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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents do not dispute that the Ninth Circuit has broken openly from the law in other circuits. For more then two decades, courts have treated the "detention" required for federal habeas jurisdiction under §1303 of the Indian Civil Rights Act of 1968 ("ICRA") as equivalent to the liberty deprivations needed to qualify for habeas review under other federal laws. In contrast, the Ninth Circuit majority below announced that "detention" in §1303 creates a far stricter standard than that of any other law, suggesting that habeas review is available under the ICRA only in cases of actual imprisonment. As the dissent below correctly observed, the Ninth Circuit's ruling "splits from every other federal appellate court to have addressed this question." Pet. App. 38a.

Unable to deny the split over the question presented, respondents insist that it is not "worthy of this Court's review." Opp. 16. But their reasoning does not withstand scrutiny. Respondents contend the holding below is limited because petitioner's banishment is temporary (10 years), and respondents even suggest that the same outcome might obtain on these same facts in other circuits. But this *presumes* the duration of petitioner's punishment is material to whether her deprivation of liberty qualifies for federal review—a premise rejected by federal habeas law. Indeed, it is beyond dispute that an inmate serving a 10-year sentence may seek habeas relief, just as an inmate serving a life sentence may do. By arguing that the duration of petitioner's banishment is relevant, respondent presumes the Ninth Circuit correctly rejected the (until-now) established rule that the deprivation of liberty needed to qualify for federal

review is the same for all habeas laws, including §1303.

Nor is there anything to respondents' theory that the *district court's* ruling in their favor bars this Court's review. The Ninth Circuit did not rule for respondents on an unchallenged, alternative ground, such that petitioner must lose her case regardless of any success in this Court. Rather, the court of appeals has yet to apply what petitioner contends is the proper legal standard to her appeal. There is nothing unusual or advisory in seeking an order directing that court to do so.

ARGUMENT

I. Respondents Do Not Deny The Existence Of A Split, And They Fail In Their Effort To Minimize Its Effect.

1. For more than 20 years, the rule was clear—in determining whether a liberty deprivation was sufficient to qualify for habeas review, courts "must conduct the same inquiry under §1303 as required by other habeas statutes." *Poodry* v. *Tonawanda Band of Seneca Indians*, 85 F.3d 874, 890 (2d Cir. 1996). Following *Poodry*, every federal court of appeals to address the issue—the Third, Sixth, and Tenth—has stated and applied this same principle. See, *e.g.*, *Barry* v. *Bergen Cty. Prob. Dep't*, 128 F.3d 152, 160-61 (3d Cir. 1997) (relying on *Poodry*'s construction of §1303 to hold that community service satisfied §2254(a)'s "custody" requirement); *Kelsey* v. *Pope*, 809 F.3d 849, 854 (6th Cir. 2016) ("[H]abeas 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."); *Valenzuela* v. *Silversmith*, 699 F.3d 1199, 1203 (10th Cir. 2012) ("[T]he 'detention' language in

§1303 is analogous to the 'in custody' requirement contained in the other federal habeas statutes." (brackets omitted) (quoting *Walton* v. *Tesuque Pueblo*, 443 F.3d 1274, 1279 n.1 (10th Cir. 2006)).

Respondents note that "the *Poodry* Court was asked" merely to decide "whether ICRA's habeas provision was *broader* than other federal habeas statutes." Opp. 19. But again, see Pet. 18-19, what matters is that *Poodry answered* that question by holding that the two "inquir[ies]" are the "same," because "Congress appears to use the terms 'detention' and 'custody' interchangeably in the habeas context." 85 F.3d at 890-91. Thus, *Poodry* explained, "[a]s with other statutory provisions governing habeas relief, one seeking to invoke jurisdiction of a federal court under §1303 must demonstrate, under *Jones* v. *Cunningham*, [371 U.S. 236 (1963)], and its progeny, a severe actual or potential restraint on liberty." *Id.* at 880. *Poodry* could not have stated its rule more clearly. And while respondents quibble with the other circuit court decisions—claiming that one "barely considered the issue," another "just happens to cite *Poodry* as an example of general habeas principles," and others addressed the issue only in a footnote, Opp. 20 & n.7—these decisions show that courts unanimously read *Poodry* the same way and unfailingly apply that reading.

This is nowhere clearer than in the leading treatise, which described the unanimous federal rule categorically: "[T]he 'detention' language [of §1303] 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). A long string of district court decisions is to the same effect. See Pet. 16-17 n.2.

Nor is there anything to respondents' suggestion that the Second Circuit backed away from *Poodry* in *Shenandoah* v. *United States Department of the Interior*, 159 F.3d 708 (2d Cir. 1998). To be sure, the court found no "detention" in *Shenandoah*, for as the court made clear, the plaintiffs there did "*not allege[] that they were banished* * * * or that defendants attempted in any[]way to remove them from [tribal] territory"—only that they were banned from certain tribally-owned facilities. *Id.* at 714 (emphasis added). Here, petitioner was *banished* from "all Tribal properties and/or surrounding facilities" and from participating in tribal activities. See Pet. App. 30a; *infra*, p. 8. In fact, *Shenandoah* reaffirmed *Poodry*'s holding that ICRA petitioners satisfy §1303's "detention" requirement so long as—like other habeas petitioners—they show "a 'severe actual or potential restraint on their liberty.'" *Shenandoah*, 159 F.3d at 714 (brackets omitted) (quoting *Poodry*, 85 F.3d at 880).

2. The decision below "splits from" this previously unanimous authority. Pet. App. 38a (Wardlaw, J., dissenting). The Ninth Circuit rejected application of *Jones* and its progeny to §1303, holding that the "ICRA's habeas provision" should not be "read in light of that jurisprudence." Pet. App. 16a. Unlike *Poodry*—which found it "unremarkable" that §1303 uses the word "detention" rather than "custody," 85 F.3d at 890—the Ninth Circuit held that "detention" in the ICRA "narrow[s] the scope of federal habeas jurisdiction over ICRA claims." Pet App. 17a. Specifically, the majority below repeatedly equated "detention" in §1303 to "physical confinement" or "imprisonment." See, *e.g.*, *id.* at 14a, 17a.

Without denying the split over the meaning of "detention" in the ICRA, respondents suggest that the court's "ultimate conclusion in this case" was "in harmony" with *Poodry* (which involved a permanent banishment) because petitioner was subject only to "a temporary, partial exclusion from tribal land." Opp. 15-16. Of course, treating any form of banishment—no matter its duration—as "detention" under §1303 is inconsistent with the reasoning below, which equates "detention" with actual "imprisonment." See also Pet. App. 25a (reasoning that it would be improper to treat any banishment order as "sufficient to invoke habeas jurisdiction for tribal members").

In any event, attempting to distinguish *Poodry* based on the length of the banishment only serves to illustrate the practical importance of the circuit split over the meaning of "detention." Because (unlike the Ninth Circuit below) *Poodry* and other courts equate the liberty deprivation required for habeas review under §1303 with other habeas laws' in-custody requirement, the length of the banishment would be immaterial. Under these other laws—and therefore under §1303 in courts outside the Ninth Circuit—habeas jurisdiction turns on "the nature, rather than the duration, of the restraint." *Nowakowski* v. *New York*, 835 F.3d 210, 216 (2d Cir. 2016).*

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* Respondents also seek to distinguish this case on the theory that it involved only a "partial" ban, see Opp. 15, but this is a nonstarter. It is true that parts of the "tribe's historic Rancheria" are now in private hands, see *id.* at 14, 17, but respondents banished petitioner from *all* Tribe-owned land—she was barred "from all tribal lands and facilities." Pet. App. 60a. There was nothing "partial" about the banishment order.

In short, the split that respondents seek to minimize as a mere "conflict with respect to * * * reasoning" makes it impossible to distinguish *Poodry* on its facts, as respondents hope to do. Opp. 17. There can be no "harmony" between *Poodry* and its progeny, on the one hand, and the decision below, on the other, as respondents contend. See *id.* at 16.

II. The District Court's Ruling In No Way Inhibits This Court's Review.

Respondents contend that the district court's decision is an "insurmountable obstacle" to this Court's review because the district "court followed *Poodry* and still concluded that Petitioner's discipline did not qualify as detention." Opp. 15, 17. Accordingly, respondents insist a decision by this Court resolving the circuit split would be "advisory." *Id.* at 19. Respondents' conclusion does not follow from their premise.

1. Restated, respondents' theory is that this Court may only hear cases if the petitioner is guaranteed to prevail under its preferred legal rule. That is absurd. This Court routinely announces a legal rule and then remands the matter for application in the lower courts. See, *e.g.*, *Great-W. Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 208-09 (2002) (district court applied existing law to deny petitioner relief, and this Court granted certiorari review of Ninth Circuit decision announcing new rule and affirming on this alternative ground); *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, 495 U.S. 660, 673-74 (1990) (remanding where Second Circuit affirmed district court on alternative ground with instructions for court of appeals to review issue that was dispositive in district court); *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 498 (1983) (after

court of appeals affirmed district court judgment on different ground, this Court reviewed and reversed court of appeals' decision and remanded for that court to consider district court's rationale, which offered alternative basis to rule against petitioner).

Respondents' authority is not to the contrary. See Opp. 18-19 (citing *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 122 (1994), and *DeBacker* v. *Brainard*, 396 U.S. 28, 31 (1969)). In both cases, it was *certain* that a ruling in petitioner's favor would have no impact on the outcome—in *Ticor* because "the parties had reached a settlement designed to moot the petition," 511 U.S. at 122, and in *DeBacker* because petitioner conceded at oral argument that it would lose under either rule, 396 U.S. at 31.

Here, in contrast, petitioner appealed to the Ninth Circuit precisely because she believed the district court misapplied the law to her case. The Ninth Circuit affirmed, but only by applying a new legal rule that petitioner now challenges. If petitioner were to prevail on the merits of that challenge in this Court, the Ninth Circuit would have to apply the correct legal rule on remand, affording proper appellate review of the district court's ruling. See, *e.g.*, *Citibank*, 495 U.S. at 673-74; *Verlinden*, 461 U.S. at 498.

2. In fact, while immaterial at this stage, there is every reason to think petitioner would prevail in that event on remand. The district court distinguished *Poodry* because the Tribe in that case banished the petitioner permanently. See Pet. App. 70a ("Unlike *Poodry*, the Tribe's decision in this case * * * was not a permanent banishment."), 75a (stating court's "conclusion * * * that temporary exclusion is not a severe enough restraint on liberty to constitute

'detention'"). But again, *Poodry* and its progeny treat "detention" under §1303 like the jurisdictional requirement in other habeas laws. And these laws do not limit habeas relief to petitioners whose liberty deprivations are permanent. See *supra*, p. 5. Should petitioner prevail in this Court, the Ninth Circuit would have to apply these long-established habeas principles on remand.

3. Indeed, petitioner's liberty deprivation far exceeds what courts have required before exercising jurisdiction in other habeas cases. The Tribe's order "banned" petitioner, once a tribal leader, from "all tribal lands and facilities" and "from attending any tribally sponsored events and/or entering all Tribal properties and/or surrounding facilities, which includes, but is not limited to the Tribal Offices, Thunder Valley Casino, the UAIC School, Health and Wellness Facilities at the Rancheria, and/or the Park at the Rancheria." Pet. App. 30a, 60a; C.A. Decl. of Jesse Basbaum, Ex. D, 2 (No. 15-4). As a result, petitioner cannot "participate in the ceremonies and events of the Tribe's culture and heritage," instead having "to sit outside the fence and look on." C.A. Decl. of Jessica Tavares 3 (No. 19). She has "been unable to attend [her] grandchildren's school graduations," "walk [her] grandchildren to class or meet with their teachers or enter the school ground for any purpose." *Ibid.* And although an "important cultural aspect of [her] Tribe is respect for [their] elders," she, an elder herself, "cannot go to the [Tribe's] Senior Center." *Ibid.* Nor can she "run for office or attend meetings to voice [her] opinion on Tribal matters." *Id.* at 4. All this simply because she spoke up.

Not surprisingly, the district court was openly "trouble[ed]" "about the fundamental fairness of

[petitioner's] continuing expulsion from her tribal homelands" and acknowledged that "the restraint in this case was severe." Pet. App. 54a, 74a. And the only appellate judge to apply traditional habeas principles to petitioner's claim found that her banishment easily qualified for habeas jurisdiction. Pet. App. 47a. Indeed, courts routinely find less burdensome, non-custodial punishments sufficient for habeas review, including bail or release on a party's own recognizance, *Hensley* v. *Mun. Court, San Jose-Milpitas Judicial Dist.*, 411 U.S. 345, 349 (1973), community service, *Barry*, 128 F.3d at 160-61 (500 hours of community service), and *Nowakowski*, 835 F.3d at 217 (2d Cir. 2016) (one day of community service and one-year conditional discharge), or even "fourteen hours of attendance at an alcohol rehabilitation program," *Dow* v. *Circuit Court of the First Circuit*, 995 F.2d 922, 922 (9th Cir. 1993) (per curiam).

III. The Issue Presented Is Important, And The Ninth Circuit Majority Erred On The Merits.

1. The petition (and supporting amicus briefs) describe the significance of the question presented and the practical importance of resolving the split. Section 1303 offers the only federal remedy for violations of the fundamental rights that the ICRA guarantees, including the right to free speech. Tribal banishment is a uniquely severe and increasingly prevalent sanction, and the majority of our Nation's reservations are in the Ninth Circuit. Pet. 25. Respondents dispute none of this. Nor do they acknowledge that the Ninth Circuit's new rule risks upending courts' construction of other federal habeas statutes, which use the terms "detention" and "custody" interchangeably. See, *e.g.*, 28 U.S.C. §§2242-2244, 2255.

Instead, respondents make a "slippery slope" argument that treating §1303 like other habeas statutes may "insert federal courts" into decisions implicating tribal sovereignty. Opp. 23. But courts have treated §1303 like other habeas statutes for over 20 years, and respondents point to no evidence that this has infringed on tribal sovereignty.

2. On the merits, respondents proceed from the premise that "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." Opp. 22 (emphasis added). But it is difficult to find ambiguity where (until now) district and appellate courts across the country have read §1303 uniformly, and where other federal habeas statutes use "detention" and "custody" interchangeably. Likewise, to the extent legislative history has a role to play, it "suggests that §1303 was to be read coextensively with analogous statutory provisions." *Poodry*, 85 F.3d at 891.

Moreover, while respondents defend the decision below as "consistent [with] federal policy in favor of tribal self-governance," Opp. 22, this ignores the fact that "[i]n enacting §1303, Congress struck a *balance* between the protection of tribal sovereignty and the *vindication of civil rights*." Pet. App. 49a-50a (emphasis added); see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62 (1978) (describing these "[t]wo distinct and competing purposes" behind the ICRA). It would not disrupt this balance to recognize §1303 jurisdiction where, as here, a Tribe has violated free speech and other rights guaranteed by the ICRA, for "Congress expressly provided a cause of action [in §1303] for that very purpose." Br. of Andrea M. Seielstad as *Amicus Curiae* in Supp. of Pet'r 11.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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