KEKER & VAN NEST LLP
ELLIOT R. PETERS - # 158708
epeters@kvn.com
JO W. GOLUB - # 246224
jgolub@kvn.com
JESSE BASBAUM - # 273333
jbasbaum@kvn.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Attorneys for Respondents

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

JESSICA TAVARES; DOLLY SUEHEAD; DONNA CAESAR and BARBARA SUEHEAD,

Petitioners,

v.

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

Respondents.

Case No. 2:13-cv-02101 TLN CKD

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

Judge: Hon. Troy L. Nunley

Date Filed: October 10, 2013

Trial Date: Not set.

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Respondents Gene Whitehouse, Calvin Moman, Brenda Adams, John Williams, and Danny Rey (collectively, "Respondents") hereby submit this Memorandum of Points & Authorities in Support of Respondents' Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(1).

I. INTRODUCTION

This action is based on an intra-tribal political dispute that has no place in federal court. In 2011, the Petitioners—four members of the United Auburn Indian Community—launched an effort to recall the members of the Tribe's governing body. In the course of their recall campaign, the Petitioners made numerous false and defamatory statements about elected Tribal officials in violation of Tribal law. Pursuant to the civil provisions of Tribal law, the Tribal officials then disciplined the Petitioners by temporarily excluding them from Tribal facilities and by withholding their per capita share of the Tribe's casino revenue. Although the exclusions and withholdings have ended for all but one of the Petitioners, they now seek to challenge that discipline in federal court. But in light of the autonomy and sovereignty enjoyed by Indian tribes, this is precisely the kind of dispute that federal courts have routinely dismissed for lack of jurisdiction. As the Supreme Court has cautioned, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

In a transparent attempt to avoid this settled precedent, the Petitioners have tried to shoehorn their political dispute into a wholly inapposite cause of action: a petition for writ of habeas corpus under 25 U.S.C. § 1303. Such a petition is exclusively reserved for tribal members who have been criminally incarcerated or who can show a "severe restraint on liberty." Yet this case concerns neither a criminal conviction nor incarceration, and the discipline falls well short of a "severe restraint." Indeed, the Ninth Circuit has squarely held that even more severe tribal discipline does not qualify as a sufficient restraint on liberty. *See Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010). The *Jeffredo* case involved permanent disenrollment from the tribe, permanent exclusion from tribal facilities, and permanent withholding of casino revenue. Here,

the Petitioners were not disenrolled, and the exclusion from facilities and withholding of revenue were temporary. In other words, the discipline in this case is less severe than discipline that the Ninth Circuit has already rejected as insufficient to confer jurisdiction under § 1303.

Aside from missing the mark on the "severe restraint" requirement, the Petition suffers from several other jurisdictional defects. ***First***, the Petition is moot as to three of the four Petitioners because the term of their discipline has expired. Those Petitioners therefore have no concrete interest in this dispute, and the Court cannot provide them any relief. ***Second***, the Petition is premised on civil Tribal proceedings and civil sanctions, yet § 1303 is only available for review of criminal proceedings. ***Finally***, even if the Petition did not already suffer from these numerous fatal defects, the Petition includes two claims that are unexhausted and that could not be heard by this Court. For all of these reasons, which are discussed in detail below, the Petition should be dismissed for lack of subject matter jurisdiction.

II. BACKGROUND

A. The United Auburn Indian Community and the Tribal Council

The United Auburn Indian Community ("the UAIC" or "the Tribe") is a federally recognized Indian Tribe that resides primarily in Placer County, California. Declaration of Brian Guth ("Guth Decl.") ¶ 5. The Tribal lands and facilities include a school, community services facilities, Tribal foster homes, recreational facilities, and administrative offices. *Id.* ¶ 5. In addition to preserving the Tribe's culture and heritage, members engage in numerous educational, environmental, and community-development programs. *Id.* ¶ 5. A primary source of revenue for these programs is the Thunder Valley Casino Resort, which was established in June 2003. *Id.* ¶ 6. Each enrolled, adult member of the Tribe is, with certain exceptions, entitled to a monthly per capita distribution of Casino revenue. *Id.* ¶ 6.

The Tribal Council is the UAIC's primary governing body and is made up of five elected members. Guth Decl. ¶ 8. The Council—in cooperation with numerous Tribal committees and other administrative bodies—is charged with promoting the peace and prosperity of the Tribe through appropriate legislation and executive actions. *Id.* ¶ 8. The Council's powers and responsibilities, along with the rights and liberties of all Tribal members, are set out in the Tribal

Constitution and the Tribal Ordinances. *Id*. ¶ 8. The Council may also impose certain forms of limited, non-punitive discipline upon Tribal members who have violated the civil provisions of the Tribal Constitution or Tribal Ordinances. *Id*. ¶ 9; *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. The Petitioners' Underlying Conduct

Petitioners Jessica Tavares, Dolly Suehead, Barbara Suehead, and Donna Caesar ("the Petitioners") are all members of the UAIC. Pet'n ¶ 1. The allegations in this case arise out of the Petitioners' efforts to recall the members of the 2011 Tribal Council.[1] *See* Pet'n ¶¶ 8-13. On November 7, 2011, the Petitioners submitted a recall petition to the UAIC Tribal Election Committee, an elected body that administers and oversees Tribal elections. Pet'n ¶ 8. The recall effort was premised, as a general matter, on allegations that the Tribal Council had mismanaged the Tribe's funds. *See* Pet'n ¶ 10. In support of their recall effort, the Petitioners issued a press release on November 9, 2011 that detailed the allegations of financial mismanagement. Pet'n ¶ 11. In this release, the Petitioners alleged, among other things, that the 2011 Tribal Council had: (1) "unjustly enriched" the Tribe's outside legal counsel with excessive payments; (2) failed to conduct a full forensic audit of the Tribe's finances; (3) failed to provide Tribal members access to the "limited audit"; and (4) obstructed the Tribal election process. Pet'n ¶ 10. On November 10, 2011, the Election Committee rejected the recall petition on numerous grounds, including failure to obtain the requisite support of 40% of the Tribal membership. Pet'n ¶¶ 12-13. The Petitioners then issued another press release, alleging that the recall petition had been unlawfully rejected. Pet'n ¶ 14.

C. The Tribal Council and Appeals Board Decisions

The statements made in the two press releases unquestionably pertained to the internal affairs of the Tribe and were properly addressed by the Tribal Council pursuant to Tribal law.

[1] The 2011 Tribal Council included Gene Whitehouse, Brenda Adams, Calvin Moman, David Keyser, and Kim DuBach. Pet'n ¶ 8. Keyser and DuBach were subsequently replaced by John Williams and Danny Rey. Pet'n ¶ 7. The Petition names only the current members of the Tribal Council in their official capacities.

After considering the legality of the Petitioners' actions, the Council determined that the Petitioners had acted in violation of Tribal law. Thus, on November 15, 2011, the Council sent each Petitioner a "Notice of Discipline and Proposed Withholding of Per Capita" ("the Notices"). *See* Pet'n ¶¶ 15-17; Declaration of Jesse Basbaum ("Basbaum Decl."), Exhs. A-D (Notices of Proposed Discipline and Proposed Withholding of Per Capita (Nov. 15, 2011)). Those Notices explained that the Tribal Council had unanimously voted to discipline each of the Petitioners for violations of two civil Tribal ordinances. *Id*. The first ordinance prohibits uttering misrepresentations against the Tribe, and the second prohibits (1) harming Tribal programs or (2) defaming the Tribe, its officials, employees, or agents outside of a tribal forum. *Id*. The Notices recounted the contents of the two press releases and explained in detail how their distribution violated the Tribal ordinances described above. *Id*. For example, the Notices explained that the 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. *Id*. The Notices also summarized numerous news articles that had reported the defamatory statements. *Id*. Finally, with respect to Petitioner Tavares, the Notice recounted several defamatory quotes that were attributed to Tavares in these news articles. *Id*.

Each Notice also explained the Tribal Council's twofold disciplinary decision. ***First***, effective on the date of the Notices, the Council temporarily banned the Petitioners from certain Tribal lands and facilities. *See* Basbaum Decl., Exhs. A-D. The ban was to last two years for Petitioners Caesar, Dolly Suehead, and Barbara Suehead, and ten years for Petitioner Tavares. *Id*. These exclusions 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*.[2] ***Second***, the Council stated its

[2] The Auburn Rancheria refers to the original plot of land that was acquired by the United States in trust for the Tribe. Guth Decl. ¶ 7. Although the Tribe was terminated by Congressional action in 1958 and the Tribe's trust land distributed or sold off, the Tribe and some Tribal members now own parcels within the Rancheria in fee simple. *Id*. ¶ 7; *see generally* Auburn Indian Restoration Act, H.R. 4228, 103rd Cong. (1994) (recounting history of the UAIC and the Rancheria). The temporary exclusion did not prohibit the Petitioners from visiting those portions of the Rancheria that are now owned by Tribal members in fee simple. Guth Decl. ¶ 19. Indeed, the Petitioners were only prohibited from visiting those portions of the Rancheria that the Tribe itself now owns. *Id*. ¶ 19.

intention to withhold per capita distributions from each Petitioner. *Id.* The withholding was to last six months for Petitioners Caesar, Dolly Suehead, and Barbara Suehead, and four years for Petitioner Tavares. *Id.* Unlike the exclusion from Tribal facilities, the proposed withholding of revenue was subject to a review process. *Id.*; *see also id.*, Exh. E (UAIC Policies & Procedures for Appeals). Both the review process and the authority to suspend per capita distributions were codified in the Tribe's revenue allocation plan, which was approved by the Secretary of the Interior as required by the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2710(b)(3); Basbaum Decl., Exh. S (Plan for the Allocation of Gaming Revenue). Accordingly, the Notices advised each Petitioner of her right to contest the proposed withholding at a subsequent hearing in front of the Tribal Council, and of her right to have an attorney present at that hearing. *Id.*, Exhs. A-D.

The Council held hearings on the per capita withholdings on November 22, 2011. Basbaum Decl., Exhs. F-I (Notices of Tribal Council Findings & Action (Nov. 29, 2011)). Petitioners Tavares, Caesar, and Dolly Suehead, accompanied by counsel, each made only a brief appearance and chose not to actively participate in the hearings.[3] Although the Petitioners had the opportunity to be heard and to discuss the allegations against them, instead, their counsel only left a signed statement for the Council's consideration. *Id.*; *see also id.*, Exhs. J-M (Statements of Tavares, Caesar, D. Suehead, and B. Suehead in Response to Proposed Withholding (Nov. 22, 2011)). On November 29, 2011, the Tribal Council issued a "Notice of Tribal Council Findings & Action" for each Petitioner ("the Findings"). *Id.*, Exhs. F-I. The Findings for each Petitioner addressed in detail, and rejected, the arguments presented in each Petitioner's written statement. *Id.* The Council therefore confirmed the suspensions of per capita distributions for the periods set out in the respective Notices discussed above.

The Petitioners then exercised their right to appeal the Findings related to the per capita withholding. In their consolidated appeal, the Petitioners only challenged the violations of the tribal defamation ordinance and not the findings regarding the other two violations of Tribal law. *See* Basbaum Decl., Exh. N (Written Appeal (Jan. 27, 2012)). The Petitioners' primary

[3] Petitioner Barbara Suehead did not attend the hearing. *See* Basbaum Decl., Exh. F.

contention was that the Tribal defamation ordinance conflicts with the Tribal Constitution's free speech provisions. *Id*. On May 23, 2012, the Appeals Board issued four detailed rulings affirming the Tribal Council Findings. The Board held that the defamation ordinance did not violate the Tribal Constitution because it was narrowly tailored to serve an important Tribal government interest, and also because the ordinance pre-dates the Tribal Constitution and informs the free speech guarantee therein. *Id*., Exhs. O-R (UAIC Appeals Board Decisions (May 23, 2012)). Although the Board affirmed the Findings in their entirety, it reduced the length of Tavares's per capita withholding by six months (to three and a half years), and reduced the withholding for the other Petitioners by one month (to five months).

On October 10, 2013, the Petitioners filed this Petition for Habeas Corpus Under Indian Civil Rights Act [25 U.S.C. § 1303]. Dkt. 1. The Respondents are current members of the UAIC Tribal Council, which includes most, but not all, members of the 2011 Tribal Council. *See supra* note 1. The parties stipulated to extend the time for the Respondents to respond to the Petition, (Dkt. 10), and the Respondents now submit this Memorandum of Points & Authorities in Support of Respondents' Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(1).

III. LEGAL STANDARDS

The Petition alleges violations of the Indian Civil Rights Act (ICRA), which codified certain rights that no Indian tribe may infringe. *See* 25 U.S.C. § 1302(1)-(10). These rights are similar to, but not co-extensive with, those in the Bill of Rights. *See Santa Clara Pueblo*, 436 U.S. at 57. The Petitioners assert that the Respondents have violated several provisions of the ICRA, including those guaranteeing the right to freedom of speech and due process. *See* Pet'n ¶ 28-48. However, the ICRA cannot be enforced through a private cause of action for injunctive or declaratory relief. *Santa Clara Pueblo*, 436 U.S. at 69-70. Instead, the ICRA provides only a "limited mechanism" for review of tribal self-government: a habeas corpus petition under § 1303, under which the Petitioners have filed this action. *Id*.

Jurisdiction over a § 1303 habeas petition may be challenged pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See Jeffredo*, 599 F.3d at 917. Under Rule 12(b)(1), a party "can attack the substance of a complaint's jurisdictional allegations despite their formal

sufficiency, and in so doing rely on affidavits or any other evidence properly before the court." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). "It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Id*. Here, the Petitioners will be unable to establish the Court's jurisdiction.

IV. ARGUMENT

This Court lacks jurisdiction over the Petition for multiple reasons, including that (1) it is moot as to three of the four Petitioners; (2) it fails to satisfy the "detention" requirement in § 1303; (3) it is premised on civil, rather than criminal proceedings; and (4) several of its claims are unexhausted. These numerous obstacles to federal review of tribal proceedings—none of which the Petition satisfies—derive from the substantial deference that the federal courts owe to the right of tribal self-government. "[S]ubject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves may undermine the authority of the tribal cour[t] [and] infringe on the right of the Indians to govern themselves." *Santa Clara Pueblo*, 436 U.S. at 59 (citing *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (internal quotation marks omitted)). Moreover, "[n]onjudicial tribal institutions have . . . been recognized as competent law-applying bodies." *Id*. at 66; *Lewis v. Norton*, 424 F.3d 959, 962 (9th Cir. 2005) (rejecting the argument that non-judicial tribal forums are inadequate because they are composed of tribal members who disagree with the plaintiffs). These well-established principles of autonomy and deference underlie the steep burden that Petitioners face in attempting (and failing) to establish subject matter jurisdiction over this tribal dispute.

A. The Petition is moot as to Dolly Suehead, Barbara Suehead, and Donna Caesar.

"A case is moot where the issues before the court no longer present a live controversy or the parties lack a cognizable interest in the outcome of the suit." *Stout v. Te-Moak Tribe of W. Shoshone*, 217 F.3d 846 (9th Cir. 2000). "[T]he plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial

decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (internal quotation marks omitted). Here, Petitioners Dolly Suehead, Barbara Suehead, and Donna Caesar have no cognizable interest in the outcome of this action because they are no longer subject to any Tribal discipline. Their per capita suspensions ended more than eighteen months ago, and their exclusion from Tribal properties ended on November 15, 2013. *See* Guth Decl. ¶ 15; Basbaum Decl., Exhs. T-V (Letters to D. Suehead, B. Suehead, & Caesar (Nov. 15, 2013)). Thus, even if these Petitioners were "detained" by the Tribal Council's actions—which they were not, as discussed in section IV.B., below—they have since been "released."

In habeas corpus proceedings, a petition is not always moot simply because the restraint has been lifted. But in cases where the restraint already has been lifted, "[s]ome collateral consequence of the conviction must exist . . . in order for the suit to be maintained." *Wilson v. Terhune*, 319 F.3d 477, 479 (9th Cir. 2003). The collateral-consequence inquiry proceeds in two steps: (1) whether the type of harm at issue is entitled to a presumption of collateral consequences, and (2) if not, whether the petitioner can establish actual collateral consequences. *See Spencer*, 523 U.S. at 8-17. Petitioners Dolly Suehead, Barbara Suehead, and Donna Caesar cannot satisfy either of these requirements.

It is well-established that a **criminal** conviction under state or federal law triggers a presumption of collateral consequences. *See Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994), *superseded on other grounds by* 28 U.S.C. § 2253(c). But "[t]he Supreme Court has distinguished between 'substantial civil penalties' that result from a criminal conviction, such as the inability to engage in certain businesses, to serve as an official of a labor union, to vote in state elections, and to serve as a juror, and 'non-statutory consequences' [of other discipline] such as the effect on employment prospects or the sentence imposed in future criminal proceedings." *Wilson*, 319 F.3d at 480 (quoting *Lane v. Williams*, 455 U.S. 624, 632-33 (1982)). Non-statutory consequences include, for example, "'discretionary decisions' that 'are not governed by the mere presence or absence of a recorded violation.'" *Id*.

Here, there is no basis for applying the presumption of collateral consequences. The Petitioners are not challenging a criminal conviction under state or federal law, nor even under

Tribal law, as discussed more fully in section IV.C., below. The violations at issue involve a civil ordinance, civil proceedings, and a finding of civil liability with no attendant incarceration. Guth Decl. ¶ 13. Moreover, nothing in the Tribal Constitution, ordinances, or any other Tribal law imposes any disability or potential disability on the Petitioners as a result of the underlying findings or discipline. In short, there are no "statutory consequences" to the findings of liability and thus there can be no presumption of collateral consequences. *See Wilson*, 319 F.3d at 480 (holding that there is no presumption of collateral consequences for a challenge to prison disciplinary proceedings); *see also Diaz v. Duckworth*, 143 F.3d 345, 346 (7th Cir. 1998) (holding that the collateral-consequences presumption is limited to criminal convictions).

Without the benefit of a presumption, the burden is on Petitioners to show that collateral consequences flow from the Tribal Council actions. *Wilson*, 319 F.3d at 480-83. The Petition itself makes no allegation that any collateral consequence flows from the underlying discipline, and indeed none do. For example, now that it has expired for three of the Petitioners, none of the past discipline has any effect on their right to receive Tribal services, serve on Tribal committees, hold Tribal office, or obtain employment. *See* Guth Decl. ¶ 22; *compare Carafas v. LaVallee*, 391 U.S. 234, 237 (1968) (finding collateral consequences for petitioner who, as a result of criminal conviction, could not engage in certain businesses, serve as an official of a labor union for a specified period of time, vote in any state election, or serve as a juror). Nor does the discipline automatically increase the length or severity of any future civil discipline or criminal punishment. *See* Guth Decl. ¶ 23; *see also Lane v. Williams*, 455 U.S. 624, 632-33 (1982) (holding that potential effect on "sentence imposed in a future criminal proceeding" is a "non-statutory consequence" that cannot defeat mootness). Accordingly, the Petitioners cannot establish any collateral consequences arising from the findings and discipline in this case, and the petitions of Dolly Suehead, Barbara Suehead, and Donna Caesar should be dismissed as moot. *See Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) ("Mootness is a jurisdictional issue, and federal courts have no jurisdiction to hear a case that is moot . . . ." (internal quotation marks omitted)).

B. The Court lacks jurisdiction over the Petition because none of the Petitioners are, or were, "detained" within the meaning of § 1303.

Aside from being moot as to three Petitioners, the Petition is deficient as to **all** Petitioners because none of them are, or were, "detained." Under § 1303, "[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." The jurisdictional "detention" requirement of § 1303 is as broad as, but no broader than, the "in custody" requirement in other federal habeas statutes. *See Jeffredo*, 599 F.3d at 918. Although "detention" under § 1303 does not require actual imprisonment, it does require a "severe actual or potential restraint on liberty." *Id*. at 919.

The Ninth Circuit has set a demanding standard for establishing detention under § 1303, and the discipline in this case falls well short. In *Jeffredo*, the Ninth Circuit addressed the petition of former tribal members who had been permanently disenrolled because they were not lineal descendants of a tribal member. 599 F.3d at 917. Aside from disenrollment, the petitioners were also denied access to certain tribal facilities including the Senior Citizens' Center and the health clinic. *Id*. at 918-19. Their children were forbidden from attending the tribal school, and they were also stripped of over $250,000 per year in casino revenue. *Id*. at 918-19, 922 & n.1 (Wilken, D.J., dissenting). Despite this far-reaching and permanent discipline, the court ruled that the petitioners had failed to establish the requisite restraint on liberty under § 1303. The court first held that "the denial of access to certain facilities does not pose a severe actual or potential restraint on the [petitioners'] liberty." *Id*. at 919. The court then rejected the contention that the disenrollment—*i.e.*, the permanent stripping of tribal citizenship—was a sufficient restraint. *Id*. at 920. This holding relied, in large part, on the principle that "'[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.'" *Id*. at 917-18 (quoting *Santa Clara Pueblo*, 436 U.S. at 72 n.32)). Moreover, the court noted, "nothing in the legislative history of § 1303 . . . suggests the provision should be interpreted to cover disenrollment proceedings." *Id*. at 920.

The discipline in this case is much less severe than in *Jeffredo*. The Tribal Council imposed only two forms of discipline: the temporary withholding of per capita revenue and the

temporary exclusion from certain tribal facilities. The exclusion applies only to Tribe-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. Basbaum Decl., Exh. F-I. The Petitioners were expressly permitted to retain their tribal medical benefits, and none of the discipline extended to the Petitioners children, grandchildren, or other dependents. *Id.*; *see also* Guth Decl. ¶ 16. Moreover, each Petitioner retained the right to vote, via absentee ballot, in any Tribal election. Guth Decl. ¶ 17. Most importantly, and unlike *Jeffredo*, **none of the Petitioners have been disenrolled from the Tribe**. Each Petitioner has remained a full-fledged member of the Tribe even during the period of discipline. Guth Decl. ¶ 18. Moreover, unlike *Jeffredo*, the exclusion from Tribal facilities was temporary, rather than permanent. Given that the severe discipline in *Jeffredo* was insufficient, the more modest discipline in this case must also be insufficient.

The Second Circuit has articulated a similarly high threshold for conferring jurisdiction under § 1303. In *Shenandoah v. U.S. Dep't of Interior*, the petitioners alleged (as here) that they had been disciplined in connection with a tribal political dispute. 159 F.3d 708 (2d Cir. 1998). Specifically, they alleged that they had been terminated from employment positions, excluded from the health center, stripped of quarterly distributions, banished from various business and recreational facilities, removed from the tribal membership rolls, and prohibited from speaking to other tribal members. *Id*. at 714. The court affirmed the dismissal of the § 1303 claim, however, because the petitioners had not been "banished from the [tribe], deprived of tribal membership, convicted of any crime" or subjected to attempted removal from tribal territory. *Id*. As with the discipline in *Jeffredo*, the *Shenandoah* discipline is even more severe than in this case, in which the Petitioners were not removed from the membership rolls, did not lose the right to vote in Tribal elections, were not terminated from any employment positions, did not lose access to healthcare, and were not prohibited from speaking to tribal members. Thus, under clear precedent from both the Ninth and Second Circuits, the Petitioners in this case are not "detained" within the

meaning of § 1303.[4]

The only kind of non-custodial discipline that has qualified as a "severe restraint on liberty" is permanent banishment. In *Poodry v. Tonawanda Band of Seneca Indians*, the Second Circuit held that a permanent banishment order against members found criminally liable for treason was sufficient to confer jurisdiction. 85 F.3d 874, 895-96 (2d Cir. 1996). The court reasoned that the banishment amounted to a "coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation." *Id*. at 895. Among other things, the banishment order permanently stripped petitioners of both their membership in the tribe and their access to tribal medical benefits. The order also excluded the petitioners from all tribal territories and decreed that they be removed from their tribal homes. *Id*. at 878. Finally, the *Poodry* court relied on other "undisputed jurisdictional facts," including that the banishment notices had been served by groups of fifteen to twenty-five people, the petitioners had been threatened or assaulted by tribal authorities, and the petitioners had been denied electrical services. *Id*. at 895.

The Petitioners in this case were not banished. Although the precise contours of a banishment order can vary by Tribe, at a minimum banishment requires that a member be stripped of his tribal citizenship. *See Poodry*, 85 F.3d at 895 (noting that banishment includes "deprivation of the petitioners' membership in the tribe" and is akin to denaturalization).[5] As discussed above, the Petitioners' membership has remained intact and thus—despite the Petition's liberal use of the "banishment" label—the Petitioners simply were not banished. *See* Basbaum Decl., Exhs. O-R at p.27 (explaining that discipline did not amount to banishment). Moreover, during the period of discipline, the Petitioners maintained unfettered access to portions of the

[4] At times, the Petition seems to allege that the temporary withholding of per capita revenue is itself a severe restraint on liberty. This argument is foreclosed by both *Jeffredo* and *Shenandoah*, which both involved **permanent** denial of revenue yet still did not find jurisdiction. Indeed, even if the withholding could be considered a fine rather than the denial of a privilege, the Ninth Circuit "ha[s] repeatedly recognized that the imposition of a fine, by itself, is not sufficient to meet [28 U.S.C.] § 2254's jurisdictional requirements." *Bailey v. Hill*, 599 F.3d 976, 979 (9th Cir. 2010).

[5] *See also* Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 WASH. L. REV. 941, 944 (2011) ("Banishment today most often includes permanent expulsion from tribal lands and loss of tribal citizenship.").

Tribe's historic "Auburn Rancheria," which is the original Indian reservation established by the United States for the Auburn Band of Indians. Guth Decl. ¶ 19. Much of that land is now owned by individual Tribal members and thus was not subject to the exclusion order. *Id*. ¶ 19. Accordingly, unlike the petitioners in *Poodry*, the Petitioners in this case were not excluded from the Tribe's central and historic residential community. Significantly, none of the Petitioners lived on Tribal lands, and thus none of them were ordered removed from their homes and none were stripped of their ownership of Tribal land. Guth Decl. ¶ 20; *contra Poodry*, 85 F.3d at 878.[6] Finally, there is no evidence of physical aggression, threats, or the denial of basic services. Instead, the discipline was imposed pursuant to a thorough and peaceful assessment of the Petitioners' violation of several civil Tribal ordinances. *Poodry*, which is one of the only cases to have found jurisdiction over a § 1303 petition, is plainly inapposite.

In sum, none of the Petitioners are, or were ever, "detained" within the meaning of § 1303, and the Court lacks jurisdiction over the Petition.

C. The Court lacks jurisdiction over the Petition because the underlying proceedings and sanctions were civil, not criminal in nature.

To establish jurisdiction under § 1303, the Petitioners must also show that the discipline at issue was criminal as opposed to civil. *See Santa Clara Pueblo*, 436 U.S. at 67 (noting that § 1303 is the exclusive vehicle for "federal-court review of tribal **criminal** proceedings" (emphasis added)); *Quair v. Sisco*, 359 F. Supp. 2d 948, 963 (E.D. Cal. 2004) (stating that a § 1303 petitioner "must establish that the decision which they are requesting this court to review is criminal and not civil in nature").[7] The Petitioners' case founders in this regard as well.

The UAIC does not investigate, enforce, or adjudicate any criminal actions. Guth Decl. ¶ 10. There is no Tribal police force, no Tribal jail, and no criminal code. *Id*. ¶ 10. Instead, all

[6] *See also* Basbaum Decl., Exh. R at p.28 n.34 (noting that Tavares has not lived on Rancheria for over 30 years).

[7] In *Santa Clara Pueblo*, the Supreme Court reviewed the legislative history of the ICRA and noted that Congress's "legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice" and that "[i]n light of this finding . . . Congress chose at this stage to provide for federal review only in habeas corpus proceedings." 436 U.S. at 71. In other words, the habeas remedy codified in § 1303 of the ICRA only permits federal judicial review of tribal criminal proceedings.

criminal investigation, enforcement, and adjudication falls primarily under either county or state jurisdiction. *Id.* ¶ 11. Indeed, under 18 U.S.C. § 1162 (commonly referred to as "Public Law 280"), Congress authorized several states, including California, to prosecute almost all crimes in Indian country. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("In [Pub.L. 280], California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State.").

This lack of criminal infrastructure is apparent from the specific violation, proceedings, and discipline in this case. ***First***, the Tribal defamation prohibition is civil. In the United States, the right against defamation has traditionally been enforced solely as a civil tort,[8] and nothing in the Tribe's Constitution or Ordinances suggests that the Tribe's conception of defamation deviates from this traditional interpretation. ***Second***, nothing in the Tribal proceedings suggests that the violations or proceedings were criminal. For example, of the numerous notices and rulings issued by the Tribal authorities in this matter, none of them refers to the underlying conduct as criminal. *Compare Poodry*, 85 F.3d at 889 (noting that "[t]he documents that the members of the Council of Chiefs served upon the petitioners . . . indicate that the respondents themselves view the petitioners' conduct as 'criminal'" in part because they were "'convicted'" of treason). ***Third***, the sanction itself was not criminal in nature. The Petitioners were not incarcerated or otherwise physically detained, nor were they placed on any form of probation or formal supervision. Moreover, as discussed above, the discipline at issue is not a "severe restraint on liberty," and thus is not "punitive" in the same way that permanent banishment might be. *See Poodry*, 85 F.3d at 889 (noting that "'banishment' has clearly and historically been punitive in nature").

In sum, the violations, proceedings, and sanctions were civil, and the Tribe does not even have criminal ordinances or criminal enforcement institutions. The civil nature of this dispute is yet another reason the Court lacks jurisdiction.

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[8] One survey of criminal defamation laws in the U.S. found that only 16 states have such laws, and that from 1992 to 2004 only six defendants were convicted under criminal defamation statutes. *See* Org. for Security and Co-Operation in Eur., *Libel and Insult Laws* 172 (Vienna 2005) *available at* http://www.osce.org/fom/41958.

D. The Court lacks jurisdiction over all unexhausted claims.

Setting aside the numerous fatal defects that require dismissal of the entire Petition, the Court also lacks jurisdiction over the Petition's unexhausted claims. Exhaustion of tribal remedies is another jurisdictional pre-requisite under § 1303. *Jeffredo*, 599 F.3d at 918. "The Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998) (citing *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986)). Accordingly, if a tribal petitioner fails to raise a particular claim to the tribal authorities, a federal court cannot exercise jurisdiction over that claim in the first instance. For example, in *Selam* the Ninth Circuit refused to reach a tribal petitioner's argument that she was denied the right to confront witnesses in her criminal trial, given that the petitioner had not raised the argument to the tribal appeals board. 134 F.3d at 953-54.

Here, the Petitioners assert two unexhausted claims. ***First***, the Petition devotes several paragraphs to an alleged "secret slush fund" established by the 2011 Tribal Council. *See* Pet'n ¶¶ 25-27. According to the Petition, the Tribal Council established this fund by "misappropriating millions of dollars in tribal revenues," and the fund only benefits the 2011 Tribal Council and the Tribe's counsel, Howard Dickstein. Pet'n ¶ 26. These allegations bear no coherent relevance to the Petition's three claims—*i.e.*, unlawful banishment, unlawful denial of a fair trial, and unlawful denial of benefits—because neither the defamatory statements nor the discipline relate or refer in any way to this fund. Pet'n ¶¶ 28-48. But more importantly for the purposes of this motion, the "slush fund" allegations are unexhausted because they have not been raised to the Tribal Council, the Appeals Board, or any other tribal body. *See* Basbaum Decl., Exhs. J-M (Statements of Tavares, Caesar, D. Suehead, and B. Suehead in Response to Proposed Withholding (Nov. 22, 2011)) & N (Written Appeal (Jan. 27, 2012)). Indeed, the Petitioners concede that they were not aware of this fund until "late 2012," long after they had challenged the Tribal Council's findings. Pet'n ¶ 25. If the Petitioners believe the alleged fund was established unlawfully, the Tribe must be given the first opportunity to resolve any complaints in that regard. *See U.S. ex rel. Cobell v. Cobell*, 503 F.2d 790, 793 (9th Cir. 1974) (holding that tribal exhaustion

is necessary so that federal courts "'would intervene only in those instances in which local conflicts cannot be resolved locally'" (quoting *Dodge v. Nakai*, 298 F. Supp. 17, 25 (D. Ariz. 1968)).

Second, the Petitioners assert an unexhausted (and conclusory) equal protection claim. The Petition seems to allege that the 2011 Tribal Council "violated [P]etitioners' rights to equal protection" by allegedly taking action in response to Petitioners' exercise of their free speech rights. Pet'n ¶ 34; *see also id.* ¶ 35 (alleging that Petitioners were denied the right to vote and/or to run for tribal office, and thus were also "denied . . . equal protection under the law"). As with the "slush fund allegations," this equal protection claim was not raised to the Tribal Council, the Appeals Board, or any other tribal body. *See* Basbaum Decl., Exhs. J-M (Statements of Tavares, Caesar, D. Suehead, and B. Suehead in Response to Proposed Withholding (Nov. 22, 2011)) & N (Written Appeal (Jan. 27, 2012)). The Court would therefore lack jurisdiction over that claim, and any claim related to the "slush fund," even if the Petition did not already suffer from the jurisdictional defects discussed above. *Selam*, 134 F.3d at 953.

E. There is no jurisdiction under *Ex Parte Young*.

Perhaps recognizing that the Petition cannot meet any of the pre-requisites of jurisdiction under § 1303, Petitioners makes a passing, bare assertion that the Court has jurisdiction "pursuant to the doctrine of *Ex Parte Young*." Pet'n ¶ 4.b. This allegation is meritless. The *Ex Parte Young* doctrine is an exception to the Eleventh Amendment's guarantee of sovereign immunity, and it allows certain suits against state officials acting on behalf of the state to proceed despite the state's sovereign immunity when the official has violated federal law. 209 U.S. 123 (1908). The doctrine has been extended to tribal officials such that "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law." *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (internal quotation marks omitted). However, "when tribal officials act in their official capacity and within the scope of their authority, [*Ex Parte Young* is inapplicable and] they are immune." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271-72 (9th Cir. 1991).

As an initial matter, *Ex Parte Young* cannot serve as an independent basis for jurisdiction

over a § 1303 petition. As discussed in detail above, the Petition falls short of establishing jurisdiction under § 1303. Thus, even if the Petition could satisfy *Ex Parte Young*, the Court would still lack jurisdiction because there is no statutory basis for the suit. Moreover, the Supreme Court has cautioned against allowing *Ex Parte Young* to confer jurisdiction where Congress has already codified a cause of action. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."). Here, Congress has already enacted a remedial scheme for violations of the ICRA (*i.e.*, § 1303), and the Supreme Court has stressed that § 1303 is the "only . . . limited mechanism" for review of tribal decisions. *Santa Clara Pueblo*, 436 U.S. at 69-70. The Petitioners cannot use *Ex Parte Young* as an end-run around that scheme.

Even if *Ex Parte Young* could supplant the jurisdictional requirements of § 1303, Petitioners have not alleged an ongoing violation of federal law and do not request prospective relief. Instead, they seek only to have their discipline reversed and to be restored to their previous positions. The Petition's Prayer for Relief does not even ask that the defamation ordinance be struck down, or that the Respondents be enjoined from enforcing the ordinance. *See* Pet'n p.16; *see also Allen v. Smith*, No. 12-1668, 2013 WL 950735 at *10 n.3 (S.D. Cal. Mar. 11, 2013) (holding that tribal plaintiffs sought only to be restored to the position they had been in before disenrollment, and thus sought retrospective relief and could not rely on *Ex Parte Young* to establish jurisdiction). Moreover, Petitioners do not (and cannot) allege that the Respondents acted individually and beyond their authority, rather than officially and pursuant to Tribal and federal law. *See* 25 U.S.C. § 2710(b)(3); Basbaum Decl., Exh. S (Plan for the Allocation of Gaming Revenue); *see also* Pet'n (naming Respondents "in their official capacity"). This flaw is apparent from the fact that they seek relief from certain Respondents who were not involved in the discipline process but are only named because of their official status as Tribal Council members. *See* Pet'n ¶ 7. Accordingly, the Petition is effectively directed at the Tribe rather than the individual Respondents, and *Ex Parte Young* cannot defeat the Tribe's sovereign immunity.

See Imperial Granite Co., 940 F.2d at 1271-72. In sum, *Ex Parte Young* is not an alternative basis for establishing jurisdiction under § 1303 and, even if it were, the Petition does not satisfy any of that doctrine's requirements.

V. CONCLUSION

Based on these arguments, the Respondents respectfully ask the Court to dismiss the Petition under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

Dated: December 6, 2013

KEKER & VAN NEST LLP

By: /s/ Elliot R. Peters
ELLIOT R. PETERS
JO W. GOLUB
JESSE BASBAUM

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2013, the foregoing document was served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules.

/s/ Jesse Basbaum
JESSE BASBAUM