UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

NORBERT J. KELSEY,

Petitioner,

v.

MELISSA LOPEZ POPE, *et al.*,

Respondents.*

Case No. 1:09-cv-1015
Honorable Gordon J. Quist
Magistrate Judge Hugh W. Brenneman, Jr.

RESPONDENT'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

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*By Order of this Court, Daniel Bailey, the Chief Judge of the Tribal Court, has been deemed the only proper Respondent in this matter, and the remaining named respondents have been dismissed without prejudice. Doc. Nos. 3 and 17.

INTRODUCTION

"Indian tribes 'exercise inherent sovereign authority over their members *and* territories[.]'" *Cameron v. Bay Mills Indian Cmty.*, 843 F. Supp. 334, 336 (W.D. Mich. 1994) (Quist, J.) (emphasis added) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). "It is undisputed" that such authority "includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *U.S. v. Wheeler*, 435 U.S. 313, 322 (1978). "Congress has repeatedly recognized that power and declined to disturb it." *Id*. at 324. While these well-established principles should govern the disposition of the Petition for Writ of Habeas Corpus, the Magistrate's Report and Recommendation ("Recommendation"), Doc. No. 35, ignores them entirely. Respondent accordingly files these Objections.

The Little River Band of Ottawa Indians ("Little River" or "Tribe"), a federally recognized tribe, prosecuted Petitioner, a member of the Tribe and, at the time, of its Tribal Council, for sexual assault and harassment of a tribal employee (also an Indian). The assault took place at the Tribe's Community Center, where the victim was performing employment duties. Excerpts of Record ("ER") 887-91 (Doc. Nos. 9-11). The Tribal Court found "beyond a reasonable doubt that sexual assault," as defined by Tribal law, "did occur as the victim described." ER 26. Petitioner was convicted of sexual assault but not harassment, ER 26-27, and the Tribal Court imposed a sentence well within the constraints of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302. Petitioner received one year of probation with six months in jail held in abeyance pending his compliance with the conditions of probation: payment of a fine, community service, and avoidance of verbal contact with female Tribal employees. ER 29-30. The Court later stayed Petitioner's sentence pending appeal except for the speech restriction,

which expired in 2009. ER 17, 31. Extensive proceedings have since followed in the Court of Appeals, which has denied several of Petitioner's challenges to his conviction, while staying further action pending the disposition of this Petition. ER 18-20, 22-23.

In this habeas proceeding, the tribal courts' findings of fact are "entitled to complete deference if supported by the evidence," *Combs v. Coyle*, 205 F.3d 269, 277 (6th Cir. 2000), and Petitioner does not challenge that evidence here.[1] Instead, he argues that because the Community Center is on land owned by the Tribe, rather than held in trust by the United States (and hence, he argues, outside of "Indian country"), the Tribe lacked jurisdiction over his crime.

This is a radical suggestion. It asks this Court to impose on tribal membership-based jurisdiction the concept of Indian country, which has never been understood as a blanket restriction on tribal (or federal or state) powers, but which pertains only to territorial jurisdiction. The Recommendation adopts this suggestion, concluding that tribes have been implicitly divested of criminal jurisdiction over their members for acts outside of Indian country. In doing so, it ignores controlling Supreme Court precedent establishing that the only implicit defeasance of tribal criminal jurisdiction involves authority over non-members. If accepted, the Recommendation would pose a serious threat to the Tribe's right of self-government, including its ability to maintain law and order for its members.

The Recommendation also incorrectly concludes that the Tribal Court of Appeals violated Petitioner's due process rights in conforming tribal statutory law to the Tribal Constitution. In doing so, it again ignores controlling Supreme Court precedent.

[1] Petitioner's claim is brought under ICRA, Section 1303. ICRA's habeas remedy and procedures track those found in 28 U.S.C. Section 2254 for federal court review of state court convictions. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 891-92 (2d Cir. 1996).

Respondent respectfully asks this Court to reject the Recommendation and to adhere to the law of tribal jurisdiction and due process expressed by the Supreme Court and by this Court.

I. THE TRIBE POSSESSED JURISDICTION OVER PETITIONER'S CRIME

A. The Recommendation Disregards Controlling Supreme Court Case Law Regarding Tribes' Membership-Based Jurisdiction.

The Recommendation acknowledges tribal sovereignty, as it must. Recommendation at 11. While it does so grudgingly, *id*. at 27 (Tribal sovereignty "is but sovereignty as Congress is given to see that sovereignty"), the Supreme Court has repeatedly affirmed the tribes' inherent sovereignty. *See*, *e.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008) ("For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities[.]'"); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 780 (1991) ("Indian Tribes are sovereigns."); *Okla. Tax Comm'n*, 498 U.S. at 509 (Tribes "exercise inherent sovereign authority over their members and territories.").

This Court has also repeatedly affirmed tribal sovereignty. Importantly, this recognition has included an appreciation that tribal sovereignty includes both a territorial and a membership-based component. *See Cameron*, 843 F. Supp. at 336 ("Indian tribes exercise inherent sovereign authority over their members *and* territories[.]") (quotation marks omitted) (emphasis added)); *LaBeau v. Dakota*, 815 F. Supp. 1074, 1076 (W.D. Mich. 1993) (Quist, J.) (same); *Sandman v. Dakota*, 816 F. Supp. 448, 451 (W.D. Mich. 1992) (Quist, J.) (same).

The Supreme Court has made clear, contrary to the language of the Recommendation quoted above, that tribal sovereignty is not a creation of Congress but is an *inherent* status that "pre-exist[ed] the Constitution[.]" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *see also McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973) (Indian tribes' "claim to sovereignty long predates that of our own Government."). Tribes originally possessed all the

powers of sovereigns "with the single exception of . . . intercourse with any other European potentate than the first discoverer." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

Among the tribes' inherent sovereign powers was the jurisdiction to prescribe and enforce criminal laws against their members:

> Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

Wheeler, 435 U.S. at 322 (citation omitted). Predating "the coming of the Europeans," this membership-based jurisdiction was independent of any territorial concept of Indian country. This case concerns whether that jurisdiction has since been territorially circumscribed.

The Supreme Court has made clear that while Congress may divest tribes of specific sovereign powers, in the absence of such divestiture those powers remain intact:

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [U]ntil Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Wheeler, 435 U.S. at 323 (quotations omitted); *see also U.S. v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997) (*abrogated on unrelated grounds*, *Texas v. Cobb*, 532 U.S. 162 (2001)).

As this passage makes clear, and as the Recommendation recognizes, tribes' inherent sovereign powers are subject to diminishment by only three means: "'by treaty or statute, or by implication as a necessary result of their dependent status.'" Recommendation at 12-13 (quoting *Wheeler*, 435 U.S. at 323). Courts will not find a statutory diminishment of tribal sovereignty "in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987) (same); *Cohen's Handbook of Federal Indian Law* 222-23 (LexisNexis 2005 ed.) (Tribal sovereignty is "preserved unless Congress's

intent to the contrary is clear and unambiguous."). While the Recommendation engages in a lengthy and (as discussed below, highly flawed) discussion of federal statutes, *see* Recommendation at 13-18, it does not suggest that Congress (or any treaty) has ever evidenced an express intent to restrict membership-based criminal jurisdiction to Indian country. To the contrary, when Congress enacted legislation in 1994 restoring Little River to federal recognition, it expressly provided that "[a]ll rights and privileges of the Bands, and their members thereof, which may have been abrogated or diminished before September 21, 1994, are hereby reaffirmed." 25 U.S.C. § 1300k-3(a).

Instead, the Recommendation posits that tribes' inherent powers to enforce their criminal laws against their members have been geographically curtailed by the third means – *i.e.*, "'by implication,' a necessary result of their dependent status." Recommendation at 28 (citation omitted); *id.* at 29 (same). In doing so, the Recommendation flatly contradicts Supreme Court precedent – including *Wheeler* – clearly demarcating the extent to which tribes have been implicitly divested of their criminal jurisdiction, and restricting that divestment to relations with nonmembers.

In *Wheeler*, the Court emphasized that tribes have retained criminal jurisdiction over their members as a necessary aspect of their power of self-government:

> *It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members.* Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain a separate people, with the power of regulating their internal and social relations. *Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.*

Wheeler, 435 U.S. at 322 (emphases added) (citations and quotation marks omitted). It then rejected the notion that tribes have been implicitly divested of that jurisdiction, and it cabined the scope of implicit divestiture to relations between tribes and non-members:

> [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. *The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe*. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And, as we have recently held, they cannot try nonmembers in tribal courts.
>
> . . . But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. *They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status*.

Id. at 326 (emphases added) (citations omitted).

This critical language is directly relevant here. *Wheeler* plainly held that the realm of implicit divestiture involves only relations between tribes and non-members. *See also Montana v. U.S.*, 450 U.S. 544, 563-64 (1981) (quoting *Wheeler* and stating that tribal powers "to protect tribal self-government or to control internal relations," including "the power to punish tribal offenders," are not among aspects of sovereignty implicitly lost through dependent status). But while the Recommendation cites *Wheeler*, it nowhere acknowledges these passages, let alone attempts to reconcile them with its starkly contrary conclusion.

The Court reiterated *Wheeler*'s teachings just over a decade later in *Duro v. Reina*, 495 U.S. 676, 686 (1990), underscoring that "the retained sovereignty of the tribes is that needed to control their own internal relations," *id*. at 685, and thus, that there has been no divestiture of "[t]he power of a tribe to prescribe and enforce rules of conduct for its own members," *id.* at 686. The Court then declared:

> *The retained sovereignty of the tribe[s] is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.* Indians like all other citizens share allegiance to the overriding sovereign, the United States. *A tribe's additional authority comes from the consent of its*

> *members, and so in the criminal sphere membership marks the bounds of tribal authority.*

Id. at 693 (emphases added).[2]

The Recommendation does not acknowledge *Duro* at all, even though it is directly applicable to this case. *Duro* clearly held that the bounds of tribal criminal jurisdiction are marked not by territory but by membership, and the Recommendation was not free to ignore this holding in crafting limitations on tribal jurisdiction nowhere ordained by the Supreme Court.

Before the Magistrate, Petitioner suggested that because the crimes at issue in *Wheeler* and *Duro* took place in Indian country, those cases have no bearing here. Petitioner's Reply (Doc. No. 16) at 39. But that suggestion demonstrates a misunderstanding of the Court's holdings. In both cases, the Court addressed the extent to which tribes have been implicitly divested of criminal jurisdiction and measured that divestment by reference not to territory but to the membership status of the defendant.

Indeed, far from speaking of tribes' sovereignty over members *within* their territory, *Wheeler* references tribes' "sovereignty over *both* their members *and* their territory[.]" 435 U.S. at 323 (emphases added). *See Cameron*, 843 F. Supp. at 336 (Quist, J.) (same); *In re Fred Hawes Org., Inc.*, 957 F.2d 239, 243-44 (6th Cir. 1992) (conjunctive "and" used "to establish separate, discrete and independent" matters). And *Duro* explains the continued vitality of membership-based jurisdiction in terms that do not admit of a geographic distinction. "Retained

[2] *Duro* held that the tribes' retained sovereignty does not include the authority to criminally prosecute individuals who are Indians but non-members of the prosecuting tribe. *Id.* at 688. Congress has since affirmed that tribes' inherent powers extend also to non-member Indians, *see United States v. Lara*, 541 U.S. 193, 197, 199 (2004), a matter not at issue here as Petitioner was an enrolled member of the Tribe at the time of his crime and conviction.

criminal jurisdiction . . . [is] *justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent*." 495 U.S. at 694 (emphasis added). Unlike state citizenship, tribal membership is voluntary. When an eligible individual accepts the privileges and benefits of membership, she must also shoulder the responsibilities that accompany it, including accountability for criminal violations that affect the tribe's internal affairs. This notion of consent, not territory, underpins *Duro*'s recognition of tribes' "additional authority" with respect to their members, *id*. at 693, such that "[w]ith respect to . . . internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country," *id.* at 694.[3]

B. The Recommendation Lacks the Authority to Posit Its Own Divestment of Tribal Jurisdiction, and the Reasons It Proffers for Doing So Are Inadequate.

The Recommendation clearly lacks the authority to ordain an eradication of tribal sovereign powers beyond that sanctioned by the Supreme Court. In addition to its fundamental failure to engage relevant precedent, several other reasons lead the Recommendation to take this path, none of which remotely suggest that this Court should follow.

[3] The Court's recognition that consent endows tribes with additional powers over their members renders inapposite the Recommendation's suggestion, *see id.* at 29 n.13, that states cannot exercise extraterritorial criminal jurisdiction, which is incorrect in any event. The Michigan Supreme Court, for example, has stated that "*blind adherence to a purely territorial concept of jurisdiction inadequately addresses the State's interest in protecting its citizens from the results of criminal activity*." *People v. Blume*, 443 Mich. 476, 480 and n.6 (1993) (emphasis added). *See also, e.g.*, *State v. Jack*, 125 P.3d 311, 318 (Alaska 2005) ("[A] state may exercise extraterritorial jurisdiction when . . . there [is] a sufficient state interest . . . [and] no conflict with federal law"); *People v. Weeren*, 26 Cal.3d 654, 659 (Cal. 1980) ("[I]n the protection of its legitimate interests [a state] may exercise penal control over its citizens extraterritorially."). *See generally Pac. Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1172 (9th Cir. 2011) (canvassing cases recognizing the legitimacy of extraterritorial criminal jurisdiction where core state or federal interests are involved).

1. This Case is About Membership-Based, Not Territorial, Jurisdiction.

The Recommendation misunderstands the jurisdiction asserted by the Tribe and recognized by the Court of Appeals as territorial, declaring that the Tribe has sought "to extend its criminal jurisdiction *to a building* owned outside of . . . Indian country[.]" Recommendation at 22 (emphasis added); *see also id.* at 29 n.13 ("[A] tribe cannot . . . unilaterally extend its criminal jurisdiction . . . over [such] land").

However, as noted, inherent tribal criminal authority is premised not on territory but on tribes' powers to "control their own internal relations" and preserve "[their] social order," *Duro*, 495 U.S. at 685-86. The Tribal Court of Appeals upheld the Tribe's assertion of jurisdiction not because of territorial considerations but because Petitioner's crime bore strongly on the Tribe's internal relations:

> The beginning point for any analysis of tribal jurisdiction begins with the **inherent authority** of tribes [to] man[a]ge their internal affairs . . . .
>
> . . . The interests of the Tribe are very strong here. This case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a Tribal employee in a public setting openly visible to other employees and Tribal members who were present.

ER 6-8 (emphasis in original).

Focused as it is on territorial jurisdiction, the Recommendation misses the significance of this discussion, seeing the listed points as going not to jurisdiction, but to "the elements of the offense[.]" Recommendation at 23 n.11. However, those considerations were central to the Court of Appeals' conclusion that a tribal member had committed a crime bearing on the Tribe's internal relations (a conclusion that Petitioner has not contested, and that is not open to serious question). That finding is the relevant jurisdictional fact here. As the leading treatise on federal Indian law puts it, "[t]he more closely a matter is related to core tribal interests, the stronger the

case is for recognition of jurisdiction based on membership in the tribe. . . . [S]uch interests would include keeping peace among tribal members in tribal communities[.]" Cohen 219.

2. The Recommendation Misapprehends the Significance of Indian Country.

Because the Recommendation does not recognize the distinction between territorial and membership-based jurisdiction, it vests the concept of Indian country with a blanket significance that it does not possess. *See, e.g.*, Recommendation at 11, 14, 16, 18, 23-28. "Indian country" is statutorily defined at 18 U.S.C. § 1151 and serves to chart which sovereign has primary jurisdiction over a particular territory. "Generally speaking, primary jurisdiction *over land* that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) (emphasis added). It does not speak to membership-based jurisdiction.

Federal courts thus rely on the Indian country determination in identifying territorial authority in a particular matter. For example, crimes inside Indian country are typically punishable by the tribe or the federal government. *See Williams v. U.S.*, 327 U.S. 711, 714 (1946). Inside Indian country, moreover, states generally lack regulatory power over Indians, *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980), and tribes usually have the predominant taxing power, *see Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985).

These examples, however, illustrate general principles, not categorical rules. And they have no bearing on membership-based jurisdiction. For example, the Supreme Court has long held that while state courts generally lack criminal jurisdiction in Indian country, they have such jurisdiction over crimes between non-Indians. *See U.S. v. McBratney*, 104 U.S. 621, 624 (1881). That holding remains good law, *see* Cohen 506-10, and illustrates that the boundaries of Indian country do not stand as a Berlin Wall against the exercise of non-territorial jurisdiction.

Indeed, numerous federal and state cases recognize that the borders of Indian country are not an impermeable barrier to the exercise of tribal membership-based jurisdiction outside of them. Thus, the Ninth Circuit, which contains nearly 75 percent of the country's 566 federally recognized tribes,[4] has invoked *Wheeler* and *Duro* in declaring that:

> *[T]ribal sovereignty is not coterminous with Indian country . . . . Rather, tribal sovereignty is manifested primarily over the tribe's members.*

Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 558 n.12 (9th Cir. 1991) (emphasis added) (citing *Duro* and *Wheeler*). The Tenth Circuit has likewise stated that "[a]s the Supreme Court has repeatedly explained, *the powers of tribes extend over not only their territory but also their members*," and that therefore "tribal powers can extend over members going *beyond* reservation boundaries. *The determinative factor is whether the matter falls within the ambit of internal self-government*." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1256 (10th Cir. 2001) (first and third emphases added) (quotation marks and citation omitted).

Similarly, the Alaska Supreme Court in *John v. Baker*, 982 P.2d 738, 754 (Alaska 1999), rejected the notion that the elimination of the Alaska tribes' Indian country by the Alaska Native Claims Settlement Act "also divested Alaska Native villages of their sovereign powers." *Id.* at 750. *John* drew heavily from *Wheeler*, *Duro*, and other decisions in affirming the continued vitality of tribal membership-based jurisdiction irrespective of geography:

> The federal decisions discussing the relationship between Indian country and tribal sovereignty indicate that the nature of tribal sovereignty stems from two intertwined sources: tribal *membership* and tribal *land.* The United States Supreme Court has recognized the dual nature of Indian sovereignty for more than a century and a half; the Court has explained that, under federal law, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their

[4] *See* 78 Fed. Reg. 87 at 26384 (May 6, 2013). Available at: http://www.bia.gov/cs/groups/xraca/documents/text/idc1-021809.pdf).

> members and their territory." Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent "power of regulating their internal and social relations."

Id. at 754-55 (quoting *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975)) (footnotes omitted).[5]

The Recommendation addresses none of these decisions, asserting that cases "discussing the scope of tribal sovereignty in civil matters provide little guidance" because criminal jurisdiction is reserved to the government. Recommendation at 29 n. 13. But cases like *Venetie*, *Pierce*, and *John* cannot so easily be dismissed. Those cases, like this one, address the authority of tribal governments. They squarely hold that tribes possess both territorial and membership-based jurisdiction, and demonstrate the illogic and untoward consequences of imposing a territorial concept (Indian country) on membership-based jurisdiction.

While the Recommendation dismisses controlling or highly relevant opinions from the Supreme Court and other courts, it invites this Court to premise its ruling on the "particularly instructive" unpublished order in *Fife v. Moore*, No. 6:11-cv-133 (2011). *See* Recommendation at 24-25. In *Fife*, an Oklahoma district court had preliminarily enjoined tribal court criminal proceedings based on an alleged lack of tribal jurisdiction outside of Indian country. *See Fife v. Moore*, 808 F. Supp. 2d 1310 (E.D. Okla. 2011). After then accepting briefing on the jurisdictional issue, it granted the habeas petition, but did so using language (nowhere acknowledged in the Recommendation) that eliminates the opinion's persuasive value:

> As to the jurisdictional issue, [the Tribal] respondents in their supplemental briefing make a *clear and forceful presentation that this court was incorrect in its ruling*. . . .

[5] *See also* Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. Legal Educ. 433, 437 (Sept. 2006) ("Other criminal law systems illustrating *active* (i.e., offender-based) personality jurisdiction include those of various Native American tribes[.]").

> *. . . Respondents may well be correct in their position. Nevertheless, this court has found a few scattered references (quite few and quite scattered) indicating that the present state of the law has been interpreted in the same manner as by this court*. Under those circumstances, the court is persuaded it should stand on its previous ruling.

Fife (Doc. No. 32-2 at 3-4) (emphasis added). Thus, if anything from *Fife* is "particularly instructive," it is the court's assessment that the law favors membership-based tribal criminal jurisdiction, not the court's stubborn refusal to follow that law based on "quite few and quite scattered" references (standing only for the uncontroversial proposition that states enjoy territorial jurisdiction over crimes outside of Indian country).[6]

The Recommendation further cites *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974), for the proposition that "courts have recognized" that tribal membership-based criminal jurisdiction outside of Indian country exists as an "unusual and unique" exception to a general rule against such jurisdiction where "specific treaty rights *permit* such enforcement." Recommendation at 16, 23 (emphasis added). But *Settler* says no such thing. It rejected any notion that the

[6] Like the *Fife* court, and in addition to the points discussed in the text, the Recommendation relies on scattered references to justify its conclusions. For example, the Recommendation cites the Ninth Circuit's decision in *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975), stating that tribes possess criminal jurisdiction over their "'members *and* within the limits of the reservation[.]'" Recommendation at 12 (emphasis added) (quoting Cohen 148 (1942 ed.)). This conjunctive phrasing simply tracks *Wheeler*'s pronouncement that tribes retain inherent criminal jurisdiction "over *both* their members *and* their territory." 435 U.S. at 323 (emphasis added) (internal quotation marks omitted). The Recommendation meanwhile ignores the Ninth Circuit's comparatively recent and unequivocal pronouncement that "tribal sovereignty is not coterminous with Indian country. Rather, tribal sovereignty is manifested primarily over the tribe's members." *Venetie*, 944 F.2d at 558 n.12 (citation omitted). Similarly, the Recommendation quotes *LaPlante*, 480 U.S. at 15, for the proposition that "it is well-established that 'criminal jurisdiction of the tribal courts is subject to substantial federal limitation,'" Recommendation at 12, but the sole limitation referenced there is the lack of criminal jurisdiction *over non-Indians*. *See* 480 U.S. at 15 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

jurisdiction at issue was "permitted" by treaty, as asserted by the Recommendation; it was instead an inherent sovereign power that pre-existed the treaty and was *retained* by the tribe:

> *Prior to the Treaty* the regulations for fishing had been established by the Tribe through its customs and tradition. . . .
>
> [T]he Treaty of 1855 does not expressly state that the Yakima Nation relinquished *its jurisdiction* over matters pertaining to fishing rights. *As the treaty constitutes a grant of rights from the Indians to the Government, any rights not granted must be considered retained by the Tribe*. . . . [W]e conclude that the Yakima Nation did *reserve* the authority to regulate Tribal fishing at 'all usual and accustomed places', *whether on or off the reservation.*
>
> . . . The determination of when and how the [fishing] rights may be exercised *is an 'internal affair' of the Tribe*. As the district court correctly pointed out, 'one of the last remnants of *sovereignty retained* by the Yakima Indian Tribe is the power to regulate their *internal and social relations*'. . . .
>
> The mere fact that the fishing may take place off the reservation does not make the regulation of treaty fishing any less *an internal matter*. *The locus of the act is not conclusive*.

507 F.2d at 236-37 (emphases added) (citation and footnote omitted). Far from supporting the Recommendation, then, *Settler* emphatically confirms Little River's position: the Tribe possesses inherent jurisdiction over its members on matters pertaining to its internal affairs and self-government, "whether on or off the reservation."[7]

The Recommendation's reliance (at 23) on *U.S. v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), fares no better. *Michigan*, like *Settler*, is clear that the extraterritorial jurisdiction at issue was not "permitted" by or dependent on treaty. To the contrary,

[7] The Recommendation elsewhere suggests that the West Nutshell on Indian Law views *Settler* as recognizing an "unusual and unique" treaty-based exception to the general rule that tribal jurisdiction is limited to Indian country. Recommendation at 16-17 (quoting *William C. Canby, Jr., American Indian Law in a Nutshell* (West 4th ed. 2004)). However, it is clear that, in citing to *Settler*, the "exception" the Nutshell has in mind is simply the jurisdiction asserted here – namely, tribes' inherent and retained jurisdiction over matters implicating the "internal affairs of the Indians" and based on "the power to regulate their internal and social relations." *Settler*, 507 F.2d at 237 (internal quotation marks omitted).

> [t]he right of the [tribes] to *regulate the off-reservation treaty fishing activities of their members* was not *given up* when the Indians signed the Treaty of 1836. . . . [T]he law of treaty construction is clear that rights not expressly relinquished in the treaty are *retained* by the Indians.

471 F. Supp. at 273 (emphases added). *See also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987) (quoting *Settler* and emphasizing that tribe possessed extraterritorial jurisdiction to regulate treaty rights as "an internal matter," thus "[t]he locus of the act is not conclusive").

3. The Statutes Relied on by the Magistrate Do Not Reflect an Implicit Divestiture of Tribal Membership-Based Criminal Jurisdiction.

The Recommendation discusses various federal statutes and regulatory materials and argues that they lead to an "inescapable conclusion" of implicit divestiture. *See* Recommendation at 13-18, 29. But those sources of law do not, individually or collectively, provide any such support.

The Recommendation first invokes the Indian Trade and Intercourse Act, 1 Stat. 137 (1790), the Indian Country Crimes Act ("ICCA"), 18 U.S.C. § 1152, and the Major Crimes Act ("MCA"), 18 U.S.C. § 1153. *See* Recommendation at 13-15. These statutes extended federal criminal jurisdiction into Indian country because of the perceived absence at the time of adequate justice systems for some tribes. *See, e.g., Keeble v. United States*, 412 U.S. 205, 209-11 (1973). The Recommendation mistakenly assumes that, in doing so, they displaced tribal jurisdiction over members. But they did not. *See, e.g.*, Cohen 758 ("It is . . . settled that tribes have concurrent jurisdiction over crimes by Indians punishable under the [ICCA]"); *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) (concluding, in reliance on *Wheeler*, that tribal courts may "try a tribal member for a crime also prosecutable under the [MCA]"). Indeed, *Wheeler* cited the Intercourse Act and the ICCA as examples of "statutes establishing federal jurisdiction over

crimes involving Indians [that] *have recognized an Indian tribe's jurisdiction over its members*," and concluded, flatly contrary to the Recommendation, that "far from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of a tribe, *Congress has repeatedly recognized that power and declined to disturb it*." 435 U.S. at 324-25 (emphases added) (footnote omitted).

The Recommendation is therefore mistaken in its premise that any of these statutes limited tribal membership-based jurisdiction, whether within or outside of Indian country. Those statutes accordingly provide no support for an abrogation of that jurisdiction.[8]

The Recommendation next erroneously describes the laws establishing the Courts of Indian Offenses ("CFR Courts") as "[a]nother example of federal law *limiting tribes' criminal jurisdiction over Indians*[.]" Recommendation at 15 n.3 (emphasis added). But those courts, like the above statutes, were established to address the perceived absence of adequate tribal justice systems for certain tribes.[9] They did nothing to diminish tribal criminal jurisdiction, but "constitute[d] the judicial forum through which [a] tribe [could] exercise *its jurisdiction* until such time as the tribe adopts a formal law and order code." *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991) (emphasis added).

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[8] That *Ex Parte Crow Dog*, 109 U.S. 556 (1883), and *U.S. v. Kagama*, 118 U.S. 375 (1886), affirm "the inherent authority of tribes over their members," but do so "in the context of Indian country," Recommendation at 16 (footnote omitted), is unremarkable because both involved crimes committed by Indians within Indian country and statutes extending federal jurisdiction there. No language in either case discusses, much less limits, the geographic scope of member-based jurisdiction, and the Court's descriptions of tribal jurisdiction are devoid of geographic reference. *See, e.g., Crow Dog*, 109 U.S. at 568 (describing as "highest and best" aspect of tribal civilization "that of self-government, the regulation by themselves of their own domestic affairs, *the maintenance of order and peace among their own members by the administration of their own laws and customs*" (emphasis added)).

[9] *See* 25 C.F.R. § 11.102 (The purpose of CFR Courts is "to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes *retain jurisdiction over Indians that is exclusive of State jurisdiction* but where tribal courts have not been established to exercise *that jurisdiction*." (emphasis added)).

Nor does ICRA support the Recommendation. ICRA, among other matters, limits the sentences that tribal courts can impose. *See* 25 U.S.C. § 1302.[10] This does not imply a congressional intent to geographically limit tribal criminal jurisdiction over members. *See U.S. v. Male Juvenile*, 280 F.3d 1008, 1020 (9th Cir. 2002) (rejecting argument that post-*Wheeler* amendments to ICRA "eroded the inherent tribal sovereignty upon which the *Wheeler* decision relied"); Cohen 760 n.206 ("The fact that tribal penalties are limited . . . [under ICRA] has no bearing on whether tribes have concurrent jurisdiction over major crimes. There is no indication that by imposing these limits Congress intended to divest tribes of jurisdiction over any class of crimes."). Indeed, *Wheeler* discussed both ICRA and the CFR Courts and in doing so concluded that "the power to punish offenses against tribal law committed by Tribe members . . . has never been taken away . . . either explicitly *or implicitly*[.]" 435 U.S. at 328 (emphasis added). Again, *Wheeler* directly refutes the conclusions the Recommendation seeks to draw. And while the Recommendation declares that "[i]t cannot be gainsaid but that over the years Congress has . . . severely circumscribed the 'sovereignty' of the tribes where criminal justice is concerned," Recommendation at 21, the very sources relied on by the Recommendation demonstrate that this is simply not so regarding membership-based jurisdiction.

4. The Recommendation Stands Established Law on its Head in Relying on the Absence of a Statutory "Grant" of Jurisdiction.

The Recommendation, as noted above, recognizes at various junctures that tribes possess sovereign powers unless divested of them. *See* Recommendation at 12-13, 16-17. Yet at other junctures it slips into arguing that Respondent "has not cited any federal statute or treaty provision which grants the Tribe" the jurisdiction asserted in this case. *Id*. at 22. This argument reverses the presumption properly to be drawn from congressional silence. That tribes' inherent

[10] As discussed above, the punishment imposed upon Petitioner falls well within those limits.

sovereign powers are not "granted" by Congress is "[p]erhaps the most basic principle of all Indian law[.]" Cohen 206. Because the tribes "retain[] all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from [congressional] silence . . . is that the sovereign power . . . remains intact." *LaPlante*, 480 U.S. at 18 (internal quotation marks omitted). *See also Doherty*, 126 F.3d at 777; *Wheeler*, 435 U.S. at 328 (A tribe's "power to punish offenses against tribal law committed by Tribe members" is an aspect of "primeval sovereignty" and "is attributable in no way to any delegation to them of federal authority." (footnote omitted)). And "far from depriving Indian tribes of [this] sovereign power . . . Congress has repeatedly recognized that power and declined to disturb it." *Id*. at 325 (footnote omitted).

5. The Recommendation Wrongly Suggests that the Tribe's Membership-Based Jurisdiction Ousts the State of its Territorial Jurisdiction.

The Recommendation asserts that the tribal jurisdiction asserted here would result in a "'checkerboard jurisdiction' conundrum," Recommendation at 26-27 (*citing Hagen v. Utah*, 510 U.S. 399, 425 n.6 (1994)). This concern is without foundation. The Court of Appeals grounded its ruling in the Tribe's retained authority over its members for criminal acts bearing on the Tribe's internal relations, regardless of where those acts are committed. This jurisdiction does not detract from the territorial jurisdiction of the State of Michigan. There exist many circumstances in federal Indian law where two or more sovereigns enjoy concurrent jurisdiction. *See, e.g., Stafne*, 44 F.3d at 825-26 (recognizing concurrent federal and tribal jurisdiction for crimes enumerated in MCA); Cohen 759-60 (same). Indeed, the Tribe has expressly affirmed that while persons committing offenses proscribed by the Tribe "may be tried and punished by the Tribal Court," such jurisdiction "*shall not affect the power or authority of any other courts, including those of the United States, or the State of Michigan, which may have concurrent*

jurisdiction." Law and Order Ordinance § 4.01, Doc. No. 12 (Tribal Law Appendix ("Law App.") 33) (emphasis added). Thus, the exercise of jurisdiction by the Tribe does not come at the expense of the State.

6. The Recommendation Fails to Recognize that Jurisdictional Determinations Based on Indian Country Boundaries Can Be Far More Complicated Than Membership-Based Determinations.

In rejecting the existence of membership-based jurisdiction, the Recommendation suggests that "[t]he basis of jurisdiction cannot be a moving target based on the number of factors a prosecutor can name." Recommendation at 23 n.11. However, jurisdictional determinations based on Indian country status are frequently far more fact-intensive and litigious than membership-based determinations. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), for example, the Supreme Court had to determine the status (for jurisdictional purposes) of lands set aside as a reservation but subsequently opened for non-Indian settlement by statute. This required it to examine a range of factors, including: "the historical context surrounding the passage" of the statute, *id*. at 344; the "subsequent treatment of the area in question and the pattern of settlement there," *id*.; "subsequent congressional and administrative references to the reservation," *id*. at 351; the "'manner in which the transaction was negotiated' . . . and 'the tenor of legislative Reports presented to Congress," *id*. at 351-52; and manifestations of state and tribal authority over the lands, *id*. at 352-55.[11]

Here, the Tribe had no desire to become embroiled in litigation of this dimension in order to prosecute Petitioner, when the fact that he is a member of the Tribe and that his crime bore on

[11] Following a remand, more than a decade of additional litigation ensued involving further fact-intensive inquiries. *See Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135 (D.S.D. 1998) (*on remand*), *aff'd in part and rev'd in part*, 188 F.3d 1010 (8th Cir. 1999); *Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040 (D.S.D. 2007) (*on remand*) (*aff'd in part, vacated in part*, 577 F.3d 951 (8th Cir. 2009) (*opinion withdrawn*, 606 F.3d 985 (8th Cir. 2010), *amended and superseded*, 606 F.3d 994 (8th Cir. 2010).

its internal relations are, by contrast, so straightforward as to be uncontested. It accordingly asked Respondent to assume without deciding, for purposes of this case only, that the Tribal Community Center is not Indian country. No warrant exists for the Recommendation's suggestion that the Tribe should be forced to do otherwise.

7. The Policy Views Expressed in the Recommendation Are Properly Matters for Congress, Not the Courts.

The Recommendation concludes its jurisdictional discussion with the sweeping charge that the Tribal Court of Appeals' vindication of the Tribe's membership-based jurisdiction "is particularly disingenuous." Recommendation at 27. "[S]hould some wanderlust cause the tribe to migrate elsewhere," the Recommendation declares, and purchase land in far-flung towns, it is "implausibl[e]," "inconsistent," "counter-intuitive," and "inconceivable" that the Tribal members "attendant to these properties" would be subject to such jurisdiction. *Id.* at 27-28.

This language continues to betray a misunderstanding of the jurisdiction at issue here, which is tied not to purchases of land, but to whether a member's actions bear on the Tribe's internal relations. It also betrays a poor understanding of the Tribe's history. When the Secretary of the Interior illegally terminated the Tribe's federal recognition in 1872, the Tribe suffered the devastating effects of that non-recognition for more than a century, including the loss of its entire land base. *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att'y for the W. Dist. of Mich.*, 369 F.3d 960, 961 & n.2, 962, 967 (6th Cir. 2004) (discussing the political history of the Grand Traverse Band and noting that history to be "essentially parallel" with that of the Tribe). Since Congress reaffirmed Little River's federal recognition in 1994, 25 U.S.C. § 1300k-2, the Tribe has been engaged not in acts of wanderlust, but in the slow and painstaking effort to reassemble some small portion of its historic land base. The Community

Center exemplifies that effort – even by Petitioner's own account, it falls just outside of the Tribe's 1855 reservation boundary and well within its core historic territory.

The Recommendation's dim views of the Tribe's history, intentions, and sovereignty are thus subject to serious question. But whatever their ultimate merits, those views are not the law. Congress has never acted to divest the Tribe of its criminal jurisdiction over members for actions bearing on its internal relations, regardless of where those actions take place. And the Supreme Court has made clear that no implicit divestiture of that jurisdiction has occurred. Indeed, while the Recommendation deems it "inconceivable," under the reasoning of the *Duro* Court there is nothing remiss about the exercise of such jurisdiction over individuals who have reaped the benefits of tribal membership while accepting the responsibilities it entails. If this law is to change in response to the inclinations expressed in the Recommendation, that change must come about through Congress, rather than through the Recommendation's unilateral imposition of its views in derogation of fundamental principles of federal Indian law.

II. THE TRIBE'S EXERCISE OF CRIMINAL JURISDICTION OVER PETITIONER DID NOT VIOLATE DUE PROCESS.

The Recommendation concludes, without reference to a single case or other pertinent authority, that Petitioner's prosecution violated his due process rights because under Section 4.03 of the Tribe's Law and Order Ordinance, the Tribe's "jurisdiction did not reach petitioner" and he was not given fair notice "that the tribe considered him to be subject to the criminal jurisdiction of [the] tribe when he was on the grounds of the Community Center." Recommendation at 31. Again, this is serious error.

Petitioner's due process claim turns on whether tribal law "'made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" *United States v. Blaszak*, 349 F.3d 881, 886 (6th Cir. 2003) (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997)). Tribal law

plainly did so. Petitioner was convicted of the crime of sexual assault, which is defined at Section 19.01(c) of the Tribe's Law and Order Ordinance. Law App. 52-53. Petitioner made no claim (nor does the Recommendation) that this definition is unconstitutionally vague or otherwise failed to put him on notice as to its proscriptions. Petitioner's due process argument (and that of the Recommendation) is only that he did not have adequate notice of the Tribe's *jurisdiction* over his crime.

The Recommendation fails to establish that due process concerns are implicated by the Court's jurisdictional determination. *See, e.g.*, *Webb v. Mitchell*, 586 F.3d 383, 393 (6th Cir. 2009) (Due process protects criminal defendants against "judicial decisions that . . . retroactively convert[] an innocent act into a crime."); *United States v. Dupas*, 419 F.3d 916, 921 (9th Cir. 2005) (recognizing that due process limitations on retroactive judicial decision making apply only to "new interpretations of *substantive* criminal statutes" (emphasis in original)).

Even assuming due process is in issue, the Petitioner unquestionably had fair notice of the Tribe's asserted jurisdiction. First, nothing in the definition of the offense restricted its application to the Tribe's Indian country. Moreover, the Tribal Constitution – by which Petitioner consented to be bound when he sought tribal membership – affirmatively extends the jurisdiction of the Tribal Courts to "*all* civil and *criminal matters* . . . to which the Tribe *or an enrolled member of the Tribe is a party*." Tribal Const. art. VI, § 8(a)(1) (Law App. 10) (emphases added). The Constitution further mandates that "[t]he Tribe's jurisdiction over *its members* and territory *shall* be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law." *Id*. at art. I, §2 ("*Jurisdiction Distinguished From Territory*") (Law App. 1) (emphasis added). *See also, e.g.*, *Wheeler*, 435 U.S. at 322-23 ("It is undisputed" that tribes are empowered to "prescribe laws applicable to tribe members and

to enforce those laws by criminal sanctions.").

Petitioner likewise had full and fair notice in the Constitution that the Tribe's territorial jurisdiction extended to the Tribal Community Center, which was on Tribally-owned land:

> The territory of the Little River Band of Ottawa Indians shall encompass all lands which are now or hereinafter *owned by* or reserved for the Tribe.

Tribal Const. art. I, § 1 (Law App. 1) (emphasis added). The Tribe's Criminal Procedures Ordinance likewise provided:

> The Tribal Court shall have jurisdiction over any action by an Indian as defined by this Ordinance, that is made a criminal offense under applicable Tribal Code and that occurred within the territorial jurisdiction of the Tribe as defined in the Constitution.

Criminal Procedures Ordinance § 8.08 (Law App. 30).

In sum, the Tribe's Constitution, Law and Order Ordinance (defining the offense), and Criminal Procedures Ordinance clearly put Petitioner on full and fair notice that his conduct at the Community Center fell squarely under the Tribe's criminal jurisdiction.

The Recommendation nowhere mentions these provisions of tribal law in its due process analysis. *See* Recommendation at 30-31. The Recommendation instead refers only to Section 4.03 of the Tribe's Law and Order Ordinance. Law App. 33. That provision declared that the Tribe's criminal jurisdiction extends to all lands within the Tribe's Indian country. The Tribal Court of Appeals ruled that this provision was unconstitutionally narrow because it did not specifically provide for jurisdiction over tribal members, or on tribal fee lands, despite the Constitution's mandate that the Tribe's membership-based and territorial jurisdiction "shall be exercised to the fullest extent consistent with this Constitution." ER 9-10. This act of constitutional adjudication fell squarely within the Court's authority. *See* Tribal Const. art., VI, § 8 (a)(2) (Law App. 10) (Tribal courts are to review ordinances "to ensure they are consistent

with this Constitution and rule void those ordinances . . . deemed inconsistent with this Constitution.").[12]

According to the Recommendation, the Tribe violated Petitioner's due process rights because "prior to the decision by the Tribal Court of Appeals, [Section 4.03 of the Law and Order Ordinance] did not extend the territorial jurisdiction of the Tribe to the Community Center. The Tribal Court of Appeals did this by judicial fiat after the fact." Recommendation at 30-31. But the Court did not "extend" the Tribe's criminal jurisdiction to this case. As demonstrated above, that jurisdiction, in both its membership-based and territorial components, was firmly established long before Petitioner committed his crime.

Under the Court of Appeals' definitive interpretation, then, tribal law – with the singular exception of Section 4.03 – consistently and affirmatively provided for criminal jurisdiction over Petitioner and his conduct and provided full and fair notice to that effect. The Recommendation does not assert, nor could it, that Section 4.03 preempted the legal effect of the Constitution and the Criminal Procedures Ordinance to eliminate the Tribe's mandatory jurisdiction over Petitioner. Instead, Section 4.03 was simply in conflict with the otherwise consistent provisions of tribal law, including the paramount law of the Constitution, and the Court properly resolved that conflict when it held Section 4.03 to be unconstitutional.

That judicial act did not violate Petitioner's due process rights. Prior to its construction in Petitioner's case, the Tribal courts had never suggested that Section 4.03 limited the Tribe's jurisdictional reach to Indian country. *See Metrish v. Lancaster*, 133 S. Ct. 1781, 1788 (2013)

[12] The Court of Appeals' interpretation of the Tribal Constitution and tribal laws is not subject to review here. It is well-settled that where the highest court of a state or a tribe has interpreted its own constitution and laws, the federal courts must defer to that interpretation as definitive. *See LaPlante*, 480 U.S. at 16; *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978); *Conroy v. Frizzell*, 429 F. Supp. 918, 925 (D.S.D. 1977).

(due process protects criminal defendants against retroactive effect of a judicial interpretation of a statute "only where" such interpretation is "unexpected and indefensible *by reference to the law which had been expressed prior to the conduct in issue*" (emphasis added) (quotation marks omitted)); *O'Neal v. Bagley*, 728 F.3d 552, 559 (6th Cir. 2013) (rejecting a state prisoner's habeas corpus challenge to the foreseeability of his conviction because the state court "did not expand the scope of criminal liability beyond the contours of previous judicial interpretation").

Moreover, the Tribal Court of Appeals' ruling was foreseeable. The Tribe's Constitution, Law and Order Ordinance (defining the offense), and Criminal Procedures Ordinance made Petitioner's conduct an actionable criminal offense. Section 4.03's conflict with the Constitution was clear, as was the Court's constitutional duty to "rule void" such laws. Tribal Const. art. VI, § 8 (a)(2) (Law App. 10). Striking down Section 4.03 to resolve tension within the Tribe's constitutional and statutory scheme was a well-accepted exercise of the judicial function. The due process clause is not intended to place an "unworkable and unacceptable restraint on normal judicial processes[.]" *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001). Rather, due process protects criminal defendants "against novel developments in judicial doctrine. . . . [but that protection] applies only to unpredictable shifts in the law, *not to the resolution of uncertainty that marks any evolving legal system*." *United States v. Burnom*, 27 F.3d 283, 284-85 (7th Cir. 1994) (Easterbrook, J.) (emphasis added); *see also Lancaster*, 133 S. Ct. at 1788 (quoting *Rogers*, 532 U.S. at 461).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court reject the Report and Recommendation and deny the Petition.

Respectfully Submitted,

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