No. 19-598

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, et al.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below was correct in holding that the Tribal Government and the Tribal Supreme Court have sovereign immunity from suit where those entities have not waived immunity and Congress has not authorized the suit.

2. Whether the court below was correct in holding that the Tribal Court has civil jurisdiction to issue a civil personal protection order against Petitioner for conduct arising within the Tribe's Indian country where Congress has provided that "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[.]" 18 U.S.C. § 2265(e).

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INTRODUCTION

This case arises out of family turmoil. Petitioner was found in Tribal Court proceedings to have undertaken a prolonged campaign of aggressive harassment and stalking of her husband's son, a tribal member, in violation of tribal law. Petitioner does not challenge that finding. Petitioner instead argues that, contrary to the holdings of the courts below, the Tribal Court lacked jurisdiction to issue a civil personal protection order against her, a non-Indian, forbidding such conduct. Petitioner further argues that the Sixth Circuit erred in holding that two of the three tribal defendants – the Tribe and the Tribal Supreme Court – enjoy sovereign immunity from Petitioner's suit.

Neither argument implicates any conflict in authority or raises an issue of law so important as to warrant issuance of the writ. The Petition is instead premised on plain mischaracterizations of the Sixth Circuit's holdings and this Court's precedents.

Petitioner's first Question Presented asks whether a Tribe can "*end the federal case* by invoking sovereign immunity[.]" Pet. *i* (emphasis added). But this case presents no such question. Petitioner sued three entities: the Tribe, the Tribal Supreme Court, and the individual Tribal Court Judge. While the first two asserted sovereign immunity, the latter did not. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014) ("tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers"). As a result, the assertions of immunity by the Tribe and the Tribal Supreme Court

did not "end the federal case." To the contrary, Petitioner enjoyed a full opportunity to adjudicate *all* of her claims to conclusion, none of which substantively turned on the presence or absence of the immune defendants. Thus, Petitioner's sovereign immunity arguments are purely academic *in their entirety* as they have no bearing on the outcome of the case.

Nor do those arguments warrant certiorari in any event. This Court has been clear that "[a]s a matter of federal law, an Indian tribe is subject to suit *only* where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998) (emphasis added). *See also*, *e.g.*, *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 416 (2001) (same); *Bay Mills*, 572 U.S. at 791 & n.4 (same). The Circuit accurately set forth and applied this settled rule to Petitioner's suit against the Tribe and its Supreme Court and, finding neither condition satisfied, affirmed dismissal on that basis. Pet. App. 6a-10a.

Petitioner's second Question Presented asks whether the Sixth Circuit was correct in applying the plain language of 18 U.S.C. § 2265(e) to her. In that provision, entitled "Tribal Court Jurisdiction," Congress declared unambiguously that "a court of an Indian tribe *shall have full civil jurisdiction* to issue and enforce protection orders involving <u>*any person*</u> . . . in matters arising anywhere in the Indian country of the Indian tribe[.]" 18 U.S.C. § 2265(e) (emphasis

added).[1] The Sixth Circuit held that this provision "unambiguously" confers civil jurisdiction on tribal courts to issue civil protection orders against non-Indians, including Petitioner here. Pet. App. 2a.

Petitioner contends that the courts below applied the wrong statute and should instead have applied 25 U.S.C. § 1304 (governing tribal criminal jurisdiction over domestic violence), under which tribal jurisdiction would not extend to her. Pet. App. 17a-18a. The Sixth Circuit rejected Petitioner's argument based on a careful and reasoned analysis of the text of both statutes, Pet. App. 12a-20a, and Petitioner cites *not a single case of this Court or any other* interpreting or applying either statute contrary to the Circuit's decision. In fact, Petitioner cites no case interpreting or applying either statute *at all*. *See* Pet. 15-20. She simply proposes her own unprecedented interpretations of both statutes and asks the Court to agree with her where the courts below did not. This of course is not the stuff of certiorari.

Finally, with her legal and factual arguments rejected by the courts below based on a fair and reasoned application of the law, Petitioner falls back on the alleged "radical and dangerous" consequences of the Circuit's decision. Pet. 14. Absent reversal, Petitioner warns, "[n]ontribal defendants with no

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[1] "Indian country" as used in section 2265(e) derives from 18 U.S.C. § 1151(a), which defines it as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government[.]" Petitioner did not challenge below the status of the Tribe's Reservation as "Indian country" or that her conduct arose there.

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." *Id.*

These contentions are baseless. The Sixth Circuit expressly premised its holding on the Tribal Court's exercise of civil, not criminal, jurisdiction. Pet. 16a. The case has no implications whatsoever for "criminal . . . due process" or any other aspect of criminal law. Nor are any "vastly expanded circumstances" implicated by the Sixth Circuit's narrow ruling on a statutory provision recognizing tribal civil jurisdiction in the limited context of personal protection orders in Indian country. Petitioner does not even attempt to support her naked claim of consequences beyond that context. *See* Pet. 14. And Petitioner's suggestions that non-Indians will have "no remedy available" and will be denied "outside judicial review," *id.*, if a tribal court exceeds its jurisdiction simply make no sense in the context of this case. Petitioner fully availed herself of such federal court review and her challenge to tribal jurisdiction was *fully adjudicated* by both federal courts below, with the very remedy she sought plainly on the table. Had she won, the Tribal Court Judge would have been enjoined against any further enforcement of the protection order, rendering it null and void. Petitioner was not denied a federal forum. She just lost there. The Petitioner appears not to recognize the difference.

STATEMENT OF THE CASE

Respondent Nottawaseppi Huron Band of the Potawatomi (the "Tribe") is a federally recognized sovereign Indian tribe that enjoys a government-to-government relationship with the United States. *See* 83 Fed. Reg. 34,863, 34,865 (July 23, 2018). The Tribe's Reservation is located in Fulton, Michigan. Respondent the Honorable Melissa L. Pope is the Chief Judge of the Tribe's trial court (the "Tribal Court"). Respondent the Tribal Supreme Court is the highest appellate court in the Tribe's judiciary.

I. Statutory Background

American Indian and Alaska Native citizens experience some of the highest rates of violent crime and stalking of any group in the United States. More than 80% of Native American men and women experience violent crime in their lifetimes, and 48.8% of Native women and 18.6% of Native men experience stalking.[2] The perpetrators of these acts are overwhelmingly non-Indian – 90% in cases involving male victims and 97% in cases involving female victims.[3]

In response to this "epidemic," S. Rep. No. 112-153, at 8 (2012), Congress enacted Title IX of the

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[2] *See*, *e.g.*, André B. Rosay, Violence Against American Indian and Alaska Native Women and Men: 2010 Findings From the National Intimate Partner and Sexual Violence Survey 44-45 & Tables 6.1, 6.2 (Nat'l Inst. of Justice 2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

[3] *Id*. 46, Figure 6.1.

Violence Against Women Reauthorization Act ("VAWA") of 2013, Pub. L. No. 113-4, 127 Stat. 54. In doing so, Congress "recogniz[ed] that tribal nations may be best able to address violence in their own communities," S. Rep. No. 112-153, at 8, and accordingly enacted provisions strengthening both the criminal and the civil jurisdiction of tribes to address these matters. On the criminal side, Congress affirmed the authority of participating tribes to impose criminal sanctions against certain non-member (including non-Indian) perpetrators of domestic or dating violence, including violations of protection orders "issued by a civil or criminal court." 25 U.S.C. § 1304(a)(5), (b), (c). Section 1304's recognition of tribal criminal jurisdiction over non-members extends only to non-members with specified connections to the tribe or its reservation.[4]

On the civil side, and directly applicable here, Congress recognized that tribal civil jurisdiction to issue and enforce protection orders, including against non-Indians, is also an "important tool" for tribes to address the problem of domestic violence in Indian country. S. Rep. No. 112-153, at 11. Congress accordingly amended 18 U.S.C. § 2265(e) as part of the 2013 VAWA amendments. Prior to 2013, section

[4] Section 1304 confers special tribal domestic violence criminal jurisdiction where 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." 25 U.S.C. § 1304(b)(4)(B).

2265(e) simply stated that tribal courts enjoy "full civil jurisdiction to enforce protection orders," Pub. L. No. 106-386, § 1101, 114 Stat. 1464, 1494 (2000), without specifying that tribal courts could also *issue* such orders, and without specifying section 2265(e)'s reach to Indians and non-Indians alike. The 2013 amendment "clarif[ies] 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*," S. Rep. No. 112-153, at 11 (emphasis added), for matters arising in a tribes' Indian country. Unlike section 1304's grant of tribal criminal jurisdiction, section 2265(e) contains no restrictions limiting tribal civil jurisdiction to issue and enforce protection orders only to non-members with certain connections to a tribe or its reservation.

Indeed, section 2265(e) was amended specifically to foreclose the argument Petitioner makes here. In 2008, a federal district court had held that section 2265(e) did not recognize tribal jurisdiction over non-tribal members, reasoning:

> There must exist "express authorization" by federal statute of tribal jurisdiction over the conduct of non-members. . . .
>
> . . . [Section 2265(e) contains] no express congressional authorization to enter protective orders . . . against non-tribal members pursuant to the VAWA. Accordingly, there is no tribal

> jurisdiction pursuant to legislative grant.

Martinez v. Martinez, Case No. C08-5503 FDB, 2008 U.S. Dist. LEXIS 104300, at *9 (W.D. Wash. Dec. 16, 2008). Congress understood that its amendment of section 2265(e) "would effectively reverse a 2008 decision from a Federal district court in Washington, which held that an Indian Tribe lacked authority to enter a protection order . . . against a non-Indian[.]" S. Rep. No. 112-265, at 11 & n.66 (2012) (citing *Martinez*). *See also* S. Rep. No. 112-153, at 11 (stating that section 2265(e) as amended clarifies "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," that "[a]t least one Federal district court has misinterpreted 18 U.S.C. § 2265(e)" to hold otherwise, and that the 2013 amendment of section 2265(e) "corrects this error").

II. Litigation in the Tribal Courts

On February 2, 2017, tribal member Nathaniel Spurr petitioned the Tribal Court for an ex parte personal protection order against Petitioner, a non-Indian who is married to Mr. Spurr's father. Mr. Spurr alleged that Petitioner was engaged in an aggressive and sustained campaign of personal harassment against him, including acts of harassment and stalking within the Tribe's Reservation. Pet. 1, 3; Pet. App. 2a. The following day, the Tribal Court issued a fourteen-day ex parte civil protection order against Petitioner prohibiting her from stalking or harassing Mr. Spurr. Pet. 4; Pet.

App. 2a, 22a. Toward the end of that fourteen-day period, the Tribal Court held a hearing – at which it received witness testimony and other evidence and heard the arguments of the parties – and found the evidence sufficient to extend the protection order for a one-year period. Pet. App. 3a.

The terms of the Tribe's civil personal protection order mirror those of the State of Michigan's standard civil personal protection order. Pet. App. 16a. The Tribal Court issued the protection order as part of a civil proceeding at the request of Mr. Spurr, a civil litigant, expressly under the authority of 18 U.S.C. § 2265. *See id.* 14a.

Petitioner moved for reconsideration, challenging the Tribal Court's jurisdiction to issue the protection order against her, a non-Indian, which the Tribal Court denied. *Id.* 3a. Petitioner appealed to the Tribal Supreme Court, which affirmed the Tribal Court's jurisdiction as a matter of federal law under section 2265(e). *Id.* 3a, 14a-15a.[5]

III. Federal Court Proceedings

Petitioner filed an action in the United States District Court for the Western District of Michigan on

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[5] Several months after the Tribal Supreme Court upheld the Tribal Court's civil jurisdiction to issue the protection order against Petitioner, the Tribal Court found Petitioner in civil contempt for violating the order through continued harassment of Mr. Spurr and imposed civil sanctions against her. Pet. App. 3a. Petitioner did not challenge those actions in the courts below. *See id.* 23a-25a (setting forth Petitioner's claims).

December 11, 2017, challenging the Tribal Court's jurisdiction to issue the protection order against her. Pet. App. 21a-23a. She based her claim on her status as a non-Indian without the requisite ties to the Tribe or its Reservation to trigger tribal court jurisdiction under 25 U.S.C. § 1304. *Id.* at 33a. She sued not only the Tribal Court Judge but also the Tribe and the Tribal Supreme Court. *Id.* at 21a-22a.

On April 9, 2018, Respondents jointly moved to dismiss the suit under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, based on the plain text of section 2265(e). Pet. 5; Pet. App. 33a. They further moved to dismiss all claims against the Tribe and the Tribal Supreme Court on grounds of sovereign immunity. Pet. App. 4a, 33a. The Tribal Court Judge did not assert immunity but instead submitted to the full adjudication of Petitioner's claims. *Id*. 6a, 28a n.1.

On September 27, 2018, the district court granted the Rule 12(b)(6) motion, concluding that the Tribal Court had exercised civil jurisdiction over Petitioner and that "the plain text of [18 U.S.C. § 2265] subsection (e) clearly establishes the Tribal Court's 'full civil jurisdiction' under federal law to issue the order in this case[.]" Pet. App. 21a, 36a. It further explained that

> Plaintiff's reliance on § 1304 is misplaced. . . . 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).

Pet. App. 36a-37a. The district court did not reach the question of the sovereign immunity of the Tribe or the Tribal Supreme Court, but instead dismissed all of Petitioner's claims against all defendants on the merits. Pet. App. 28a n.1.

The United States Court of Appeals for the Sixth Circuit affirmed. On the issue of the sovereign immunity of the Tribe and the Tribal Supreme Court, the Circuit held that the district court should have reached the sovereign immunity question before proceeding to the merits, Pet. App. 10a; it then held that those entities enjoyed sovereign immunity. In doing so, the Circuit set forth this Court's settled rule that, absent tribal waiver, tribes enjoy sovereign immunity from suit unless Congress has authorized the suit. *Id*. 6a-7a (citing, *e.g.*, *Bay Mills*, 572 U.S. at 788, 790). The Circuit did not address Petitioner's argument that this rule applies only in suits based on tribal commercial activities, but implicitly rejected that argument, noting that this Court has not drawn any such distinction between commercial and governmental activities. *Id.* at 6a (citing *Kiowa*, 523 U.S. at 754-55). The Court instead construed Petitioner's argument to be that 28 U.S.C. § 1331 authorized her suit against the Tribe and its Supreme Court, thus abrogating tribal sovereign immunity.

Pet. App. 7a-10a. The Circuit rejected that argument, finding that section 1331 does not address tribal sovereign immunity, much less abrogate it "unequivocally" as required by this Court's precedents. *Id*. at 6a-8a (quoting *C & L Enters.*, 532 U.S. at 418 ("To [abrogate tribal immunity], 'Congress must "unequivocally" express that purpose.'" (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978))).[6]

The Circuit then proceeded to address the merits of the Tribal Court's civil jurisdiction to issue the protection order against Petitioner because the Tribal Court Judge had not claimed immunity. The Court stated:

> 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* [*v. United States*], 450 U.S. [544,] 564 [(1981); *see South Dakota v. Bourland*, 508 U.S. 679, 695 n.15,

[6] Petitioner has not argued to this Court that section 1331 (or any other statute) constitutes an express abrogation of tribal sovereign immunity. She limits her arguments to the notion that in suits by non-Indians, tribal sovereign immunity – and hence the requirement for express Congressional abrogation – applies only when the suit is "based on tribal activities of a commercial nature," Pet. at 9-10 & n.2, and that in all other cases, "there is no sovereign immunity unless Congress has clearly said so," *id*. at 8.

> 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*.

Pet. App. 11a (emphasis added). The Circuit found section 2265(e) to be the requisite Act of Congress and that it plainly conferred the civil jurisdiction exercised by the Tribal Court over Petitioner. *Id.* 12a-13a, 17a. The Circuit agreed with the district court that section 1304 and section 2265(e) "govern two different subject areas," tribal criminal and tribal civil jurisdiction respectively, rendering section 1304 inapplicable. *Id.* 20a.[7]

REASONS FOR DENYING THE PETITION

With her first question presented, Petitioner seeks review of the Sixth Circuit's straightforward application of this Court's settled rule governing tribal sovereign immunity. The Petition identifies no case of this Court or any other that conflicts with the Sixth Circuit's decision. Petitioner's assertions to the contrary are premised on basic misunderstandings of the cases she discusses. Moreover, Petitioner's immunity arguments are entirely academic as they would not, even if decided in her favor, affect the outcome below.

With her second question, Petitioner seeks review of the Sixth Circuit's interpretation of the

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[7] The Circuit further rejected Petitioner's alternative argument that the Tribal Court exercised criminal jurisdiction over her. Petitioner does not develop that argument before this Court.

terms of two unambiguous statutory provisions. Petitioner cites no other case interpreting those provisions, let alone supporting her position. She simply pits her atextual construction of the provisions against the plain language reading of the courts below and asks this Court to take her side. This creates no basis for review.

Finally, Petitioner's assertion of dire consequences if the Sixth Circuit's decision is allowed to stand are premised on patent misstatements as to the scope and substance of what the Sixth Circuit actually held.

I. Certiorari is not warranted to address the Sixth Circuit's correct application of settled sovereign immunity law.

As a threshold matter, Petitioner's sovereign immunity arguments rest on mistaken characterizations of the Circuit's holding. Petitioner's error is evident in her framing of the first Question Presented, which asserts that this case involves whether a Tribe can "*end the federal case* by invoking sovereign immunity," Pet. *i* (emphasis added). This case presents no such question. Petitioner sued three entities: the Tribe, the Tribal Supreme Court, and the Tribal Court Judge. While the first two entities asserted sovereign immunity, the Tribal Court Judge did not. *See Bay Mills*, 572 U.S. at 796 ("tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers"). As a result, the invocation of tribal sovereign immunity by the Tribe and its Supreme Court did not "end the federal case." Petitioner enjoyed a full and fair

opportunity in the federal courts to adjudicate *all* of her claims to conclusion, none of which substantively turned on the presence or absence of the immune defendants. Thus, Petitioner's sovereign immunity arguments are entirely academic and have no bearing on the outcome of the case.

Petitioner's error on this point pervades the Petition. She asserts that "[t]he 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." Pet. 20 (emphases added). Elsewhere, Petitioner asserts that "[c]ontrary 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 the protection order. *Id*. 15.

These contentions bear no relationship to what the Circuit in fact held. While the Circuit indeed found Petitioner's suit against the Tribe and its Supreme Court barred by tribal sovereign immunity, it clearly recognized, as had the district court before it, that federal courts have jurisdiction to review a tribal court's determination of its own jurisdiction as a matter of federal law. This is why both courts *exercised that jurisdiction and fully adjudicated the issue*, finding the Tribal Court's authority clear under section 2265(e). That Petitioner does not like that conclusion does not mean the Circuit did not reach it.

Nor do Petitioner's sovereign immunity arguments warrant certiorari in any event. This Court has been consistent and clear: "As a matter of

federal law, an Indian tribe is subject to suit *only* where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754 (emphasis added). *See also*, *e.g.*, *C & L Enters.*, 532 U.S. at 416 (quoting same). Thus, absent a tribal waiver, which Petitioner has not claimed, "[t]he upshot is this: Unless Congress has authorized [such a] suit, our precedents demand that it be dismissed." *Bay Mills*, 572 U.S. at 791 & n.4.

The Sixth Circuit accurately set forth and applied this governing rule of law and, finding neither a tribal waiver nor congressional authorization, concluded that Petitioner's suit against the Tribe and its Supreme Court (but those two defendants only) was barred by tribal sovereign immunity. Pet. 5a-10a.

Petitioner argues that this conclusion conflicts with this Court's precedents. Petitioner's error on this point is basic. She asserts that tribal sovereign immunity applies only when a suit involves a tribe's *commercial* conduct, not its *governmental* conduct, and thus that the court below erred in finding tribal sovereign immunity under the facts of this case, which involves strictly governmental conduct. *Id*. 9-10 & n.2, 12-13. This proposition is at war with this Court's relevant precedents, which repeatedly "have sustained tribal immunity from suit without drawing a distinction . . . . between governmental and commercial activities[.]" *Kiowa*, 523 U.S. at 754-55; *see also*, *e.g.*, *Bay Mills*, 572 U.S. at 790 (same); *C & L Enters.*, 532 U.S. at 416 (same). Moreover, the notion that the Court has drawn any such distinction in favor of tribal sovereign immunity for commercial

activities is beyond implausible. *See*, *e.g.*, *Kiowa*, 523 U.S. at 755 (declining to "*confine* immunity from suit to . . . governmental activities" (emphasis added)); *Bay Mills*, 572 U.S. at 790 ("The plaintiff [in *Kiowa*] asked this Court to confine tribal immunity to suits involving . . . 'noncommercial activities.' We said no." (citation to *Kiowa* omitted)).

With this fundamental error as a starting point, Petitioner unmoors her arguments from this Court's sovereign immunity precedents and turns instead to a line of cases that does not address the issue in any way. *See* Pet. at 6-8 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Strate v. A-1 Contrs.*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Duro v. Reina*, 495 U.S. 676 (1990); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Wheeler*, 435 U.S. 313 (1978); and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

In not one of these cases did this Court address the issue of tribal sovereign immunity – nor would it have had reason to do so. *Wheeler*, *Montana*, *Brendale*, and *Plains Commerce* did not involve suits brought against tribal defendants; tribal immunity was accordingly not at issue. *Bourland* involved an action for prospective injunctive relief against individual tribal officials. *See* 508 U.S. at 685 ("[T]he State filed this action against the Chairman of the Cheyenne River Sioux Tribe and the Director of Cheyenne River Sioux Tribe Game, Fish and Parks."). *Oliphant* and *Duro* were habeas actions, specifically

authorized by Congress in the Indian Civil Rights Act. *See* 25 U.S.C. § 1303. And in *Strate* the tribal defendants expressly waived any claim to immunity below, *A-1 Contrs. v. Strate*, 76 F.3d 930, 933 (8th Cir. 1996) ("The tribal defendants initially raised the affirmative defense of sovereign immunity, but subsequently consented to the suit"), so the issue was not before this Court.

All of the foregoing cases address the scope of tribal sovereign powers and in particular this Court's delineation of the limits of tribal authority over non-Indians. Petitioner's confusion as to their meaning and applicability stems from her assumption that when this Court speaks of "tribal sovereignty" in these cases, it is addressing sovereign *immunity*. For example, this Court stated in *Montana* that tribes generally lack jurisdiction over non-members on fee lands within a reservation, except where non-members (1) have entered consensual relationships with the tribe or its members; or (2) are engaged in conduct threatening or directly effecting the political integrity, the economic security, or the welfare of the tribe. *Montana*, 450 U.S. at 565-66. Petitioner reads these two exceptions to delimit the circumstances under which "the tribe retains *sovereign immunity*[.]" Pet. 8-9 (emphasis added). But *Montana* says no such thing.

From this erroneous premise, Petitioner asserts that when the Court explained that beyond those two exceptions, tribal authority over non-members "cannot survive without express congressional delegation," *Montana*, 450 U.S. at 564, it was referring to tribal sovereign *immunity*. Pet. 11-

13. Thus, laying error upon error, Petitioner concludes, "*there is no sovereign immunity unless Congress has clearly said so*." *Id*. 8 (emphasis added). This is precisely the opposite of what the Court has repeatedly stated about tribal sovereign immunity. *See*, *e.g.*, *Bay Mills*, 572 U.S. at 806 (tribal sovereign immunity applies "except where Congress has expressly abrogated it" (Sotomayor, J., concurring); *C & L Enters.*, 532 U.S. at 418 ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose.").[8]

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[8] The Ninth Circuit has cogently rejected the argument that *Montana* and its progeny are sovereign immunity cases:

> [Appellant] correctly notes that "tribal jurisdiction over the conduct of nonmembers exists only in very limited circumstances" and that "the inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers of the Tribe."
>
> From this solid precipice, however, [Appellant] plummets to the assertion that the Nation cannot assert tribal sovereign immunity against [Appellant's] claims. We disagree…. [Appellant] appears to confuse the fundamental principles of tribal sovereign authority and tribal sovereign immunity. The cases [Appellant] cites [*e.g.*, *Montana*] address only the extent to which a tribe may exercise jurisdiction over those who are nonmembers, *i.e.*, tribal sovereign authority. Those cases do not address the concept at issue here – our authority and the extent of our jurisdiction over Indian Tribes, *i.e.*, tribal sovereign immunity.

Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1161 (9th Cir. 2002).

Petitioner identifies no split in authority on this point. She cites two circuit cases that purportedly "squarely . . . conflict," Pet. 11, with the Sixth Circuit's ruling because they allowed claims against tribal entities absent congressional authorization or tribal waiver. *Id.* 8. Neither case remotely supports that proposition. In *Stifel v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015), non-Indian plaintiffs "sought an injunction . . . to preclude the Tribal Entities [a tribe and its wholly owned corporation] from pursuing their tribal court action." *Id.* at 188. Contrary to Petitioner's characterization of the Seventh Circuit's decision, it held that "the Tribal Entities *effectuated a valid waiver of their sovereign immunity*, and, <u>*therefore*</u>, the action against them may proceed." *Id.* (emphasis added). That conclusion – which Petitioner fails to mention, much less grapple with – wholly defeats Petitioner's suggestion of a conflict with the decision below.

Likewise, in *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), the Tenth Circuit did not permit a suit against a tribal government or court absent a tribal waiver or congressional authorization, as Petitioner suggests. It instead allowed a suit to proceed against an *individual tribal judge* under the *Ex parte Young* doctrine. *See id.* at 1154-55. That holding – also not mentioned by Petitioner – does not in the least conflict with the Sixth Circuit's ruling, as the Tribal judge here did not assert sovereign immunity but instead submitted to the full adjudication of Petitioner's claims in both courts below.

In sum, Petitioner has presented no basis for issuance of the writ on her first question.

II. Certiorari is not warranted to address the Sixth Circuit's correct application of an unambiguous statute.

Congress has declared unambiguously that "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[.]" 18 U.S.C. 2265(e) (emphasis added). This Court has "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. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations and quotation marks omitted). The Sixth Circuit thus appropriately held that section 2265(e) plainly and unambiguously conferred jurisdiction on the Tribal Court to issue its civil protection order against Petitioner.

Petitioner's arguments to the contrary do not warrant certiorari. She first perfunctorily suggests that section 2265(e) cannot possibly be read to authorize tribal jurisdiction over her because "federal common law imposes severe limits on both the criminal and civil jurisdiction of a tribal court over non-Tribal members." Pet. 15 (citing *Montana, Duro*, and *Oliphant*). None of the cases cited by Petitioner is at odds with the Circuit's decision. All of them pre-dated Congress's 2013 amendment of section 2265(e).

As this Court has stated in analogous circumstances, such decisions "are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference." *United States v. Lara*, 541 U.S. 193, 207 (2004). The Sixth Circuit was not at liberty to disregard the plain language of section 2265(e) and instead applied that text while carefully accounting for this Court's prior precedents relied on by Petitioner. *See* Pet. App. 11a-12a (citing *Montana* for the proposition that tribal civil jurisdiction over non-Indians beyond the Court's recognized limits requires congressional authorization and finding section 2265(e) to be such authorization). *See also id.* at 13a n.2. (stating that section 2265(e)'s "express delegation of authority to tribes obviates Spurr's suggestion that a tribe also must meet one of the two *Montana* exceptions").

Petitioner's primary argument on Question 2 is that the Circuit applied the wrong statute – that instead of section 2265(e), it should have applied 25 U.S.C. § 1304, and had it done so, it would have found tribal jurisdiction lacking because the factual predicates for tribal jurisdiction under that provision (*see supra* note 4) are not met in her case. Petitioner's argument rests, as recognized by both the district court and the Circuit, on a clear misunderstanding of the text of both statutes, and she cites no authority that supports her position.

According to Petitioner, "in Section 1304 Congress has specifically stated that jurisdiction of tribal courts *to issue* personal protection orders *is*

criminal jurisdiction." Pet. 16 (first emphasis added). Section 1304 will be searched in vain for any support for this statement. Section 1304, unlike section 2265(e), simply does not address tribal court jurisdiction "to issue" protection orders at all, as the Sixth Circuit correctly recognized. Pet. App. 19a-20a. Section 1304 instead confers special criminal jurisdiction on tribes to impose criminal sanctions for violations of protection orders already in effect – *i.e.*, those "issued by a civil or criminal court." 25 U.S.C. § 1304(a)(5)(A). As the Circuit correctly stated, section 1304 simply "defines the types of protection orders that – if violated – authorize a tribal court to exercise its 'special domestic violence criminal jurisdiction.'" Pet. App. 19a-20a. But as both courts below found, *the Tribe did not exercise special domestic violence criminal jurisdiction, or any other criminal jurisdiction, over Petitioner*, rendering section 1304 irrelevant.[9]

Petitioner further erroneously asserts that the Circuit "accepted" "that Section 1304 applies only to 'criminal protection orders[.]'" Pet. 16. *See also id.* ("[T]he decision of the Circuit Court was based entirely on the assumption that this statute applied only to criminal orders."). In fact, the Circuit neither assumed nor accepted any such thing. It acknowledged that section 1304 authorizes tribes to exercise special domestic violence criminal jurisdiction to enforce protection orders "*issued* by a

[9] Petitioner did not claim below, and does not claim here, that she has ever been subjected by the Tribal Court to any criminal sanctions of any nature for violation of the protection order issued against her.

civil or criminal court." Pet. App. 19a (quoting same and adding emphasis). The Circuit simply found, as had the district court, that the Tribal Court did not exercise "special domestic violence criminal jurisdiction" over Petitioner. It instead exercised civil jurisdiction over her expressly under Congress's *entirely separate* and emphatically clear declaration that "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 . . . in matters arising anywhere in the Indian country of the Indian tribe[.]" 18 U.S.C. § 2265(e).

Notably, Petitioner has identified no case of this Court or any other interpreting or applying either section 2265(e) or section 1304 contrary to the Circuit's decision. Indeed, Petitioner has identified *not a single case applying either statute at all*. *See* Pet. 15-20. Petitioner simply offers her own interpretations of both statutes – ungrounded in any clear assessment of their actual text – and urges this Court to agree with her where two lower courts did not. In sum, Petitioner seeks error correction of the Circuit's determination as to which statute applied. That question does not remotely warrant certiorari. Indeed, as enacted in its current form in 2013, section 2265(e) has not been interpreted by any federal court other than the two courts below. This is surely a circumstance where, even were section 2265(e) susceptible to interpretations contrary to the Sixth Circuit's, the issue would best be left to percolate in the lower courts.

III. Certiorari is not warranted to address Petitioner's practical effects arguments.

Finally, Petitioner falls back on practical effects arguments to conjure a measure of importance that this case simply does not bear. Petitioner asserts that, if allowed to stand, the consequences of the Sixth Circuit's decision will be "radical and dangerous" and "drastic." Pet. 14, 20. Petitioner's arguments in this regard are thoroughly estranged from what the Circuit actually held.

For example, she asserts that if the Circuit's decision is not reversed, "[n]ontribal 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." Pet. 14. First, the Circuit expressly premised its holding on the Tribal Court's exercise of civil, not criminal, jurisdiction. The case has no implications for "criminal . . . due process guarantees" or any other aspect of criminal law. Nor are any "vastly expanded circumstances" implicated by the Circuit's narrow ruling on a statutory provision recognizing tribal civil jurisdiction in the limited context of personal protection orders in Indian country. Petitioner does not even attempt to support her naked claim of implications beyond that context. *See id*. 14. And finally, Petitioner's suggestion that non-Indian litigants will be denied "outside judicial review" of tribal court decisions simply makes no sense in the context of this case. Petitioner fully availed herself of such review in both the district

court and the Circuit, both of which adjudicated the merits of her claims to conclusion.

Petitioner similarly warns that under the Circuit's ruling, "[i]f 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." Pet. 14. But again, Petitioner *did* bring an action in federal court, and her challenge to tribal jurisdiction was fully adjudicated with the very remedy she sought plainly on the table. Had Petitioner won, the Tribal Court Judge would have been enjoined against any further enforcement of the protection order, rendering it null and void. Petitioner was not denied a federal forum. She just lost there. That Petitioner does not seem to understand the difference is no warrant for certiorari.

CONCLUSION

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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December 9, 2019