No. 14-1537

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORBERT J. KELSEY,

Petitioner-Appellee,

v.

MELISSA LOPEZ POPE, Chief Justice of the Little River Band of Ottawa Indians Tribal Court of Appeals; MARTHA KASE, Justice of the Little River Band of Ottawa Indians Tribal Court of Appeals; RONALD DOUGLAS; Special Visiting Justice of the Little River Band of Ottawa Indians Tribal Court of Appeals,

Respondents,

DANIEL T. BAILEY, Chief Judge of the Little River Band of Indians Tribal Court,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN, No. 1:09-cv-1015-GJQ

UNITED STATES' BRIEF AS *AMICUS CURIAE* IN SUPPORT OF TRIBAL COURT JURISDICTION

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STATEMENT OF INTEREST

The Little River Band of Ottawa Indians (the "Tribe") is a federally-recognized Indian tribe that has an ancestral homeland within Michigan's present-day Manistee and Mason Counties. 25 U.S.C. § 1300k(4); *see also* 79 Fed. Reg. 4748, 4750 (Jan. 29, 2014). The Tribe descends from and is a political successor to signatories of the 1836 Treaty of Washington and the 1855 Treaty of Detroit. *Id.* §§ 1300k(1), (4). In 1994, after finding that the United States, Michigan and local governments had continuous dealings with recognized political leaders of the Tribe since 1836, *id.* § 1300k(9), Congress enacted legislation that "reaffirmed" the "Federal recognition" of the Tribe. *Id.* § 1300k-2(a).

The legislation provided that "all laws and regulations of the United States of general applications to Indians or nations, tribes, or bands of Indians" shall be applicable to the Tribe, *id.*, and "reaffirmed" "all rights and privileges" of the Tribe and tribal members "which may have been abrogated or diminished" prior to the Act. *Id.* § 1300k-3(a). The legislation also provided procedures for confirming tribal enrollment and establishing a tribal constitution, *id.*, §§ 1300k-6, 1300k-7, and authorized the Secretary of the Interior to acquire land and take land into trust for a tribal reservation. *Id.* § 1300k-4(b), (c); *see also* 25 U.S.C. § 467. The Secretary subsequently approved a tribal constitution and took land into trust for a reservation near Manistee, Michigan. *See* RE 1, Ex. 5, PID# 48-65 (Tribe's

constitution). Among other things, the Tribe's constitution establishes a Tribal Court with powers to adjudicate all civil and criminal matters within the Tribe's jurisdiction. *Id.*, PID# 55-57.

The United States recognizes Indian tribes as "sovereign[s]," 25 U.S.C. §§ 476(h), 3601(3), with the right of self-government and "authority to establish their own . . . tribal justice systems" for the "adjudication of disputes affecting personal and property rights." 25 U.S.C. § 3601(4)-(6). The United States submits this *amicus* brief in accordance with the federal policy to support tribal courts and tribal self-government.

ISSUE PRESENTED

Whether Indian tribes retain inherent sovereign authority to try and punish tribal members for offenses outside of Indian country, when reasonably necessary to manage tribal land, protect tribal self-government, and/or control a tribe's internal relations.[1]

[1] In his habeas petition, Petitioner also raised a due-process claim, which the district court declined to address. *See infra*. This brief is limited to the jurisdictional question.

STATEMENT OF THE CASE

A. Tribal Court Proceedings

On July 5, 2005, Heidi Foster, an employee of the Tribe's medical clinic and member of a neighboring Indian tribe, was conducting a meeting at the Tribe's community center to assist tribal elders in obtaining Medicare coverage. RE 35, PID# 504 (report & recommendation). The community center was on land owned by the Tribe, adjacent to but not within the Tribe's reservation. RE 1, Ex. 3, PID# 37 (Tribal Court of Appeals opinion). During the meeting, Petitioner Norbert J. Kelsey – an enrolled member of the Tribe and then a member of the tribal council – accosted Foster, making inappropriate physical contact of a sexual nature. RE 35, PID# 504 (report & recommendation). In June 2007, the Tribe executed a complaint and warrant charging Petitioner, under a tribal ordinance, with misdemeanor sexual assault. *Id.* Following a two-day bench trial, the Tribal Court found Petitioner guilty and imposed a sentence of probation. *Id.*, PID# 505.

In a post-conviction motion, Petitioner challenged the Tribal Court's subject-matter jurisdiction, alleging that the Tribe lacked authority to apply its Law and Order ordinance to offenses occurring outside the Tribe's reservation. *Id.*, PID# 506. The dispute ultimately reached the Tribal Court of Appeals (the Tribe's highest court), which issued a June 2009 decision affirming the Tribal Court's jurisdiction. RE 1, Ex. 3, PID# 36-42.

The Tribal Court of Appeals took "judicial notice" of the "tribal nature" of "all . . . activities" occurring at the community center, which was used as a "community gathering point to host varied and numerous tribal meetings, to serve community meals and to provide tribal office space for the conduct of [tribal] business." *Id.*, PID# 38. In addition, the court observed that the offense involved

> 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 . . . [and] a Tribal Court finding that the Defendant exercised political influence affecting the victim and the Tribe's welfare.

Id., PID# 39. Based on these circumstances, the court determined that the Tribe had "sovereign authority to hold [Petitioner] accountable [for] his violations of Tribal standards of behavior." *Id.*

The Tribal Court of Appeals then addressed whether "the Tribe itself [had] imposed a limitation on the exercise of its inherent authority" through tribal positive law. *Id.* The court acknowledged that the Tribe's Law and Order ordinance described the Tribe's territorial jurisdiction as including reservation and trust lands or other lands constituting "Indian country" per 18 U.S.C. § 1151, which did not include the community center. *Id.*, PID# 40-41. The court noted, however, that the Tribe's Criminal Procedures Ordinance granted the Tribal Court jurisdiction over any Tribal criminal offense occurring "within the territorial jurisdiction of the Tribe as defined in the [Tribal] Constitution," and that the

Tribe's constitution defines the Tribe's "territory" as including "*all lands . . . owned by or reserved for the Tribe*." *Id.*, PID# 39, 41 (emphasis in original). The court also noted that the Constitution mandates that the "Tribe's jurisdiction over its members and its territory shall be exercised to the fullest extent consistent with [the Tribal] Constitution, the sovereign powers of the Tribe, and federal law." *Id.*, PID# 40-41; *see also* RE 1, Ex. 5, PID# 48 (Tribal constitution). Construing these provisions as a whole, the Tribal Court of Appeals determined that the Tribal Court had jurisdiction over Petitioner's offense. RE 1, Ex. 3, PID# 41.

B. District Court Proceedings

Petitioner filed a petition for a writ of habeas corpus in November 2009.[2] RE 1, PID# 1-153 (petition & attachments). Petitioner alleged (1) that the Tribe lacked jurisdiction to try and convict him for an offense that occurred outside the Tribe's reservation, and (2) that the Tribal Court violated his right to due process under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302(a)(8),[3] by allegedly retroactively expanding the scope of tribal criminal jurisdiction. RE 1, PID# 18-26.

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[2] The Indian Civil Rights Act grants "[t]he privilege of the writ of habeas corpus . . . in a court of the United States" to any person seeking "to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303.

[3] The Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. *See Talton v. Mayes*, 163 U.S. 376 (1896); *United States v. Doherty*, 126 F.3d 769, 777 (6th Cir. 1997).

The district court referred the Petition to a magistrate judge, who issued a report and recommendation on November 7, 2013. RE 35, PID# 532-33 (report and recommendation). While acknowledging that Indian tribes retain all vestiges of sovereignty not withdrawn by treaty or statute or "by implication as a necessary result of their dependent status," *id.*, PID# 513-14 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)), the magistrate judge concluded that tribes have impliedly surrendered all power to try and punish off-reservation offenses as a necessary result of their dependent status. *Id.*, PID# 529-30. Contrasting "two centuries" of enactments providing for federal and/or State criminal jurisdiction within Indian country with the absence of legislation specifically addressing tribal criminal jurisdiction outside of Indian country, the magistrate judge inferred that Congress does not believe (and thus must not intend) the latter jurisdiction to exist. *Id.*, PID# 514-19, 528-30.

The magistrate judge also faulted the Tribal Court of Appeals for stating that it could not find "any federal limitation over the exercise of tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe." *Id.*, PID# 508. The magistrate judge rejected the "view that the Tribe's criminal jurisdiction over its members is co-extensive with any real estate the Tribe may own or decide to purchase on the open market outside Indian country," *id.*, PID# 528, finding it "implausib[le]" for tribal criminal jurisdiction to be measured

not by "the definition of Indian country" but instead by wherever "wanderlust" might cause a tribe to purchase land. *Id.*, PID# 528-29.

Finally, the magistrate judge determined that, even if the Tribe had inherent jurisdiction over Petitioner's offense, the prosecution violated Petitioner's due-process rights. *Id.*, PID# 532. The magistrate judge reasoned that the Tribal Court of Appeals' interpretation of the Tribe's Law and Order ordinance constituted an *ex post facto* expansion of tribal jurisdiction, without advance "legal[] . . . notice" to Petitioner. *Id.*

The district court adopted the magistrate's report and recommendation in part. RE 41, PID# 580-585 (opinion) (Mar. 31, 2014). Like the magistrate judge, the district court contrasted the "comprehensive legislative framework for concurrent criminal jurisdiction in Indian country" with the absence of "a single statute discussing concurrent jurisdiction outside Indian country," to infer that "Congress believes that tribes do not have jurisdiction outside their territory." *Id.*, PID# 584. While acknowledging that such belief is "not conclusive," *id.*, the district court found the magistrate judge's reasoning that Indian tribes lack jurisdiction over off-reservation conduct to be persuasive, and thus granted habeas relief. *Id.*, PID# 582-83. The district court declined to address Petitioner's due-process claim. *Id.*, PID# 584.

ARGUMENT

"For nearly two centuries," federal law has "recognized Indian tribes as 'distinct, independent political communities,'" *Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. 316, 327 (2008) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)), "qualified to exercise many of the powers and prerogatives of self-government." *Id.* "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). Because tribes operate within and subject to the sovereignty of the United States, tribal sovereignty "is of a unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Nonetheless, tribes retain all attributes of sovereignty that have not been "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.*; *United States v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997).

One of the most significant sovereign powers retained by Indian tribes is the "power . . . to prosecute members for tribal offenses." *Wheeler*, 435 U.S. at 326.

No court has found this power to be limited by a strict principle of territoriality.[4] By holding that tribes have been impliedly divested of their inherent sovereign authority to punish members for off-reservation violations of tribal criminal law, the district court imposed a new and unprecedented limitation on tribal sovereignty. This Court should reject the district court's view for three reasons. First, the exercise of sovereign powers to punish extraterritorial member conduct that affects internal affairs, tribal government, or tribal property interests is consistent with the historic practice of tribes and established principles governing extraterritorial jurisdiction. Second, there is no basis in federal statutes, treaties, or case precedent to find an implied divestiture of this inherent power. Third, contrary to the district court's apparent reasoning, recognizing concurrent tribal criminal jurisdiction over off-reservation member conduct that affects internal tribal affairs, tribal government, or tribal property interests would not leave tribes with unlimited jurisdiction over extraterritorial conduct, nor would it conflict with state territorial jurisdiction.

[4] In *Fife v. Moore*, 808 F. Supp. 2d 1310 (E.D. Okla. 2011), a federal district court preliminarily enjoined a tribal prosecution involving an off-reservation theft, but did not specifically address extraterritorial jurisdiction. *Id.* at 1314 & n.6. In a later unpublished opinion, the court acknowledged that Indian tribes "may well" possess extraterritorial criminal jurisdiction. *Fife v. Moore*, slip op., No. 11-cv-113 (E.D. Okla. Sept. 8, 2011); RE 32-2, PID# 492-93.

A. The Power to Try and Punish Members for Extraterritorial Offenses Against a Tribe Is an Attribute of Tribal Sovereignty.

There can be no dispute that Indian tribes historically exercised jurisdiction to punish members for offenses against tribal order without regard to whether the conduct occurred within recognized tribal territory. Many tribes were nomadic. *See Solem v. Bartlett*, 465 U.S. 463, 466 (1984). And even where tribes had relatively fixed territories, there is no reason to believe that they treated their territorial borders as limitations on tribal power to punish their own members. As explained in a 1939 opinion of the Solicitor of Department of the Interior, "we cannot read into the laws and customs of the Indian tribes a principle of territoriality of jurisdiction with which they were totally unfamiliar, and which no country has adopted as an absolute rule." Solicitor's Opinion, April 27, 1939, 1 Op. Sol. On Indian Affairs 891, 896 (U.S.D.I. 1979); *Brief of Respondent-Appellant Chief Judge Daniel T. Bailey* ("*Appellant's Brief*"), App. B at 9-10.

Moreover, early treaties and enactments by Congress presumed tribal power to punish member conduct committed beyond tribal lands. For example, in 1834, Congress enacted the Depredations Act to require any tribe "in amity" with the United States to "make satisfaction," upon demand by the United States, for property offenses committed by tribal members against non-Indians either within or outside Indian country. *See* 25 U.S.C. § 229 (codifying R.S. § 2156) (from Acts June 30, 1834, c. 161, § 17, 4 Stat. 731; Feb. 28, 1859, c. 66, § 8, 11 Stat. 401).

Although this enactment was not a criminal statute, Congress's determination to hold tribes responsible for the wrongs of their members, notwithstanding the conduct's location, strongly implies Congress's understanding that tribes could and would punish members for such conduct. For these reasons, the Solicitor determined, in 1939, that it "cannot be challenged" that "the original sovereignty of an Indian tribe extended to the punishment of . . . member[s] . . . for . . . misconduct committed outside the territory of the tribe." Solicitor's Opinion, April 27, 1939, 1 Op. Sol. On Indian Affairs 891, 896 (U.S.D.I. 1979); *Appellant's Brief*, App. B at 9.

In addition, while international law has long recognized territorial borders to be a defining aspect of nation-state jurisdiction, territorial boundaries have never been absolute barriers to criminal prosecution. To the contrary, "[c]ustomary international law recognizes five bases on which a [nation] State may exercise criminal jurisdiction over a citizen or non-citizen for acts committed outside of the prosecuting State." *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003). These "five well-recognized bases of criminal jurisdiction" are:

> (1) the "objective territorial principle," which provides for jurisdiction over conduct committed outside a [nation's] borders that has, or is intended to have, a substantial effect within its territory; (2) the "nationality principle," which provides for jurisdiction over extraterritorial acts committed by a [nation's] own citizen; (3) the "protective principle," which provides for jurisdiction over acts committed outside the [nation] that harm the [nation's] interests; (4) the "passive personality principle," which provides for jurisdiction over acts that harm a [nation's] citizens abroad; and (5) the

> "universality principle," which provides for jurisdiction over extraterritorial acts by a citizen or non-citizen that are so heinous as to be universally condemned by all civilized nations.

Id. (citing *In re Marc Rich & Co.*, 707 F.2d 663, 666 (2d Cir.1983)); *see also United States v. Lawrence*, 727 F.3d 386, 394 (5th Cir. 2013); Restatement (Third) of Foreign Relations, § 402 (1986).[5]

Although international law does not automatically translate to the circumstances of Indian tribes, federal law has long treated tribes as akin to foreign nations, as a starting point for jurisdictional analysis. *See Worcester*, 31 U.S. at 557; *see also Doherty*, 126 F.3d at 777 ("tribes exercise powers of self-government

[5] Echoing, in part, the law of foreign relations, courts also have long recognized the power of each U.S. state to prosecute out-of-state offenses that have detrimental effects within the state. Over a century ago, Justice Holmes declared that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). States have relied on this "effects" principle in a variety of contexts. *See*, *e.g.*, *Jaynes v. Commonwealth*, 666 S.E.2d 303, 306-08 (Va. 2008) (Virginia prosecution of out-of-state conduct causing emails with false routing and transmission information to be sent through servers in Virginia); *State v. Jack*, 125 P.3d 311, 318-22 (Alaska 2005) (Alaska prosecution of sexual assault on an Alaska ferry while in Canadian territorial waters); *In re Vasquez*, 705 N.E. 2d 606, 610-12 (Mass. 1999) (Oregon prosecution of Massachusetts resident for criminal nonsupport of child residing in Oregon). In addition, the Model Penal Code recognizes a state's authority to prescribe penalties for conduct outside its borders whenever the conduct "bears a reasonable relation to a legitimate interest of [the] State and the actor knows or should know that his conduct is likely to affect that interest." Uniform Laws Annotated – Model Penal Code § 1.03(1)(f).

. . . pursuant to their status as sovereigns under principles of international law").[6] Because criminal jurisdiction over extraterritorial conduct bearing on legitimate sovereign interests has long been held to be an attribute of sovereignty, and because "tribal . . . punish[ment] [of] . . . members for depredations committed against [non-Indians] outside of the Indian country is a matter of historical record," Solicitor's Opinion, April 27, 1939, 1 Op. Sol. On Indian Affairs 891, 896 (U.S.D.I. 1979); *Appellant's Brief*, App. B at 10, such jurisdiction is an inherent power that tribes "retain" under federal law, unless there has been an express divestiture by treaty or statute, or an implied divestiture as a "necessary result" of a tribe's dependent status. *Wheeler*, 435 U.S. at 323; *Doherty*, 126 F.3d at 778.

B. Tribes Did Not Forfeit, as a Necessary Result of Their Dependent Status, the Power to Punish Tribal Members for Off-Reservation Offenses Against Tribes.

The district court did not identify any treaty or statute that divests the Little River Band of jurisdiction to prescribe standards of conduct for off-reservation member activities that implicate internal tribal relations or to punish members for criminal violations of such standards. Instead, the district court adopted the magistrate judge's conclusion that tribes impliedly lost such power as a "necessary result" of their dependent status. RE 35, PID# 530 (report and recommendation);

[6]While treating Indian tribes as akin to nations, the Supreme Court has held that they are not "foreign States" for purposes of Article III of the U.S. Constitution, given their domestic dependent status. *Cherokee Nation*, 30 U.S. at 11-15.

see also RE 41, PID# 585 (opinion adopting report and recommendation). In so doing, the district court misapplied Supreme Court precedent. The Supreme Court has repeatedly cautioned that courts must not "lightly assume that Congress . . . intends to undermine Indian self-government." *Bay Mills Indian Community*, 134 S. Ct. at 2032. As discussed *infra*, although the Supreme Court has, in a series of cases, implied the absence of inherent tribal jurisdiction over certain conduct by *nonmembers*, the rationale of those opinions does not apply to a tribe's jurisdiction to enforce rules for its own members in relation to its own internal affairs, governmental operations, or property interests.

1. The Supreme Court Has Found Implied Divestiture of Sovereign Powers Only As to Jurisdiction Over Nonmembers.

The Supreme Court first articulated the principle of implied divestiture in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), a case involving tribal criminal jurisdiction over non-Indians. The Court surveyed the history of treaties, statutes, and judicial decisions regarding crimes in Indian country and found a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians." *Id.* at 206. Although Congress "never expressly forbade Indian tribes to impose criminal penalties on non-Indians," the Court found that Congress "consistently believed" such a prohibition to be the "necessary result of its repeated legislative actions." *Id.* at 204. The Court also reasoned that it would be inconsistent with the

"dependent status" of tribes and the United States' paramount interest in protecting its citizens "from unwarranted intrusions on their personal liberty," to find that "Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to [tribal] customs and procedure." *Id.* at 208-211; *see also Duro v. Reina*, 495 U.S. 676, 688 (1990) (similar ruling as to non-member Indians).[7]

The Supreme Court invoked similar reasoning to find an implied divestiture of some tribal civil jurisdiction over non-Indians. Specifically, the Court determined that, due to their dependent status, Indian tribes "do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank*, 554 U.S. at 328. The Court declared, however, that Indian tribes retain (1) the power to exclude nonmembers and regulate their use of tribal lands, *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 144-45 (1982); *Montana v. United States*, 450 U.S. 544, 557 (1981); (2) the power to tax, license, or otherwise regulate the activities of nonmembers who "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *Montana*, 450 U.S. at 565; and (3) the power to regulate nonmember conduct

[7] In response to *Duro*, Congress enacted legislation "affirm[ing]" the inherent authority of tribes to exercise criminal jurisdiction over non-member Indians. *See* 25 U.S.C. § 1301(2). The Supreme Court subsequently acknowledged Congress's authority to "lift the restriction" on tribal jurisdiction recognized in *Duro*. *United States v. Lara*, 541 U.S. 193, 200-207 (2004).

within a reservation that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566; *see also Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808-16 (9th Cir. 2011). In articulating these limits, the Supreme Court reasoned that "tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564.

These cases stand for the proposition that tribes cannot, consistent with their dependent status, exercise full territorial jurisdiction over non-Indians akin to that of states or nations. *See Duro*, 495 U.S. at 684. That is, tribes cannot apply tribal law to the activities of non-Indians, simply because such conduct happens to occur within Indian country. *Id.*; *see also Plains Commerce Bank*, 554 U.S. at 327. The Supreme Court, however, has never implied a similar limitation on a tribe's inherent authority to prescribe and enforce standards of conduct for its own members.

Nor is there any basis for finding that a tribe's authority over its members is strictly limited to a tribe's territory. Although the Supreme Court has looked to the line between "internal" and "external" affairs when explaining the limits of retained tribal sovereignty, the Court has not employed these terms in the territorial

sense. *See Montana*, 450 U.S. at 563-64; *Wheeler*, 435 U.S. at 326 (explaining *Oliphant*). Indeed, the Court deemed the prosecution of nonmembers for conduct *inside* a Tribe's territory to be part of the tribe's "*external* relations." *Wheeler*, 435 U.S. at 326 (emphasis added). The Court explained that Indian tribes are without the power to try and punish nonmembers for conduct on Indian reservations, because such prosecutions implicate "external relations" which are beyond the tribes' "freedom independently to determine" as "dependent" sovereigns. *Id.* In the same manner, when emphasizing tribal retention of the "powers of *self*-government," including the "power to prescribe and enforce *internal* criminal laws," the Supreme Court referred to laws governing the internal affairs of tribes, not specifically to conduct geographically within tribal territorial boundaries. *See id.* (emphasis added).

Moreover, member conduct *outside* a tribe's reservation plainly can affect tribal *internal* affairs. For example, when a tribe authorizes absentee voting in tribal elections by members residing outside the tribe's reservation, the voting is "internal" to the tribe, notwithstanding its off-reservation location. Likewise, a tribal prosecution of a member for off-reservation election fraud would be, in the words of the Supreme Court, the enforcement of an "internal criminal law[]." *See id.*; *cf. United States v. Bowman*, 260 U.S. 94, 98 (1922) (noting government's "right . . . to defend itself against obstruction or fraud wherever perpetrated,

especially if committed by its own citizens"). The same is true, as a general rule, for any tribal prosecution of a member for off-reservation conduct that impacts retained sovereign interests. When reasonably necessary for "controlling internal relations," "protecting tribal self-government," or "managing tribal land," the exercise of such jurisdiction cannot be deemed inconsistent with a tribe's dependent status. *Plains Commerce*, 554 U.S. at 334-35 (quoting *Montana*, 450 U.S. at 564; *Worcester*, 31 U.S. at 561) (internal quotation marks omitted).

2. An Intent to Preclude Tribal Jurisdiction Over Extraterritorial Conduct of Members Cannot Be Inferred from Federal Statutes.

Echoing *Oliphant*, the district court based its no-jurisdiction ruling on a finding that Congress "believes that tribes do not have jurisdiction [over member conduct] outside their territory." RE 41, PID# 584 (opinion) (citing *Oliphant*, 435 U.S. at 203). As just explained, however, *Oliphant* addressed an entirely different question: whether "Congress . . . believed" tribes to have power to "impose criminal penalties on *non-Indians*." *Oliphant*, 435 U.S. at 204 (emphasis added). Nothing in *Oliphant* or the statutes it cited supports the district court's view that Congress believed tribes to lack jurisdiction to punish their own members for off-reservation offenses against tribal sovereign interests.

Congress has addressed criminal jurisdiction in Indian country through a series of statutes dating back to the 18th century. In the Trade and Intercourse Act of 1790, Congress established federal jurisdiction to enforce state criminal laws

against non-Indians who committed offenses against Indians in Indian country. *See Oliphant*, 435 U.S. at 201 (citing 1 Stat. 137). In 1817, Congress extended federal enclave law to offenses in Indian country, with the exception of crimes by Indians against Indians. *See Oliphant*, 435 U.S. at 201 (citing 3 Stat. 383, codified as amended, 18 U.S.C. § 1152). In 1885, Congress for the first time established federal jurisdiction to prosecute Indians for crimes against other Indians (as well as other persons) in Indian country, but limited such prosecutions to enumerated major crimes. *See Oliphant*, 435 U.S. at 203 (citing Act of Mar. 3, 1885, c. 341, § 9, codified as amended, 18 U.S.C. § 1153). In 1953, Congress enacted "Public Law 280," to grant specified states (not including Michigan) jurisdiction to prosecute offenses "by or against Indians" within specified Indian country within those states. Act of Aug. 15, 1953, c. 505, 67 Stat. 588; 18 U.S.C. § 1162.

The magistrate judge found it "inconceivable" that Congress would, in this manner, "closely" "regulate" tribal criminal jurisdiction within but not outside Indian country, and thus inferred that the latter jurisdiction must not exist. RE 35, PID# 529. The district court concurred. RE 41, PID# 584. But this analysis misconstrues the context and purpose of the Indian country statutes. Early in the nation's history, federal law conceived of Indian country as foreign territory where state criminal codes would not presumptively operate, including as to crimes by non-Indians. *See*, *e.g.*, *Worcester*, 31 U.S. at 561 ("The Cherokee nation, then, is a

distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . "). At the same time, however, Congress believed tribes to be without authority to try and punish non-Indians. *Oliphant*, 435 U.S. at 197-201. In addition, many Indian tribes historically lacked formal criminal codes or institutions for prosecuting Indians. *See id.*; *Doherty*, 126 F.3d at 780.

So Congress established federal and/or state criminal jurisdiction within Indian country to provide criminal justice where tribal powers were presumed absent, or where tribal institutions were perceived to be inadequate. *See Keeble v. United States*, 412 U.S. 205, 209-12 (1973) (history of Major Crimes Act); *Bryan v. Itasca County*, 426 U.S. 373, 379-380 (1976) (history of Public Law 280). In its early enactments, Congress concerned itself only with offenses by or against non-Indians, which implicated relations between tribes and non-Indian frontier inhabitants. *See Oliphant*, 435 U.S. at 201; *see also* 18 U.S.C. § 1152 (excluding offenses committed by one Indian against another). When later establishing jurisdiction over offenses by Indians against Indians within Indian country, Congress did not act to restrict tribal powers, but instead to enable federal enforcement. *See Keeble*, 412 U.S. at 209-12. Congress did not, at the same time, address jurisdiction over Indian offenses outside Indian country because, as the Supreme Court stated in a similar context, "the problem Congress set out to

address . . . arose in Indian lands alone." *See Bay Mills*, 134 S. Ct. at 2034. Offenses outside Indian country already were subject to prosecution under the laws of the state or federal territory where the offense occurred. *See Hagen v. Utah*, 510 U.S. 399, 401-02 (1994).

In contrast to the Indian country statutes, which do not directly regulate tribal jurisdiction, Congress later enacted a statute that does directly regulate tribal jurisdiction. Specifically, the Indian Civil Rights Act of 1968 (as amended) limits, *inter alia*, the sentences that tribes can impose on any defendant,[8] 25 U.S.C. § 1302(a)(7), and requires tribes to accord all persons within their jurisdiction enumerated rights akin to the federal Bill of Rights. *Id.* § 1302(a); *see also Doherty*, 126 F.3d at 778. These restrictions, however, are not limited to member offenses within Indian country. Rather, they apply to any exercise of a tribe's "powers of self-government," which are not limited to member activities within tribal reservations. 25 U.S.C. §§ 1301, 1302.

Thus, there is no basis for the magistrate judge's suggestion that Congress closely regulated tribal jurisdiction over offenses within but not outside Indian country. RE 35, PID# 529. When closely regulating tribal jurisdiction, Congress has made no such distinction. 25 U.S.C. § 1302. Further, because Indian tribes

[8] The maximum prison term for offenses that would be felonies under federal or state law is three years for any offense and nine years for any proceeding. 25 U.S.C. § 1302(a)(7).

historically exercised authority to punish their own members for offenses against tribal sovereign interests wherever the offenses occurred, and because such extraterritorial jurisdiction is a recognized attribute of sovereignty (*see* pp. 10-13, *supra*), the proper inference from Congress's silence is that Congress did not intend to divest Indian tribes of this inherent authority. *See Bay Mills*, 134 S. Ct. at 2032; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

3. Tribal Extraterritorial Jurisdiction Is Not Limited To Treaty Rights.

In finding tribes to be without criminal jurisdiction over member conduct outside tribal reservations, the magistrate judge also misinterpreted the Ninth Circuit's ruling in *Settler v. Lameer*, 507 F.2d 231, 238 (9th Cir. 1974). *See* RE 35, PID# 524. *Settler* involved the Yakima Tribe's treaty right to continued use of traditional fishing grounds outside the Yakima Reservation. 507 F.2d at 236. The Ninth Circuit held that the tribe retained authority to regulate member use of the fishing grounds and to try and punish members for violating such regulations. *Id.* at 236-38. According to the magistrate judge, *Settler* stands for the proposition that Indian tribes may "enforce regulations outside of Indian country," but only "where specific treaty rights permit such enforcement." RE 35, PID# 524.

This is not what *Settler* holds.[9] Although the treaty in *Settler* reserved Yakima tribal rights to take fish at "usual and accustomed places," the treaty recognized such rights to be "in common with the Citizens of [Washington] territory" and did not expressly acknowledge tribal power to regulate member fishing. *Id.* at 236. The Ninth Circuit held that the tribe possessed such authority because it was part of the tribe's inherent sovereignty, because the tribe had not expressly ceded such authority by treaty, and because a divestiture of this inherent authority was not to be implied. *Id.* at 237. Under the same principles, this Court must not lightly imply a divestiture of tribal jurisdiction to try and punish members for other off-reservation offenses against tribal sovereign interests. *See Bay Mills*, 134 S. Ct. at 2031.

C. The Tribe Exercised Jurisdiction over Petitioner's Conduct in Accordance with Limitations on Extraterritorial Jurisdiction.

As noted (p. 6, *supra*), the magistrate judge also faulted the Tribe for asserting "inherent power to exercise criminal authority on *any* real estate it owns," a view the magistrate judge deemed unbounded and "implausib[le]." RE 35, PID# 520, 529-30. This critique, however, misconceived the issue before the court. To be sure, the Tribe's constitution defines the Tribe's territory to include all real

[9] In *Settler*, the Ninth Circuit did recognize a different limitation: that the Yakima Tribe's inherent authority to *arrest* tribal members off reservation is "limited strictly to violations of tribal fishing regulations" "committed in the presence of the arresting officer." *Id.* at 240. Extraterritorial arrest authority is distinct from the power to criminalize extraterritorial conduct. *See infra*, p. 28.

estate owned by the Tribe. *Id.* at PID# 509. And it was on this basis, in part, that the Tribal Court of Appeals determined that Petitioner's prosecution was permitted under *tribal law*. *Id.* PID# 509-10. But as the Tribal Court of Appeals recognized, the tribal law issue (whether the Tribe itself "ha[d] imposed a limitation on the exercise of its inherent authority"), *id.*, is different from the federal jurisdictional issue (whether the Tribe retains sovereign power to try and punish Petitioner for his off-reservation offense). When reviewing a petition for a writ of habeas corpus, a district court does not sit in review of a tribe's determination of tribal law. *Cf. Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (same determination as to state court's application of state law). Rather, the district court's review is limited to "whether [the tribal] conviction violated the Constitution, laws, or treaties of the United States." *Id.*

As to the latter question, the Tribal Court of Appeals did not stop with the observation that it had found "no federal limitation over the exercise of tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe." *Id.*, PID# 508. Rather, the court emphasized the "tribal nature" of the activities conducted at the Tribe's community center and the "very strong" interests of the Tribe in regulating the conduct in this case. *Id.*, PID# 508-09. The district court erred by failing to account for these case-specific factors.

As all parties acknowledged, the Tribe's community center was not on land taken into trust by the Secretary for the Tribe's reservation. For this reason, the Tribe could not, consistent with federal law governing the establishment of the reservation (25 U.S.C. § 1300k-4(b), (c)), exercise *territorial* jurisdiction over the offense. Rather, to comport with federal law, the Tribe's prosecution needed to adhere to principles of *extraterritorial* jurisdiction. *See generally* pp. 11-13, *supra*; *see also* Restatement (Third) of Foreign Relations, § 402. These requirements are in addition to limitations on criminal jurisdiction inherent to tribes' "dependent" sovereignty, *see Oliphant*, 435 U.S. at 211 (no jurisdiction over non-Indians), and limitations imposed by statute. *See, e.g.*, 25 U.S.C. § 1302 (ICRA).

Given the particular circumstances of this case, however, the Tribe's exercise of criminal jurisdiction over Petitioner's conduct was well within the principles governing extraterritorial jurisdiction. Under these principles, a sovereign may prescribe and enforce laws with respect to the "activities, interests, status, or relations of its nationals outside as well as within its territory," Restatement (Third) of Foreign Relations § 402(2) ("nationality" principle), as well as extraterritorial conduct "directed against" sovereign interests, *id.* § 402(3) ("protective" principle), unless circumstances render the exercise of jurisdiction "unreasonable." *Id.* § 403. Factors relevant to the reasonableness of an exercise of jurisdiction over conduct outside a sovereign's borders include the connections to

the sovereign, the strength of the sovereign's interests, and any potentially conflicting interests of the state where the conduct occurs. *Id.* § 403(2).

The prosecution here involved a reasonable exercise of jurisdiction under both the "nationality" and "protective" principles. Petitioner was an elected tribal official, accused of sexually assaulting a tribal employee, while she was conducting a tribal meeting of tribal elders, on tribal fee land that was dedicated for use for tribal community purposes. Thus, although the conduct occurred outside the Tribe's reservation, the prosecution implicated significant sovereign interests, including the Tribe's sovereign powers to prescribe and enforce standards of conduct: (1) for tribal leaders in the exercise of their official duties; (2) for tribal members interacting with tribal employees conducting tribal business; and (3) for tribal members utilizing tribal property dedicated for community use. Each is a legitimate exercise of sovereign power, fundamental to the exercise of self-government.

Since the Tribe had legitimate grounds, relating to its retained sovereign powers, for prescribing and enforcing tribal law with respect to Petitioner's conduct, there was no reason for the magistrate judge to speculate whether the Tribe could apply its Law and Order ordinance more broadly, *i.e.*, to any member offense on any tribal property however used. *See* RE 35, PID# 528-30. This is so because, with the exception of prosecutions implicating First Amendment rights

and similar cases, a habeas petitioner may challenge only the lawfulness of his or her detention, not whether a law or ordinance is facially invalid. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 154-56 (1979). Here, Petitioner was not entitled to habeas relief simply because tribal law defining the Tribe's sovereign territory (as including off-reservation fee property) is in tension with federal law limiting the Tribe's territorial jurisdiction to the Tribe's reservation. Rather, to obtain relief, Petitioner needed to show that the Tribe's exercise of jurisdiction over his conduct went beyond the Tribe's inherent authority to govern its members and internal affairs, an authority that is not subject to strict territorial limits. *See* 10-13, *supra.*

Further, because the question here is whether the Tribe acted within the scope of its retained *extraterritorial* jurisdiction – and not, as the magistrate judge assumed, whether the Tribe could expand its *territorial* jurisdiction merely by purchasing off-reservation property – there is no basis for the magistrate judge's concern that acknowledging tribal jurisdiction over Petitioner's offense would somehow displace Michigan's "fully functioning criminal justice system." RE 35, PID# 530, n.13. The Tribe's extraterritorial jurisdiction is concurrent with Michigan's territorial jurisdiction and no different in kind from another state's exercise of jurisdiction over conduct in Michigan under the "effects" principle. *See, e.g.*, *Strassheim*, 221 U.S. at 285 (affirming Michigan's authority to prosecute

an offense against Michigan that was perpetrated in Illinois); *see also* p.12, n.5, *supra*.

Affirming the Tribe's jurisdiction to try and punish members for off-reservation offenses affecting tribal sovereign interests would not diminish Michigan's authority to enforce its own criminal laws against Petitioner's conduct. *Cf. Wheeler*, 435 U.S. at 329-330 (double jeopardy clause does not bar prosecution by separate sovereigns). Nor would it imply that the Tribe has authority to make off-reservation arrests. *See* Restatement (Third) of Foreign Relations, § 431 (treating arrest authority separately). Because the use of force within another sovereign's territory implicates public safety within the host territory and the host sovereign's law-and-order functions, extraterritorial arrests generally may be made only with the host sovereign's consent. *Id.*; *cf. Settler*, 507 F.2d at 240 (finding tribal authority to "conduct . . . inspections, arrests, and seizures" to enforce tribal regulations governing member fishing at traditional fishing grounds, but subject to "reasonable regulation" by State of Washington). The issue here is simply whether the Tribe properly exercised its inherent authority to try and punish Petitioner for his off-reservation conduct after "succeeding" in getting him "within its

[territorial] jurisdiction." *Strassheim*, 221 U.S. at 285. The district court identified no precedent or legal principle prohibiting the Tribe from so doing.[10]

[10] The district court did not adopt the magistrate judge's determination that the prosecution violated Petitioner's due-process rights under ICRA. 25 U.S.C. § 1302(a)(8). *See* RE 41, PID# 584. In his recommendation, the magistrate judge reasoned that the Tribal Court of Appeals "retroactively expand[ed]" the jurisdictional reach of the Tribe's Law and Order ordinance. But there was no retroactive *expansion* of jurisdiction if, at the time of the offense, tribal law as a whole gave Petitioner fair warning that his conduct would be subject to tribal prosecution. *See generally Metrish v. Lancaster*, 133 S. Ct. 1781, 1788 (2013) ("judicial alteration of a common law doctrine of criminal law . . . violates the principle of fair warning, and hence must not be given retroactive effect, only where [the alteration] is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue") (internal quotation marks and citations omitted). Neither the magistrate judge nor the district court addressed this issue. *See* RE 35, PID# 531-532; RE 41, PID# 584.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the district court and hold that tribes retain inherent sovereign authority to try and punish tribal members for offenses outside of Indian country when reasonably necessary to manage tribal land, protect tribal self-government, or control the Tribe's internal relations.

Respectfully Submitted,

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November 20, 2014
D.J. No. 90-12-14245

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this amicus brief conforms to the typeface, type style, and type volume requirements of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(5), (a)(6) and (a)(7)(B) because:

1. This brief has been prepared using 14 point, proportionally spaced, serif typeface, *i.e.*, Microsoft Office Word, Times New Roman, 14 point; and
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November 20, 2014 *s/ John L. Smeltzer*

Date John L. Smeltzer

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Section 10.1 of this Sixth Circuit Guide to Electronic Filing, that the foregoing ***United States' Brief as Amicus Curiae*** has been served, on this *20th* day of *November, 2014*, upon the following counsel of record, *via* this Court's Electronic Case Filing ("ECF") system:

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