No. 19-

IN THE

Supreme Court of the United States

JOY SPURR,

Petitioner,

v.

MELISSA L. POPE, CHIEF JUDGE, TRIBAL COURT OF THE NOTTAWASEPPI HURON BAND OF POTAWATOMI, THE SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF POTAWATOMI, THE NOTTAWASEPPI HURON BAND OF POTAWATOMI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A member of an Indian tribe filed a petition in tribal court for an ex parte personal protection order against "stalking" by a nontribal member. The petition was granted by the tribal court. The nontribal member later sued in federal court claiming that her conduct was not "stalking" and that the tribal court lacked jurisdiction. The tribe moved to dismiss the federal case on the grounds that it had sovereign immunity, and the Sixth Circuit ruled in favor of the tribe.

The questions presented are:

1. Suppose a nontribal member is sued in a court of an Indian Tribe, and later sues in federal court claiming that the tribal court lacked jurisdiction. Can the Tribe end the federal case by invoking sovereign immunity? and

2. Does an Indian Tribe have jurisdiction to issue and enforce a personal protection order against a non-Tribal member who has none of the ties to the Tribe required by Section 1304 of the Violence Against Women Reauthorization Act?

LIST OF PARTIES AND RELATED CASES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit. The directly related proceedings are:

Joy Spurr v. Melissa Pope, et al., No. 1:17-cv-1083, U.S. District Court for the Western District of Michigan. Judgment entered September 27, 2018.

Joy Spurr v. Melissa Pope, et al., No. 18-2174, U.S. Court of Appeals for the Sixth Circuit. Judgment entered August 26, 2019.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Cited Authorities

Cited Authorities

Page

ARTICLES

PETITION FOR A WRIT OF CERTIORARI

Joy Spurr respectfully petitions this Court for a writ of certiorari to review the August 26, 2019 Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit. The Circuit Court affirmed the District Court's order of September 27, 2018 granting a motion to dismiss for failure to state a claim on which relief can be granted. The Circuit Court held with respect to two of the appellees, the Tribe and the Tribal Supreme Court, that the claims against them were barred by Tribal sovereign immunity. The Circuit Court also held that a Tribal Court has jurisdiction to issue a personal protection order against a non-Tribal member even if she has none of the ties to the Tribe required by Section 1304 of the Violence Against Women Reauthorization Act (residence with the Tribe, employment by the Tribe, or a romantic relationship with a Tribal member).

OPINIONS BELOW

The Petitioner seeks review of the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit in Case No. 18-2174, Joy Spurr v. Melissa Lopez Pope, Chief Judge, Tribal Court of the Nottawaseppi Huron Band of Potawatomi; the Supreme Court for the Nottawaseppi Huron Band of Potawatomi; and the Nottawaseppi Huron Band of Potawatomi, of August 26, 2019. The opinion of the Court of Appeals is reported at *Spurr v. Pope*, 936 F. 3d 478 (6th Cir. 2019) and is reprinted in Appendix A to this Petition, pp. 1a – 20a. The prior opinion of the United States District Court for the Western District of Michigan in Case No. 1:17-cv-01083, entered on September 27, 2018, is reported at *Spurr v. Pope*, 2018 U.S. Dist. LEXIS 225934 (W.D. Mich. 2018), and is reprinted in Appendix B to this Petition, pp. 21a – 37a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Federal courts have jurisdiction to review tribal court jurisdiction pursuant to 28 U.S.C. § 1331, which provides: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. See *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. Sec. 2265, Full Faith and Credit Given to Protection Orders, Appendix C, pp. 38a-40a, and Appendix D, p. 41a

25 U.S.C. Sec. 1304, Tribal Jurisdiction over Crimes of Domestic Violence, Appendix C, pp. 38a-39a

25 U.S.C. Sec. 1304(d), Rights of Defendants Appendix C, p. 40a

STATEMENT OF THE CASE

This case basically involves two issues:

(1) If a nontribal member is sued in a Tribal Court, and later sues in federal court claiming that the tribal court lacked jurisdiction, can the case proceed, or is it barred if the tribe claims sovereign immunity?; and

(2) whether a Tribal Court has personal and subject matter jurisdiction under federal law to issue a personal protection order against a non-Tribal member who has

none of the ties to the Tribe required by 25 U.S.C. 1304 of the Violence Against Women Reauthorization Act.

The petition for the protection order against Mrs. Spurr was filed in NHBP Trial Court by Nathaniel W. Spurr (hereinafter Nathaniel), who is a member of NHBP, a federally recognized American Indian Tribe. It is important to know whether Mrs. Spurr fits into any of certain categories specified in 25 U.S.C. 1304(b)(4)(B) that could provide support for a claim of subject matter jurisdiction. The categories in question apply to a person who:

> (i) resides in the Indian Country of the participating tribe;
>
> (ii) is employed in the Indian Country of the participating tribe; or
>
> (iii) is a spouse, intimate partner, or dating partner of
>
> > (I) a member of the participating tribe; or
> >
> > (II) an Indian who resides in the Indian country of the participating tribe.

It is undisputed by the parties that none of these categories applies to Mrs. Spurr.

Litigation in NHBP Tribal Courts

On February 2, 2017, Nathaniel filed a petition for a personal protection order against Mrs. Spurr in the

NHBP Trial Court. On February 3, 2017 the NHBP Trial Court issued an ex parte temporary Personal Protection Stalking Order against Mrs. Spurr, prohibiting her from "stalking" Nathaniel. The Order stated, in paragraph 9, that it was effective immediately, and would remain in effect until February 17, 2017.

The NHBP Trial Court stated that it issued the ex parte order of February 3 without hearing any testimony. The February 3 Order was issued by the Court without prior notice of any kind to Mrs. Spurr, who did not learn of the order until February 8, 2017. On February 17, 2017, the NHBP Trial Court issued a permanent Personal Protection Order against Mrs. Spurr, identical in its terms to the temporary protection order. The Order of February 17 stated that

> Violation of this order subjects the respondent to immediate arrest and to the civil and criminal contempt powers of the court. If found guilty, the respondent *shall be imprisoned* for not more than 90 days and/or may be fined not more than $1000. [emphasis supplied].

On March 5, 2017, Mrs. Spurr filed a motion contending she did not stalk and that the NHBP Trial Court lacked civil or criminal jurisdiction to issue a personal protection order against her as a nonmember of the Tribe without any of the ties specified above under 25 U.S.C. 1304(b)(4)(B). On July 21, 2017 the Trial Court denied the motion.

On July 22, 2017 Mrs. Spurr filed with the NHBP Supreme Court a notice of appeal. On January 25, 2018 the NHBP Supreme Court filed its opinion, denying Mrs. Spurr's appeal in every respect.

The NHBP Trial Court issued continuous Personal Protection Orders dated February 3, 2017, February 17, 2017, and February 13, 2018.

Litigation in Federal Courts

On December 11, 2017 Mrs. Spurr filed a Complaint for Declaratory Judgment and Injunctive Relief in U.S. District Court in the Western District of Michigan. On April 9, 2018 the Tribe filed a joint motion to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted. On September 27, 2018, the District Court found that oral argument was unnecessary to resolve the issues, and entered a final order and judgment granting the Tribe's motion and dismissing Mrs. Spurr's Complaint, reported at 2018 U.S. Dist. LEXIS 225934 (W.D. Mich. 2018). Mrs. Spurr appealed to the Sixth Circuit Court of Appeals. After a hearing, the Circuit Court issued an opinion and judgment affirming the decision of the District Court on August 26, 2019, now reported at 936 F. 3d 478 (6th Cir. 2019).

REASONS FOR GRANTING THE PETITION

1. **The Sixth Circuit erred when it dismissed the federal case, holding that the tribe had sovereign immunity. This Decision would Subject Nontribal Defendants to Tribal-Court Jurisdiction in vastly expanded circumstances. Such defendants would not be protected by guarantees of due process, and would be unable to obtain outside review of the tribal court decision.**

The Circuit Court erred when it held with respect to two of the appellees, the Tribe and the Tribal Supreme

court, that the claims against them were barred by Tribal sovereign immunity.[1] The Circuit Court mistakenly adopted the theory that a tribe has sovereign immunity unless Congress has specifically and "unequivocally" abrogated it (Appendix A, pp. 13a-16a); according to this view Section 1331 allows people to sue on a federal question in district court, but does not abrogate tribal sovereign immunity. That is, Section 1331 allows a tribal court defendant to sue, but not to have his or her case continue once the Tribe invokes immunity.

The Circuit Court's theory ignores a crucial, dispositive fact: the person challenging the jurisdiction of the tribal court over her was a nontribal member. Federal common law imposes severe limits on both the criminal and civil jurisdiction of a tribal court over non-Tribal members. See, e.g., *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Indian nation et al.*, 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990); *South Dakota v. Bourland*, 508 U.S. 679 (1993); and *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). In *Oliphant*, this Court held that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." 435 US 191, 208. In *Montana,* which involved the civil jurisdiction of a tribe over non-tribal members, this Court noted that

> "Though *Oliphant* only determined inherent tribal authority in criminal matters, the

1. The claim against the third appellee, Judge Pope, was not barred, but only because the Tribe had explicitly waived Tribal sovereign immunity with respect to her.

> principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. 544, 565.

The lack of inherent sovereign immunity in the context of our case was confirmed in two more recent cases of this Court, *Brendale v. Confederated Tribes and Bands of the Yakima Indian nation et al.*, 492 U.S. 408 (1989) and *South Dakota v. Bourland*, 508 U.S. 679 (1993). In *Brendale* this Court stated that:

> A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's "external relations." *Wheeler*, 435 U.S. at 326. Those cases in which the Court has found a tribe's sovereignty divested generally are those involving the relations between an Indian tribe and nonmembers of the Tribe." *Ibid.* 492 U.S. at 425-426.

Finally, in *South Dakota v. Bourland* (1993), the Court noted that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' 450 U.S. at 564 and is therefore not inherent." 508 U.S.at 695 n. 15 (1993).

A. The fact that federal courts have often issued injunctions or declaratory judgments against proceedings in tribal courts shows that tribal sovereign immunity is not applicable

If there were any remaining notion that sovereign immunity could bar Mrs. Spurr from bringing this action

in federal court, it is dispelled by a simple fact: there are many cases in which a challenge to the jurisdiction of a tribal court has led a federal court to issue an injunction or declaratory judgment against the tribal court. None of these courts thought that tribal sovereign immunity would bar the plaintiff from obtaining an injunction or declaratory judgment. See, e.g., *Montana v. United States*, 450 U.S. 544 (1981); *Plains Commerce Bank* (2008); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *McKesson Corporation et al. v. Todd Hembree* et al., 2018 U.S. Dist. Lexis 3700 (N.D. Okla. 2018); *Stifel, Nicholaus & Company, Inc. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F. 3d 184 (7th Cir. 2015); *Kerr-McGee Corporation et al., v. Kee Tom Farley et al.*, 88 F. Supp. 2nd 1219 (D. New Mexico 2000); *Crowe & Dunlevy v. Gregory R. Stidham*, 640 F.3d 1140 (2011) at 1157; and *UNC Resources, Inc., et al. v. Kee Joe Benally et al.*, 518 F. Supp. 1046 (D. Arizona 1981).

The cases cited above show that with respect to the relation between a tribe and nonmembers, the doctrine of tribal sovereignty, including sovereign immunity, is not applicable unless either (1) Congress has extended it to cover such a case, or (2) the case falls within one of two narrowly defined "Montana exceptions." In other words, contrary to the Circuit Court's holding that tribal sovereign immunity applies unless Congress has clearly said otherwise, there is no sovereign immunity unless Congress has clearly said so. The reason given by the Supreme Court for these limitations is that non-tribal members should not be subject to trial by "political bodies that do not include them." *Duro v. Reina*, 495 U.S. at 693.

As noted above, there are two exceptions to this rule: the tribe retains sovereign immunity with regard to (1) the activities of nonmembers who enter into commercial

relationships with the tribe or its members, and (2) the conduct of non-members on lands within its reservation if it "imperils the subsistence" or would be "catastrophic" to tribal self-government. *Montana*, 450 U.S. at 566, and *Plains Commerce Bank*, 554 U.S. at 341. Neither of these conditions applies to the instant case.

B. The Cases Cited by the Circuit Court Do Not Support The Claim of Tribal Sovereign Immunity

The cases cited by the Circuit Court do not support its broad view of tribal sovereign immunity. The Court cited *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751 (1998), *C & L Enterprises, Inc. v. Citizen Band Potawatomi,* 532 U.S. 411 (2001), *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.* 585 F.3d 917 (6th Cir. 2009), *Michigan v. Bay Mills Indian Cmty.* 572 U.S. 782 (2014); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Whittle v. United States*, 7 F.3d 1259 (6th Cir. 1993); *Reed v. Reno*, 146 F.3d 392 (6th Cir. 1998); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); and *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007) (Appendix A, pp. 5a-10a). The first four of these cases, *Kiowa,C & L Enterprises, Inc., Memphis Biofuels,* and *Michigan v. Bay Mills,* all involved lawsuits initially brought against Indian tribes based on commercial relationships and activities.[2] Thus these cases

2. Kiowa involved a purchase of an aviation business by a tribal entity, Memphis Biofuels a tribal corporation contracting to deliver diesel fuel and soybean oil to another business, and Bay Mills the operation of a tribal casino, in which the State of Michigan sought jurisdiction under the Indian Gaming Regulatory Act. In C & L Enterprises a tribe was sued by a contractor with whom it had entered into a construction contract. The statement in Kiowa that "As a matter of federal law, an Indian tribe is subject to suit only

fall within the first Montana exception. Four of the other five cases relied on by the Circuit Court did not involve tribal sovereign immunity: *Dellmuth v. Muth*, *Blatchford*, *Whittle v. United States*, and *Reed v. Reno* involved the sovereign immunity of either a state, the U.S. Army. or the United States. The Circuit Court's holding was based on two incorrect assumptions about the rules on sovereign immunity: (1) that the rules that apply to the two *Montana* exceptions apply to all cases involving nontribal members, and (2) that the rules that apply to a state or the United States also apply to an Indian Tribe.

2. The holdings of the Sixth and Tenth Circuits that tribal sovereign immunity applies unless Congress has clearly said otherwise are in Conflict with Decisions of this Court and the Other Circuits.

The last case cited by the Circuit Court, *Miner Electric.* takes a position well outside the mainstream of federal common law. There a tribal court ordered the forfeiture to the tribe of a vehicle owned by a customer of the tribe's casino, and the customer sought relief from the forfeiture in District Court on the basis that the Tribal Court lacked jurisdiction. The 10th Circuit held that even if there were federal question jurisdiction, it would not override the tribe's sovereign immunity unless "some other statute" provided a waiver of immunity. 505 F.3d at 1011. In effect, then, the 10th Circuit accepted the theory that a tribe has sovereign immunity regardless of the facts unless Congress has specifically abrogated it. The 10th Circuit cited two of its own decisions for this proposition, but no other authority. One of those cases involved the

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where Congress has authorized the suit or the tribe has waived its immunity" (523 U.S. 754) applies when there is a lawsuit against a tribe based on tribal activities of a commercial nature.

immunity of a federal agency, and the other case cannot be found anywhere on Lexis-Nexis. We have found no decisions prior to *Miner Electric* holding that an Indian tribe could use sovereign immunity against a claim by a nontribal member in federal court challenging the civil jurisdiction of its Tribal Court, in a case where neither of the two "Montana exceptions" was applicable. With the instant decision the 6th Circuit has joined the 10th Circuit in support of this proposition, which is squarely in conflict with the decisions of this Court and the other circuits. This is an issue that must be resolved by this Court.

The table set forth below summarizes the applicability of sovereign immunity under federal common law, when the case involves nontribal members and Congress has not taken a position on tribal immunity one way or the other. Note from the third row of the table (on p. 13) that *Miner Electric* and the instant case are very much in the minority. Federal common law, established by decisions of the Supreme Court, the Circuit Courts of Appeal, and the federal District Courts, overwhelmingly confirms the principle that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' 450 U.S. at 564, and is therefore not inherent." *South Dakota v. Bourland,* 508 U.S. 679, 695 n. 15 (1993).

A. The Scope of Tribal Sovereign Immunity Under Federal Common Law

Subject at Issue:	**The Tribe's Relations with Non-Tribal Members**
Commercial Dealings, in Which a Plaintiff Files a Lawsuit Against the Tribe (the first *Montana* exception)	Tribal Immunity Unless It is Waived *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.* (1998), *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi* (2001), *Memphis Biofuels, LLC v. Chickasaw Nation* (2009), *Michigan v. Bay Mills Indian Cmty.* (2014)
The Lawsuit Imperils the Subsistence of the Tribe, or Threatens the Political Integrity of Tribal Government (the 2nd *Montana* exception)	Tribal Immunity Unless It is Waived

Subject at Issue:	**The Tribe's Relations with Non-Tribal Members**
All Other Legal Disputes, Including Lawsuits Alleging Lack of Tribal Court Jurisdiction	Tribal Immunity Unless It is Waived *Miner Elec., Inc. v. Muscogee (Creek) Nation,* (10th Cir. 2007); *Joy Spurr v. Melissa Pope et al.* (6th Cir. 2019) **Tribe is Not Immune** *Oliphant v. Suquamish Indian Tribe* (1978); *Montana v. United States* (1981); *Plains Commerce Bank v. Long Family Co.* (2008); *Strate v. A-1 Contractors* (1997); *McKesson Corporation et al. v. Todd Hembree et al.* (2018); *Stifel, Nicholaus & Co, Inc. v. Lac Du Flambeau Band* (2015); *Kerr-McGee Corporation et al., v. Farley et al.* (2000); *Crowe & Dunlevy v. Gregory R. Stidham* (2011); *UNC Resources, Inc., et al. v. Benally et al.* (1981).

B. Consequences of the Circuit Court's Decision

The Circuit Court's decision is a radical and dangerous departure from federal common law and the decisions of this Court. If the Circuit Court's decision were allowed to stand, and it became widely accepted, the consequences would be drastic in all areas of the law where Congress had not "unequivocally" abrogated sovereign immunity. Nontribal defendants with no contact with a tribe would be subjected to Tribal-Court Jurisdiction in vastly expanded circumstances without the protection of criminal and civil due process guarantees or the possibility of outside judicial review.

Tribal courts are quite different from state and federal courts in the United States. For example, as former Justice Souter pointed out in *Nevada v. Hicks*, the Bill of Rights and the Fourteenth Amendment "do not of their own force apply to Indian tribes." *Hicks*, 533 U.S. 353, at 383 (Souter, J., concurring). Although the Indian Civil Rights Act of 1968 (ICRA) provides for some safeguards in tribal courts, 25 U.S.C. § 1302, "the guarantees are not identical," *Oliphant*, 435 U.S. at 194-195, and there is a "definite trend by tribal courts" toward the view that they "have leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U.S. Supreme Court precedents 'jot-for-jot,'" Newton (1988) at 344, n. 238, cited in *Hicks* by Souter, J. at 384. If a Tribal Court violated federal law by acting outside its jurisdiction when imposing liability, or a fine or imprisonment on a nontribal member, there would be no remedy available to the nontribal member if she could not bring an action in federal court. This would give every tribal court system unlimited jurisdiction, unlike every municipal, state, and federal court in the country.

Contrary to the decision of the Circuit Court, the District and Circuit Court did have jurisdiction to determine whether the Tribal Court had jurisdiction to issue and enforce a personal protection order against Mrs. Spurr, a non-tribal member.

3. The Sixth Circuit erred when it held that the Tribal Court had jurisdiction to issue and enforce a personal protection order against a non-Tribal member who has none of the ties to the Tribe specified in Section 1304 of the Violence Against Women Reauthorization Act (residence with the Tribe, employment by the Tribe, or a romantic relationship with a Tribal member).

The other issue in this case is whether the NHBP Tribal Courts had subject matter jurisdiction to issue and enforce a personal protection order against Mrs. Spurr. As previously noted, federal common law imposes severe limits on both the criminal and civil jurisdiction of a tribal court over non-Tribal members. See, e.g., *Oliphant v. Suquamish Indian Tribe*, *Duro v. Reina*, and *Montana.*

Congress granted additional jurisdiction to Tribal Courts in 2013, under 25 U.S.C. 1304, the title of which is "Tribal Jurisdiction over Crimes of Domestic Violence." This statute provides a grant of jurisdiction to tribal courts, but the scope of the new jurisdiction over personal protection orders, *whether civil or criminal*, was severely limited with respect to non-tribal members, applicable only if they had the ties to the Tribe specified in Section1304(b)(4)(B), viz. they either reside in the tribal reservation, are employed by the Tribe, or have an intimate relationship with a tribal member. This is clear from the statute's legislative history (see Appendix C, pp. 38a-40a) and the

statute itself. It is undisputed that Mrs. Spurr had no such ties to the Tribe.

The point that Section 1304(a)(5) applies to both civil and criminal protection orders is crucial, because the decision of the Circuit Court was based entirely on the assumption that this statute applied only to criminal orders. (Appendix A, pp. 13a-16a). 25 U.S.C. 1304(5) defines the term "protection order" broadly to include "any . . . order issued by a civil or criminal court . . ." This section of the statute was designed to preclude the argument accepted by the Circuit Court, namely that Section 1304 applies only to "criminal protection orders", and that the Tribal Trial Court's order is "only" a civil protection order. The proposed distinction between "civil" and "criminal" protection orders that do the same thing is found nowhere in the federal statutes nor anywhere else. Both Sections 1304 and 2265 speak only of "protection orders." Even Section 2265(e), on which the Circuit Court relies so heavily, speaks of "protection orders," not "civil protection orders." More fundamentally, however, in Section 1304 Congress has specifically stated that jurisdiction of tribal courts to issue personal protection orders *is* criminal jurisdiction. This designation is made in twelve subsections of the statute.[3]

The Circuit Court's argument for tribal court jurisdiction is based on 18 U.S.C. Section 2265(e) (Appendix A, p. 20a). Section 2265 was enacted at exactly the same time as Section 1304, on March 7, 2013. Both sections, with virtually identical wording (see Appendix C,

3. 25 U.S.C. Sections 1304(a)(4), (a)(6), (b), (b)(1), (b)(2), (b)(4)(A)(ii), (b)(4)(B), (c), (d), (d)(4), (f)(1) and (f)(3).

pp. 38a-40a) appear in H.R. 4154, introduced on March 7, 2012, and H.R. 757, introduced on February 15, 2013, and both were enacted on March 7, 2013 as part of P.L. 113-4, Title IX. The title of section 2265 is "full faith and credit given to protection orders." Part of this statute, 18 USC Sections 2265(b)(1) and (2), actually provides additional requirements for protection orders: the Tribal Court's jurisdiction must be based on Tribal law, and must protect the defendant's right to due process, specifically the defendant's right to "reasonable notice and an opportunity to be heard." However, the Circuit Court contends that 2265(e) grants a Tribal Court plenary jurisdiction to issue and enforce personal protection orders against anyone, whether or not they have any connection with the Tribe.

This subsection states that:

> For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person . . . in matters arising anywhere in the Indian country of the Indian tribe . . . or otherwise within the authority of the Indian tribe.

Section 2265(e) was motivated by a concern that a valid personal protection order issued by a Tribal Court under the new statute might not be taken seriously by other jurisdictions and non-Tribal courts. Congress wanted to ensure that a valid protection order, i.e. one that fully complied with Sections 1304, 2265(b)(1) and (2), would be given full faith and credit by other jurisdictions, and would have access to means of law enforcement outside the Tribe, such as city, county, state and federal

law enforcement personnel and resources such as the Law Enforcement Information Network of Michigan. Accordingly the Senate Report (in Appendix D, p. 41a) characterized Section 2265(e) as a "narrow technical fix to clarify Congress's intent to recognize that tribal courts have full civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian." The Senate Report also noted that this section "does not in any way alter, diminish or expand tribal criminal jurisdiction or existing tribal authority to exclude individuals from Indian land."[4]

To accept the Circuit Court's argument, this Court would have to believe that the same committees of Congress passed two sections of the statute on the same day, one of which, under the title "Jurisdiction," explicitly denied tribal courts jurisdiction to issue personal protection orders (whether criminal or civil) against non-tribal members without specified ties to the Tribe, and the other granting them an unlimited right to do so. The legislative history (in Appendix C, pp. 38a-40a, and Appendix D, p. 41a), which was presented to the Circuit Court but not mentioned in its opinion, strongly conflicts with the Circuit Court's construction. Finally, the Tribe's argument would render Section 1304 meaningless and impotent. Section 1304 would become

> . . . meaningless surplusage providing a hollow remedy. It is a cardinal rule of statutory construction that there is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause

4. Senate Report 112-153 (2012), in Appendix D, p. 41a..

> grave public injury or even inconvenience. *Aluminum Co. of America v. Department of Treasury*, 522 F.2d 1120 (6th Cir. 1975)
>
> A far more logical interpretation is to assume that Sections 1304 and 2265 are consistent with each other and complementary. Section 1304 refers to Section 2265 in a way that makes it clear that there is no conflict between the two sections, and that indeed they complement each other. 25 U.S.C. 1304(c) states that
>
> A participating tribe may exercise . . . jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:
>
> . . .
>
> (2) Violations of protection orders. An Act that
>
> (A) occurs in the Indian Country of the participating tribe; and
>
> (B) . . .
>
> (iv) is consistent with section 2265(b) of title 18, United States Code.

Section 2265 simply states that if a protection order meets all the requirements of Section 1304, 2265(b)(1) and (2), it should be given full faith and credit by other jurisdictions. This is indicated by the language "For purposes of this section" with which 2265(e) begins, and the fact that 1304 and 2265 were drafted simultaneously by the same

committees, and enacted into law at the same time.

In Sections 1304 and 2265, Congress offered tribal courts the option to issue protection orders on nontribal members against stalking, harassment and other types of domestic violence, but only if they would provide the specified protections of criminal due process and limit jurisdiction to those with specified close ties to the Tribe. Congress did not offer tribes the option of imposing fines and imprisonment on nontribal members without ties to the Tribe and without due process guarantees under the rubric of civil jurisdiction.

As of June 20, 2018, 573 Native American tribes were legally recognized by the Bureau of Indian Affairs of the United States.[5] Since there is no other case law on this point, and there are many tribes in some states, the Circuit Court's opinion would clear the way for multiple sources of personal protection orders emanating from many different tribal courts, each with potentially different standards. This would not happen if a tribe could assert jurisdiction over a nonmember only if he or she had the close ties to the tribe required by Section 1304(b)(4)(B).

CONCLUSION

The Circuit Court has held that the decision of a tribal court cannot be reviewed outside the Tribe unless Congress has specifically intervened to abrogate its sovereign immunity. This decision is a radical and dangerous departure from federal common law and the decisions of this Court.

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5. Federal Register, Vol. 83, No. 141, July 23, 2018.

With respect to the construction of 25 U.S.C. 1304 and 18 U.S.C. 2265, Congress offered tribal courts the option to issue protection orders on nontribal members against stalking, harassment and other types of domestic violence, but only if they would provide the specified protections of criminal due process and limit jurisdiction to those with the close ties to the Tribe specified in Section 1304(b)(4)(B). Congress did not offer tribes the option of imposing criminal sanctions on nontribal members without ties to the Tribe and without due process guarantees under the rubric of civil jurisdiction.

Accordingly, Mrs. Spurr respectfully requests that this Court grant her petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 26, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-2174

JOY SPURR,

Plaintiff-Appellant,

v.

MELISSA LOPEZ POPE, CHIEF JUDGE OF TRIBAL COURT OF NOTTAWASEPPI HURON BAND OF THE POTAWATOMI; SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF POTAWATOMI; NOTTAWASEPPI HURON BAND OF THE POTAWATOMI,

Defendants-Appellees.

May 1, 2019, Argued;
August 26, 2019, Decided and Filed

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 1:17-cv-01083—Janet T. Neff, District Judge.

Before: DAUGHTREY, COOK, and GRIFFIN, Circuit Judges.

Appendix A

OPINION

COOK, Circuit Judge. Most family spats end long before a court gets involved. This one did not, however, and an Indian tribal court eventually issued a protection order against Joy Spurr, the stepmother of a tribal member. But our review involves no probing of the facts, just a pure question of law: Does a tribal court have jurisdiction under federal law to issue a civil personal protection order against a non-Indian and non-tribal member in matters arising in the Indian country of the Indian tribe? Because 18 U.S.C. § 2265(e) unambiguously grants tribal courts that power, and because tribal sovereign immunity requires us to dismiss this suit against two of the named defendants, we AFFIRM the district court's dismissal of Spurr's complaint.

I.

Joy Spurr is the stepmother of Nathaniel Spurr, a tribal member of the Nottawaseppi Huron Band of the Potawatomi (NHBP), a federally recognized, sovereign Indian tribe located in Fulton, Michigan. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34863 (July 23, 2018). In February 2017, Nathaniel sought an ex parte personal protection order (PPO) from the NHBP tribal court, alleging that Spurr engaged in a campaign of harassment against him that included, among many other things, unwanted visits to Nathaniel's residence on the NHBP reservation and several hundred letters, emails, and phone calls. R. 22-3, PageID 268-81. The tribal court issued the ex parte PPO.

That same month, the tribal court held a hearing to determine whether to make the PPO "permanent"—in other words, to make it last one year. After considering witness testimony, other evidence, and the parties' arguments, the tribal court issued a permanent PPO against Spurr. This PPO swept broadly, prohibiting Spurr from contacting Nathaniel or "appearing within [his] sight." R. 1-3, PageID 31. The court later denied Spurr's motion to reconsider or modify that order in a thorough, thirty-six-page opinion. On appeal, the NHBP Supreme Court affirmed, holding that tribal law authorizes the tribal court to issue civil personal protection orders against "a non-Indian who resides outside of the boundaries of Nottawaseppi Huron Band Indian country."

About six months later, Nathaniel again initiated proceedings in tribal court, claiming that Spurr violated the PPO. After holding two hearings (Spurr did not attend the first) where the parties presented evidence and testimony, the tribal court found Spurr "in civil contempt for violating the [PPO], a civil personal protection order." R. 22-4, PageID 283-84. The tribal court mandated that Spurr pay (1) the attorney's fees incurred by Nathaniel for the hearing where Spurr failed to appear; and (2) $250 to NHBP for the "costs . . . associated with holding the hearing." R. 22-4, PageID 284. In lieu of the $250 payment, Spurr could choose to perform twenty-five hours of community service.

After Nathaniel alleged that Spurr violated the PPO—but before either hearing—Spurr went on the offensive. In federal district court, she sued (1) Melissa L. Pope,

the Chief Judge of the NHBP Tribal Court (who issued the PPO), (2) the NHBP Supreme Court (that affirmed), and (3) the Band (a sovereign Indian tribe), seeking a declaratory judgment and injunctive relief. In an order denying Spurr's request for a preliminary injunction, the court limited the parties' motion-to-dismiss briefing to two issues: sovereign immunity and subject-matter jurisdiction. In its joint motion to dismiss, the Tribal defendants argued that Spurr's claims against the Band and the NHBP Supreme Court were barred by sovereign immunity and should be dismissed under Federal Rule of Civil Procedure 12(b)(1). R. 30, PageID 354.

The district court held that, under 28 U.S.C. § 1331, it had federal question jurisdiction to review Spurr's claim that the tribal court "lacked jurisdiction to issue the PPO as a matter of federal law." R. 33, PageID 396-98. But the court ultimately found that 18 U.S.C. § 2265 established the tribal court's jurisdiction and dismissed under Rule 12(b)(6) Spurr's jurisdictional challenge without addressing the sovereign immunity issue. Spurr appealed.[1]

II.

We review de novo a motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6). *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 572 (6th Cir. 2008); *Hedgepeth v. Tennessee*, 215 F.3d 608, 611 (6th Cir. 2000). "When [a]

1. On February 14, 2019, after a hearing, the tribal court reissued its PPO against Spurr. R. 39, Ex. 3.

defendant challenges subject matter jurisdiction through a motion to dismiss, the plaintiff bears the burden of establishing jurisdiction." *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) (citation omitted). We must consider the Rule 12(b)(1) challenge first; if this court lacks subject matter jurisdiction, the Rule 12(b)(6) motion becomes moot. *See Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990); *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

III.

Spurr's briefs present a cornucopia of grievances—some reference the Constitution, others the emotional and financial burden of this litigation. But as her opening brief posits, this case involves "a single issue of law": Did the NHBP tribal court have jurisdiction under federal law to issue this personal protection order against her, a non-Indian and non-tribal member? After first resolving the threshold issue of tribal sovereign immunity, we hold that it did.

A. Tribal Sovereign Immunity

The district court determined that it had federal question jurisdiction over the claims raised, so it needn't address the issue of tribal sovereign immunity. But tribal sovereign immunity is a jurisdictional doctrine. That means we must address it—and must do so first. If it shields the tribe, we have the power to say that (and only that) and to dismiss the claim for lack of subject-matter jurisdiction. *Memphis Biofuels, LLC v. Chickasaw*

Nation Indus., Inc., 585 F.3d 917, 919-20 (6th Cir. 2009) ("[I]f [the tribe] enjoys tribal-sovereign immunity, we need not address the issues of diversity jurisdiction and federal-question jurisdiction."). The Band explicitly waived sovereign immunity on appeal as to Chief Judge Pope, but asserts that sovereign immunity deprives us of jurisdiction to consider the claims against the other two tribal defendants. We agree. Tribal sovereign immunity bars this suit against the Band and the NHBP Supreme Court. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790-91, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014).

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Id.* at 788 (citations omitted). That sovereignty includes "common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)). It shields not only an Indian tribe itself, but also "arms of the tribe" acting on its behalf. *Memphis Biofuels*, 585 F.3d at 921; *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-55, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) (recognizing that the Court has not "yet drawn a distinction between governmental and commercial activities of a tribe"). As the Supreme Court recently reminded us, the baseline rule "is tribal immunity." *Bay Mills*, 572 U.S. at 790.

But the Constitution grants Congress plenary control over tribes, and thus the power to abrogate tribal sovereign immunity. *Id.; United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004). To do

so, "Congress must 'unequivocally' express that purpose." *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001) (quoting *Santa Clara Pueblo*, 436 U.S. at 58); *Bay Mills*, 572 U.S. at 790. Indeed, Indian tribes remain separate sovereigns that pre-existed the Constitution, and "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Id.* at 788 (quoting *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)).

To support her view that Congress unequivocally expressed the purpose to subject the Band to this suit, Spurr points to 28 U.S.C. § 1331. That statute reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Spurr reasons that by granting district courts the authority to hear such actions, Congress authorized suits against an Indian tribal court exercising federally-derived authority. But § 1331's text fails to abrogate tribal sovereign immunity. To upset the baseline rule of tribal immunity, the statute's text "must 'unequivocally' express that purpose"—shout it, not whisper it. *Bay Mills*, 572 U.S. at 790 (citation omitted). Yet § 1331 never hints at jurisdiction over suits against separate nations, the status recognized tribes hold. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what

it says there."). Thus, we cannot say that § 1331 reflects Congress's unmistakably clear intention to abrogate tribal sovereign immunity. *See Dellmuth v. Muth*, 491 U.S. 223, 227-28, 109 S. Ct. 2397, 105 L. Ed. 2d 181 (1989).

Beyond the text of § 1331, our precedent interpreting it also leans this direction. In the context of the United States' sovereign immunity, we have held that § 1331 "is not a general waiver of sovereign immunity; it merely establishes a subject matter that is within the competence of federal courts to entertain." *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993); *see Reed v. Reno*, 146 F.3d 392, 397-98 (6th Cir. 1998) ("Section 1331's general grant of federal question jurisdiction, however, 'does not by its own terms waive sovereign immunity and vest in district courts plenary jurisdiction' over claims for money judgments against the United States." (citation omitted)). And "[t]ribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States." *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007); *see Bay Mills*, 572 U.S. at 789 (citing *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 84 L. Ed. 894 (1940)). It therefore follows that § 1331 "is not a general waiver" of tribal sovereign immunity. *See Whittle*, 7 F.3d at 1262.

Indeed, the Tenth Circuit rejects this same argument. In *Miner Electric*, plaintiffs sought declaratory and injunctive relief related to a forfeiture order issued by the Nation's tribal court, arguing that the court did not have jurisdiction over them. 505 F.3d at 1008. The Nation moved to dismiss the complaint on sovereign immunity grounds,

and the district court denied the motion, reasoning that it had "the authority [under § 1331] to determine whether a tribal court had the power to exercise civil subject matter jurisdiction over a non-Indian's property rights." *Id.* at 1009, 1011. The Tenth Circuit reversed and remanded for dismissal under Fed. R. Civ. P. 12(b)(1), holding that "federal-question jurisdiction [does not] negate[] an Indian tribe's immunity from suit" because "nothing in § 1331 unequivocally abrogates tribal sovereign immunity." *Id.* at 1011.

The district court here, in implicitly reasoning otherwise, cited *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), specifically the Court's statement that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *Id.* at 852. That reasoning, however, answers a different question that the parties here do not dispute: whether this case presents a federal question. That is, § 1331 concerns whether the court has jurisdiction over the *claims* raised. But "[t]he fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 n.4, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991); *Whittle*, 7 F.3d at 1262.

The Court in *National Farmers* went no further, resolving that petitioners needed to first exhaust their

tribal court remedies before a federal court could entertain the claim. *See El Paso Natural Gas. Co. v. Neztsosie*, 526 U.S. 473, 478, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999) (explaining that *National Farmers* announced the "tribal-court exhaustion" rule). In fact, the Supreme Court has expressed doubt that § 1331 abrogates sovereign immunity, holding in *Blatchford* that 28 U.S.C. § 1362—which grants district courts original jurisdiction over "all civil actions, brought by any Indian tribe or band . . . aris[ing] under the Constitution, laws, or treaties of the United States"—does not reflect an "unmistakably clear" intent to abrogate state sovereign immunity in suits brought against States by Indian tribes. 501 U.S. at 786. In so holding, it reasoned that § 1362's "text is no more specific than § 1331 . . . , and no one contends that § 1331 suffices to abrogate immunity for all federal questions." *Id.*

We reject Spurr's reliance on § 1331 as supporting this court's exercising subject-matter jurisdiction here and hold that tribal sovereign immunity bars the claims against the Band and the NHBP Supreme Court. *See Miner*, 505 F.3d at 1011. The district court thus erred by denying the motion to dismiss those claims for lack of subject-matter jurisdiction. We affirm dismissal on sovereign immunity grounds. *United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 435 (6th Cir. 2016) ("This court may affirm on any grounds supported by the record, even those not relied on by the district court.").

B. The Source of Tribal Jurisdiction

Having dispensed with Spurr's claims against the Band and NHBP, only the claims against Chief Judge Pope remain. The Band explicitly waived sovereign immunity as to the Chief Judge, so we finally get to the meaty question of whether federal law vests the NHBP tribal court with jurisdiction to issue this personal protection order against Spurr.

Indian tribes have the "right to make their own laws and be governed by them." *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). This inherent sovereign authority includes the power to determine tribal membership, regulate relations among its members, and punish tribal offenders. *Id.* But this authority generally "do[es] not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); *Hicks*, 533 U.S. at 359. When it comes to non-Indians and nonmembers, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564; *see South Dakota v. Bourland*, 508 U.S. 679, 695 n.15, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993). Thus, to exercise tribal authority over nonmembers, an Indian tribe must point to one of two sources of power: its inherent sovereign authority or an Act of Congress. *Hicks*, 533 U.S. at 360; *Strate v. A-1 Contrs.*, 520 U.S. 438, 445-46, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

The parties argue only the second source, focusing their arguments on different statutes, both enacted as part of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013). The Band argues that 18 U.S.C. § 2265(e) expressly grants tribal courts the power to issue civil PPOs against *any person*, a category of persons that, of course, includes a non-Indian, nonmember like Spurr. Spurr counters that a different statute, 25 U.S.C. § 1304, governs this tribal action and grants tribal courts jurisdiction to issue PPOs only against *some* non-Indians and nonmembers—those with specific ties to the tribe (of which she has none). The district court agreed with the Band, and so do we.

"A matter requiring statutory interpretation is a question of law requiring de novo review, and the starting point for interpretation is the language of the statute itself." *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1059 (6th Cir. 2014) (quoting *Roberts v. Hamer*, 655 F.3d 578, 582 (6th Cir. 2011)). If the text makes clear the statute's meaning, we go no further. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003); *see Caminetti v. United States*, 242 U.S. 470, 485, 490, 37 S. Ct. 192, 61 L. Ed. 442 (1917) ("[T]he sole function of the courts is to enforce [the law] according to its terms . . . . [I]t is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.").

1. 18 U.S.C. § 2265(e)

As argued by the Band, § 2265(e) unambiguously grants tribal courts the power exercised by the NHBP tribal court here. It reads:

> **(e) Tribal court jurisdiction**.--For purposes of this section, a court of an Indian tribe shall have *full civil jurisdiction* to issue and enforce protection orders involving *any person*, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

18 U.S.C. § 2265(e) (emphasis added). This text authorizes Indian tribal courts to issue and enforce *civil* protection orders against *any person*—Indian or non-Indian, tribal member or non-tribal member—in matters arising in the Indian country of an Indian tribe.[2] Spurr of course cannot contest that the NHBP tribal court is "a court of an Indian tribe," her fit within the category of "any person," or that this matter arises in the Indian country of the Band.

But Spurr *does* dispute whether this PPO is a civil protection order. She suggests that the tribal court here issued a *criminal* protection order, an action not authorized

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2. This express delegation of authority to tribes obviates Spurr's suggestion that a tribe also must meet one of the two *Montana* exceptions. *See* 540 U.S. at 564; *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 237, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("[F]ederal common law is used . . . when Congress has not 'spoken to a *particular* issue.'" (quotation omitted)); *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1234 (10th Cir. 2014) (describing *Montana* as "federal common law").

by § 2265(e), citing NHBP law, the PPO's language, its "severe restrictions on [her] freedom of movement and communication," and the penalties for violating it. Her arguments referencing the PPO's language and NHBP law unavoidably run together and, as the NHBP Supreme Court noted, NHBP law "perhaps could be made clearer." R. 22-2, PageID 258.

The NHBP Code authorizes a tribal court to issue a "civil protection order," NHBP Code § 7.4-49, on behalf of "any person claiming to be the victim of . . . stalking," NHBP Code § 7.4-50. And the Code also states that "[t]his article is intended to provide victims [of harassment] with a speedy and inexpensive method of obtaining *civil harassment protection orders* preventing all further unwanted contact between the victim and the perpetrator." NHBP Code § 7.4-71 (emphasis added).

In granting the PPO, titled "Personal Protection Order (Non-Domestic) (Stalking)," the tribal court found that Spurr engaged in "conduct prohibited under the [NHBP] Domestic Violence Code." R. 1-3, PageID 31. And the PPO's text states that Nathaniel's petition "has been filed and is enforceable under the authority of . . . 18 U.S.C. § 2265," R. 1-3, PageID 31, a statute that authorizes tribal courts to issue only *civil* protection orders. But Spurr seizes on language in the tribal court's opinion refusing to reconsider or modify its order that refers to the PPO as a "Permanent Harassment Protection Order," which rests under the heading of "Criminal Protection Orders." NHBP Code § 7.4-72, 73. She also points to NHBP law, which defines "stalking" as a crime in § 7.4-42(a) of the Domestic Violence Code.

On appeal, after wrestling with this inartful drafting and Spurr's arguments, the NHBP Supreme Court held that the Tribal Code authorizes tribal courts to issue civil PPOs for stalking or harassment, which includes the PPO issued here. R. 22-2, PageID 258-59. And "[o]rdinarily, we defer to tribal court interpretations of tribal law 'because tribal courts are best qualified to interpret and apply tribal law.'" *Kelsey v. Pope*, 809 F.3d 849, 864 (6th Cir. 2016) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)).

But even without this decision from the Band's highest court, Spurr's argument falls short. The tribal court's decision to issue the PPO explicitly to prohibit stalking supports the conclusion that the court issued a *civil* PPO on behalf of a "victim of . . . stalking," NHBP Code § 7.4-50. So does its express statement that the petition was filed and enforceable under § 2265. R. 1-3, PageID 31. And though the Domestic Violence Code does list "stalking" as a crime, NHBP law explicitly authorizes a tribal court to issue a "*civil* protection order" on the behalf of a "victim of . . . stalking." NHBP Code § 7.4-49, 50.

That leaves us with Spurr's contention that the penalties for violating the PPO and its restrictions on her "freedom of movement and communication" make it criminal in nature. The PPO states that "[v]iolation of this order subjects [Spurr] to immediate arrest and to the civil and criminal contempt powers of the court. If found guilty, the respondent shall be imprisoned for not more than 90 days and/or may be fined not more than $1,000.00." R. 1-3, PageID 31. But the fact that Spurr faces

criminal contempt or imprisonment *if* she violates this PPO fails to change the nature of the order. *See United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1400 (6th Cir. 1991) ("Incarceration has long been established as an appropriate sanction for civil contempt."); *Smith v. Leis*, 407 F. App'x 918, 920 (6th Cir. 2011) (noting that the Sheriff's Office arrested the defendant for "violating the terms of a civil protection order"). The same goes for its restrictions on her movement and communication. *See Morrison v. Warren*, 375 F.3d 468, 470 (6th Cir. 2004) (civil protection order issued against husband for allegations of domestic abuse prohibited him "from possessing, using, carrying, or obtaining any deadly weapon for up to five years"); *Kelm v. Hyatt*, 44 F.3d 415, 417-18 (6th Cir. 1995) (domestic violence victim sought and obtained a civil protection order requiring her husband to "vacate the marital residence").

The Band notes that it modeled its civil PPO's language after the Michigan statute authorizing a state court to issue civil PPOs under state law for stalking. The Band even went so far as to copy Michigan's list of restricted conduct. *Compare* R. 1-3 ¶ 5, PageID 31, *with* Mich. Comp. Laws § 600.2950a(3). Moreover, it flags that the tribal court ultimately issued "civil contempt" sanctions (in the form of attorney's fees) for Spurr's violation of the court's order, not any criminal penalties. *See McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir. 2000) ("[A]n award of attorney's fees is appropriate for civil contempt in situations where court orders have been violated."). For all those reasons, we disagree with Spurr: The tribal court issued a civil protection order against her.

Spurr also presses a contextual argument that fares no better. She argues that § 2265's title—"Full faith and credit given to protection orders"—reveals that its provisions do not grant tribal courts the power to issue PPOs; rather, § 2265 provides full faith and credit for protection orders issued under statutes that *do* authorize issuing protection orders. But "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947); *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998). That's especially true when § 2265(e)'s heading reads: "Tribal court jurisdiction."

Titles "are but tools available for the resolution of a doubt." *Bhd. of R.R. Trainmen*, 331 U.S. at 529. Thus, "considering the title is not appropriate unless the statute is ambiguous." *United States v. Cain*, 583 F.3d 408, 416 (6th Cir. 2009). And we find no ambiguity here. Section 2265 unequivocally states that tribal courts "shall have full civil jurisdiction to issue and enforce protection orders involving any person." § 2265(e). Its title "cannot undo or limit" what the text makes plain. *Bhd. of R.R. Trainmen*, 331 U.S. at 529; *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 222 (2012) ("[A] title or heading should never be allowed to override the plain words of a text.").

2. 25 U.S.C. § 1304

That brings us to Spurr's argument that an entirely different statute, 25 U.S.C. § 1304, defeats the Band's

reliance on 18 U.S.C. § 2265. She argues that § 1304 grants tribal courts the power to issue criminal and civil PPOs, but only when the defendant has specific ties to the tribe. Section 1304 provides participating tribes "special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories": (1) domestic violence and dating violence; or (2) violations of protection orders. 25 U.S.C. § 1304(c). For defendants lacking ties to the Indian tribe, § 1304(b)(4)(B) authorizes the exercise of this "special domestic violence criminal jurisdiction" only when a defendant:

> (i) resides in the Indian country of the participating tribe;
>
> (ii) is employed in the Indian country of the participating tribe; or
>
> (iii) is a spouse, intimate partner, or dating partner of—
>
> (I) a member of the participating tribe; or
>
> (II) an Indian who resides in the Indian country of the participating tribe.

Spurr argues that, because she meets none of these criteria, the tribal court had no authority to issue the PPO against her.

But the tribal court did not exercise its "special domestic violence jurisdiction." Not one of § 1304's

jurisdictional hooks—domestic violence or dating violence or violations of protection orders—were satisfied. 25 U.S.C. § 1304(c). As defined by the statute, Spurr did not engage in acts of dating or domestic violence. § 1304(a)(1)-(2); R. 33, PageID 399. Nor did the tribal court exercise jurisdiction over Spurr for the *violation* of a protection order. § 1304(c)(2)(B). Rather, as discussed above, the tribal court exercised *civil* jurisdiction to issue a *civil* PPO for stalking.

Spurr insists that § 1304(a)(5) supports her stance, but it does not. That section defines "protection order" to:

> (A) mean[] any injunction, restraining order, or other order *issued* by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and
>
> (B) include[] any temporary or final order *issued* by a civil or criminal court . . . if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

25 U.S.C. § 1304(a)(5) (emphasis added). This language speaks of already-issued PPOs, however, such that the PPO could have been violated—one of the statute's jurisdictional hooks. § 1304(c)(2). In other words, § 1304(a)(5) defines the types of protection orders that—if

violated—authorize a tribal court to exercise its "special domestic violence criminal jurisdiction." That section does not authorize tribal courts to issue PPOs—whether civil or criminal—in the first instance. As the district court correctly put it, this statute and 18 U.S.C. § 2265(e) "govern two different subject areas." R. 33, PageID 399.

* * *

Because 18 U.S.C. § 2265(e) grants Indian tribal courts the power to issue civil protection orders against any person in matters arising in the Indian country of the Indian tribe, we uphold the issuance of this civil PPO against Spurr as valid, affirming dismissal of the claims against the Band and the NHBP Supreme Court on sovereign immunity grounds.

IV. CONCLUSION

We AFFIRM the district court's judgment.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Case No. 1:17-cv-1083

JOY SPURR,

Plaintiff,

v.

MELISSA L. POPE, *et al.*,

Defendants.

September 27, 2018, Decided
September 27, 2018, Filed

HON. JANET T. NEFF, United States District Judge.

OPINION AND ORDER

Plaintiff Joy Spurr, represented by her husband, Stephen Spurr, initiated this case against Melissa L. Pope, identified as the Chief Judge of Tribal Court of Nottawaseppi Huron Band of the Potawatomi; the Supreme Court for the Nottawaseppi Huron Band of Potawatomi; and the Nottawaseppi Huron Band of

Potawatomi Indians (ECF No. 1). The matter is before the Court on Defendants' Joint Motion to Dismiss (ECF No. 29), seeking dismissal of Plaintiff's Complaint for lack of subject-matter jurisdiction and failure to state a claim on which relief can be granted. *See* FED. R. CIV. P. 12(b)(1), (6). Having considered the parties' submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d). For the reasons that follow, the Court grants Defendants' motion.

I. BACKGROUND

Neither Plaintiff nor Stephen Spurr is a member of the Nottawaseppi Huron Band of Potawatomi Indians ("the Tribe") (ECF No. 1-1 at PageID.7-9). They do not live on the reservation (ECF No. 1-4 at PageID.34). However, Stephen Spurr was previously married to a Tribe member, Laura Spurr (ECF No. 1-1 at PageID.7-9). Stephen Spurr has an adult son, Nathaniel Spurr, who lives on the reservation (ECF No. 1-4 at PageID.32, 34). This case arises from the February 17, 2017 issuance of a Non-Domestic Personal Protection Order (PPO) by the Nottawaseppi Huron Band of Potawatomi (NHBP) Tribal Court ("the Tribal Court") against Plaintiff as respondent in NHBP Case No. 17-046-PPO/ND (ECF No. 1-3). The PPO prohibited Plaintiff from "stalking" Nathaniel Spurr, the petitioner (*id.*). Plaintiff moved for reversal by the Supreme Court for the Nottawaseppi Huron Band of Potawatomi, which was denied on December 6, 2017 (ECF No. 1-10 at PageID.101).

On December 11, 2017, Plaintiff filed a four-page "Complaint for Declaratory Judgment and Injunctive

Relief" (ECF No. 1) in this Court, as well as a 26-page "Brief in Support" (ECF Nos. 1-1 & 1-2). Plaintiff's Complaint does not delineate any counts, but her brief includes a "Statement of the Legal Issues," as follows:

A. Did the Evidence Before the Trial Court Support the Court's Findings that the Plaintiff was engaged in "Stalking" as defined under the NHBP Domestic Violence Code?

B. Putting Aside the Issue of Jurisdiction, Should the Trial Court Have Issued a Permanent Personal Protection Order Against the Plaintiff Based on the Evidence Before the Court?

C. If a Permanent Protection Order Against "Stalking" is considered a Criminal Sanction, Did the Trial Court have Jurisdiction to Issue It Against the Plaintiff Under NHBP Tribal Law or United States Law?

D. If a Permanent Protection Order Against "Stalking" is considered a Civil Sanction, Did the Trial Court have Jurisdiction to Issue It Against the Plaintiff Under NHBP Tribal Law or United States Law?

E. If the Trial Court did not Have Jurisdiction to Issue its Permanent Protection Order Against the Plaintiff, Was the Trial Court Justified in Submitting its Order to the Michigan Law Enforcement Information Network?

F. Would the Plaintiff suffer a Continuing, Irreparable Harm in the Absence of Preliminary Injunctive Relief?

G. Has the Plaintiff Exhausted Her Remedies, by Challenging the Tribal Court's Jurisdiction in Federal Court?

(ECF No. 1-1 at PageID.11-12).

Plaintiff also included an "Appendix" with three more "Related Procedural Issues," as follows:

H. Was it Appropriate for the Trial Court to Suggest to the Petitioner that his Personal Protection Order could be renewed annually, unless the Plaintiff could prove she had not harassed him?

I. What are Other Consequences of Entering a Permanent Protection Order into the Michigan Law Enforcement Information Network?

J. Should the Trial Court Have Granted the Plaintiff's Request to Postpone the Hearing to a Date Later than February 16, 2017?

(ECF No. 1-2 at PageID.26-29).

Plaintiff seeks a declaratory judgment "that (1) the Defendants do not have personal or subject matter jurisdiction to issue against the Plaintiff the temporary and permanent personal protection orders that have

been issued by the Defendant ... Judge Pope; and (2) the Defendants are legally required to withdraw the permanent protection order from the Michigan Law Enforcement Information Network [LEIN]" (ECF No. 1 at PageID.3). Plaintiff also seeks preliminary injunctive relief in the form of an injunction "to prevent the Defendants from unlawfully pursuing proceedings against the Plaintiff based on the permanent Personal Protection order, and from maintaining the Order on the Michigan Law Enforcement Information Network" (*id.*). Last, although not included in its title, Plaintiff's "Complaint for Declaratory Judgment and Injunctive Relief" seeks "damages against the Defendants, jointly and severally" (*id.*).

On January 25, 2018, Defendants jointly moved for a Pre-Motion Conference, proposing to file a motion to dismiss (ECF No. 13). On January 30, 2018, the Court noticed a Pre-Motion Conference for March 12, 2018 (ECF No. 18). On January 31, 2018, Plaintiff filed in this Court an "Emergency Motion for a Temporary Restraining Order and for Scheduling a Hearing on a Preliminary Injunction" (ECF No. 19). This Court denied Plaintiff's request for a TRO and indicated that the Court would address the topic of preliminary injunctive relief at the scheduled proceeding on March 12, 2018 (Order, ECF No. 20).

Following the combined Pre-Motion Conference and Motion Hearing on March 12, 2018, this Court issued an Order denying Plaintiff's request for a Preliminary Injunction for the reasons stated on the record and setting forth a briefing schedule on Defendants' proposed motion

to dismiss (Order, ECF No. 26). In May 2018, Defendants filed their Motion to Dismiss (ECF No. 29). Plaintiff filed a response in opposition (ECF No. 31), and Defendants filed a Reply (ECF No. 32).

II. ANALYSIS

A. Motion Standards

Defendants move to dismiss this case under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(1) permits dismissal for a lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). "When the defendant challenges subject matter jurisdiction through a motion to dismiss, the plaintiff bears the burden of establishing jurisdiction." *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) (quoting *Hedgepeth v. Tennessee*, 215 F.3d 608, 611 (6th Cir. 2000)). *See also Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). Motions to dismiss for lack of subject-matter jurisdiction take one of two forms: (1) facial attacks and (2) factual attacks. *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 721-22 (6th Cir. 1999). If the jurisdictional attack is facial, then the court must accept the allegations in the complaint as true and construe them in a light most favorable to the non-moving party. *Id.* If the attack is factual, however, then the court may look to material outside the pleadings and make factual findings. *Id. See also Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003) ("In reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free

to supplement the record by affidavits."); *Ohio Nat'l Life Ins. Co. v. U.S.*, 922 F.2d 320, 325 (6th Cir. 1990) ("The court has wide discretion to consider material outside the complaint in assessing the validity of its jurisdiction.").

Federal Rule of Civil Procedure 12(b)(6) authorizes the court to dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6). In deciding a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations in the complaint as true. *Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 750 (6th Cir. 2014). To survive a motion to dismiss, the complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). *See also Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007) ("When a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment.").

B. Discussion

"Federal courts are courts of limited jurisdiction." *Insurance Corp. of Ireland, Ltd. v. Compagnie des*

Bauxites de Guinee, 456 U.S. 694, 701, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264; 74 U.S. 506, 19 L. Ed. 264 (1868)). Indeed, the Court has an obligation to dismiss an action "at any time" it decides that "it lacks subject-matter jurisdiction." FED. R. CIV. P. 12(h)(3).

Plaintiff alleges this Court has jurisdiction over the subject matter of her Complaint pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1302; the Declaratory Judgment Act, 28 U.S.C. § 2201; and the federal-question statute, 28 U.S.C. § 1331 (ECF No. 1 at PageID.2). The Court will consider the parties' arguments under each of these three alleged jurisdictional bases, in turn.[1]

1. The Indian Civil Rights Act

Defendants argue that the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1303, does not provide this Court with subject matter jurisdiction over Plaintiff's Complaint (ECF No. 30 at PageID.360-361). Despite including the ICRA in the jurisdictional statement of her

1. Given its conclusions herein, the Court does not reach Defendants' alternative argument that this Court should dismiss the claims against Defendants NHBP and the NHBP on the basis of sovereign immunity.

Complaint, Plaintiff does not address its applicability in her response to Defendants' motion to dismiss.

Defendants' argument has merit.

With the passage of the ICRA, Congress imposed "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). "[Section] 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." *Id.* at 72. "In 25 U.S.C. § 1303, the only remedial provision expressly supplied by Congress, the 'privilege of the writ of habeas corpus' is made 'available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.'" *Id.* at 58. *See also LaBeau v. Dakota*, 815 F. Supp. 1074, 1076 (W.D. Mich. 1993) ("Congress did not provide a private right of action in the Indian Civil Rights Act..."). Therefore, even assuming arguendo that Plaintiff has not waived this claimed basis for jurisdiction, the Court agrees with Defendants that the ICRA does not provide the Court with subject matter jurisdiction in this case.

2. The Declaratory Judgment Act

Defendants argue that the Declaratory Judgment Act, 28 U.S.C. § 2201, likewise fails to confer this Court with subject matter jurisdiction in this case (ECF No. 30 at PageID.361-362). Again, despite including the Declaratory Judgment Act in the jurisdictional statement of her

Complaint, Plaintiff does not address its applicability in her response to Defendants' motion to dismiss.

Defendants' argument has merit.

"[T]he operation of the Declaratory Judgment Act is procedural only." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 70 S. Ct. 876, 94 L. Ed. 1194 (1950) (citation omitted). "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Id.* Hence, "[t]he plaintiff's claim itself must present a federal question." *Id.* Therefore, assuming arguendo that Plaintiff has not also waived this claimed basis for jurisdiction, the Court agrees with Defendants that the Declaratory Judgment Act does not provide the Court with subject matter jurisdiction.

3. The Federal-Question Statute

Similarly, the federal-question statute, 28 U.S.C. § 1331, does not, in and of itself, supply a substantive basis for federal jurisdiction. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In other words, § 1331 merely gives the federal district court jurisdiction when a federal question arises based on other federal law. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 112, 57 S. Ct. 96, 81 L. Ed. 70 (1936) ("To bring a case within [§ 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.").

Appendix B

As noted *supra*, Plaintiff did not state her claims in her Complaint as required by Federal Rule of Civil Procedure 10(b), but this Court will consider the ten issues Plaintiff presented in her accompanying brief and appendix to determine if she has identified a federal question for review. Plaintiff's Issues A and B address the sufficiency of the evidence under the NHBP statutory definition of stalking in support the Tribal Court's issuance of the PPO against her (ECF No. 1-1 at PageID.12-18). Plaintiff's Issues C and D concern the Tribal Court's jurisdiction to issue the PPO against her, a non-tribal member, as either a criminal or civil sanction (*id.* at PageID.17-21). In Issue E, Plaintiff challenges the propriety of submitting the PPO on Michigan's LEIN system (*id.* at PageID.21). This Court has already resolved Issue F, Plaintiff's request for a preliminary injunction (*id.* at PageID.21-23). Issue G concerns whether Plaintiff exhausted her remedies in the Tribal system (*id.* at PageID.23-24). And Issues H, I and J are "related procedural issues" concerning how the Tribal Court entered the PPO (ECF No. 1-2 at PageID.26-29).

a. *Tribal-Law Claims*

Defendants argue that with the exception of Plaintiff's challenge to the Tribal Court's jurisdiction, Plaintiff's claims are grounded solely in the asserted requirements of tribal law, not federal law (ECF No. 30 at PageID.359). Defendants conclude that this Court is not empowered to speak on these questions (*id.*).

In her response to Defendants' motion to dismiss, Plaintiff does not dispute that her claims in Issues A, B,

E, G, H, I and J do not "aris[e] under the Constitution, laws, or treaties of the United States" for purposes of federal-question jurisdiction under § 1331.

Defendants' argument has merit.

The Court determines it lacks jurisdiction over the subject matter of Plaintiff's tribal-law claims. *See, e.g., Talton v. Mayes*, 163 U.S. 376, 385, 16 S. Ct. 986, 41 L. Ed. 196 (1896) ("[T]he determination of what was the existing law of the Cherokee nation . . . [was] solely [a] matter[] within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States"); *Shelifoe v. Dakota*, 966 F.2d 1454, at *1 [published in full-text format at 1992 U.S. App. LEXIS 14670] (6th Cir. 1992) ("[T]he district court lacks jurisdiction to review a challenge to the propriety or wisdom of a tribal court's decision."); *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 722 (W.D. Mich. 2017) ("Whether the Tribe correctly interpreted and applied its own ordinance does not present a federal question."). Hence, Plaintiff has not borne her burden of demonstrating any jurisdictional basis for this Court to review her tribal-law claims, and the tribal-law claims are properly dismissed under FED. R. CIV. P. 12(b)(1).

b. *Jurisdictional Claim*

Defendants concede that unlike Plaintiff's tribal-law claims, federal-question jurisdiction lies over her claim that the Tribal Court lacked jurisdiction to issue the PPO

as a matter of federal law (ECF No. 30 at PageID.362), i.e., Plaintiff's remaining Issues C and D. Although they concede subject matter jurisdiction exists over the jurisdictional claim, Defendants request that this Court dismiss the claim "against all Defendants under Rule 12(b)(6) because the claim is squarely foreclosed by Congress' unambiguous recognition of tribal jurisdiction in 18 U.S.C. § 2265(e)" (ECF No. 30 at PageID.362). According to Defendants, the jurisdictional claim turns on a pure question of law and is "not plausible on its face" (*id.*).

In her response, which incorporates some of her earlier briefing on the topic, Plaintiff "agree[s] with the Defendants' statement that Joy Spurr's claim is suitable for disposition without further briefing, apart from the issues of damages, costs and attorney fees" (ECF No. 31 at PageID.374). However, contrary to Defendants' reliance on 18 U.S.C. § 2265(e), Plaintiff contends that 25 U.S.C. § 1304 instead indicates Congress' clear intent to *not* authorize tribal courts to issue PPOs against non-tribal members over crimes of domestic violence (*id.* at PageID.374-375). Plaintiff asserts that § 2265 "is about 'full faith and credit given to protection orders,' not jurisdiction" (ECF No. 23 at PageID.307). According to Plaintiff, if this Court looks to § 1304, then the Court will conclude that the Tribal Court lacked jurisdiction to issue the PPO in this case because Plaintiff "does not fit within any of the designated categories" delineated in § 1304(b)(4)(B) for exercising jurisdiction against a defendant who "lacks ties to the Indian tribe" (*id.* at PageID.306). Plaintiff reiterates her request that the Court issue a declaratory judgment that "the NHBP courts lacked jurisdiction

to grant the personal protection order against her, and issue a corresponding permanent injunction against the Defendants, in view of the unambiguous language of 25 U.S.C. 1304" (ECF No. 31 at PageID.375).

In reply, Defendants argue that "the parties' briefing to date demonstrates that Plaintiff has no viable argument to evade Congress's clear mandate in 18 U.S.C. § 2265(e)" (ECF No. 32 at PageID.380).

Defendants' argument has merit.

Although this Court lacks jurisdiction to review a challenge to the "propriety or wisdom" of a tribal court's decision, a remedy may be available to challenge the jurisdiction of the tribal court. *See Shelifoe*, 966 F.2d at *1 [published in full-text format at 1992 U.S. App. LEXIS 14670] (citing *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 513 (8th Cir. 1989) ("The question of whether an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a federal question under 28 U.S.C. § 1331.")).

Specifically, in *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), where the petitioners contended that the tribal court had no power to enter a judgment against them, i.e., that "federal law has curtailed the powers of the tribe," the United States Supreme Court decided that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one

that must be answered by reference to federal law and is a 'federal question' under § 1331." The Supreme Court pointed out that because the petitioners contended that federal law divested the tribe of this aspect of sovereignty, "it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference," and "[t]hey have, therefore, filed an action 'arising under' federal law within the meaning of § 1331. *Id.* at 853. The Supreme Court held that the district court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction. *Id. See also Kelsey v. Pope*, 809 F.3d 849, 854 (6th Cir. 2016) (deciding, as a federal question under § 1331, whether the Little River Band of Ottawa Indians properly asserted extraterritorial criminal jurisdiction).

Here, too, the Court determines that it has federal-question jurisdiction under § 1331 to determine whether the Tribal Court exceeded the lawful limits of its jurisdiction in issuing the PPO in this case. Accordingly, the Court turns to the merits of Defendants' argument under Rule 12(b)(6) that Plaintiff has not stated a plausible jurisdictional challenge.

In general, 18 U.S.C. § 2265 provides for "full faith and credit" for protection orders issued by the courts of any "State, Indian tribe, or territory." Defendants correctly rely on subsection (e) in this case, which provides more specifically the following:

> (e) **Tribal court jurisdiction**.—For purposes of this section, a court of an Indian tribe

> shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

18 U.S.C. § 2265(e). On its face, the "Personal Protection Order (Non-Domestic) (Stalking)" (ECF No. 1-3) was filed under 18 U.S.C. § 2265, and the plain text of subsection (e) clearly establishes the Tribal Court's "full civil jurisdiction" under federal law to issue the order in this case for the benefit of Nathaniel Spurr.

Plaintiff argues that if this Court instead looks to 25 U.S.C. § 1304 to determine if the Tribal Court exceeded the lawful limits of its jurisdiction, then a different conclusion is compelled. However, Plaintiff's reliance on § 1304 misplaced. Section 1304 provides a participating tribe with "special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories: (1) Domestic violence and dating violence [and] (2) Violations of protection orders." 25 U.S.C. § 1304(c) ("Criminal conduct"). Section 1304 sets forth the limits of a participating tribe's "special domestic violence criminal jurisdiction," whereas § 2265(e) establishes the tribe's "full civil jurisdiction to issue and enforce protection orders involving any person." The two statutes govern two different subject areas. In short,

Plaintiff's jurisdictional challenge is not plausible and is properly dismissed under FED. R. CIV. P. 12(b)(6).

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants' Joint Motion to Dismiss (ECF No. 29) is GRANTED, and Plaintiff's Complaint (ECF No. 1) is DISMISSED.

Because this Opinion and Order resolves all pending claims in this matter, a corresponding Judgment will also enter. *See* FED. R. CIV. P. 58.

Dated: September 27, 2018 /s/ Janet T. Neff
JANET T. NEFF
United States District Judge

APPENDIX C — RELEVANT STATUTORY PROVISIONS

Comparison of 25 U.S.C. 1304(b)(4)(B) and 18 U.S.C. 2265(e) with Original Bills Introduced in Congress

H.R. 4154, in Section 204. Tribal Jurisdiction over Crimes of Domestic Violence, provides in Section (d) Dismissal of Certain Cases, the following in subsection (3) Ties to Indian Tribe, the following at p. 13:

(3) TIES TO INDIAN TRIBE. In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the case shall be dismissed if-

> (B) the prosecuting tribe fails to prove that the defendant or the alleged victim-

(i) resides in the Indian Country of the participating tribe;

(ii) is employed in the Indian Country of the participating tribe; or

(iii) is a spouse or intimate partner of a member of the participating tribe.

This is the language of 25 U.S.C. 1304(b)(4)(B):

> (B) Defendant lacks ties to the Indian tribe. A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant

(i) resides in the Indian Country of the participating tribe;

(ii) is employed in the Indian Country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of

(I) a member of the participating tribe; or

(II) an Indian who resides in the Indian country of the participating tribe.

In H.R. 4154, section 6. Tribal Protection Orders, subsection (e) on Tribal Court Jurisdiction, provides in paragraph (1) the following at p. 17:

Except as provided in paragraph (2), for purposes of this section, a court of an Indian Tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

H.R. 4154, section 6, subsection (e), paragraph (2), on pp. 17-18, states that paragraph (1) shall not apply to certain specified Indian Tribes in Alaska.

This is the language of 18 U.S.C. 2265(e):

For purposes of this section, a court of an Indian Tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

Appendix C

H.R. 757 has exactly the same language as H.R. 4154, with the same titles of sections, subsections and paragraphs, on p. 13 and p. 17 respectively.

25 U.S.C. Section 1304(d) – Concerning "Rights of Defendants."

" . . . the participating tribe shall provide to the defendant . . .

(3) the right to a trial by an impartial jury that is drawn from sources that –
(B) do not exclude any distinctive group in the community, including non-Indians; and

(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."

APPENDIX D — SENATE REPORT 112-153 ON THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2011, MARCH 12, 2012, P. 11

Section 905 of the legislation [the predecessor of Section 2265] is a *narrow technical fix* to clarify Congress's intent to recognize that tribal courts have full civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian. At least one Federal district court has misinterpreted 18 U.S.C. 2265(e) and held that tribes lack civil jurisdiction to issue and enforce protection orders against certain nonIndians who reside within the reservation . . . Section 905 corrects this error. *It does not in any way alter, diminish or expand tribal criminal jurisdiction or existing tribal authority to exclude individuals from Indian land.* [emphasis supplied]