the authority to create federal jurisdiction over violations of the ICRA, and it chose habeas review as the vehicle for those claims. *Santa Clara Pueblo*, 436 U.S. at 56–58, 98 S. Ct. 1670. Critically, "Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." *Id.* at 66–67, 98 S. Ct. 1670 (internal quotation marks omitted); *see also id.* at 67, 98 S. Ct. 1670 ("Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments."). In enacting

§ 1303, Congress struck a balance between the protection of tribal sovereignty and the vindication of civil rights. Our job is not to alter that balance based on our own views about the competing values at stake. Rather, we ought simply to apply the standards of federal habeas law.

This is a responsibility that Congress explicitly delegated to the courts, and one for which we are uniquely suited and, indeed, have a duty to perform.[12] But the majority contends that tribes' authority to ban non-members from tribal land must mean that banishment orders cannot invoke habeas jurisdiction. The majority claims that if banishment orders trigger jurisdiction under § 1303, under which the privilege of the writ of habeas corpus is "available to any person" detained by a tribe, then "any person" under a banishment order—including non-members of the tribe—would enjoy federal habeas review. Because that cannot be the case, the majority concludes that the only way to reconcile the intrusion upon tribal sovereignty embodied by § 1303 is to bar from habeas jurisdiction *all* banishment orders, in-

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[12] The Supreme Court has referred to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

cluding whatever it is the majority means by "exclusion."

The majority's reading assumes too much. Tribes' power to ban non-members from their land is rooted in their inherent power as separate sovereigns. By contrast, tribes' power to ban tribal members from their land was explicitly "limit[ed]" and "modif[ied]" by Congress's use of its "plenary authority" to provide individual rights to American Indians and to establish a narrow mechanism of federal judicial review to protect those rights. *Santa Clara Pueblo*, 436 U.S. at 56, 98 S. Ct. 1670. There is no particular reason why we must treat an order banning a tribal member who enjoys legitimate associations of kin, culture, tradition, and birthright to the tribe as equivalent to one banning a non-member with no such associations; indeed, for the purposes of § 1303, we ought not to. To so hold is to choose a blunt tool, even while more precise analytical instruments are available.

D.

The majority believes that by exercising habeas jurisdiction over Tavares's ten-year banishment, we "would create a perverse incentive for tribes to first disenroll and *then* banish a member" to avoid federal review of the temporary banishment. Maj. Op. 877. The true effect of the majority's decision is to render unnecessary that "two-step dance," Maj. Op. 877; all a tribe would need to do to evade federal review is to *temporarily* banish a member—whether for ten years or fifty, or longer. This creates a different "perverse incentive": to banish a member "temporarily"—say, for ten years—and then to extend the banishment, again "temporarily," perhaps for another ten, and so on. The majority opines that Tavares's requested

remedy "runs counter to Congress's goal of 'strengthening the position of individual tribe members vis-à-vis the tribe' by enacting the ICRA," Maj. Op. 877 (quoting *Santa Clara Pueblo*, 436 U.S. at 62, 98 S. Ct. 1670), but that is precisely backward. It is the majority's opinion that runs counter to and weakens that goal. The majority's decision makes the individual rights that Congress championed in the ICRA dependent upon the whims of the tribe and hands the tribe the tool by which it can evade our habeas review—the only relief that the individual tribal member has against arbitrary or retaliatory violations of her ICRA rights.

IV.

Balancing individual civil rights against the importance of tribal sovereignty, Congress in 1968 decided that the doors of the federal courts are open to American Indians claiming unlawful and significant restraints on their liberty by their tribes. It is not for us to adjust the lines that Congress has drawn based on our own personal views of where the limits should be drawn. Despite Congress's instruction to the contrary, the majority denies Tavares the opportunity to challenge her detention in our courts. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Jessica TAVARES, Dolly Suehead, Donna Caesar, and Barbara Suehead, Petitioners,

v.

Gene WHITEHOUSE, Calvin Moman, Brenda Adams, John Williams, and Danny Rey, in their official capacities as members of the Tribal Council of the United Auburn Indian Community, Respondents.

No. 2:13–cv–02101–TLN–CKD.

Signed March 20, 2014.

Filed March 21, 2014.

MEMORANDUM AND ORDER

TROY L. NUNLEY, District Judge.

This matter is before the Court on Respondents' Motion to Dismiss for lack of jurisdiction. (ECF No. 12.) Petitioners are members of the Auburn Indian Community. Through this action, Petitioners challenge their punishment imposed by the Tribal Council of the United Auburn Indian Community. Respondents, members of the Tribal Council, seek dismissal, arguing essentially this case concerns internal tribal matters, and therefore this Court lacks

jurisdiction. Petitioners oppose dismissal arguing their petition is within the Court's jurisdiction under the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1303, because their exclusion from tribal lands and suspension of per capita gaming benefits-although temporary-constitute "detention" within the meaning of the statute. The court heard oral argument on January 30, 2014. Elliot R. Peters appeared for respondents, and Andrew W. Stroud appeared for petitioners. Jesse Basbaum and Jo W. Golub were also present for respondents.

Petitioners' application for federal habeas relief raises troubling questions about the fundamental fairness of Petitioner Tavares's continuing expulsion from her tribal homelands. These larger questions, however, are not currently before the Court. Instead, the Court analyzes the narrow issue raised by Respondents' motion: whether Petitioners' punishment was so severe a restraint on liberty it constitutes "detention" sufficient to invoke this Court's federal habeas corpus jurisdiction under ICRA. This issue is discussed below, informed by the applicable law, the record in this case, and the parties' helpful briefs and oral arguments.

BACKGROUND

This case arises from a dispute over tribal management. The general contours of the underlying dispute are as follows. Petitioners initiated an unsuccessful recall campaign attempting to remove Respondents, members of the Tribal Council, from office. Afterwards, the Tribal Council determined Petitioners had violated a Tribal ordinance prohibiting defamation; Petitioners allege their punishment was imposed in retaliation for the recall campaign. Petitioners argue their punishment constitutes banish-

ment, invoking this Court's ICRA habeas jurisdiction. Since Petitioners' claim challenges the actions of their Tribal Government, this Court's review is informed by the peculiar principles of Indian sovereign immunity,[1] which are discussed briefly below, before the factual background of this dispute is recounted in greater detail.

A. Legal Background–Indian Sovereign Immunity and ICRA

Under established United States Supreme Court precedent, American Indian tribes are separate sovereigns immune from suit unless Congress decides to abrogate their immunity. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55–58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers .... subject to the superior and plenary control of Congress." (citations omitted)).

In response to perceived abuses in the administration of criminal justice to tribe members, in 1968, Congress chose to exercise its plenary authority and to abrogate Indian tribal immunity in part through the Indian Civil Rights Act ("ICRA"), 29 U.S.C. §§ 1301–1304. *See Santa Clara Pueblo,* 436 U.S. at 71 ("Congress['s] ... legislative investigation

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[1] *See* Angela L. Riley, (*Tribal) Sovereignty and Illiberalism,* 95 CAL. L. REV. 799, 802 (2007) ("American Indian tribes do not neatly fit into existing legal paradigms because they inhabit a strange sovereign space in the U.S. legal system, one which they alone occupy."); *see also Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L. Ed. 25 (1831) (Marshall, C.J.) (observing that Indian tribes "are correctly perhaps ... denominated domestic dependent nations.").

revealed that ... serious abuses of tribal power had occurred in the administration of criminal justice."). Section 1302 of the Act extends several (but not all) of the civil rights protections contained in the Bill of Rights to Indian tribe members, including many First Amendment protections and due process. The statute provides:

> No Indian tribe in exercising powers of self-government shall-
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> …
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> (9) pass any bill of attainder or ex post facto law; or
>
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302(a).

The substantive civil rights contained in section 1302, however, are not accompanied by an express cause of action for declaratory or injunctive relief against Tribal officers. *See Santa Clara Pueblo,* 436 U.S. 59–60. In *Santa Clara Pueblo,* the Supreme Court held that the substantive civil rights guarantees contained in ICRA section "1302 do[ ] not im-

pliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." *Id.* at 72.

Thus, the exclusive means to enforce ICRA's civil rights protections in federal court is through a petition for writ of habeas corpus under section 1303. *Bressi v. Ford,* 575 F.3d 891, 896 n. 6 (9th Cir. 2009) ("[E]xcept for habeas corpus challenges, any private right of action under [the Indian Civil Rights] Act lies only in tribal court.").

B. Factual Background[2]

Petitioners are four members of the federally recognized United Auburn Indian Community ("Tribe"). In addition to being a member, Petitioner Jessica Tavares served as the Chairperson of the Auburn Indian Tribal Council from 1996 until 2009, and Petitioner Dolly Suehead also served on the Tribal Council during the same period. Respondents are the members of the Tribal Council that imposed the punishments challenged through this action, and they are being sued in their official capacities.

1. Underlying Dispute–The Recall Petition

In 2011, Petitioners initiated a recall campaign against the Tribal Council members alleging the Council members:

- misrepresented to tribal members that a full, independent forensic financial audit of the Tribe

[2] The following factual background is drawn from Petitioners' application for federal habeas relief under ICRA (ECF No. 1), unless otherwise noted.

> had been conducted, and denied tribal members access to the "limited audit" that was conducted,
>
> • refused to take action to reclaim close to $25 million paid to the tribe's outside attorney, Howard Dickstein, and
>
> • refused to allow Tribal Council election candidates observe the casting of ballots to ensure the integrity of the election.

(Pet. Writ of Habeas Corpus Under Indian Civil Rights Act ("Pet.") ¶ 10, ECF No. 1.)

Petitioners submitted the recall petition to the Election Committee of the Tribal Council in November 2011. The Tribal Council appoints the members of the Election Committee. Petitioners allege the Election Committee is, therefore, "subject to ... [the] control of the five member Tribal Council" such that the recall petition "was essentially submitted to and controlled by the same Tribal Council members to whom the recall effort was directed." (*Id.* ¶ 8.)[3] As part of their recall petition, Petitioners obtained the signatures of seventy-four tribal members, "which [P]etitioners believe constituted 40% of the tribal membership as required for recall under the Tribe's constitution." (*Id.* ¶ 9.)

As part of their recall campaign, Petitioners circulated a press release to local media outlets that detailed Petitioners' allegations of financial mismanagement. Petitioners explain they circulated the

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[3] Petitioners Tavares and Suehead were also running for office on the Tribal Council in the regular election, held one month later in December 2011, against two then-current members of the Tribal Council. (Pet.¶ 8.)

press release to communicate the specifics of their grievances to the entire tribal membership: "Because the 2011 Tribal Council refused to release the mailing addresses of Tribe members, petitioners sought to communicate their grievances to the entire tribal membership through the media in the form of a press release." (*Id.* ¶ 11.)

The Tribal Council reacted to the press release swiftly. Two days after Petitioners circulated the press release, on November 9, 2011, the Tribal Council "mailed a one-page statement to all tribal members accusing [P]etitioners of making a 'public display of our tribal business in the local newspapers and on television,' calling [P]etitioners' statements in the Recall Petition and press release 'defamatory and malicious,'" and "characterizing [P]etitioners' [statements] as having a 'negative impact on the reputation of our Tribe.'" (*Id.*) The letter also indicated the Tribal Council "will be taking appropriate disciplinary and legal action." (*Id.*)

The next day, on November 10, 2011, the Election Committee notified Petitioners that their recall petition had been rejected. The Election Committee explained that it rejected the petition in part because of "the failure to obtain the requisite support of 40% of the membership." (*Id.* ¶ 12.) The Election Committee "did not indicate how many signatures were necessary to meet the 40% threshold," and Petitioners allege the 40% threshold "was satisfied by the seventyfour signatures they ... had gathered." (*Id.*)

The Election Committee also explained it rejected the recall petition because the petition "did not comply with a newly adopted Election Ordinance ... that required each signature ... to be individually witnessed by a notary public." (*Id.* ¶ 13.) Petitioners

allege the ordinance was drafted by the Tribal Council's outside attorney, Howard Dickstein—the same attorney Petitioners through their recall petition alleged "bilked" $25 million from the Tribe. (*Id.*) Petitioners also allege they asked for applicable election ordinances before initiating their recall campaign, and the Tribe gave them "a version of the ordinance that did not contain the individual notarization requirement." (*Id.*)

2. Disciplinary Action and the Severity of the Punishments

Over the next week or so, beginning on November 15, 2011, the Tribal Council sent Petitioners notices of discipline for misrepresentations against the Tribe for defamation-based on several false claims to the media. Petitioners allege that the tribal ordinance, under which Petitioners were "convicted," was also drafted by Dickstein. (*Id.* ¶ 15.) The discipline imposed included:

- Banning Petitioners "from all tribal lands and facilities" for a period of four years (in the case of three members) and ten years (in the case of Tavares), and
- Withholding per capita distributions of casino profits for six months (in the case of three members) and four years (in the case of Tavares).

(*Id.* ¶¶ 16–17.)

Petitioners claim their punishments constitute a severe restraint on their liberty. Petitioner Tavares avers that as a result of the discipline, she could not attend her grandchildren's school graduations or "walk [her] grandchildren to class." (Decl. Jessica Tavares ¶ 8, ECF No. 19.) Petitioner Tavares also

declares: "One of the most important aspects of Tribe membership is the ability to participate in the ceremonies and events of the Tribe's culture and heritage." (*Id.* ¶ 7.) As a result of her punishment, she cannot participate in tribal ceremonies and events, and cannot attend and participate in the Tribe's annual cultural fair. Petitioner Tavares states she and the other petitioners "have had to sit outside the fence and look on, as if we were criminals or untouchables." (*Id.*) Petitioner Tavares avers that as the former Tribal Council Chair, "many members of the Tribe referred to [her] as 'Chief,'" ¶ 2, and that an "important cultural aspect of [the] Tribe is respect for ... elders"; however, she and Petitioner Suehead, "a well-respected elder member of [the] Tribe," cannot go to the Senior Center on tribal lands. (*Id.* ¶¶ 2, 9.)

Moreover, Petitioner Tavares declares she has been stripped of her political rights and that her punishment effectively prevents her "from being a real member of the tribe [she] once led." (*Id.* ¶ 12.) Specifically, Tavares's punishment makes it impossible for her to participate in the Tribe's political activities:

> I cannot run for office or attend meetings to voice my opinion on Tribal matters. Tribal records are kept at the Tribe's administrative offices, yet I cannot go and view those records in order to keep up with the Tribe's finances or other aspects of tribal affairs. I have been effectively silenced.

(*Id.* ¶ 10.)

The following facts tend to undermine a finding that the punishments in this case constitute a severe

restraint on liberty. Under the terms of the discipline imposed by the tribe, Petitioners were excluded from Tribe-sponsored events and were excluded from tribal properties and surrounding facilities including "Tribal Offices, Thunder Valley Casino, the UA IC School, Health and Wellness facilities at the [Auburn] Rancheria, and[ ] the Park at the Rancheria." (Decl. Jesse Basbaum, Ex. F, Letter to Barbara Suehead, Nov. 29, 2011, at ¶ 1, ECF No. 15–6.) Thus, Petitioners continued to have access to most of the historic Auburn Rancheria, which is privately owned and, therefore, does not constitute "tribal lands." Petitioners did not live on tribal lands and therefore were not removed from their homes. (Decl. Brian Guth ¶ 20, ECF No. 14.) Moreover, Petitioners retained their tribal medical benefits and retained their right to vote in tribal elections through absentee ballot. (*Id.* ¶¶ 16–17.)

3. The Process of Imposing and Appealing the Punishments

The punishments were imposed without prior notice or an opportunity for a hearing. (Pet. ¶ 33, ECF No. 1.) After the punishments were imposed, Petitioners were afforded an opportunity to contest their punishments at a meeting before the Tribal Council-"the same body that imposed the sanction-as the sole avenue of redress available to challenge their sentences of banishment...." (*Id.* ¶ 18.)

Petitioners claim this meeting lacked adequate procedural protections. At the meeting before the Tribal Council, each Petitioner was allowed to have one person present on her behalf, and that person could be an attorney; but, Petitioners were precluded from presenting or confronting witnesses. (Pet. ¶ 18, ECF No. 1.) Petitioners requested the presence of a

stenographer or a device to videotape or make an audio recording of the proceeding: these requests were denied, and there is no record. (*Compare* Decl. Fred J. Hiestand, Ex. 2, at 2, ECF No. 18–2 (requesting the tribal Council to "inform me in writing that the Council will not object to our engagement of a court reporter," or "[i]f the Council does object to our use of a certified stenographer, may we record the scheduled 'meeting' by video or audio?"), *with Id.,* Ex. 3, ECF No. 18–3 (responding "your request is denied" and your specific "request for a 'certified court reporter' [is] not appropriate for this venue").)

The Tribal Council upheld Petitioners' punishments. (Pet. ¶ 20, ECF No. 1.)

Under the Tribe's Amended Plan for Allocation of Gaming Revenue, Petitioners could appeal, to the Tribe's Appeals Board, the withholding of their tribal gaming benefits only; but the Tribal Council's decision to exclude Petitioners from tribal lands could not be appealed. The Tribe's Appeals Board consists "'of three members appointed by the Tribal Council'—that is, the same Tribal Council that had ordered that [P]etitioners be punished." (*Id.* ¶ 22.) On appeal to the Tribe's Appeals Board, the per capita distribution withholding punishment was reduced by six months for Petitioner Tavares (from four years, to three-and-one-half years) and by one month for other three Petitioners (from six months, to five months). (*Id.* ¶¶ 20, 44.)

Petitioners brought their petition for habeas corpus asserting they were banished, and their tribal gaming benefits withheld, without due process, without a fair trial, and in retaliation for protected political speech in violation of ICRA. Respondents move to dismiss for lack of jurisdiction.

STANDARD

Federal courts are courts of limited jurisdiction and, until proven otherwise, cases lie outside the jurisdiction of the court. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). The burden of establishing subject matter jurisdiction "rests upon the party asserting jurisdiction." *Id.* (citing *McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 182–83, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)). A party may challenge a court's subject matter jurisdiction through a motion under Federal Rule of Civil Procedure 12(b)(1). The challenge "can be either facial or factual." *White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000). A facial challenge attacks the pleadings as insufficient to invoke federal jurisdiction; whereas a factual challenge contests the veracity of the jurisdictional pleadings. *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual attack on jurisdiction, a court need not consider the allegations of the complaint as true but may look beyond the complaint to evaluate jurisdictional facts. *Id.*

"Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.* (quoting *Savage v. Glendale Union High Sch.,* 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003)). "A court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.'" *Roberts v. Corrothers,* 812 F.2d 1173, 1177 (9th Cir. 1987) (cit-

ing *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir. 1983)).

ANALYSIS

Respondents move to dismiss under Rule 12(b)(1) primarily arguing Petitioners' punishments do not "satisfy the 'detention' requirement in § 1303" of ICRA. (Mem. P. & A. in Supp. of Resp'ts' Mot. to Dismiss ("Mot. to Dismiss") 7:7–10, ECF No. 13.) Respondents also assert Petitioners' application for federal habeas relief is moot with respect to three of the four petitioners; the application should be dismissed because it is premised on civil (rather than criminal) proceedings; and several of the claims contained in Petitioners' application for habeas relief are unexhausted. Petitioners oppose arguing the Court has jurisdiction under ICRA and, in the alternative, has jurisdiction under *Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Since Respondents' argument that the Court lacks ICRA jurisdiction has the potential to dispose of all claims,[4] the Court's analysis begins there.

A. Federal Habeas Jurisdiction Under ICRA

Respondents move to dismiss Petitioners' application for federal habeas relief for lack of subject matter jurisdiction. Respondents rely primarily on the Ninth Circuit's decision in *Jeffredo v. Macarro,* 599 F.3d 913 (9th Cir. 2010), in which the court affirmed dismissal of an ICRA habeas petition in part because the "limitation of [petitioners'] access to cer-

[4] Since Respondents' argument-that Petitioners Dolly Suehead, Donna Caeser, and Barbara Suehead's claims are moot-does not pertain to Petitioner Tavares, the Court analyzes the ICRA habeas jurisdictional argument first.

tain tribal facilities does not amount to a 'detention.'" *Id.* at 919. Petitioners oppose dismissal arguing that under the Second Circuit's decision in *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874 (2d Cir. 1996) "banishment is a sufficient restraint on liberty to constitute 'detention' within the meaning of § 1303, thereby warranting the exercise of habeas jurisdiction." (Pet'rs' Opp'n to Resp'ts' Mot. to Dismiss ("Opp'n") 8:5–24, ECF No. 17.) Petitioners also point to an Eastern District of California decision in *Quair v. Sisco,* 359 F. Supp. 2d 948 (E.D. Cal. 2004) as persuasive authority for the proposition that "banishment by itself need not be 'forever' to invoke habeas review." (Opp'n 9:14–16.)

Federal courts lack jurisdiction over tribal matters unless the party invoking federal jurisdiction can meet the requirements of § 1303 of ICRA. *Bressi,* 575 F.3d at 896 n. 6. Section 1303 provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his *detention* by order of an Indian tribe." 25 U.S.C. § 1303 (emphasis added). The Ninth Circuit has held "[t]he term 'detention' in the statute must be interpreted similarly to the 'in custody' requirement in other habeas contexts." *Jeffredo,* 599 F.3d at 918 (citing *Moore v. Nelson,* 270 F.3d 789, 791 (9th Cir. 2001)). Therefore, a federal court may review an ICRA habeas petition if the petitioner is "detained" or "in custody." *Id.* at 918–19.

Even so, "actual *physical* custody is not a jurisdictional prerequisite for federal habeas review" under ICRA. *Poodry,* 85 F.3d at 893–94. The Ninth Circuit has held that in order to establish "detention" in the absence of physical custody-and thereby jurisdiction under § 1303–the petitioner must establish " 'a

severe actual or potential restraint on liberty.'" *Id.* at 919 (quoting *Poodry,* 85 F.3d at 880). In this regard the Ninth Circuit follows the Second Circuit. *Id.* ("We agree with our colleagues on the Second Circuit and hold that § 1303 does require 'a severe actual or potential restraint on liberty.'" (quoting *Poodry,* 85 F.3d at 880)).

Permanent banishment is a sufficiently severe restraint on liberty to constitute "detention" and invoke federal habeas jurisdiction under § 1303 of ICRA. In *Poodry,* the petitioners accused various members of the Tonawanda Band Council of Chiefs of misusing tribal funds, concealing business records, and interfering with tribal elections. 85 F.3d at 877–78. The petitioners formed an interim tribal council. *Id.* at 878. The Council of Chiefs then notified the petitioners that their "actions to overthrow ... the traditional government of the Tonawanda Band ... are considered treason," and the petitioners were permanently stripped of their tribal citizenship, told to leave their homes, and told that they would be escorted to the edge of tribal lands—they had been permanently banished. *Id.* The district court granted the respondents' motion to dismiss for lack of jurisdiction, holding that banishment did not invoke ICRA's habeas corpus jurisdiction; the Second Circuit reversed. *Id.* at 879, 901.

The court in *Poodry* held the "petitioners have ... demonstrated a sufficiently severe restraint on liberty" to meet the "detention" prerequisite for habeas review. *Id.* at 901. In reaching this conclusion, the court reasoned that the banishment order severely restrained the petitioners' liberty because, under that order, "the petitioners may be removed from the Tonawanda Reservation at any time." *Id.* at 895.

Moreover, the court reasoned the "coerced ... deprivation of the petitioners' membership and their social and cultural affiliation" is more severe than the punishment of imprisonment, as it "works a complete destruction of one's social, cultural, and political existence," *id.* at 897, and because under tribal law, imprisonment accompanies lesser crimes: "We believe that Congress could not have intended to permit a tribe to circumvent the ICRA's habeas provision by permanently banishing, rather than imprisoning, members 'convicted' of the offense of treason." *Id.* at 895. The court also observed: "the holding of the case may have significance in the future. This is especially true at a time when some Indian tribal communities have achieved unusual opportunities for wealth, thereby unavoidably creating incentives for dominant elites to 'banish' irksome dissidents for 'treason.'" *Id.* at 897.

If a tribe permanently disenrolls its members and excludes them from some, but not all, tribal facilities, then those members have not suffered a sufficiently severe restraint on liberty to constitute detention and invoke federal habeas jurisdiction under ICRA. In *Jeffredo,* the Enrollment Committee of the Pechanga Tribe disenrol led several of the Tribe's members "for failure to prove lineal descent from an original Pechanga Temecula person." 599 F.3d at 917. The disenrol led members filed a petition for writ of habeas corpus under ICRA in a federal district court; the petition was dismissed for lack of jurisdiction, and the Ninth Circuit affirmed. *Id.* at 915, 917. The court distinguished *Poodry,* noting that "disenrollment does not mean that a person is banished from the Pechanga Reservation," and that the petitioners' "movements have not been restricted on the Reservation." *Id.* at 916, 919. The court rejected

the petitioners' argument that they have been detained because "they have been denied access to the Senior Citizens' Center, cannot go to the health clinic, and their children cannot go to tribal school." *Id.* at 918–19. The court explained: "This is not *Poodry*. In *Poodry,* the petitioners were convicted of treason, sentenced to permanent banishment, and permanently lost any and all rights afforded to tribal members. Appellants have not been convicted, sentenced, or permanently banished.... [T]herefore ... the limitation of Appellants' access to certain tribal facilities does not amount to a 'detention.'" *Id.* (citation omitted) (citing *Poodry,* 85 F.3d at 876, 878). The court also noted that, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Id.* at 920 (internal quotation marks omitted) (quoting *Santa Clara Pueblo,* 436 U.S. at 71 n. 32).

Here, contrary to Respondents' argument that *Jeffredo* is controlling, this case lies between the permanent banishment for treason in *Poodry* and the disenrollment for failure to prove lineal descent in *Jeffredo.* Unlike *Jeffredo,* in which those petitioners' movements on tribal lands were not restricted, here, Petitioners were excluded from all Auburn Indian tribal lands. Moreover, the Enrollment Committee's decision in *Jeffredo*—that those petitioners were not lineal descendants of Pechanga Temecula persons—was within the Indian tribe's "power to define membership as it chooses," 599 F.3d at 920 (quoting *Williams v. Gover,* 490 F.3d 785, 789 (9th Cir. 2007)); whereas here, the Auburn Tribal Council decided to exclude these Petitioners from all tribal lands for "defamatory statements" critical of the Tribal Council and allegedly in retaliation for protected political

speech. Unlike the defamation decision in the election campaign context here, the decision in *Jeffredo*—whether a person is a lineal descendant—is, as the Supreme Court observed in *Santa Clara Pueblo v. Martinez,* "particularly ... delicate": "To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it." 436 U.S. at 54 (internal quotation marks omitted).

Further, this case is distinguishable from *Poodry* as well. Unlike *Poodry,* the Tribe's decision in this case, to ban Petitioners from all tribal lands for several years, was not permanent banishment. Moreover, the Tribe in this case did not decide to permanently strip Petitioners of their tribal citizenship, unlike *Poodry*. In *Poodry,* the court reasoned that permanent banishment was a sufficiently severe restraint on liberty in part because it is akin to denationalization in that it results in "an extraordinarily severe penalty," 85 F.3d at 895–96 (quoting *Klapprott v. United States,* 335 U.S. 601, 611–12, 69 S. Ct. 384, 93 L. Ed. 266 (1949)), since the result is the "total destruction of the individual's status in organized society," *id.* at 896 (quoting *Trop v. Dulles,* 356 U.S. 86, 101–02, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion) (Warren, C.J.)).[5] Petitioners' punishment in this case does not implicate this reasoning from *Poodry* because Petitioners either retain their political status in the Tribe, or will regain

[5] The court in *Poodry* also noted that, in *Trop,* the U.S. Supreme Court held that the penalty of denationalization of a natural-born citizen after conviction for desertion was unconstitutional as "a form of punishment more primitive than torture." 85 F.3d at 896 (quoting *Trop,* 356 U.S. at 101–02).

that status after a period of time. Thus, Petitioners have not suffered a permanent "total destruction" of their "social, cultural, and political existence," unlike the petitioners in *Poodry*. *Id.* at 896–97.

Thus, neither *Poodry* nor *Jeffredo* resolve this case, although the principles articulated in those decisions inform the Court's analysis here. Both cases teach that this Court should examine the nature and severity of Petitioners' punishment to determine whether Petitioners' liberty has been sufficiently restrained to constitute "detention." *See Jeffredo,* 599 F.3d at 919 (examining the severity of the restraints on the petitioners' liberty); *Poodry,* 85 F.3d at 895 (identifying the specific restraints on the petitioners' liberty).

Here, Petitioners argue their liberty has been severely restrained because they have been excluded from all tribal lands and thereby have been precluded from participating in tribal ceremonies and cultural events. The severity of the restraint on Petitioners' liberty inflicted through their exclusion from all tribal lands is magnified by the special connection between American Indians and their ancejstral homel and,[6] and the cultural destruction wrought by the tragic history of land removal and allotment.[7]

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[6] Riley, *supra* note 1, at 846–47 & n. 360 (describing the impact of federal allotment policy under the Dawes Act of 1887 as having a "profound irreversible effect" on American Indians' "sense of community and [their] social structure" (quoting *The Native Americans* (TBS television broadcast 1992) (interview with former Principal Chief of the Cherokee Nation of Oklahoma, Wilma Mankiller))).

[7] *See* Riley, *supra* note 1, at 847 n. 361 (quoting President Theodore Roosevelt as stating "The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts

Moreover, Petitioner Tavares was prevented from attending her grandchildren's school graduations and cannot walk her grandchildren to class. Petitioner Tavares avers an "important cultural aspect of our Tribe is respect for our elders." (Decl. Tavares ¶ 9, ECF No. 19 .) Yet, Petitioners, two of whom are "well-respected elders," have also been unable to visit the Tribe's Senior Center. Further, Petitioners were active in tribal politics before their expulsion: Petitioner Tavares was the former Chair of the Tribal Council and Petitioner Suehead served on the Council. Under the exclusion order, Petitioners could not attend Tribal Council meetings to participate or otherwise engage in political activities. Petitioner Tavares declares: "I have been effectively silenced. My most precious liberties, my freedom of speech and freedom of association, have been taken from me." (*Id.* ¶ 10.)

Yet, Petitioners' punishments in this case were, in many ways, not as severe a restraint on liberty as the punishments in *Jeffredo* and *Poodry*. Each Petitioner retained the right to vote through absentee ballot. Petitioners also retained their tribal medical benefits. Unlike *Jeffredo,* none of the Petitioners herein were disenrolled from membership in the Tribe and all Petitioners remained members of the Tribe. Also, because some of the historic Auburn

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directly upon the family and the individual"); *see also* Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151,* 27 AM. INDIAN L. REV. 421, 449 (2003) ("Allotment's impact on communally held land and important sacred and cultural sites opened the door for the eventual destruction of tribal life-ways.... [T]he blow was less economic than psychological and even spiritual. A way of life had been smashed; a value system destroyed.")

Rancheria is on private land, Petitioners continue to have access to those portions of the Rancheri a that are not tribal land. Respondents assert, therefore, "unlike the petitioners in *Poodry,* the Petitioners in this case were not excluded from the Tribe's central and historic residential community." (Mot. to Dismiss 13:1–7, ECF No. 13.)

The Court finds Petitioners have not met their burden to show their exclusion from tribal lands and suspension of gaming benefits are a sufficiently severe restraint on liberty to constitute "detention" and establish jurisdiction in this case. Petitioners are not confined to a particular area. *Cf. Jones v. Cunningham,* 371 U.S. 236, 242, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963) (finding parolee remained "in custody" outside of prison because "Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer."). Moreover, as Respondents point out, unlike *Poodry,* Petitioners exclusion from tribal lands is temporary. Further, as Respondents stated at oral argument, Petitioners have not pointed to a single case in which a federal court asserted jurisdiction to review a tribe's decision to temporarily exclude members from all tribal lands. Petitioners' reliance on *Quair v. Sisco,* 359 F. Supp. 2d 948 (E.D. Cal. 2004) and *Sweet v. Hinzman,* 634 F. Supp. 2d 1196 (W.D. Wash. 2008) is misplaced in this regard because, as Respondents point out in reply, both of these cases involved challenges to permanent banishment.

Petitioners' argument is not without logical force, however. As Petitioners stated at oral argument, in the ordinary criminal habeas context, the temporary duration of the detention is irrelevant: just as there is habeas jurisdiction over a ten-year prison sentence

and a permanent sentence of life without parole alike, so too should there be federal habeas jurisdiction over temporary exclusion and permanent exclusion from tribal lands alike, Petitioners contend. Petitioners also point out the Ninth Circuit instructs courts to look to cases in the ordinary criminal habeas context for guidance. *See Jeffredo,* 599 F.3d at 918 ("The term 'detention' in [ICRA] must be interpreted similarly to the 'in custody' requirement in other habeas contexts."). Moreover, the restraint in this case was severe: like an incarcerated prisoner, Petitioner Tavares could not attend graduations of relatives, and Petitioners could not participate in tribal political activities, ceremonies, and events. Further, Respondents cannot point to a single decision in which an Indian tribe excluded a member from all tribal lands (even for a temporary period), and a federal court declined to exercise jurisdiction after finding the restraint on liberty insufficiently severe.

Nonetheless, because the burden is on Petitioners as the proponents of federal jurisdiction, the Court hesitates to expand the scope of federal jurisdiction in the absence of any authority. The presumption that the Court lacks jurisdiction, *Kokkonen,* 511 U.S. at 377, is of particular force here because Petitioners challenge the decision of an Indian tribal government. As the Supreme Court has "repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly *restrained*." *Santa Clara Pueblo,* 436 U.S. at 72 (emphasis added); *cf. Lewis v. Norton,* 424 F.3d 959, 960 (9th Cir. 2005) ("Although their claim ... appears to be a strong one, ... their claim cannot survive the double jurisdictional whammy of sovereign immunity

and lack of federal court jurisdiction to intervene in tribal membership disputes."). Thus, as the Ninth Circuit observed in *Jeffredo* and *Lewis,* even though "this case is deeply troubling on the level of fundamental substantive justice," the Court is "not in a position to modify ... doctrines of sovereign immunity. This is a matter in the hands of a higher authority than our court." *Jeffredo,* 599 F.3d at 921 (quoting *Lewis,* 424 F.3d at 963).

Moreover, the Court's conclusion—that temporary exclusion is not a severe enough restraint on liberty to constitute "detention"—is consistent with persuasive authority declining jurisdiction to review restraints short of permanent banishment. For example, federal courts have held that they lack habeas jurisdiction under ICRA over Tribe actions including:

- termination of employment, health care, and annuity payments, *Shenandoah v. U.S. Dep't of Interior,* 159 F.3d 708, 714 (2d Cir. 1998),
- a refusal to certify a candidate for a Tribal Council election, *Lewis v. White Mountain Apache Tribe,* No. 12–cv–8073, 2013 WL 510111, at *6 (D. Ariz. Jan. 24, 2013),
- unlawful detainer and eviction orders, *Quitquit v. Robinson Rancheria Citizens Bus. Council,* No. 11–c–0983, 2011 WL 2607172, at *7–8 (N.D. Cal. July 1, 2011); *Shenandoah v. Halbritter,* 275 F. Supp. 2d 279, 285–86 (N.D. N.Y. 2003), and
- the temporary suspension of a license to practice as a tribal-court advocate, *Poulson v. Tribal Court for the Ute Indian Tribe of the Uintah & Ouray Reservation,* No. 2:12–cv–497, 2013 WL 1367045, at *2 (D. Utah Apr. 4, 2013).

As these decisions reflect, "short of an order of permanent banishment, federal courts have been reluctant to find tribal restraints severe enough to warrant habeas review." *Mitchell v. Seneca Nation of Indians,* No. 12–cv–119–A, 2013 WL 1337299, at *3–4 (W.D.N.Y. Mar. 29, 2013) (holding that tribal resolution prohibiting the petitioner from entering tribal buildings, businesses, and health care facilities "is not a restraint severe enough to permit habeas corpus review").

For the foregoing reasons and in accordance with the courts that have considered similar questions, the Court finds Petitioners have not met their burden to show their temporary exclusion from tribal lands constitutes "detention." Therefore, Respondents' Motion to Dismiss for lack of jurisdiction is granted, and the Court need not and does not consider Respondents' mootness and exhaustion arguments, or Respondents' argument that the civil nature of this dispute precludes habeas review.

B. Jurisdiction Under *Ex parte Young*

Petitioners' application for federal habeas relief under ICRA also asserts the "Court has jurisdiction over all [R]espondents, who collectively constitute the current Tribal Council ... pursuant to the doctrine of *Ex [p]arte Young*." (Pet.¶ 4(b), ECF No. 1.) Respondents move to dismiss, arguing the *Ex parte Young* doctrine "is an exception to the Eleventh Amendment's guarantee of sovereign immunity," and "cannot serve as an independent basis for jurisdiction" because there remains "no statutory basis for [Petitioners'] suit." (Mot. to Dismiss 16:18–17:3, ECF No. 13.) In their opposition to the motion to dismiss, Petitioners appear to clarify that their *Ex parte Young* argument is intended only to allow Petitioners

to litigate their "slush fund" claim: that "third parties, who hold no membership or office in the Tribe, are empowered ... to dip into a tribally-funded account," which Petitioners describe as a "slush fund," with "no advance notice to the Tribe." (Opp'n 16:24–18:8, ECF No. 17.) Petitioners' argument appears to address Respondents' contention that the "slush fund" claims were not presented to the Tribe and are therefore unexhausted. (*See id.*)

Ex parte Young does not provide an independent basis of federal jurisdiction, particularly if "Congress has created a remedial scheme for the enforcement of a particular federal right." *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 74, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). The Supreme Court in Santa Clara Pueblo rejected the argument that *Ex parte Young* permits an implied private right of action to enforce the civil rights protections contained in § 1302 of ICRA. The Court concluded "Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303." *Santa Clara Pueblo,* 436 U.S. at 70. Therefore, since Petitioner cannot meet the requirements for ICRA habeas jurisdiction under § 1303 for the reasons set forth above, *Ex parte Young* does not provide an alternative jurisdictional basis to challenge the Tribe's actions.

CONCLUSION

Based on the foregoing, Respondents' Motion to Dismiss for lack of jurisdiction (ECF No. 12) is GRANTED. The Petition for Writ of Habeas Corpus Under the Indian Civil Rights Act is DISMISSED. The Clerk of the Court is directed to close the case.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-15814

Jessica Tavares; Dolly Suehead; Donna Caesar; Barbara Suehead
Petitioners–Appellants

v.

Gene Whitehouse; Calvin Moman; Brenda Adams; John Williams; Danny Rey, in their official capacity as members of the Tribal Council of the United Auburn Indian Community
Respondents-Appellees

April 24, 2017

Before: McKEOWN, WARDLAW, and TALLMAN, *Circuit Judges*.

Judge McKeown and Judge Tallman vote to deny the petition for rehearing and the petition for rehearing en banc. Judge Wardlaw votes to grant the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.