No. 17-429

IN THE
Supreme Court of the United States

JESSICA TAVARES,
Petitioner,

v.

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

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Whether the Ninth Circuit correctly held that the Indian Civil Rights Act does not authorize a member of an Indian tribe to seek habeas relief in federal courts when she has been temporarily banned from tribal properties, but not from her residence or the entire reservation.

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INTRODUCTION

Section 1303 of the Indian Civil Rights Act ("ICRA") creates federal habeas jurisdiction for persons who are in "*detention* by order of an Indian tribe." 25 U.S.C. § 1303 (emphasis added). In this case, the Ninth Circuit held that Petitioner's temporary exclusion from tribally-owned properties does not qualify as "detention" and thus cannot serve as a basis for ICRA habeas jurisdiction in the federal courts.

Petitioner does not allege any split on that conclusion: She cannot point to any other court of appeals that has held that a temporary exclusion qualifies as "detention" under ICRA. Instead, she alleges that this Court should grant certiorari because—in reaching its conclusion that Petitioner's discipline did not qualify as "detention"—the Ninth Circuit reasoned that the term "detention" in ICRA should be interpreted more narrowly than the term "custody," which is used in other federal habeas statutes. *See, e.g.*, 28 U.S.C. § 2255(a). Petitioner faults the Ninth Circuit for interpreting the different words differently, observing that other courts have suggested that the two words mean the same thing.

Petitioner has greatly exaggerated the extent of any conflict on that issue. Only a single circuit, the Second, has even confronted the question and it held only that the term "detention" was no broader than the term "custody." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 893 (2d Cir. 1996). In any event, any alleged split is purely academic: The Ninth Circuit's interpretation of "detention" did not dictate the outcome here. The district court assumed that "custody" and "detention" are roughly equivalent, yet it still concluded that the disciplinary actions Petitioner faces do not qualify as "detention." Pet. App. 66a, 76a. And nothing in the Ninth Circuit's opinion suggests that the outcome would change if "custody" and "detention" had the same meaning. Nor can Petitioner point to any other case in which the alleged split was outcome-determinative. According to Petitioner, the Ninth Circuit decision in this case was the first to hold

squarely that "detention" is narrower than custody, and the only other district court that applied the Ninth Circuit's interpretation held that it would reach the same result under *Poodry*.

The illusory and academic nature of Petitioner's alleged split is not the only reason to deny review. The decision below is also correct. The Ninth Circuit's interpretation of § 1303 is a reasonable one in light of this Court's instructions to read statutes to protect tribal sovereignty and to avoid creating private rights of action that Congress did not intend. And the Ninth Circuit's decision denying habeas relief reflects the fact that the Petitioner's case resides at the core of tribal sovereignty: Petitioner is a *tribal* member challenging a *tribal* disciplinary order issued by her *tribal* government, and the discipline involves a restriction on entry to *tribal* lands. Certiorari review should be denied.

STATEMENT

A. The United Auburn Indian Community

The United Auburn Indian Community ("UAIC") is a federally recognized tribe of Maidu and Miwok Indians who reside primarily in Placer County, California. C.A. E.R. 89; S. Rep. No. 103-340, 1994 WL 454555, at *5 (1994). The historic Auburn Rancheria comprises approximately 40 acres of land in Placer County. Pet. App. at 3a. Twelve parcels of that land are owned by the Tribe. Pet. App. 4a. The remaining 21 are owned by individuals, many of whom are Tribal members. *Id.* The Tribe-owned lands within the historic Rancheria include "a preschool, community-service centers, foster homes, and recreational

facilities." *Id.* Aside from the 12 Rancheria parcels, the Tribe also owns land and facilities off the Rancheria, including the Thunder Valley Casino Resort. *Id.*

The UAIC's central governing body is the Tribal Council, made up of five elected members. *Id.* The Council may, among other things, impose certain forms of limited discipline upon Tribal members who have violated the civil provisions of the Tribal Constitution or Tribal Ordinances. *Id.*; *see also United States v. Kagama*, 118 U.S. 375, 382 (1886) (recognizing Indian tribes' inherent "power of regulating their internal and social relations").

B. Factual Background

Petitioner served on the Tribal Council from approximately 1996 to 2010 and was the Council Chairperson from 1996 to 2009. Pet. App. 57a. During her tenure as Chairperson, the Council passed Tribal Ordinance 2004-001 § III(I) ("the Defamation Ordinance"), which obligates members to "refrain from defaming the reputation of the Tribe, its officials, its employees or agents *outside of a tribal forum*." *Id.* at 5a (internal quotation marks omitted and emphasis added). The Defamation Ordinance reflects the Tribe's ongoing efforts to promote economic development and autonomy after enduring decades of poverty and instability. As the Tribal Appeals Board explained when ruling on Petitioner's claims, the Ordinance "foster[s] strong and stable communications with the public at large," including "business partners [and] local, state, and federal

governments."[1] These communitarian norms are not unique to the UAIC, and indeed are embedded in the traditions and identities of many Indian tribes.[2]

In 2010, the Council unanimously voted to remove Petitioner as Chairperson for 15 acts of "malfeasance," "misconduct," and "gross neglect of duty." C.A. E.R. 2-8. Petitioner's federal habeas suit arises out of her efforts the following year to recall the members of the 2011 Tribal Council. Pet. App. 5a.

Petitioner's recall effort was premised on allegations that the Tribal Council had mismanaged the Tribe's funds. *Id.* In concert with three other Tribal members whose claims are now moot, Petitioner issued a press release to mass-media outlets on November 7, 2011 alleging, among other things, that the Tribal Council had engaged in "cover-ups of financial misdealings," that the Council had "fraudulently" refused to conduct a financial audit of the Tribe's finances, and that the Tribe's elections were

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[1] C.A. E.R. 344.

[2] For example, the Exclusion Code of the Grand Portage Band of Chippewa Indians authorizes exclusion for "'[p]ersonal, impertinent, slanderous or profane remarks made to a member of the Tribal Council, its staff or the general public.'" Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. Rev. 85, 115 (2007) [hereinafter Kunesh] (quoting Grand Portage Code ch. 2, § 5202(b)). The laws of the Confederated Tribes of the Colville Reservation authorize expulsion for conduct that "'substantially threatens or has some direct effect on the political integrity, institutional process, economic security or health or welfare of the [tribe].'" Kunesh at 113-14 (quoting Colville Tribal Law & Order Code tit. 3, ch. 3-2, § 3-2-3 (2001)).

"dishonest and rigged." *Id.* at 6a (internal quotation marks omitted).

On November 11, 2011, the Election Committee rejected the recall petition on numerous grounds, including failure to obtain the requisite support of 40% of the Tribal membership. *Id.* at 59a.

C. Tribal Proceedings

The next week, the Tribal Council determined that Petitioner had violated the Defamation Ordinance and sent her a Notice of Discipline explaining the findings. *Id.* at 60a. For example, the Notice explained that assertions about the Council's failure to conduct a forensic audit were entirely false, given that such audits were performed each year and that the audits were made available to all Tribal members. C.A. E.R. 7-8, 97-125. The Council concluded that Petitioner's misrepresentations "ha[d] a negative impact on" the Tribe. Pet. App. 59a. As just one example of this negative impact, the Council noted that Petitioner's claims of financial instability "greatly alarmed the banks that are financing the casino and our potential business partners." C.A. E.R. 118.

The Notice also set out the Tribal Council's disciplinary decision. Effective on the date of the Notice, the Council excluded Petitioner from certain Tribal lands and facilities for ten years. *Id.* at 60a. The exclusion covered tribally sponsored events, Tribal properties, and surrounding facilities including the Tribal Offices, Thunder Valley Casino, the UAIC School, health and wellness facilities at the Rancheria, and the Park at the Rancheria. *Id.* at 62a.

The exclusion did not bar the Petitioner from visiting the 21 out of 33 parcels on the Rancheria that are now owned by individuals. *Id.* Thus, Petitioner was not excluded from her own home or from any of the residential portions of the Rancheria. *Id.* She has remained free to visit and interact with all Tribal members and thus has not been excluded from the social world of the Tribe. *See id.* She also has retained her Tribal medical benefits and the right to vote by absentee ballot in Tribal elections. *Id.* In imposing the ban, the Tribal Council considered not just her defamatory statements, but the disciplinary record associated with her removal as Council Chairperson. C.A. E.R. 171, 121-125.

In addition to the exclusion, the Council stated its intention to withhold per-capita distributions from Petitioner for four years. Pet. App. 60a.

Petitioner appealed to the UAIC Appeals Board, which comprises three tribal members appointed by the Tribal Council, two of whom were appointed during Tavares's tenure on the Council. *Id.* at 63a; C.A. E.R. 334-364. Petitioner's appeal argued that the Defamation Ordinance is invalid under the UAIC Constitution and under federal law, and further claimed that Petitioner had been denied due process in challenging her discipline. Pet. App. 62a-63a.

On May 23, 2012, the Appeals Board issued a 30-page ruling affirming the Findings. The crux of the ruling was that (1) the Defamation Ordinance was facially valid and properly applied under both Tribal law and the ICRA; and (2) the Tribe had not violated Petitioner's due-process rights. C.A. E.R. 334-364.

D. District Court Proceedings

On October 10, 2013, Petitioner filed a petition for writ of habeas corpus in the district court under 25 U.S.C. § 1303 of the Indian Civil Rights Act (ICRA). Pet. App. 54a. Petitioner alleged that the tribal discipline imposed upon her violated free-speech and due-process rights protected by the ICRA.[3]

Respondents filed a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), arguing, among other things, that Petitioner had failed to satisfy the jurisdictional "detention" requirement of § 1303. *Id.* at 53a-54a.

The district court granted the motion: ICRA's habeas provision permits federal jurisdiction only when a petitioner is in "detention," and the district court held that the tribal discipline that the Petitioner challenged did not qualify as "detention" under the statute. *Id.* at 76a.

The district court began its analysis by observing that, in its view, existing Ninth Circuit precedent dictated that "the term 'detention' in [ICRA] must be interpreted similarly to the 'in custody' requirement in other habeas contexts." Pet. App. 74 (quoting *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010)).

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[3] In the district court, Petitioner was joined by three other tribal members who were also disciplined for their role in disseminating defamatory information about the Tribe. The other members were excluded from tribal properties for a shorter period, which has already expired. Their habeas petitions are therefore moot and they do not join Petitioner's request for certiorari.

The district court therefore framed the inquiry as whether Petitioner was "'detained' or 'in custody.'" Pet. App. 74. And it asserted that the standard for making that assessment comes from the Second Circuit's decision in *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996). Under *Poodry*, a court must decide whether a habeas petitioner has established "a severe actual or potential restraint on liberty." Pet. App. 74 (quoting *Jeffredo*, 599 F.3d at 919 (quoting *Poodry*, 85 F.3d at 880)).

The district court then conducted a fact-intensive survey of the case to determine whether the restraint imposed on Petitioner satisfied that test. In particular, it compared the facts of this case to those underlying the Second Circuit's decision in *Poodry* and the Ninth Circuit's decision in *Jeffredo*. In *Poodry*, the Second Circuit found § 1303 jurisdiction where tribal members were convicted of treason and permanently banished from all tribal lands, a punishment that subjected them to possible eviction from their homes, dispossession of their land, and the permanent loss of their tribal citizenship. *Id.* at 877-78. In *Jeffredo,* the Ninth Circuit held (in the district court's words) that "[i]f a tribe permanently disenrolls its members and excludes them from some, but not all, tribal facilities, then those members have not suffered a sufficiently severe restraint on liberty to constitute detention and invoke federal habeas jurisdiction under ICRA." Pet. App. 68a.

The district court did not find a comparison to the facts of either case dispositive. The court distinguished *Poodry*—where "detention" *was* found—because, unlike in *Poodry*, Petitioner's discipline

didn't involve "permanent banishment" or a decision to "permanently strip Petitioner[ ] of [her] tribal membership," resulting in the "'total destruction of [Petitioner's] status in organized society.'" *Id.* at 70a. Here, instead, Petitioner "either retain[ed her] political status in the Tribe, or [would] regain that status after a period of time." *Id.* at 70a-71a. But the court also distinguished *Jeffredo*—where "detention" *wasn't* found—because in *Jeffredo*, "petitioners' movements on tribal lands were not restricted," whereas here, Petitioner was excluded from the 12 Rancheria properties still owned by the Tribe and from a handful of off-reservation properties as well. *Id.* at 69a (citing *Jeffredo*, 599 F.3d at 920).[4]

The district court also held that *both* cases were distinguishable because "Petitioner['s] punishments in this case were, in many ways, not as severe a restraint on liberty as the punishments in *Jeffredo* and *Poodry*." *Id.* at 72a. Petitioner retained the right to

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[4] The district court also distinguished *Jeffredo* on the ground that it involved disenrollment based on lack of lineal descent. Pet. App. 68a-69a. In this respect, both the district court and, later, the dissenting Ninth Circuit Judge Wardlaw, misread *Jeffredo*—and Petitioner endorses their error. *See id.* at 46a. *Jeffredo* cannot be distinguished because it was—in part—a disenrollment case. The *Jeffredo* petitioners argued that three separate restraints amounted, *independently*, to "detention" under § 1303: (1) the actual restraints discussed above, (2) the potential that the petitioners would be excluded permanently and completely from their homes and all tribal lands, *and* (3) their disenrollment from the tribe. 599 F.3d at 918. The Ninth Circuit rejected all three contentions, and its first holding applies directly to this matter.

vote by absentee ballot, her tribal medical benefits, and her tribal membership. Moreover, Petitioner "continue[d] to have access to those portions of the Rancheria [] that [were] not tribal land" and thus she was "not excluded from the Tribe's central and historic residential community." *Id.* at 73a (internal quotation marks omitted).

Accordingly, "neither *Poodry* nor *Jeffredo* resolve[d] this case"; but "[b]oth cases [taught] that [the district court] should examine the nature and severity of Petitioner['s] punishment to determine whether [her] liberty [had] been sufficiently restrained to constitute 'detention.'" *Id.* at 71a.

Because no existing case was on all fours with this one, the district court also was guided by two general principles of federal law: the presumption against federal jurisdiction and the principle of Congressional primacy in Indian matters. The court held that the "presumption that the Court lacks jurisdiction" was "of particular force here because Petitioner[ ] challenge[d] the decision of an Indian tribal government." *Id.* at 74a (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Congress's authority over Indian matters is "extraordinarily broad," the court observed; and thus "the role of courts in adjusting relations between and among tribes and their members [is] correspondingly *restrained*." *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 72) (emphasis added by district court).

Applying these principles, and considering the facts of this case in light of *Poodry*, *Jeffredo*, and other Section 1303 cases, the district court ultimately concluded that Petitioner had failed to carry her

burden of demonstrating a restraint on liberty severe enough to invoke federal subject-matter jurisdiction under ICRA. *Id.* at 75a-76a.

E. The Ninth Circuit's Decision

The Ninth Circuit affirmed, narrowly framing the issue as "whether a temporary exclusion from tribal land, but not the entire reservation, constitutes a detention under the ICRA." *Id.* at 2a. The court of appeals agreed with the district court that such a temporary, partial exclusion could not qualify as "detention" under ICRA's habeas provision, although its reasoning differed somewhat from the district court's.

The Ninth Circuit began its opinion by emphasizing that background principles caution against a broad reading of the ICRA habeas provision. The court of appeals stressed the importance of "two foundational principles in the Indian law canon: tribal sovereignty and congressional primacy in Indian affairs." *Id.* at 9a. It observed that the first principle, tribal sovereignty, requires courts to construe ICRA "generously" toward the Tribe "in order to comport with traditional notions of Indian sovereignty and with the federal policy of encouraging tribal independence." *Id.* at 10a (internal quotation marks omitted). Looking to a long series of cases from this Court, the Ninth Circuit concluded that "to the extent a statute is ambiguous, we construe it liberally in favor of the tribes' inherent authority to self-govern." *Id.* at 9a-10a (citing *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980)); *McClanahan v. State Tax*

Comm'rs of Ariz., 411 U.S. 164, 172 (1973); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

As to the second principle, congressional primacy, the Ninth Circuit observed that "[b]ecause Congress's jurisdiction is plenary" with respect to tribal matters, the courts' jurisdiction is "correspondingly narrow." *Id.* at 10a. Accordingly, a court must "refrain from interpreting [ICRA] in a way that limits tribal autonomy unless there are 'clear indications' that Congress intended to do so." *Id.*[5]

Applying these principles, the Ninth Circuit diverged from the district court's understanding of the term "detention" in ICRA's habeas provision. Unlike the district court, the court of appeals concluded that the word "detention" should be read more narrowly than the word "custody," which is used in other federal habeas provisions. *Id.* at 16a. The Ninth Circuit explained that this narrower interpretation was grounded in Congress' choice to depart from its practice of using "custody" in habeas statutes, and that it also was rooted in the historical definition of "detention." *Id.* at 14a-16a. In addition, the Ninth Circuit drew support from the legislative history of ICRA, which demonstrated that Congress was particularly

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[5] In support of the Congressional-primacy principle, the Ninth Circuit relied on this Court's decisions in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979), *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

concerned with tribal abuses during criminal, rather than civil, proceedings. *Id.* at 16a-18a.

Although the Ninth Circuit's understanding of the term "detention" was narrower than the one applied by the district court, the court of appeals employed a substantially similar methodology in determining whether Petitioner's discipline qualified as "detention." Like the district court, the court of appeals "engaged in a factual inquiry about the severity of the restrictions the petitioner[ ] faced." *Id.* at 22a. And this similar methodology lead to an identical result: The Ninth Circuit concluded that an exclusion order featuring the specific temporal, political, financial, and geographic elements present in this case does not qualify as an ICRA detention. *Id.* at 27a. In particular, the court focused on the fact that the Petitioner "could vote in tribal elections through absentee ballots" and was "not excluded from the twenty-one privately owned parcels of land, including [her] own home[ ] and land owned by other members of the Tribe." *Id.* at 7a.

Judge Wardlaw dissented, asserting that "detention" and "custody" should be interpreted identically. *Id.* at 32a.

REASONS FOR DENYING THE PETITION

I. THE CASE DOES NOT PRESENT ANY SPLIT WORTHY OF THIS COURT'S REVIEW.

Petitioner's case for certiorari review is predicated almost entirely on her assertion that the Ninth Circuit's decision conflicts with those of its sister circuits. Petitioner faces an uphill battle because there is *no* split of authority with respect to the Ninth Cir-

cuit's ultimate conclusion in this case: A partial, temporary exclusion from tribal land does not qualify as "detention" under ICRA's habeas provisions. Petitioner does not point to any cases that conclude that such tribal disciplinary action would qualify as "detention." In fact, existing precedent suggests the opposite.

Petitioner is therefore forced to allege a split with respect to the Ninth Circuit's *reasoning*. Petitioner claims that the Ninth Circuit broke with the other circuits by concluding that the meaning of "detention" in ICRA is narrower than the meaning of "in custody" in other federal habeas statutes. But Petitioner faces an insurmountable obstacle right out of the gate: the Ninth Circuit's reasoning was not outcome-determinative. The district court adopted Petitioner's favored interpretation of "detention," but nevertheless held that Petitioner's discipline did not qualify as "detention" under ICRA. And even in the Ninth Circuit, the detention/custody distinction was less important to the outcome than the Court's careful consideration of all the facts and circumstances surrounding Petitioner's punishment. Thus, this was a case in which the alleged split was not outcome-determinative—and in that circumstance, this Court routinely denies review.

In any event, Petitioner badly exaggerates the alleged split on the meaning of "detention." Petitioner relies primarily on a single case from the Second Circuit, *Poodry*, which did not even squarely address the question that the Petitioner presents. And Petitioner's citation to stray statements from other circuits are even further afield.

In the end, Petitioner simply cannot disguise the fact that this case presents no conflict worthy of this Court's review.

1. To begin, there is plainly no split as to the Ninth Circuit's actual conclusion in this case—that a temporary, partial exclusion from tribal land does not constitute a detention under the ICRA. No appellate court has held that ICRA jurisdiction exists in these circumstances. Indeed, while Petitioner makes much of the Ninth Circuit's alleged divergence from the Second Circuit with respect to its reasoning, the Second Circuit's precedent suggests that it is in harmony with the Ninth Circuit with respect to the ultimate outcome.

To be sure, the Second Circuit's decision in *Poodry* held that a permanent banishment order—subjecting tribal members to eviction, dispossession, and permanent loss of tribal membership—constitutes "detention" under ICRA's habeas provision. But in its decision in *Shenandoah v. United States Department of Interior*, 159 F.3d 708, 714 (2d Cir. 1998), the Second Circuit recognized that disciplinary measures involving exclusion from tribal land do not qualify as "detention" where the punishment is less "severe" than the order at stake in *Poodry*. Thus, in *Shenandoah*, the Second Circuit held that petitioners were not in "detention" where they alleged that they were denied access to discrete tribal facilities, including the tribe's health center and various businesses and recreational facilities such as the casino. 159 F.3d at 714.

The facts here are far more similar to *Shenandoah*'s than *Poodry*'s because Petitioner's temporary

exclusion barring her from tribal lands leaves her free to visit the bulk of the tribe's historic Rancheria; and she retains many of the social and welfare benefits of tribal membership. For example, Petitioner was not excluded from her own home, and she is still able to visit the 21 out of 33 parcels on the Rancheria that are now owned by individuals (including many that are owned by Tribal members). Pet. App. 7a. In addition, she retains her tribal medical benefits and the right to vote by absentee ballot in Tribal elections. *Id.*

Thus, it is reasonable to assume that the Second Circuit, following *Shenandoah*, would reach the same conclusion concerning the availability of ICRA habeas relief that the Ninth Circuit reached here. And Petitioner points to no precedent suggesting that any other court of appeals would hold otherwise.

2. Unable to allege a split on the Ninth Circuit's ultimate holding, Petitioner claims a conflict with respect to the reasoning. Petitioner points out that in *Poodry*, the Second Circuit stated that "Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context." Pet 13 (quoting *Poodry*, 85 F.3d at 890). Petitioner alleges a conflict with the Ninth Circuit's determination in this case that "detention" should be interpreted more narrowly than "custody." But there are at least three fundamental problems with this asserted split.

First, any split on this issue is not outcome-determinative because the district court followed *Poodry* and still concluded that Petitioner's discipline did not qualify as detention. Indeed, the dis-

trict court specifically observed that "the term 'detention' in [ICRA] must be interpreted similarly to the 'in custody' requirement in other habeas contexts." Pet App. 66a (internal quotation marks omitted). And in articulating the standard for assessing whether a party is in detention, the district court used words drawn directly from *Poodry*, stating that it was required to evaluate whether Petitioner had established "a severe actual or potential restraint on liberty." *Id.* at 66a-67a (quoting *Jeffredo*, 599 F.3d at 919 (quoting *Poodry*, 85 F.3d at 880)). Yet despite applying Petitioner's favored standard, the district court reached the exact same conclusion as the Ninth Circuit: habeas relief is not available under ICRA.[6]

This Court routinely declines to decide a question where it is not outcome-determinative for the Petitioner. *See, e.g., Ticor Title Ins. Co. v. Brown*, 511

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[6] Although Judge Wardlaw reached a different outcome applying Petitioner's favored standard, her dissent incorporated key factual errors. For example, her conclusion that "the restraint on [Petitioner's] individual liberty is obvious" rested in part on her conclusion that Petitioner "cannot set foot on her tribe's reservation." Pet. App. 30a; *accord id.* at 47a (asserting that discipline imposed here involved "denying [Petitioner] access to her homeland" as opposed to merely denying her "access to certain government facilities"); *id.* (referring to Petitioner's "total physical exclusion"). But that is wrong: Petitioner's ban extends only to tribally-owned property, and only a portion of the historic Auburn Rancheria is tribally-owned. *See id.* at 7a. Petitioner is free to enter many parts of the Rancheria. *See id.* Judge Wardlaw's conclusion cannot be separated from her exaggerated view of Petitioner's punishment.

U.S. 117, 122 (1994) (dismissing writ where resolving issue would not "make any difference even to these litigants"); *DeBacker v. Brainard*, 396 U.S. 28, 31 (1969) (holding that case was "not an appropriate vehicle for consideration of the standard of proof in juvenile proceedings" where counsel admitted that the evidence was sufficient "no matter what the standard was"). That is for good reason. An opinion issued under these circumstances could be deemed impermissibly advisory: "Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted). And even if review is technically permissible, any resulting opinion will be of limited utility in providing guidance to the lower courts because the Court will be unable to illustrate how the different standards under consideration lead to different results on the ground. That is reason enough to deny review of Petitioner's alleged split.

Second, Petitioner greatly exaggerates any division of authority on the appropriate legal standard for gauging whether a person is in "detention" by a tribe. Again, Petitioner primarily focuses on the Second Circuit's decision in *Poodry*. But the *Poodry* Court was asked to consider whether ICRA's habeas provision was *broader* than other federal habeas statutes; it had no occasion to review whether the "detention" requirement might, in other circumstances, be narrower than the general "in custody" standard. *See* 85 F.3d at 890-891 (assessing whether the use of the word "detention" was meant to suggest

that ICRA's habeas provision should have a more "expansive application" than other federal habeas provisions).

The other courts cited by Petitioner have barely considered the issue. The primary Tenth Circuit precedent on which Petitioner relies is a footnote describing the two requirements as "analogous," in the context of a punishment that obviously fell short under either standard. *See Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1277, 1279 n.1 (10th Cir. 2006) (concerning the revocation of a vendor license at a flea market).[7] Meanwhile, the Sixth Circuit's decision in *Kelsey v. Pope* is, at best, a drive-by jurisdictional holding. The *Kelsey* court stated that § 1303 is "most similar to habeas sections arising under 28 U.S.C. § 2241," but never confronted whether the petitioner was detained, as the issue does not appear to have been contested. 809 F.3d 849, 854, 863-64 (6th Cir. 2016). And the Third Circuit case is even less on point—it is a § 2254 habeas proceeding that just happens to cite *Poodry* as an example of general habeas principles. *See Barry v. Bergen Cty. Probation Dep't*, 128 F.3d 152, 161 (3d Cir. 1997).

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[7] The other two Tenth Circuit cases cited by the Petitioner are not on point. The court in *Dry v. CFR Court of Indian Offenses for the Choctaw Nation* exercised jurisdiction under general federal habeas statutes, not ICRA, and included nothing more than a dictum footnote on ICRA. *See* 168 F.3d 1207, 1208 & n.1 (10th Cir. 1999). And *Valenzuela v. Silversmith* quoted the *Walton* footnote in a general overview of Indian civil-rights law; the case did not address whether the petitioner was "detained," because it was decided on exhaustion grounds. *See* 699 F.3d 1199, 1203, 1208 (10th Cir. 2012).

Each of these courts would be free to hold that the Petitioner's particular exclusion did not amount to "detention" without contradiction; and all but the Second Circuit could hold that "detention" is, in some circumstances, narrower than "custody" without risking direct conflict.[8]

Third and finally, any split that does exist has not yet had any practical consequences. Petitioner herself asserts that the Ninth Circuit broke new ground in this opinion, and she points to only a single district-court case applying the Ninth Circuit's guidance to date, *Napoles v. Rogers*, No. 16-cv-1933, 2017 WL 2930852 (E.D. Cal. July 10, 2017). Ironically, though, the *Napoles* court observed that "even under the decision in *Poodry*" the outcome of the case would have been the same. *Id.* at *6. Thus, just as in this case, the asserted conflict in *Napoles* with respect to the *reasoning* had no effect with respect to the *result*. A split with so few real-world implications is plainly unworthy of this Court's review.

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[8] Petitioner quotes Cohen's Indian-law treatise for language that is largely absent from the other circuits' opinions—i.e., that courts treat "detention" "*the same*" as they treat "custody." Pet. 12 (emphasis added). Of course, a treatise's summary of the law of the other circuits cannot be taken as a substitute for what those courts have actually held. And Petitioner's selective quotation of Cohen ignores the treatise's criticism of *Poodry*. As the Ninth Circuit observed, Cohen casts doubt on *Poodry,* describing the decision as an "attempt[ ] to circumvent exclusive tribal jurisdiction" that "disrupt[s] the delicate balance of tribal and federal interests established by Congress." Pet. App. 23a n.14 (quoting Cohen § 14.04[2]).

II. THERE IS NO OTHER REASON TO GRANT CERTIORARI REVIEW.

Petitioner has not offered any other compelling reason to grant certiorari review.

1. Petitioner suggests that the Court should correct the Ninth Circuit's erroneous interpretation of § 1303, but there is no error to correct. At a bare minimum, Congress' choice to use "detention" rather than "custody" in ICRA creates ambiguity about whether "detention" is identical to "custody" as used in other federal habeas statutes. *See* Pet. App. 13a-18a.

In resolving that ambiguity against the creation of federal-court jurisdiction, the Ninth Circuit properly considered this Court's instructions to "construe[] [statutes] generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence," Pet. App. 10a (citation omitted), and to "refrain from interpreting federal statutes in a way that limits tribal autonomy unless there are 'clear indications' that Congress intended to do so," *id.* at 10a (citation omitted). And those principles comport with this Court's generally "cautious course" when determining whether Congress has created a cause of action. *See Ziglar v. Abassi*, 137 S. Ct. 1843, 1855 (2017).

2. The Ninth Circuit's decision also vindicates the consistent federal policy in favor of tribal self-governance. This Court has never wavered from the proposition that Indian tribes are "'distinct, independent political communities, retaining their original natural rights' in matters of *local self-*

government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)) (emphasis added). At the core of these natural rights to self-government lie cases involving the tribal governance of Indians on tribal territory. *Id.* at 59–61; *accord Montana v. United States*, 450 U.S. 544, 564 (1981).

If ever there were a case in that core, it is this one. The discipline at issue here concerns a member of the tribe challenging the tribal government, and that discipline concerned entry onto tribal lands. The Ninth Circuit was thus correct to recognize that ICRA should be read in light of the Court's historic respect for tribal sovereignty and the concomitant requirement that Congress speak with utmost clarity when it seeks to diminish that sovereignty. Pet. App. 9a-10a (citing *Ramah*, 458 U.S. at 846 (1982)).[9]

3. Petitioner cites as a further ground for review the notion that claims like hers may become a more frequent problem in the years to come. *See* Pet. 21. She thus admits that she hopes to "insert federal courts" even more frequently into "precisely the types of internal tribal decisions that most implicate tribal sovereignty." Cohen § 14.04[2]. That invitation should be rejected.

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[9] The dissent, by contrast, grants almost no weight to tribal sovereignty or Congressional primacy. Adopting its view would therefore upset the careful balance that the ICRA strikes between its "[t]wo distinct and competing purposes . . . [:] strengthening the position of individual tribal members vis-à-vis the tribe, [and] . . . promot[ing] the well-established federal policy of furthering Indian self-government." *Santa Clara Pueblo*, 436 U.S. at 62 (internal quotation marks omitted).

In sum, the petition presents a question whose resolution won't affect the outcome of the case or benefit the Petitioner; that doesn't involve a cert-worthy circuit split; and that concerns an opinion that is, on its merits, correct. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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