No. 16-5120

In the Supreme Court of the United States

Norbert J. Kelsey,

Petitioner,

v.

Daniel T. Bailey, Chief Judge of the
Little River Band of Ottawa Indians Tribal Court,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Shayne Machen
Rebecca Liebing
LITTLE RIVER BAND OF OTTAWA INDIANS
2608 Government Center Drive
Manistee, Michigan 49660
(231) 398-6821
ShayneMachen@lrboi-nsn.gov

Riyaz A. Kanji
Counsel of Record
David A. Giampetroni
Lucy W. Braun
Philip H. Tinker
KANJI & KATZEN, PLLC
303 Detroit Street
Suite 400
Ann Arbor, Michigan 48104
(734) 769-5400
rkanji@kanjikatzen.com

Counsel for Respondent Chief Judge Daniel T. Bailey

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding, in the first federal or state appellate decision to directly consider the question, that an Indian tribe has not been divested of its inherent authority to prosecute a tribal member for an offense occurring outside of its Indian country when necessary to protect tribal self-government or to control internal relations.

2. Whether the Court of Appeals erred in holding that established fair notice principles are not violated by a tribal court's decision that tribal law allows for the exercise of jurisdiction over a tribal member, when tribal and state law clearly proscribed the conduct at issue and multiple provisions of the tribe's constitution and laws provided for the exercise of such jurisdiction.

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INTRODUCTION

The Petition presents two questions. The first concerns the Court of Appeals' holding that the Little River Band of Ottawa Indians ("LRB" or "Band") retains its inherent sovereign power to prosecute its members for crimes affecting its self-governance interests. Petitioner Norbert Kelsey does not allege that the court's decision brought it into conflict with the decision of any sister court of appeals or state court of last resort. Moreover, while Kelsey veers between acknowledging that the issue is one that has been left open by this Court's precedent and claiming that the Court of Appeals' holding contravenes it, in truth the holding follows directly from this Court's decisions, including two handed down in the past three Terms.

The second question concerns the Court of Appeals' application of constitutional fair notice principles to the LRB courts' determination that tribal law extended the Band's jurisdiction over Kelsey's conduct. Kelsey claims that the Court of Appeals brought itself into conflict with decisions from this Court and others by suggesting that fair notice principles do not apply to jurisdictional determinations. But nothing turned on the court's suggestion, as it went on to apply fair notice principles in this case. Even had it not, Kelsey's claims of a cognizable conflict would founder because of his erroneous conflation of ex post facto and fair notice case law.

Kelsey also challenges the Court of Appeals' application of fair notice principles to this case, but the court's fact-bound application of settled law creates no conflict and is decidedly not a basis for a grant of certiorari.

The Petition should be denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Little River Band

The Band is a federally recognized Indian tribe located in western Michigan. Pet. App. 2; 25 U.S.C. § 1300k-2. The United States established a government-to-government relationship with the Band through the Treaty of Greenville in 1795, and that relationship remained in place (including through treaties creating reservations in 1836 and 1855) until 1872. Pet. App. 2; *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Att'y for the W. Dist. of Mich.*, 369 F.3d 960, 961-62, 967 (6th Cir. 2004) (discussing the political history of the Grand Traverse Band and noting it to be "essentially parallel" with that of LRB); *see also* 25 U.S.C. § 1300k.

That year, the Secretary of the Interior unlawfully terminated federal recognition of the Band and other signatories to the 1855 Treaty of Detroit. *Grand Traverse Band*, 369 F.3d at 961 & n.2. The Band then endured over a century of federal neglect, until Congress reaffirmed its federal recognition in

1994. 25 U.S.C. § 1300k-2. In doing so, Congress expressly provided that "[a]ll rights and privileges of the Band[], and [its] members thereof, which may have been abrogated or diminished before [September 21, 1994], are hereby reaffirmed." *Id.* § 1300k-3(a).

Since reaffirmation, the Band has endeavored to rebuild a small portion of its fractured land base. The Treaty of Detroit had "created what were intended to be permanent reservations for the [signatory] tribes with[in] their traditional homelands." S. Rep. No. 103-260, 1994 WL 194298, at *2 (1994). However, the "mismanagement," "criminal wrongdoing," and "fraudulent activities" of the very federal officials assigned to protect the reservations meant that "by the end of the nineteenth century, all that remained of the reservations within the exterior boundaries . . . were scattered parcels," *id.*, a process of dispossession compounded by the Secretary's unlawful termination of the Band's recognition, *Grand Traverse Band*, 369 F.3d at 961-62.

The rebuilding of the Band's land base has necessarily proceeded on an incremental basis given the lack of resources and available property. It has also been hampered by the bureaucratic delays and other obstacles the Band has faced in having the federal government take its land acquisitions into trust, even though the trust process is mandated by the reaffirmation act. 25 U.S.C. § 1300k-4.

Trust lands, reservation holdings, and other property expressly set aside for a tribe or its members by the federal government constitute its "Indian country." *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 526-27 (1998). Tribes enjoy territorial jurisdiction over that Indian country, generally to the exclusion of state authority, *id.* at 527 n.1, and also enjoy jurisdiction over their members by virtue of their citizenship. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978) (tribes "possess[] attributes of sovereignty over both their members and their territory" (internal quotation marks omitted)). Because of the Band's land history, many of its members reside on property outside of its formal Indian country, and many of its governmental and communal properties do not enjoy trust status.

B. Petitioner and His Crime

"The Band has adopted a strict separation-of-powers Constitution, including an independent Tribal judiciary." Pet. App. 3. On January 21, 2008, Petitioner Norbert Kelsey was convicted in the Band's trial court of sexual assault against a tribal employee (and member of a neighboring tribe) named Heidi Foster. *Id.* At the time of both the crime and the conviction, Kelsey was not only a member of the Band but also an elected and salaried member of its Tribal Council, which exercises the Band's legislative power. *Id.*; Order of Judgment, C.A. RE09, PageID#1558.

The crime took place at the Band's Community Center, where Ms. Foster was discharging her duties at an official meeting of tribal elders. Pet. App. 3, 15. The Community Center at that time housed governmental offices and hosted tribal meetings. *Id*. at 66. It was located on land held in fee simple by the Band, and for purposes of this litigation the Band has stipulated that it was located just across the street from its reservation boundaries. *Id*. at 3, 5. Accordingly, it did not fall within the Band's "Indian country."

Kelsey continues to quarrel here, as he did in the courts below, with the nature and significance of his crime. Pet. 6, 20. No need exists to belabor the unsavory details of Kelsey's conduct in response. Instead, three points bear emphasis.

First, the record amply evidences that, during the tribal meeting, Kelsey approached Ms. Foster and "made inappropriate physical contact of a sexual nature with [her]." Pet. App. 3. The Band's trial court found this to be the case, the Tribal Court of Appeals affirmed, and the courts below left this determination undisturbed on habeas review. *See id.* at 3-4, 21 ("Kelsey cannot seriously argue that his conduct—touching the victim's breasts through her clothing—was 'innocent . . . .'").

Second, there is no question that the conduct as charged was proscribed under the criminal laws of both the Band and the State of Michigan. Pet. App. 21

& n.13; *see also* LRB Law and Order Ordinance art. III, § 3.17, and art. XIX, § 19.01(c)(1), Resp. C.A. Br. App. A, C.A. Doc. No. 22-2, at 6-7. Indeed, Kelsey, while disputing that he had engaged in the charged conduct, conceded this point below. Pet. C.A. Br., C.A. Doc. No. 36, at 28.

Third, both the Court of Appeals and the Tribal Court of Appeals were clearly correct in concluding that the Band has a critical interest in holding Kelsey accountable for his actions:

> We agree with the Band that Kelsey's conduct clearly implicates core governmental concerns and substantially affects the tribe's ability to control its self-governance. Not only was Kelsey a member of the Band's nine-person legislative Tribal Council, but his victim was a tribal employee discharging her official duties at an official tribal elders' meeting. The criminal conduct took place at the Community Center, "the center of Tribal community activities ever since it was purchased," serving to formerly house elements of the tribal judiciary and "provid[ing] tribal office space for the conduct of the business of a tribal sovereign." R. 9, Tribal App'x at 13, PID 1539. This is no run-of-the-mill criminal conduct, but conduct visited on the Band's employee by the Band's *own elected official* during an official tribal function: in pure form, this was an offense against the peace and dignity of the Band itself.

Pet. App. 15 (emphasis and brackets in original); *see also id*. at 4 n.1 (quoting Tribal Court of Appeals' determination to same effect) and *id*. at 67.

II. COURSE OF PROCEEDINGS

A. Tribal Court Proceedings

After Kelsey was convicted, the tribal trial court sentenced him to one year of probation with six months in jail held in abeyance pending his compliance with the conditions of probation—payment of a fine, performance of community service, and a ban on speaking to the Band's female employees. Pet. App. 3; Order of Sentencing, C.A. RE09, PageID#1561-1562. The trial court later stayed the sentence pending appeal, except for the speech restriction, which expired on February 4, 2009. Pet. App. 3; Order Granting Stay, C.A. RE09, PageID#1563; Order of Affirmance, C.A. RE09, PageID#1549.

Kelsey challenged the jurisdiction of the Band's courts over him for the first time in a post-conviction motion. Kelsey claimed that the Band's Community Center lies just beyond the Band's historic reservation boundaries and that those boundaries have been disestablished in any event. Motion to Vacate, C.A. RE11, PageID#1286-1287. Accordingly, Kelsey contended that the Community Center falls outside of the Band's Indian country, and that the Band lacked jurisdiction over his crime.

The trial court rejected the argument, Pet. App. 71-72, and the Tribal Court of Appeals affirmed, *id*. at 64-70. It held that the Band possesses inherent sovereign authority to prosecute its members in matters implicating the Band's

significant interests. *Id*. at 65-67. The court further examined the Band's Constitution and laws and determined that they authorized the prosecution. *Id*. at 67-69.

B. Habeas Corpus Proceedings

Despite the fact that he had other challenges to his conviction pending before the Tribal Court of Appeals, Motion for Clarification, C.A. RE10, PageID#1018, 1022, Kelsey filed this federal habeas action on November 5, 2009, Petition, C.A. RE01. The tribal appellate court then stayed the proceedings before it. Order for Stay, C.A. RE09, PageID#1554-1555.

The federal habeas action was referred to a magistrate judge, before whom the Band waived the comity-based requirement that Kelsey exhaust his tribal court remedies. Answer, C.A. RE13, PageID#264-266. To avoid time-consuming litigation over the Band's reservation boundaries, the Band also stipulated—*solely* for the purposes of this litigation—that the Band's Community Center falls outside of the Band's Indian country. *Id*., PageID#255, 259 n.4.

On November 7, 2013, the magistrate judge issued a Report and Recommendation ("Report") finding the Band to have been implicitly divested of its membership-based jurisdiction. Pet. App. 42-60. The magistrate suggested that various statutes conferring *federal* criminal jurisdiction within Indian country indicate an absence of *tribal* jurisdiction outside of it. *Id.* Additionally, relying

on reasoning derived from Ex Post Facto Clause precedent, the magistrate concluded that the Tribal Court of Appeals had violated Kelsey's due process rights in its construction of the Band's laws. *Id*. at 61-62. On March 31, 2014, the district court adopted the Report's jurisdictional conclusions in a brief opinion while declining to reach the due process issue, and entered an order granting the writ. *Id*. at 26-31; Order, C.A. RE42.

In a unanimous decision authored by Judge McKeague, the Court of Appeals reversed, "hold[ing] that the Band has jurisdiction because it has not been expressly or implicitly divested of its inherent sovereign authority to prosecute members when necessary to protect tribal self-government or control internal relations." Pet. App. 2. The court explained that tribes have exercised criminal jurisdiction over their members since well before the advent of Indian country boundaries, and that the sources Kelsey cites as suggesting that this authority has been curtailed involve changes only in the scope of tribal territorial, rather than membership-based, jurisdiction. *Id*. at 5-17. The court further held that "Kelsey's due process challenge under the Indian Civil Rights Act fails," *id*. at 2, noting that there was nothing "unexpected and indefensible" about the Tribal Court of Appeals' construction of the Band's laws, *id*. at 24 (internal quotation marks omitted). Accordingly, the Court of Appeals vacated the district court's grant of habeas relief. *Id*. at 25.

REASONS FOR DENYING THE PETITION

I. THE COURT SHOULD NOT GRANT CERTIORARI ON THE EXTRATERRITORIALITY QUESTION.

A. The Court of Appeals' Jurisdictional Holding Creates No Conflict in Lower Court Authority.

Kelsey does not contend that the Court of Appeals' jurisdictional holding conflicts with the decision of any federal court of appeals or state court of last resort, and for good reason. "In this relatively sparse area of law," Pet. App. 7, the decision below was the first at the federal or state appellate level to squarely address the question of extraterritorial tribal criminal jurisdiction. This alone is reason to deny the writ.

In a footnote, Kelsey suggests that the Court of Appeals' holding is in tension with *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974). Pet. 15 n.2. However, the two cases are entirely consistent. *Settler* held that the levying of criminal sanctions for off-reservation fishing violations by its members was "within the scope of the rights *retained* by the Yakima Nation" in its treaties with the United States. 507 F. 2d at 238 (emphasis added). As the United States well explained in its briefing below in support of the Band's position, C.A. Doc. No. 29, the Yakima could only have retained this power "because it was part of the tribe's inherent sovereignty." *Id*. at 23. The treaties themselves "did not expressly acknowledge tribal power to regulate member fishing." *Id*. The additional, "very narrow" authority tied by the

court to the treaties was that of off-reservation arrest and seizure, 507 F.2d at 240, which is not at issue here.

The decision below also accords with decisions from the federal courts of appeals and the Alaska Supreme Court in the civil context recognizing that tribes possess jurisdiction over their members distinct from their territorial jurisdiction. *See*, *e.g.*, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1256 (10th Cir. 2001) ("As the Supreme Court has repeatedly explained, the powers of tribes extend over not only their territory but also their members . . . ."); *Sidney v. Zah*, 718 F.2d 1453, 1456 (9th Cir. 1983) ("Membership is . . . another aspect of tribal sovereignty which exists separate and apart from the territorial jurisdiction of the tribe."); *John v. Baker*, 982 P.2d 738, 754 (Alaska 1999) (holding that tribes' membership-based jurisdiction exists as "a source of sovereignty independent of the land they occupy").

The Court of Appeals thus correctly declared that "[d]ecisions from outside our Circuit also provide support for membership as a basis for the assertion of tribal sovereignty independent of tribal territory," Pet. App. 10 (citing *Zah*, *Settler*, and *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 558 n.12 (9th Cir. 1991)). No conflict exists, and the writ should not issue.

B. The Court of Appeals' Holding Does Not Contravene Any Decision of This Court.

Kelsey concedes that the issue of extraterritorial tribal criminal jurisdiction

has been "left open" by this Court's precedents and that "[t]his case squarely presents that question to this Court for the first time . . . ." Pet. 11-12. It follows that the Court of Appeals' jurisdictional holding does not contravene any decision of this Court and that there is no warrant for the writ to issue on that basis.

However, Kelsey goes on to claim that the decision below conflicts with various decisions of this Court. This claim is not sustainable.

In support of his assertion that "[f]rom its earliest decisions, the Court has considered the bounds of tribal sovereignty and territory to be coextensive," Kelsey cites to Chief Justice Marshall's seminal opinions for the Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), and *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Pet. 11. However, that those decisions established that tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive" of state power, *Worcester*, 31 U.S. at 557, does not negate the power of tribes over their members beyond those boundaries. To the contrary, in *Worcester* Chief Justice Marshall expressly referenced the "extra-territorial power of every legislature . . . [over] its own citizens . . . ." *Id.* at 542.[1]

[1] Kelsey's reliance on *Talton v. Mayes*, 163 U.S. 376 (1896), is similarly misplaced. *Talton* concerned whether the Bill of Rights applied to the prosecution of a Cherokee citizen by the Cherokee government for a murder committed in Cherokee territory. *Id.* at 379. While this Court stated that the Cherokee government could prosecute its members for crimes within the Nation's territory, *id.* at 380-81, it nowhere suggested that this was the extent of Cherokee authority. In seeking to draw a negative inference from the statement in *Talton*, Kelsey

Nor does it assist Kelsey that this Court has shifted from its early view of robust tribal territorial jurisdiction to its present view that tribes enjoy more constrained authority over non-Indians within their territories. That shift was presaged by Justice Johnson's separate opinion in *Fletcher v. Peck*, 10 U.S. 87, 147 (1810) (Johnson, J., concurring), which Kelsey thrice quotes. Pet. 3, 11, 14. Justice Johnson stated there that the tribes had lost "the right of governing every person within their limits except themselves," 10 U.S at 147, but nowhere in his opinion did he address the extent of tribal powers over members, whether within or beyond those limits.[2]

Modern cases have moved in the direction of Justice Johnson's restrictive view of tribes' territorial powers, and Kelsey invokes them here. But as the Court of Appeals noted, Kelsey's reliance on decisions including *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001), "miss[es] the mark. Each one discusses tribal authority or jurisdiction only with respect to *non-members* instead of tribal *members*—a crucial distinction given the importance of tribal membership in determining various aspects of tribal sovereignty." Pet. App. 9

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disregards this Court's admonition that its opinions should not be read like statutes. *Nevada v. Hicks*, 533 U.S. 353, 372 (2001).

[2] Kelsey cites the quotation as coming from the opinion of the Court (authored by Chief Justice Marshall), Pet. 3, 11-12, 14, but it does not. *See* 10 U.S. at 143 (marking commencement of opinion of Johnson, J.).

(emphases in original); *see also id*. at 8 n.3. Indeed, these cases can be described as establishing that membership status "counts as the primary jurisdictional fact" when it comes to tribal authority over individuals, *Nevada v. Hicks*, 533 U.S. 353, 382 (2001) (Souter, J., concurring), a view that supports, rather than detracts from, tribal membership-based jurisdiction.[3]

The other authorities Kelsey invokes are even less pertinent. For example, *Elk v. Wilkins*, 112 U.S. 94 (1884), concerned whether Indians who had abandoned their tribal affiliation could be considered American citizens, a question not even remotely relevant to this case. And far from quoting *Ex parte Kenyon*, 5 Dill. 385 (C.C.W.D. Ark. 1878), with approval, Pet. 15, the *Elk* Court did so only to explain that it had no relevance to the issue before it, 112 U.S. at 108.

Finally, there is no question that "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). *See* Pet. 18. But the Court of Appeals' decision in no way contravenes this principle. The court fully recognized that the jurisdiction asserted by the Band is concurrent with that of a state's territorial jurisdiction. Pet. App. 21. The Double Jeopardy Clause does

[3] *Plains Commerce Bank*'s statement that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation," 554 U.S. at 327; *see* Pet. 14, merely recognizes the uncontroversial point that "tribal power is *at its zenith* where territory and membership intersect," Pet. App. 9 (emphasis in original).

not apply in this dual-sovereignty context, and nothing in the court's decision threatens the excellent working relationship between the State of Michigan and Band prosecutors.

In sum, any claim that the Court of Appeals' jurisdictional holding contravenes this Court's decisions is wide of the mark, and provides no basis for issuance of the writ.

C. The Holding Below Is Correct.

Given the absence of any cognizable conflict, Kelsey's first question presented reduces to one of error correction. That, of course, is not normally the stuff of certiorari. And even if it were, there was no error here. Far from contravening this Court's precedents, the Court of Appeals' holding firmly follows the arc of the law.

1. As this Court has reaffirmed twice in the past three Terms, tribes "remain separate sovereigns pre-existing the Constitution" and continue to "exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (internal quotation marks omitted); *accord Puerto Rico v. Sanchez Valle*, 579 U.S. ___, 136 S. Ct. 1863, 1873 n.5 (2016) (discussing the "profound importance of the tribes' pre-existing sovereignty" and stating "in no uncertain terms that the tribes are separate sovereigns precisely because of that inherent authority"). Congress wields "plenary and exclusive

[power] to legislate in respect to Indian tribes," *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted), but "unless and '[u]ntil Congress acts, the tribes retain' their historic sovereign authority," *id.* (quoting *Wheeler*, 435 U.S. at 323). This settled rule that tribal powers may be diminished only by express congressional action is subject to one exception: the *limited class of powers* that tribes have "implicitly lost by virtue of their dependent status." *Wheeler*, 435 U.S. at 326.

Accordingly, the court below "assess[ed] the question of extra-territorial criminal jurisdiction by breaking th[e] governing framework into three separate inquiries: (1) do Indian tribes have inherent sovereign authority to exercise extra-territorial criminal jurisdiction? (2) If so, has that authority been expressly limited by Congress or treaty? And (3) if not, have the tribes been implicitly divested of that authority by virtue of their domestic dependent status?" Pet. App. 6.

The parties concurred in this approach. *Id*.

a. The Court of Appeals had little difficulty answering the first inquiry affirmatively, and that determination is unassailable. Just this past Term, in *Sanchez Valle,* this Court reiterated its conclusion in *Wheeler* that historically "'the tribes were self-governing sovereign political communities,' possessing (among other capacities) the 'inherent power to prescribe laws for their members and to

punish infractions of those laws.'" *Sanchez Valle*, 136 S. Ct. at 1872 (quoting *Wheeler*, 435 U.S. at 322-23). There is no dispute that tribes enjoyed this power long "[b]efore the coming of the Europeans," *Wheeler*, 435 U.S. at 322-23, and hence that they possessed inherent criminal authority over their members independent of the boundaries now associated with Indian country. And "[u]nless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority *in its earliest form*." *Sanchez Valle*, 136 S. Ct. at 1872 (emphasis added).

As the Court of Appeals observed, a 1939 Opinion of the Solicitor of the Interior Department confirms the inherent and nonterritorial nature of tribal criminal jurisdiction over members in terms directly applicable to this case:

> That the original sovereignty of an Indian tribe extended to the punishment of a member . . . for depredations or other forms of misconduct *committed outside the territory of the tribe cannot be challenged* . . . . That Indian tribes . . . acted to punish their members for *depredations committed against whites outside of the Indian country* is a matter of historical record.

Pet. App. 9 (quoting 1 Op. Sol. on Indian Affairs 891, 896 (U.S.D.I. 19[3]9); emphases in court's opinion).[4]

[4] The Opinion addressed tribal jurisdiction over unrestricted fee lands within allotted reservations and reserved the question of tribal jurisdiction outside reservation boundaries, *id*. at 891-99 (included in Resp. C.A. Br. App. B, C.A. Doc. No. 22-3), but extensive portions of it, including those quoted here, addressed tribal jurisdiction more broadly, and without regard to that limitation.

Kelsey suggests that the Opinion supports his position because it noted that "'the existing Law and Order Regulations and tribal codes restrict the jurisdiction of

This Court's decisions not only have identified tribal criminal authority over members as an inherent tribal power, but, as the Court of Appeals observed, they have "provide[d] the core principle underpinning and justifying a membership-based jurisdiction that is not rigidly tied to geographic qualifications." Pet. App. 8. Thus, in *Duro v. Reina*, 495 U.S. 676 (1990), this Court observed that "[r]etained criminal jurisdiction over members is accepted by our precedents and *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*." *Id*. at 694 (emphasis added). It is precisely because "[a] tribe's additional authority comes from the consent of its members," the *Duro* Court emphasized, that "*in the criminal sphere membership marks the bounds of tribal authority.*" *Id.* at 693 (emphasis added).

Accordingly, while neither *Duro* nor *Wheeler* had to squarely confront the

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Indian courts to acts committed within an Indian reservation . . . .'" Pet. 17 (quoting Op. at 899). But the Opinion's reference here is not to tribal courts, but to federal administrative tribunals established by the Department of Interior to address a perceived law enforcement gap in Indian country. Op. at 897; *see* 25 C.F.R. § 11.102. The federal government's decision not to expend *federal* resources prosecuting Indian crimes outside of Indian country can hardly be taken to evidence an understanding that tribes should be deprived of the authority to regulate their own members' conduct, and the Opinion nowhere suggests that it should.

Kelsey also notes that a 1934 Solicitor's Opinion had stated without elaboration that tribal jurisdiction ceases at a reservation's border, Pet. 17, but that unsupported statement soon gave way to the extensive analysis contained in the 1939 Opinion.

question of extraterritorial tribal criminal jurisdiction over members, they provide strong support for the Court of Appeals' conclusion that such jurisdiction forms an important component of the tribes' inherent sovereignty. The only remaining question is whether tribes have been divested, expressly or implicitly, of that authority to punish their members irrespective of territory.

b. Kelsey did not identify any source of explicit divestiture below, and the Court of Appeals correctly found that "no statute or treaty expressly divests the Band of its inherent authority to try and punish its members for off-reservation conduct . . . ." Pet. App. 12. Before this Court, Kelsey points for the first time to the language of the "*Duro* fix," 25 U.S.C. § 1301(2), which restored to tribes the power to prosecute nonmember "Indians" that the *Duro* decision had found to be lacking. Pet. 14. Congress defined "Indian" by reference to the Major Crimes Act ("MCA"), 18 U.S.C. § 1153, which extends *federal* criminal jurisdiction over certain crimes committed by "any Indian" if that conduct occurs "within the Indian Country." But in incorporating the MCA's definition of "Indian" for tribal jurisdictional purposes, the *Duro* fix does not also transfer that act's geographical restrictions on federal authority to the tribes. *See* 25 U.S.C. § 1301(4) ("'Indian' means *any person* who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18 . . . ." (emphasis added)).

Moreover, in enacting the *Duro* fix Congress legislated with respect to tribal

authority over nonmembers. *See United States v. Lara*, 541 U.S. 193, 211 (2004) (Kennedy, J., concurring) ("The amendment to the Indian Civil Rights Act of 1968 (ICRA) enacted after the Court's decision in *Duro* v. *Reina*, 495 U.S. 676 . . . (1990), demonstrates Congress' clear intention to restore to the tribes an inherent sovereign power to prosecute nonmember Indians."). There is nothing to suggest that, in the very act of restoring to tribes jurisdiction over *nonmember Indians*, Congress intended to divest them of their extraterritorial jurisdiction over *members*. Congress "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 468 (2001). Kelsey's belated claim of express divestiture fails to establish error in the holding below.

c. Nor have the tribes been implicitly divested of their membership-based criminal jurisdiction. *Wheeler* squarely forecloses this argument, as it held that the implicit divestiture doctrine applies only to certain tribal powers over nonmembers, and not to the tribes' criminal authority with respect to their own citizens:

> [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.

Wheeler, 435 U.S. at 326. *Duro* reaffirmed this core proposition: "The power of a tribe to prescribe and enforce rules of conduct for its own members 'does not fall

within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status.'" *Duro*, 495 U.S. at 686 (quoting *Wheeler*, 435 U.S. at 326).

Nevertheless, the district court concluded that certain federal statutes extending federal criminal jurisdiction *into* Indian country—the Indian Trade and Intercourse Act, 1 Stat. 137 (1790), the Indian Country Crimes Act, 18 U.S.C. § 1152, and the MCA—reflect a congressional understanding that tribal membership-based criminal jurisdiction does not exist *outside* of it. Pet. App. 44-45. This runs directly counter to this Court's admonition in *Bay Mills* that courts should "not lightly assume" a congressional derogation of tribal powers. 134 S. Ct. at 2032. These statutes say not a word about restricting tribal authority and have instead been construed by this Court as recognizing tribal criminal jurisdiction over members and "declin[ing] to disturb it." *Wheeler*, 435 U.S. at 325. Congress's decision to address the "special problems of [on-reservation] law enforcement," *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978), by establishing a system of concurrent jurisdiction within Indian country, says nothing about Congress's views regarding the nature and extent of tribal criminal jurisdiction for crimes committed beyond Indian country. As this Court stated in *Bay Mills*, in a context with clear parallels to this one, the courts have "no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader. . . . [T]he problem Congress set out to address

. . . arose in Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact." *Bay Mills*, 134 S. Ct. at 2034.

2. Given the support that the Court of Appeals' holding derives from this Court's decisions in *Wheeler*, *Duro*, *Bay Mills*, and *Sanchez Valle*, Kelsey can only rely on a scattershot invocation of outdated and conclusory secondary sources to support his claim of error. Pet. 16. Even if secondary sources could bear the weight Kelsey places on them, they would not help him here. This Court has described the 2005 edition of Cohen's Handbook of Federal Indian Law as "the leading treatise on federal Indian law," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211 (2012), and it fully accords with the holding below:

> Tribal jurisdiction based on membership finds support in *United States v. Mazurie*, in which the Supreme Court observed that tribes . . . "possess[] attributes [of sovereignty] over both their members and their territory." . . . This authority over members extends to the criminal law . . . . "Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in tribal government, the authority of which rests on consent. . . ." [Citing *Duro*.] . . . This sort of non-territorial based jurisdiction is analogous to the principle of international law recognizing a state's authority to prescribe law to regulate the conduct of its citizens outside of the state's territory. [Citing Restatement (Third) of Foreign Relations Law.] The 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.

Cohen's Handbook of Federal Indian Law § 4.01[2][d] (2005 ed.) (footnotes omitted; fourth ellipses in original).[5]

The Court of Appeals committed no error in its jurisdictional determination, and Kelsey's claims to the contrary provide no basis for the writ to issue.

D. Kelsey's Inflated Claims of Harm Do Not Warrant a Grant of Certiorari.

Kelsey claims that this case "presents an issue of exceptional importance" because, in his view, members of the twelve federally recognized tribes in the Sixth Circuit (all in Michigan), and those members alone, will now be subject to both territorial and membership-based jurisdiction, with all manner of adverse consequences to follow. Pet. 10. Kelsey's premise is incorrect, and his claims of harm are vastly overblown.

"It is well-established that Congress may criminalize extraterritorial conduct," *United States v. Shibin*, 722 F.3d 233, 245 (4th Cir. 2013), and its power to do so "based solely on the defendant's status as a U.S. citizen is firmly established," *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006) (citing cases). States may likewise exercise extraterritorial jurisdiction over their citizens for "matters in which the State has a legitimate interest . . . ." *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941); *see also* Wayne R. LaFave et al., 4 *Criminal Procedure*

[5] The current (2012) edition of Cohen's Handbook contains the same language. Cohen's Handbook of Federal Indian Law § 4.01[2][d] (2012 ed.).

§16.4(c) (3d ed.). Michigan, for example, exercises jurisdiction without regard to territory over acts impacting "the system of government or the community welfare of this state . . . ." Mich. Comp. Laws § 762.2(2)(c). The Court of Appeals simply recognized in the tribes the same authority possessed by federal and state sovereigns.

That authority poses no affront to state interests, Pet. 18, as the tribes' membership-based jurisdiction is concurrent with the power of the states to prosecute crimes taking place within their borders. Pet. App. 21. Nor did the Court of Appeals recognize a "free-floating, membership-based jurisdiction over *any criminal conduct*." *Id*. at 14 (emphasis in original). Appropriately confining itself to the factual context of this case, the Court of Appeals held that tribes possess extraterritorial jurisdiction at least "when necessary to protect tribal self-government or control internal relations." *Id*. at 2. Kelsey criticizes this standard as "vague and unworkable," Pet. 19, but the Court of Appeals drew it directly from *Montana v. United States*, 450 U.S. 544 (1981), *see* Pet. App. 14. This case would present an extraordinarily poor vehicle to consider the standard in any event because, notwithstanding Kelsey's failure to acknowledge the gravity of his crime, there is little doubt that such conduct "clearly implicates core governmental concerns and substantially affects the tribe's ability to control its self-governance." *Id*. at 15.

Finally, the tiresome and unfounded recitation of purported infirmities with tribal courts in general, Pet. 18-19, provides no basis for a grant here. The Band has enshrined the protections of the Indian Civil Rights Act "in a strict separation-of-powers Constitution," Pet. App. 3, and its "independent Tribal Judiciary," *id.,* scrupulously honored those protections in this case. Kelsey was tried for two crimes: sexual assault and harassment. Order of Judgment, C.A. RE09, PageID#1556. He was found guilty of sexual assault but not harassment, *id*., PageID#1556-1559, and given a suspended sentence pursuant to which he has had to spend not a single day in jail, Order of Sentencing, C.A. RE09, PageID#1561-1562. The tribal courts have afforded him numerous opportunities to challenge his conviction, entertaining well over a dozen post-trial motions, including the untimely challenge to the Band's jurisdiction that led to these proceedings. Remand Order, C.A. RE09, PageID#1533-1535.

Kelsey, in sum, has presented no basis for a grant of certiorari with respect to the Court of Appeals' jurisdictional holding.

II. THE COURT SHOULD NOT GRANT CERTIORARI ON THE FAIR NOTICE QUESTION.

A. The Court of Appeals' Suggestion that the Fair Notice Requirement Does Not Apply to Jurisdictional Elements Had No Effect on the Outcome, Creates No Conflict, and Is Correct.

1. The Tribal Court of Appeals construed the Band's Constitution and statutes as supplying jurisdiction over Kelsey's crime at the time it was committed.

Pet. App. 67-70. Kelsey challenged this determination on habeas review, Pet. 20-25, claiming that the court's construction of the Band's laws violated his right to fair notice under the due process provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(8), which mirrors the due process protections of the federal Constitution.

The district court did not reach this argument, and the Court of Appeals rejected it. The appeals court noted, as an initial matter, that "[u]nder existing case law, fair notice protection has not been extended to an expansion of jurisdiction as opposed to a retroactive criminalization of *conduct*." Pet. App. 21 (emphasis in original). Kelsey contends that this statement contravenes decisions from this Court and others, and accordingly warrants review. The contention fails.

In the very next sentence of its opinion, the Court of Appeals stated that "we need not rely on this distinction [between jurisdictional and substantive provisions] here because even if retroactive jurisdictional changes *did* implicate fair notice concerns in a case like Kelsey's, the [tribal] Court of Appeals' decision to recognize jurisdiction over Kelsey's conduct" did not violate fair notice principles. Pet. App. 21 (emphasis in original). This Court sits "to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (Jackson, J.). The statement on which Kelsey focuses had no bearing on the outcome below and hence is not a basis for granting certiorari.

2. Even if the Court of Appeals' statement had formed a part of the court's holding, it fully conformed to "existing case law" rather than conflicting with it. As the court noted, Pet. App. 21, the Second Circuit agrees that fair notice requirements pertain only to judicial decisions that retroactively alter the elements of a crime, and not to decisions regarding a court's jurisdiction. *See United States v. Al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011) ("Fair warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere." (emphasis in original)).

The decisions that Kelsey posits as creating a conflict are inapposite. In claiming that the court below ran afoul of this Court's precedents, Kelsey relies exclusively on cases applying the Ex Post Facto Clause, which of course constrains the legislative process. *See* Pet. 21 (discussing *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *Calder v. Bull*, 3 U.S. 386, 390 (1798); and *Weaver v. Graham*, 450 U.S. 24, 31 (1981)). In *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001), this Court instructed, in no uncertain terms, that the "incorporation of [ex post facto analysis] into due process limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes . . . ." Kelsey's disregard of this admonition provides no basis for certiorari.

Kelsey also claims a conflict with *Helton v. Fauver*, 930 F.2d 1040 (3d Cir. 1991), and *People v. Morante*, 975 P.2d 1071 (Cal. 1999). Pet. 22. These are due process cases, but they were both decided before *Rogers*, when many courts mistakenly believed that ex post facto principles (such as the protections against an increase in punishment and removal of a procedural defense that Kelsey relies on, Pet. 20) "were coextensive" with fair notice. *Webb v. Mitchell*, 586 F.3d 383, 392 (6th Cir. 2009). In *Helton*, the court explicitly applied those principles to a due process claim. 930 F.2d at 1045-46. And the California Supreme Court at the time of *Morante* labored under the same error. *See*, *e.g.*, *Moss v. Superior Court*, 950 P.2d 59, 81 (Cal. 1998). *Rogers* has rendered these cases obsolete, and they accordingly give rise to no conflict warranting review.

3. Finally, review is also unwarranted because the Court of Appeals' understanding of the interplay between jurisdictional elements and fair notice principles is correct. "Due process protects against judicial infringement of the 'right to fair warning' that *certain conduct* will give rise to criminal penalties . . . ." *Rogers*, 532 U.S. at 459 (quoting *Marks v. United States*, 430 U.S. 188, 191-92 (1977)) (emphasis added). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted). Such concerns simply were not implicated here. Both

the Band's and the State of Michigan's sexual assault provisions were firmly in place and proscribed Kelsey's conduct at the time he engaged in it. *See* LRB Law and Order Ordinance art. XIX, § 19.01(c)(1), Resp. C.A. Br. App. A, C.A. Doc. No. 22-2, at 7; Mich. Comp. Laws § 750.520e; Pet. App. 21 ("[Kelsey's] conduct was criminal, regardless of where it occurred."). Because the Tribal Court of Appeals' jurisdictional decision did not "attach[] criminal penalties to what previously had been innocent conduct," *Rogers*, 532 U.S. at 459, it did not implicate fair notice concerns.

B. The Court of Appeals' Fact-Bound Application of Settled Fair Notice Law Provides No Basis for Review.

On the assumption that fair notice principles apply to jurisdictional determinations, the court below held that the Tribal Court of Appeals' construction of the Band's jurisdictional provisions "more closely resembles a 'routine exercise of common law decisionmaking,' *Rogers*, 532 U.S. at 467, than an 'unexpected and indefensible' judicial construction that runs headlong into the constitutional protections of due process. *See Bouie*, 378 U.S. at 354." Pet. App. 23. Kelsey makes no claim that the court below applied the wrong legal standard, nor could he, as *Bouie* and *Rogers* are the seminal decisions in this area.

Nor does Kelsey claim that the Court of Appeals' determination gives rise to a conflict. The court simply engaged in the application of accepted fair notice

principles to the unique facts of this case. That fact-bound conclusion is decidedly not a basis for a grant of certiorari.

Moreover, the Court of Appeals applied those fair notice principles correctly. As the court elaborated, "the Tribal Constitution Art. I, Section 1 & 2; the Tribal Constitution Art. VI, Section 8; the Criminal Procedure Ordinance, and the Tribal Court Ordinance all provided warning that criminal jurisdiction would extend to Kelsey's conduct by virtue of either Tribal ownership of the Community Center or Kelsey's tribal membership." Pet. App. 24; *see also id*. at 18-24 (explicating these provisions). *See id*. at 75-76, 79 (setting forth text of LRB Constitution art. I, §§ 1-2, and art. VI, § 8(a), and Criminal Procedure Ordinance art. I, §§ 1.01, 1.02, and art. VIII, § 8.08) and Resp. C.A. Br. App. A, C.A. Doc. No. 22-2, at 4 (setting forth text of Tribal Court Ordinance §§ 4.01, 5.01).

The Tribal Court of Appeals simply harmonized the Band's laws by deeming the one jurisdictional outlier—the narrower definition of the Band's territorial jurisdiction in Section 4.03 of the Law and Order Ordinance—subordinate to the Constitution's broader definition of that jurisdiction. Pet. App. 68-69. As the court below stated, this "is not only unsurprising but is within the Tribal Court of Appeals' authority to 'rule void those ordinances and resolutions deemed inconsistent with [the Band's] Constitution.'" Pet. App. 23 (brackets in original; citing Const. art. VI, § 8(a)(2), which is reprinted at Pet. App. 75). *See*

also Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427-28 (2012) ("At least since *Marbury v. Madison*, we have recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (citation omitted; brackets in original)). Due process simply does not prohibit the judicial "resolution of uncertainty that marks any evolving legal system," *Metrish v. Lancaster*, 133 S. Ct. 1781, 1788 (2013) (internal quotation marks omitted), and that resolution is precisely what the Tribal Court of Appeals accomplished here.

No unfairness accrued to Kelsey as a result. As the court below aptly put it, "we must accept the legal fiction that Kelsey read and understood the jurisdictional limitation in the Offenses Ordinance before he committed his crime, but we need not and should not grant him the luxury of picking and choosing a la carte which ordinances he read." Pet. App. 24. Moreover, the issue has no prospective significance, even within the Band, as tribal members are fully on notice that the Band can exercise extraterritorial jurisdiction over them in cases affecting the Band's self-governance interests.

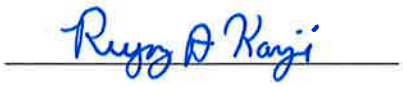
Kelsey has presented no basis for the writ to issue on his second question.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

August 4, 2016

Respectfully submitted,



Shayne Machen
Rebecca Liebing
LITTLE RIVER BAND OF OTTAWA INDIANS
2608 Government Center Drive
Manistee, Michigan 49660
(231) 398-6821
ShayneMachen@lrboi-nsn.gov

Riyaz A. Kanji
Counsel of Record
David A. Giampetroni
Lucy W. Braun
Philip H. Tinker
KANJI & KATZEN, PLLC
303 Detroit Street
Suite 400
Ann Arbor, Michigan 48104
(734) 769-5400
rkanji@kanjikatzen.com

Counsel for Respondent
Chief Judge Daniel T. Bailey