No. 17-429

IN THE

Supreme Court of the United States

JESSICA TAVARES,
Petitioner,
v.
GENE WHITEHOUSE, *ET AL.*,
Respondents.

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

BRIEF OF ANDREA M. SEIELSTAD, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Professor Andrea M. Seielstad has over 25 years of experience representing individuals in tribal court proceedings, as well as in state, federal and administrative courts of Ohio and New Mexico. She has represented Native Americans in habeas actions in tribal and state court and collaborated in the representation of Indian defendants in federal habeas court review of tribal court orders pursuant to 25 U.S.C. §1303. Specifically, Professor Seielstad represented the petitioners in *Napoles v. Rogers, et al*., in proceedings before the United States District Court, No. 16-CV-01933 (E.D. Cal.), and in earlier proceedings before the Southern California Intertribal Court of Appeals and Bishop Paiute Tribal Court of Appeals.

Professor Seielstad is a tenured professor at the University of Dayton School of Law, where she teaches civil procedure, civil rights enforcement, and dispute resolution. She also teaches at the University of New Mexico's Southwest Indian Law Clinic and participated as a public defender in the Nez Perce Tribal Court at the University of Idaho School of Law.

Professor Seielstad is committed to balancing the civil rights of Native Americans with principles of tribal sovereignty. Based on her experience representing tribal members, she understands the importance of adequate legal representation and due process rights in tribal justice systems. Based on her experiences, Professor Seielstad supports the petition

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[1] No counsel for a party authored any part of this brief, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. All parties have consented to its filing, and all parties received notice 10 days prior to its filing.

for a writ of *certiorari* seeking reversal in *Tavares v. Whitehouse,* 851 F.3d 863 (9th Cir. 2017).

SUMMARY OF ARGUMENT

Habeas corpus provides every citizen (and non-citizen) with a powerful tool to challenge a wrongful restriction on liberty. The unique authority exercised by tribal governing bodies makes independent judicial review of restrictions they may impose, such as the 10-year banishment in this case, particularly important for Native Americans. The Ninth Circuit's application of a different custody standard from that normally applied in habeas cases departs from the view of every other Circuit and essentially guts habeas corpus for tribal members, ironically in the name of tribal sovereignty, leaving them with no federal remedy for constitutional violations.

ARGUMENT

I. JUDICIAL REVIEW AS A NECESSARY ELEMENT OF DEFINING AND DEFENDING CIVIL LIBERTIES FROM A HISTORICAL PERSPECTIVE

As a people, civil liberties are essential to our identity. From the time of the Magna Carta, our ruling classes recognized the critical importance of ensuring that no person would be unjustly deprived of his freedom or liberty. *Boumedine v. Bush*, 553 U.S. 723, 740 (2008). And no person was above the law, not even the King, who was himself accountable for his official acts. *Id*. This was a fundamental tenet of the relationship between the executive and the individual.

Throughout the centuries, our predecessors also recognized that the ability to seek judicial review of civil rights deprivations is as important as the rights

themselves. When one's civil liberties are infringed, there must be a process to challenge that injury, an opportunity to be heard, and, critically, a system of judicial review to test the legitimacy of that deprivation. *Boumedine*, 553 U.S. at 741. Indeed, the "very essence" of civil liberty is "the right to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). "One of the first duties of government is to afford that protection" and where "the laws furnish no remedy for the violation of a vested legal right," then it cannot be called a government of laws, but is instead a government of men. *Id*.

Understanding this history, our nation's founders decreed that freedom from unlawful restraint—particularly by the government—is a "fundamental precept of liberty" and the writ of habeas corpus is a "vital instrument to secure that freedom." *Boumedine*, 553 U.S. at 739. Thus, not only does habeas review provide a check on power, but it also guarantees the method by which to challenge a deprivation of civil liberties. *Id*. at 743. The founders wrote these "safeguards of liberty" directly into the Constitution through the separation of powers doctrine and the Suspension Clause, before the Bill of Rights even existed. *Id.* at 739. The separation of powers doctrine was designed to "not only make Government accountable but also to secure individual liberty." *Id.* at 742-43. By providing for independent judicial review of the acts of the executive, it "guarantees an affirmative right to judicial inquiry into the causes of detention," providing its own "defense against tyranny." *Id*.

Over time, the writ of habeas corpus has come to protect other fundamental liberties beyond physical detention. See *Poodry v. Tonawanda Band of Seneca*

Indians, 85 F.3d 874, 881 (2d Cir. 1996). Moreover, individuals may seek judicial review of constitutional rights violations that occur at the hands of state and local governmental institutions where their policies or customs result in a deprivation of an individual's civil rights (*Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1977)), at the hands of state actors (42 U.S.C. §1983), and at the hands of federal officials (*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 398-97 (1971)).

While Native American tribes existed before the establishment of the Constitution and are bound their own systems of self-governance, they are nevertheless comprised of American citizens. Recognizing this, Congress, in the exercise of its plenary authority to modify the powers of tribal self-governance, enacted the Indian Civil Rights Act ("ICRA"), extending the most fundamental rights and liberties to Native Americans. 25 U.S.C. §1302. It also extended the privilege of the writ of habeas corpus to enforce those rights. 25 U.S.C. §1303. Section 1303 provides for judicial review of civil rights violations by the executive where meaningful relief is otherwise unavailable.

The Ninth Circuit's decision in *Tavares* puts these processes in jeopardy in Native American communities by constraining the right of habeas review to physical detentions only, despite the writ's ability to protect restrictions on liberty more broadly. This is particularly concerning given the unique nature of tribal operations, which makes members susceptible to oppression by their government through banishment, political oppression, and property takings. By limiting the use of habeas to physical detention only, tribal members remain vulnerable to abuses of power

by their tribal councils with no means to challenge them.

This amicus brief in support of the petition for writ of certiorari aims to educate the Court about the unique conditions that exist in Native American communities and how the *Tavares* decision will erode the most fundamental guarantees of liberty for these American citizens.

II. COMPETING LEGAL AND PHILOSOPHICAL PRINCIPLES MAKE JUDICIAL REVIEW EXCEEDINGLY IMPORTANT TO DEFENDING CIVIL LIBERTIES IN NATIVE AMERICAN TRIBAL COMMUNITIES

In arriving at its conclusion in *Tavares*, the Ninth Circuit noted, correctly, that there are several competing principles that permeate the discussion of federal jurisdiction over tribal disputes. First, tribes enjoy an inherent authority to self-govern, with the goal of fostering tribal independence. *Tavares*, 851 F.3d at 869. Second, Congress has plenary power to modify these powers of self-government. *Id.*, citing Cohen's Handbook of Federal Indian Law §2.01[1] (hereinafter "Cohen"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

Congress exercised that authority in enacting the ICRA, which extended to Native Americans "the broad constitutional rights secured to other Americans." *Tavares*, 851 F.3d at 879 (Wardlaw, J., dissenting), citing S. Rep. No. 90-841, at 6 (1967). The "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. Thus, Congress explicitly provided for habeas review "to test the legality of…detention by order of an Indian tribe,"

which helped "strengthen[ ] the position of the individual tribal members vis-à-vis the tribe." *Id.* at 62; 25 U.S.C. §1303.

While ostensibly recognizing the fundamental importance of these principles, the Ninth Circuit nevertheless abandoned them in concluding that the ICRA does not provide for federal habeas review of the petitioner's banishment, long recognized as one of the "harshest" punishments, akin to a loss of citizenship. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n. 23 (1963). That the petitioner was banished, without due process, after exercising her first amendment right to criticize the tribal council's abuses of power makes the council's actions particularly egregious. *Tavares*, 851 F.3d at 867-68.

Just as our Constitution and statutes provide processes by which American citizens may obtain independent judicial review of civil rights violations to "strengthen the position of [the] individual[ ]" vis-à-vis the government through actions brought under *Bivens*, *Monell*, and section 1983, Native Americans deserve the same right of independent review when their tribal councils so infringe. *Santa Clara Pueblo*, 436 U.S. at 62. ICRA was intended to provide such a process. *Id*.

Over time, these and other legal and philosophical constructs unique to tribal communities have had the unintended consequences of making tribal members more susceptible to civil rights violations, and making tribal councils particularly ill-suited to provide independent, self-critical review of their actions toward the members. Sovereign immunity, jurisdictional uncertainty regarding criminal prosecutions, and tribal councils' susceptibility to external financial influences converge to create a system in need of protection through independent judicial review.

A. Sovereign Immunity

Because Indian tribes are considered sovereign nations that existed before the Constitution, they are not directly bound by the Constitution in exercising their powers. *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896). Tribes also enjoy sovereign immunity, as most governments do, which protects them from lawsuits brought in federal, state, or tribal courts. *Santa Clara Pueblo*, 436 U.S. at 58.[2] While other governments often waive immunity in certain circumstances, tribes rarely do. Seielstad, p. 669. Nor do tribes generally recognize laws that confer causes of action for civil rights violations. *Id*. As a result, tribal immunity is strong in these communities. Klint A. Cowan, International Responsibility for Human Rights Violations by American Indian Tribes, 9 Yale Hum. Rts. & Dev. L.J. 1, 9 (2006).

Consequently, absent an express waiver by the tribe, sovereign immunity bars all civil actions for injunctive and declaratory relief against a tribe. *Santa Clara Pueblo*, 436 U.S. at 59. Thus, §1303 provides the only independent cause of action that may be brought against a tribe for civil rights violations. *Id*.

B. Public Law 280

Pursuant to the enactment of Public Law 280, Congress gave state law enforcement agencies jurisdiction over most criminal and civil matters on tribal lands,

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[2] For a detailed analysis of the doctrine of tribal sovereign immunity, see Andrea M. Seielstad, The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty, 37 Tulsa L. Rev. 661 (2002) (hereinafter, "Seielstad").

nominally exercised concurrently with tribal authorities. Cohen, §6.04[3]. Practically speaking, however, tribes are limited in their ability to exercise criminal jurisdiction and typically lack the prosecutorial systems to do so. Furthermore, the types of criminal sanctions they can impose are severely limited. 25 U.S.C. §1302(b). State law enforcement agencies also are reluctant to interfere in internal tribal affairs such as land disputes, governance, and civil rights issues. This creates a jurisdictional gap, with no clear expectations about which entity will assert criminal jurisdiction under given circumstances. Yet there remains a recognition by the tribes that they must be able to hold people accountable to certain standards of community behavior.[3]

Consequently, tribes have incentive to extend severe civil punishments—including banishment and exclusion—to address conduct that is criminal in nature. In *Tavares*, tribal officials banished the petitioner from lands and services for up to ten years after she challenged the management of tribal affairs. In *Napoles*, a post-*Tavares* case in which Amicus is involved, tribal officials imposed civil trespass citations, imposed a temporary restraining order *sua sponte*, and threatened to subject the petitioners to federal and state prosecution in an effort to keep the petitioners off of their family land that tribal officials sought to use for commercial development. 2017 U.S. Dist. LEXIS 106382, at *5-6.

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[3] For further discussion of how civil infraction systems have arisen in response to other jurisdictional gaps, such as the lack of tribal court jurisdiction over non-members, see Leah Juress, Halting the "Slide Down the Sovereignty Slope": Creating Remedies for Tribes Extending Civil Infraction Systems Over Non-Indians, 16 Rutgers Race & L. Rev. 39 (2015).

In both *Tavares* and *Napoles*, the petitioners alleged they sustained serious civil rights deprivations under the ICRA, including restricted movement, coercive conditions akin to probationary orders, and abuse of process, that met the requirements of "detention" sufficient to invoke habeas relief, although they were not arrested or charged with crimes. Nevertheless, the tribal officials imposed civil consequences that arguably are more restrictive than any temporary detention. Nor were petitioners afforded representation, due process, or other substantive protections guaranteed under the ICRA.

Despite the disturbing allegations, those petitioners cannot seek federal judicial review of these egregious violations under §1303 because they were not actually incarcerated. *Tavares* now makes "abundantly clear that any extension of 'detention' under §1303 beyond actual physical custody must be narrowly construed by courts of this circuit." *Napoles*, 2017 U.S. Dist. LEXIS 106382, *14. The *Napoles* 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 *15.

It must be noted that a substantial number of Indian nations operate robust judicial systems that seek to provide remedies to individuals whose rights have been violated. Amicus often relies on the Navajo Nation Supreme Court and Southern California Intertribal Court of Appeals for well-reasoned interpretations of legal doctrine, tribal law, and tradition. The sovereignty of tribal governments, the perpetuation of the tribal culture, and the need for self-government often play a critical role in tribal courts.

Amicus respects the authority of tribal courts to exercise jurisdiction and interpretative authority over the ICRA. She also recognizes the fine balance between civil rights, tribal sovereignty, and cultural values. Through her legal and scholarly work, Amicus seeks to advance these individual rights in light of existing tribal infrastructure.

However, federal review must be available to vindicate civil rights violations where those means have proven futile, processes have been exhausted, or conflicts of interest exist. Amicus notes a disturbing trend of abuses of power that cause tribal courts to bypass, dismantle, or deliberately subvert established legal processes.[4] External financial pressures in the form of private development prospects are powerful motivators to cash-strapped tribal councils. Tribal judges, where they exist, subvert independent judicial review in favor of political objectives. In such cases, serious

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[4] In *Napoles*, the Tribal Council disbanded its appellate court after that court reversed the tribal court's finding that the petitioners had trespassed because the tribal council had failed to establish it had authority over in the land in question. The land was part of a parcel of land that the petitioners have used and occupied as part of a family land assignment granted to their grandmother and mother pursuant to a Congressionally-delegated federal land exchange wherein the United States gave land assignments to induce people to vacate homes located elsewhere and move upon the land that is now part of the Bishop Paiute reservation. Only after the petitioners filed their petition for writ of habeas corpus in federal court and before that lower court decision was dismissed did the tribal council re-assemble its appellate court. The fact that the new panel of judges were hired in a closed process during the pendency of subsequent legal proceedings filed in tribal court by Bishop Paiute Tribal Council creates a cloud over the legitimacy and independence of the judiciary as well, although it has yet to be seen how that body will actually rule in the pending legal matters.

civil rights violations are likely to occur. The more tribal members speak out, the more serious the retaliation may be, further exacerbating the problems.

ICRA was not intended to open the flood gates to federal review of all tribal actions. To the contrary, Congress sought to combat only "the most serious abuses of tribal power." *Santa Clara Pueblo*, 436 U.S. at 71. The only way to enforce those rights in federal court is through the habeas remedy provided in §1303. *Id*. at 57-58. Congress expressly provided a cause of action for that very purpose. However, as the petition notes, the *Tavares* decision "drastically circumscribes" that singular federal remedy. Pet. 21.

III. WITHOUT JUDICIAL REVIEW UNDER ICRA, THERE WILL BE RECURRING AND SUBSTANTIAL VIOLATIONS OF INDIVIDUAL RIGHTS AGAINST CITIZENS OF THE UNITED STATES, INCLUDING TRIBAL MEMBERS, FOR WHICH THERE IS NO REDRESS.

The petitioner makes compelling legal arguments for why this Court should accept *certiorari* and reverse the restrictive interpretation of "detention" under the ICRA. Federal jurisdiction is critical to ensuring independent judicial review of those substantial civil rights violations sufficient to invoke habeas review. Without a meaningful opportunity for independent review, tribal governments will act with impunity in putting their interests above the individuals, subjecting a growing number of tribal members to civil rights abuses. Individuals and families may be banished from their communities, removed from their land, or subjected to severe restrictions on their movement with no available remedies.

A. Banishment and Exclusion from Tribal Lands or Services

The use of banishment and exclusion from tribal lands and services is significant and likely to recur in light of *Tavares*. A number of tribes impose this consequence in response to those members who call their officials to account for sound governance and financial accountability in the interests of the whole tribe. In *Poodry*, 85 F.3d at 877-78, the petitioners belonged to a Seneca Indian tribe and raised serious allegations of misconduct by tribal leaders. *Id*. Following their protest, tribal officials declared them guilty of "treason" and permanently banished them from the reservation. *Id*. They were removed from the Tribal rolls, their Indian names were taken away, and their lands escheated to the government. They were permanently stripped of Indian citizenship and escorted off the reservation. *Id*.

The petitioners challenged their banishment under §1303. The Second Circuit determined that the tribe's acts constituted a detention under the ICRA. *Id*. at 895. Banishment is punitive in nature and constitutes a "severe" restraint on liberty, even though the petitioners were not physically incarcerated. *Id*.

Similarly, the petitioner in *Tavares* expressed disagreement with the tribal council's governance of internal tribal affairs. 851 F.3d at 867-868. She submitted a recall petition to the tribe's election committee seeking removal of council members for financial mismanagement, electoral irregularities, and denial of due process, among other things. *Id*. The council banished her from tribal lands for ten years. Although not permanently banished, she was subject to severe and lasting restrictions on her liberty. *Id*. at 868-869. Unlike *Poodry*, however, the Ninth Circuit

did not find this punishment to rise to the level of a detention to confer habeas jurisdiction. *Id*.

Aside from the legal implications, these acts affect one's social and political identity and have devastating impacts on members' livelihoods. That is different, however, from cases involving "disenrollment" from tribal membership. In *Santa Clara Pueblo*, this Court determined that a tribe has a sovereign right to determine its membership from an eligibility standpoint. 436 U.S. at 52-53. The issue in that case was whether a child born to one tribe member and one non-member was considered a member of that tribe. *Id*. Control over enrollment is part of the bundle of sovereign rights that a tribe enjoys and not about depriving one of vested rights.

Neither *Tavares* nor *Napoles* involve enrollment decisions, nor do they require the court to determine whether ICRA habeas relief may apply to disenrollment cases lacking in other forms of physical restraint. The main jurisdictional basis behind *Tavares* is the actual physical exclusion of Petitioners from tribal lands and services. Similarly, *Napoles* is also about physical exclusion, banishment from lands, and other restrictions on liberty. It does not implicate enrollment in any way.

Amicus does not advocate in this case for the expansion of federal habeas review to disenrollment situations lacking in other aspects of physical and geographical restraint. However, the underlying circumstances of the enrollment cases further exemplify the ways in which gaming and financial incentives and pressures, internal politics, and flawed legal process may give rise to serious violations of individual rights. Where disenrollment combines with any form of ban-

ishment, exclusion, taking of land, or judicial superintendence imposing restrictions, Congress most definitely intended there to be federal review.

B. Taking and restricted access to use and occupancy rights of land that is not tribal trust land.

Land ownership, land use, and occupancy rights within Indian country have complex variation. Much "Indian land" is tribal trust land, wherein the title is held in trust by the United States for the beneficial interest of the tribe itself. Cohen, §15.02. Other statuses exist as well, including restricted fee or trust land held by individuals. Additionally, individuals can acquire use and occupancy rights on tribal trust land within reservation boundaries such as grazing and home site leases. Homes can be financed and built and improvements made based on these use and occupancy rights. There is land held in fee simple by Indians as well as non-Indians located within the exterior boundaries of reservations as well. See *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 328-29 (2008) (addressing tribal court civil adjudicatory jurisdiction over a discrimination claim occurring over a sale of fee simple land within the exterior boundaries of a reservation).

This complex jurisdictional landscape creates pressures and opportunities for activities that may jeopardize the rights and interests of those living upon and possessing use and occupancy rights on Indian lands. Those impacted may be Indian or non-Indian. Without federal habeas review under ICRA, individuals holding property interests within the exterior boundaries of tribal lands may have no means of protecting those interests.

A clear example of what can happen absent habeas review occurred in the Tenth Circuit case of *Dry Creek Lodge, Inc., v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). In *Dry Creek*, the plaintiffs, non-Indians, built a guest lodge on a tract of land that they owned within the Arapahoe and Shoshone reservation. *Id*. at 684. Once completed, however, the tribes' Joint Business Council permitted an Indian family to barricade a road on the family's property that had been the sole means of access to the lodge. *Id*. Dry Creek Lodge and the other plaintiffs sought relief with the tribal court, but the tribal judge refused to hear their case, stating that "he could not incur the displeasure of the Council" and that he would not do anything without the Council's permission. *Id*.

Although the tribes moved to dismiss the case as barred by sovereign immunity, the federal district court permitted the case to proceed. The court reasoned: "[i]t is obvious that the plaintiffs in this appeal have no remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate. The record demonstrates that plaintiffs sought a forum within the tribes to consider the issue . . . There has to be a forum where the dispute can be settled." *Id*. at 685. The Tenth Circuit affirmed, holding that federal court review of the resulting interference with petitioner's land is permitted under the ICRA.

In *Napoles v. Rogers*, the petitioners possess an original and continuing interest in use and occupancy of a family land assignment originally granted to the family by the federal government for the purpose of vacating

other lands located in Owens Valley, California at the inception of the creation of Bishop Paiute reservation.

Notwithstanding their uninterrupted claim to the land in question, Bishop Paiute Tribal Council sought to permanently eject the petitioners and other family members from a portion of their original family assignment in order to pursue a development project, specifically a hotel and an expansion to their casino, using repeated action by tribal and county law enforcement officers, erection of physical structures, the filing of trespass actions in the tribal court in an effort to do so, and legal orders effectively banning them upon threat of arrest and federal criminal prosecution. Significantly, the proposed development was rejected by a referendum vote by the General Council, the governing body bestowed with responsibility for such decisions.[5] In addition to actions taken on the land by tribal police, county sheriffs, and other representatives of the tribal council that petitioners allege to be "detentions" under the ICRA, a number of trespass citations were filed against them in tribal court as well.

Like the tribal court in *Dry Creek*, the tribal judge in Bishop Paiute Tribal Court refused to go against the wishes of the tribal council or even to hear testimony about the status of the land in question.[6] The judge

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[5] A detailed description of the history of the land is set forth in the tribal court appellate decisions in Bishop Paiute Tribal Council v. Bouch, BP-AP 1412-6-12, Intertribal Court of Appeals of Southern California acting by designation as the Bishop Paiute Appellate Court (November 3, 2015), vacated and re-issued upon rehearing in Opinion (June 1, 2016).

[6] In the hearing, the court explained to the petitioners and their family, "[o]nce again I cannot, if the [t]ribal [c]ouncil tells me it's their land, there's nothing I can do about that. Let me say

simply ordered that the petitioners would be removed from the land. The petitioners appealed the case to the Bishop Paiute Court of Appeals, which vacated the trespass decision and remanded the matter to tribal court for further proceedings. *Bishop Paiute Tribal Council v. Bouch*, B-AP-1412-6-12, *14. Rather than do that, however, the tribal court dismissed the case with prejudice. Thereafter, representatives of the tribal council filed numerous trespass citations against the petitioners and utilized other means to eject and ban them from their land. The council dismissed and reinstated citations before the tribal court as a means of evading review. The tribal judge then issued a Temporary Protection Order ("TPO") against the petitioners under the federal Violence Against Women Act ("VAWA")—*sua sponte* and without any evidentiary support—effectively excluding them from the land under threat of further legal prosecution, including prosecution of federal crimes. *Napoles*, 2017 U.S. Dist. LEXIS 106382, at *5.

When Petitioners attempted to challenge these actions through a writ of mandamus action filed in the tribal court of appeals, they discovered that the tribal council had terminated its contract and disbanded that court. It was at this point—physically excluded from the land, surrounded and intimidated by tribal police and county sheriffs, bound by the terms of an invalid TPO that notified outside law enforcement

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that, and I'm not disagreeing with you, I'm telling you I have no authority to make that determination. . . . And I have to accept the Tribal Council's position that it's their land at this point in time. . . [I]f the tribal council comes and tells me this is our land I can't say no it's not, I don't have that kind of authority." *Napoles v. Rogers*, First Amended Petition, Paragraph 56 (citing Transcript, at 4-5, Bishop Paiute Tribal Court, June 17, 2014).

agencies of potential (though baseless) federal criminal violations, and without the protection of the tribal court of appeals—that the petitioners filed their federal habeas action.

In each of these instances, Indian and non-Indian individuals with use and occupancy rights to lands located within the exterior boundaries of Indian reservations suffered severe restraints and taking of their land. In the case of *Napoles*, the taking was accompanied by other actions that restricted the petitioners' liberties and freedom of movement, as well as threatened their physical safety. Although tribal courts existed in those instances, they were unwilling to go against the interests of the tribal council that was directing the offending action. In fact, through issuance of ex parte orders issued *sua sponte* and without evidentiary support, the tribal judge directly participated in the deprivation of the petitioners' civil liberties, leaving them with no recourse to defend their rights and property interests. This can be a recurring and frequent problem in tribal communities.

Land is scarce within the boundaries of Indian country and many reservations, like the Bishop Paiute, are confined to a few hundred acres. In areas like California, where land available for development in surrounding areas is scarce and in close proximity to prime recreational areas, there can be great pressure imposed on tribal officials to enter into projects that convert lands designated for tribal members' residential and community buildings into lucrative casinos, hotels, and golf courses. It is not the fact of business development that is the problem, but rather the manner and means of approving and effectuating it. Not only may these actions displace individuals from their

homes and otherwise encroach upon their fundamental rights, but they may erode the physical foundation upon which the tribe's sovereignty is based.

Having represented individuals in civil rights cases, Amicus has encountered first-hand the external pressures that can be imposed on tribes, both financially and politically, as well as the absolutely devastating impact these kinds of actions can have on individuals living within tribal boundaries. These self-interested practices undermine the security of all people living within the tribes' territorial boundaries. If one family is banished, stripped of its land, or is otherwise wrongly excluded from tribal lands in contravention of their civil liberties, all suffer that risk. A particular tribal council could pledge tribal assets or enter into contractual obligations on any member's land, and there would be no recourse. Conversely, if a local government official ejected a family from its land without due process and enlisted the help of police and the courts to accomplish that, there undoubtedly is a constitutional remedy for that. Just as a citizen living within city limits would have clear legal recourse, so too should a citizen being impacted by similar actions of a tribal government. Congress did provide that remedy under the ICRA. However, the Ninth Circuit severely abrogated that remedy. Under *Tavares*, a tribal citizen would have no recourse and would simply lose his or her family land and home, which in a Native American community, is akin to denationalization and loss of political identity.

C. Cases involving probation, pretrial release, or other non-incarceration restrictions on liberty

There is a separate line of cases holding that habeas relief is warranted where individuals, although not incarcerated, are subjected to judicial superintendence and control in ways that establish custody. See *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (restraints and conditions of a parole order); *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (terms of personal recognizance requiring petitioner to appear at times and places as ordered by any court or magistrate and other restraints "'not shared by the public generally'" (quoting *Jones*, 371 U.S. at 240)); *United States ex rel. B. v. Shelly*, 430 F.2d 215, 217–18 n. 3 (2d Cir.1970) (probation); *Sammons v. Rodgers*, 785 F.2d 1343, 1345 (5th Cir.1986) (per curiam) (suspended sentence carrying a threat of future imprisonment); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 301 (1984) (obligation to appear in court and requirement that petitioner not depart the state without the court's leave demonstrated the existence of restraints on the petitioner's personal liberty "not shared by the general public"). See also *Dow v. Circuit Court*, 995 F.2d 922, 923 (9th Cir.1993) (per curiam) (holding that a requirement to attend fourteen hours of alcohol rehabilitation constituted "custody" because requiring petitioner's physical presence at a particular place "significantly restrain[ed][his] liberty to do those things which free persons in the United States are entitled to do.").

The Tenth Circuit also has held that release on personal recognizance pending trial constitutes detention under ICRA section 1303. *Dry Creek*, 168 F.3d at 1208. As the *Dry Creek* court explained, "[a]lthough

[a]ppellants are ostensibly free to come and go as they please, they remain obligated to appear for trial at the court's discretion. This is sufficient to meet the 'in custody' requirement of the habeas statute." *Id*. Prior to *Tavares*, the Ninth Circuit recognized the applicability of ICRA in the context of a pretrial release order in which a petitioner was prohibited from having contact with his former father-in-law or coming within 100 yards of his house. He was ordered to appear before the Navajo trial court or face re-arrest and additional punishment for any failure to appear. *Means v. Navajo Nation,* 432 F.3d 924 (9th Cir. 2005).

Limiting habeas corpus under §1303 to cases involving physical custody alone 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." Pet. 22.

While Amicus currently reads *Tavares* to apply only in those contexts in which banishment or physical geographical restriction is at issue, and not those involving judicial control or sanctions,[7] *Tavares* predictably may be expanded more broadly to these cases

[7] Specifically, the petitioner argues that the *Jones* and *Hensley* lines of cases regarding judicial superintendence present an independent basis for habeas jurisdiction, separate from that created by banishment or exclusion orders. For example, in the *Napoles* case, the respondents have argued and will continue to argue in the appeal before the Ninth Circuit, that the tribal court's issuance of the ex parte order in and of itself establishes a basis for federal habeas jurisdiction cases based on the precedent of *Means*, *Jones*, and *Hensley*. The petitioners argue that the efforts to physically eject them from their land, including approaches by law enforcement, physical fencing, and repeated

of judicial superintendence as well, which would have a severe impact on the fuller spectrum of individual rights and liberties. For example, those facing criminal prosecution would be impacted but would lack any remedy. Even without incarceration in jail or prison, conditions of pretrial release, probation, and parole can exact punishing restrictions on individuals' movement, privileges, actions, livelihoods, employment, relationships and other aspects of life. This would be a devastating consequence of *Tavares*, handing tribal courts unfettered power to infringe upon the liberties of tribal members.

CONCLUSION

Congress explicitly provided a right of federal judicial review of habeas petitions involving allegations of civil rights violations of tribe members at the hands of the tribe council. However, under *Tavares*, that relief is limited to only those situations involving an actual, physical detention. A gray area has developed whereby individuals who no doubt are "in custody" under federal habeas statutes are left without a remedy under the unnecessarily restrictive reading of the habeas clause in the ICRA. That is not consistent with the longstanding principle that all citizens of this country are entitled to be free from government oppression and to challenge the legitimacy of any restriction on their civil liberties. The Ninth Circuit's decision in *Tavares* unnecessarily undermines these goals, dramatically limiting the circumstances in which Native Americans may seek redress in federal court for the most egregious violations of their civil

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trespass citations, create a banishment and physical geographical restriction that is also a "detention" for the purposes of section 1303 and forms a separate basis for habeas jurisdiction.

rights at the hands of their tribal councils. Not only does this have a devastating impact on the affected individuals and their families, but it impacts the security and well-being of all who live within those tribal reservations. Without intervention by the Court here, tribal courts will have virtually unbridled authority to strip tribal members of their liberty and property, so long as they stop short of directing actual arrest and incarceration. Thus, the petition for writ of certiorari should be granted.

Respectfully submitted,

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