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.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

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

PARTIES TO THE PROCEEDINGS BELOW

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

STATUTES INVOLVED

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

A. The Indian Civil Rights Act of 1968

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

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

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

B. Factual Background

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

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

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

C. **Proceedings Below**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Ninth Circuit denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

Id. at 890-91.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Issue Is Important And Recurring.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The Ninth Circuit's Decision Is Erroneous.

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

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

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

CONCLUSION

Tbe petition for certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2017