No. 14-15814

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA TAVARES; DOLLY SUEHEAD;
DONNA CAESAR; BARBARA SUEHEAD,
Petitioners – Appellants,

v.

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

On Appeal from the United States District Court
for the Eastern District of California
Honorable Troy L. Nunley
D.C. No. 2:13-cv-02101-TLN-CKD

APPELLEES' ANSWERING BRIEF

ELLIOT R. PETERS # 158708
STEVEN A. HIRSCH # 171825
JO W. GOLUB # 246224
JESSE BASBAUM # 273333
KEKER & VAN NEST LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Attorneys for Appellees
GENE WHITEHOUSE, CALVIN MOMAN, BRENDA ADAMS,
JOHN WILLIAMS, AND DANNY REY

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF JURISDICTION 2

III. COUNTERSTATEMENT OF ISSUE PRESENTED 2

IV. STATEMENT OF THE FACTS AND THE CASE 3

A. History of the United Auburn Indian Community 3

B. The UAIC today 5

C. The petitioners' underlying conduct 9

D. The Tribal Council findings 10

E. Appeals Board rulings 15

F. The habeas-corpus petition and district-court order 18

V. SUMMARY OF ARGUMENT 22

VI. COUNTERSTATEMENT OF THE STANDARD OF REVIEW 24

VII. ARGUMENT 25

A. The scope of federal jurisdiction over ICRA violations must be construed narrowly to promote tribal sovereignty. 25

1. The ICRA prohibits tribes from abridging certain individual rights. 25

2. In *Santa Clara Pueblo*, the Supreme Court strictly limited the availability of federal review of alleged ICRA violations. 26

TABLE OF CONTENTS
(continued)

Page(s)

3. *Santa Clara Pueblo* and settled canons of Indian law require restraint in construing the scope of § 1303. 29

B. Petitioners have failed to show a severe restraint on their liberty. 32

1. Petitioners bear the burden of establishing a "severe restraint on liberty." 32

a. Federal Rule of Civil Procedure 12(b)(1) 32

b. 25 U.S.C. § 1303 33

2. Under *Jeffredo*, the "actual restraints" imposed on petitioners are insufficient to confer jurisdiction under § 1303. 35

3. The Second Circuit, under analogous facts, applied the same standard as this Court to dismiss a § 1303 petition for lack of jurisdiction. 40

4. *Poodry* does not apply because the petitioners were not permanently banished and stripped of their tribal citizenship. 43

a. The permanent banishment in *Poodry* was significantly more severe than the discipline in this case. 43

b. *Poodry* has been roundly criticized by scholars and has only been followed by two district courts. 47

TABLE OF CONTENTS
(continued)

Page(s)

5. The district court's dismissal was consistent with jurisdictional standards for non-ICRA habeas petitions. 48

C. Petitioners' substantive ICRA claims are not before the Court. 50

D. There is no jurisdiction over the Petition because the underlying proceedings and sanctions were civil, not criminal in nature. 52

E. The Petition is moot as to Dolly Suehead, Barbara Suehead, and Donna Caesar. 55

1. The petitioners have not shown that any collateral consequences arise from their discipline. 57

2. The alleged harm is not capable of repetition while evading review. 61

F. The petitioners have failed to exhaust tribal remedies. 63

VIII. CONCLUSION 65

STATEMENT OF RELATED CASES 67

STATUTORY ADDENDUM SA1

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Alire v. Jackson
65 F. Supp. 2d 1124 (D. Or. 1999) 53

Atel Fin. Corp. v. Quaker Coal Co.
321 F.3d 924 (9th Cir. 2003) (per curiam) 52, 55

Bailey v. Hill
599 F.3d 976 (9th Cir. 2010) 41

Burke v. Barnes
479 U.S. 361 (1987) 56

California v. Cabazon Band of Mission Indians
480 U.S. 202 (1987) 8, 53

Carafas v. LaVallee
391 U.S. 234 (1968) 59

Chacon v. Wood
36 F.3d 1459 (9th Cir. 1994) 57

City of Roseville v. Norton
348 F.3d 1020 (D.C. Cir. 2003) 31

Diaz v. Duckworth
143 F.3d 345 (7th Cir. 1998) 59

Ex Parte Fabiani
105 F. Supp. 139 (E.D. Pa. 1952) 50

Ex Parte Young
209 U.S. 123 (1908) 19, 21

Fisher v. District Court
424 U.S. 382 (1976) 31

TABLE OF CONTENTS
(continued)

Page(s)

Hardin v. White Mountain Apache Tribe
779 F.2d 476 (9th Cir. 1985) 55

Hensley v. Municipal Ct.
411 U.S. 345 (1973) 34

In re Wilshire Courtyard
729 F.3d 1279 (9th Cir. 2013) 33

Jeffredo v. Macarro
599 F.3d 913 (9th Cir. 2010) ..... *passim*

Jones v. Cunningham
371 U.S. 236 (1963) 34, 49, 50

Lane v. Williams
455 U.S. 624 (1982) 59, 60

Lehman v. Lycoming Cnty. Children's Servs. Agency
458 U.S. 502 (1982) 32, 55

Lewis v. White Mt. Apache Tribe
CV-12-8073-PCT-SRB, 2013 WL 510111 (D. Ariz. Jan. 24, 2013) 39

Mitchell v. Seneca Nat. of Indians
12-CV-119-A, 2013 WL 1337299 (W.D.N.Y. Mar. 29, 2013) 39, 42

NLRB v. Pueblo of San Juan
276 F.3d 1186 (10th Cir. 2002) 31, 48

Poodry v. Tonawanda Band of Seneca Indians
85 F.3d 874 (2d Cir. 1996) ..... *passim*

TABLE OF CONTENTS
(continued)

Page(s)

Poulson v. Tribal Court for the Ute Indian Tribe of the Uintah & Ouray Reservation
2:12-CV-497 BSJ, 2013 WL 1367045 (D. Utah Apr. 4, 2013) 39

Pub. Utilities Comm'n of State of Cal. v. F.E.R.C.
100 F.3d 1451 (9th Cir. 1996) 61

Quair v. Sisco
359 F. Supp. 2d 948 (E.D. Cal. 2004) 47, 53

Quair v. Sisco
No. 02-5891, 2007 WL 1490571 (E.D. Cal. May 21, 2007) 47

Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.
458 U.S. 832 (1982) 30

Safe Air for Everyone v. Meyer
373 F.3d 1035 (9th Cir. 2004) 33

San Manuel Indian Bingo & Casino v. NLRB
475 F.3d 1306 (D.C. Cir. 2007) 30

Santa Clara Pueblo v. Martinez
436 U.S. 49 (1978) ..... *passim*

Selam v. Warm Springs Tribal Corr. Facility
134 F.3d 948 (9th Cir. 1998) 63, 65

Shenandoah v. United States Department of Interior
159 F.3d 708 (2d Cir. 1998) ..... *passim*

Spencer v. Kemna
523 U.S. 1 (1998) 56, 57

Stout v. Te-Moak Tribe of W. Shoshone
217 F.3d 846 (9th Cir. 2000) 56

TABLE OF CONTENTS
(continued)

Page(s)

Sweet v. Hinzman
634 F. Supp. 2d 1196 (W.D. Wash. 2008) 47

Talton v. Mayes
163 U.S. 376 (1896) 25

U.S. ex rel. Cobell v. Cobell
503 F.2d 790 (9th Cir. 1974) 64

United States v. Errol D., Jr.
292 F.3d 1159 (9th Cir. 2002) 30

United States v. Kagama
118 U.S. 375 (1886) 6

Viewtech, Inc. v. United States
653 F.3d 1103-04 (9th Cir. 2011) 24

W. Coast Seafood Processors Ass'n v. NRDC
643 F.3d 701 (9th Cir. 2011) 62

Williams v. Taylor
529 U.S. 420 (2000) 32

Wilson v. Belleque
554 F.3d 816 (9th Cir. 2009) 51

Wilson v. Terhune
319 F.3d 477 (9th Cir. 2003) 57, 58, 59, 60

Federal Statutes

18 U.S.C. § 1162 53

25 U.S.C. § 1291 2

25 U.S.C. § 1302 ..... 26, 27, 28

TABLE OF CONTENTS
(continued)

Page(s)

25 U.S.C. § 1302(a)(1)-(10) 25

25 U.S.C. § 1303 ..... *passim*

25 U.S.C. § 2710(b)(3) 14

28 U.S.C. § 2241 49

28 U.S.C. § 2253(c) 57

28 U.S.C. § 2254 31

Auburn Indian Restoration Act of 1994, Pub. L. No. 103-434, 108 Stat. 4533 5

Federal Rules

Federal Rule of Civil Procedure 12(b)(1) 2, 18, 32

State Statutes

California Business and Professions Code § 480(a)(2) 60, 61

Other Authorities

Brendan Ludwick, *The Scope of Federal Authority over Tribal Membership Disputes and the Problem of Disenrollment*, 51 Fed. Law. 37 (2004) 48

Cohen's Handbook of Federal Indian Law (Nell Jessup Newton ed., 2012) 4, 31, 47

Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. Legis. 557 (1972) 25, 26

TABLE OF CONTENTS
(continued)

Page(s)

Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 Wash. L. Rev. 941 (2011) 48

Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 Hamline L. Rev. 97 (2007) 48

Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. Rev. 85 (2007) 8, 44, 48

Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 Colum. Hum. Rts. L. Rev. 235 (1997) 8

S. Rep. No. 103-340 (1994) ..... *passim*

Schwarzer *et al*, *Federal Civil Procedure Before Trial* (2014) 33

I. INTRODUCTION

Petitioners[1] in this case ask the Court to resolve a question that it has already answered: whether the temporary exclusion of a tribal member from tribal facilities is a sufficient restraint on liberty to warrant habeas corpus review under 25 U.S.C. § 1303. The Court answered that question "no" in *Jeffredo v. Macarro*, 599 F.3d 913, 919 (9th Cir. 2010), holding that "the denial of access to certain [tribal] facilities does not pose a severe actual or potential restraint on the [petitioners'] liberty." Under *Jeffredo*, the district court's judgment of dismissal must be affirmed.

Petitioners ignore this binding precedent and rely instead on the magic word "banishment" to claim that habeas jurisdiction exists. But as *Jeffredo* and all other courts have recognized, the jurisdictional inquiry under § 1303 is based on facts, not labels. And in this case, the facts show that while petitioners have been temporarily excluded from tribal facilities, they have retained full tribal membership, medical benefits, the right to vote, the ability to remain in their own homes, and the ability to visit the homes of any and all tribal members, including

[1] "Petitioners" refers to Jessica Tavares, Dolly Suehead, Donna Caesar, and Barbara Suehead.

those who live on the tribe's historic reservation. Whether petitioners choose to label this status "banishment," "exile," or anything else is irrelevant. What matters is whether the respondents have subjected petitioners to a severe actual or potential restraint on liberty. Under these facts and this Court's precedent, they have not. The judgment of dismissal therefore should be affirmed for lack of subject-matter jurisdiction.

II. COUNTERSTATEMENT OF JURISDICTION

The district court lacked jurisdiction and properly dismissed the action under Federal Rule of Civil Procedure 12(b)(1). Final judgment was entered on March 21, 2014.[2] A timely Notice of Appeal was filed on April 18, 2014[3] and this Court has appellate jurisdiction under 25 U.S.C. § 1291.

III. COUNTERSTATEMENT OF ISSUE PRESENTED

May petitioners who have been temporarily excluded from tribal facilities and temporarily denied per-capita income from casino revenues—while still retaining full tribal membership, medical benefits, the right to vote, and the ability to visit the residential property of any

[2] ER 521-39.

[3] ER 40-41.

and all tribal members—invoke habeas-corpus jurisdiction under 25 U.S.C. § 1303?

IV. STATEMENT OF THE FACTS AND THE CASE

A. History of the United Auburn Indian Community

The United Auburn Indian Community ("UAIC") is a federally recognized tribe of Maidu and Miwok Indians who reside primarily in Placer County, California.[4] The Tribe's history, like the history of Indians throughout North America, is a complex narrative of hardship, struggle, and survival.

Like all Indian tribes, the Maidu and Miwok Indians endured catastrophic losses after European contact in the sixteenth century.[5] By 1845, the California Indian population had dropped from 350,000 to 150,000.[6] In 1848, Mexico ceded the California territory to the United States, but the bloodshed and subjugation did not end. For example, during California's Gold Rush, Indians were viewed as "obstacles to settlement [and] were enslaved, starved and targeted for elimination."[7]

---

[4] ER 89; S. Rep. No. 103-340, 1994 WL 454555 at *5 (1994) [hereinafter *Auburn Indian Restoration Act (AIRA) Report*].

[5] *AIRA Report* at *1.

[6] *AIRA Report* at *2.

[7] *AIRA Report* at *2.

In 1850, California passed an act "for the Government and Protection of Indians" which, among other things, allowed for the sale of Indians into slavery.[8]

The twentieth century brought a mix of hope and further hardship to the Auburn Tribe.[9] In 1917, the federal government acquired a plot of land in trust for the Auburn Indians, and another plot was added in 1953.[10] This land became known as the Auburn Indian Rancheria and the Auburn Indians became a federally recognized tribe.[11] But the federal government soon severed the federal-tribe relationship with the Auburn Indians and countless other tribes as part of a policy of "rapid assimilation through termination."[12] The federal government terminated the Auburn Rancheria in 1958 and sold off most of its land.[13] Much of that land was sold to individual tribal members.[14]

---

[8] *AIRA Report* at *2.

[9] "Auburn Tribe" refers to the ancestors of the UAIC before the tribe was re-recognized in its current form.

[10] *AIRA Report* at *4.

[11] *AIRA Report* at *4-5.

[12] *Cohen's Handbook of Federal Indian Law* at 85-86 (Nell Jessup Newton ed., 2012).

[13] *AIRA Report* at *5; ER 89-90 at ¶7.

[14] ER 89-90.

In 1991, descendants of the historic Auburn Indians drafted and adopted the UAIC Constitution. The Tribe then submitted a request to the Bureau of Indian Affairs for federal recognition as the United Auburn Indian Community of the Auburn Rancheria. The government granted that recognition in 1994 by enacting the Auburn Indian Restoration Act.[15]

B. The UAIC today

The historic Auburn Rancheria comprises approximately thirty-five acres of land in Placer County, California.[16] Twelve parcels of that land are owned by the Tribe, and the remaining twenty-one parcels are owned by individuals, many of whom are Tribal members.[17] The tribe-owned lands within the historic Rancheria include a pre-school, community-service centers, foster homes, and recreational facilities.[18] Aside from the twelve Rancheria parcels, the Tribe also owns land and facilities off the Rancheria, including the Thunder Valley Casino

---

[15] *See* Auburn Indian Restoration Act of 1994, Pub. L. No. 103-434, 108 Stat. 4533.

[16] Respondents' Motion to Take Judicial Notice ("RFJN"), Exs. 1-5.

[17] *Id.*

[18] ER 89.

Resort.[19] Each enrolled, adult tribal member is, with certain exceptions, entitled to a monthly per-capita distribution of Casino revenue.[20]

The UAIC's central governing body is the Tribal Council, made up of five elected members.[21] The Council—in cooperation with numerous Tribal committees and other administrative bodies—is charged with promoting the Tribe's peace and prosperity through legislation and executive actions.[22] The Council's powers and responsibilities, along with the rights and liberties of all Tribal members, are set out in the Tribal Constitution and the Tribal Ordinances.[23] The Council also may impose certain forms of limited, non-punitive discipline upon Tribal members who have violated the civil provisions of the Tribal Constitution or Tribal Ordinances.[24]

One such ordinance, Tribal Ordinance 2004-001 § III(I) ("the Defamation Ordinance"), imposes upon members a "duty to refrain from

---

[19] ER 89.

[20] ER 89.

[21] ER 90.

[22] ER 90.

[23] ER 90; ER 425-41.

[24] ER 90; *see also United States v. Kagama*, 118 U.S. 375, 382 (1886) (recognizing Indian tribes' inherent "power of regulating their internal and social relations").

defaming the reputation of the Tribe, its officials, its employees or agents *outside of a tribal forum*."[25] This Ordinance was passed while petitioner Tavares was Chairperson of the Tribal Council.[26]

The Defamation Ordinance reflects the Tribe's ongoing efforts to promote economic development and autonomy after enduring decades of poverty and instability. As the Tribal Appeals Board explained in ruling on petitioners' claims, the Ordinance "foster[s] strong and stable communications with the public at large, who include valuable Thunder Valley Casino customers, as well as business partners, local, state, and federal governments."[27] These collectivist norms are not unique to the

---

[25] ER 407 at ¶I (emphasis added). The predecessor to the Defamation Ordinance, which was passed prior to the adoption of the UAIC Constitution, defined "Member in Good Standing" in part as "one who has not engaged in conduct that defames the reputation of the tribe in a non-tribal forum or who has engaged in serious and repeated violations of tribal laws." ER 342. The core proscription of the Defamation Ordinance has therefore been operative since before the passage of the UAIC Constitution. ER 343.

[26] ER 342-43.

[27] ER 344. Casino revenue has been critical to the autonomy and prosperity of the UAIC and many other previously impoverished Indian tribes. As the Supreme Court observed regarding the Cabazon and Morongo Reservations: "[These] Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of

UAIC, and indeed are embedded in the traditions and identities of many Indian tribes.[28]

Petitioner Tavares served on the Tribal Council from approximately 1998 to 2010, and she was the Council Chairperson for many of those years.[29] She was a member of the Council when the Defamation Ordinance was passed, and she imposed discipline on tribal

---

employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 418-19 (1987), *superseded by statute on other grounds as recognized in Michigan v. Bay Mills Indian Comm.,* 134 S. Ct. 2024 (2014).

[28] For example, the Exclusion Code of the Grand Portage Band of Chippewa Indians authorizes exclusion for "'[p]ersonal, impertinent, slanderous or profane remarks made to a member of the Tribal Council, its staff or the general public.'" Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. Rev. 85, 115 (2007) (quoting Grand Portage Code ch. 2, § 5202(b)). The laws of the Confederated Tribes of the Colville Reservation authorize expulsion for conduct that "'substantially threatens or has some direct effect on the political integrity, institutional process, economic security or health or welfare of the [tribe].'" *Id.* at 114 (quoting Colville Tribal Law & Order Code tit. 3, ch. 3-2, § 3-2-4(a)). One commentator has observed that "peacemaking," the traditional tribal method for dispute resolution, "is concerned with justice as it relates to the benefit of the community, and not just for the benefit of individual members." Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 Colum. Hum. Rts. L. Rev. 235, 251 (1997).

[29] ER 413.

members under the Ordinance.[30] During Tavares's tenure, the Council also appointed two of the three Appeals Board members that ruled on the claims giving rise to this petition.[31] In 2010, the Council unanimously voted to remove Tavares as Chairperson for fifteen acts of "malfeasance," "misconduct," and "gross neglect of duty."[32]

C. The petitioners' underlying conduct

Petitioners are members of the UAIC whose allegations arise out of their efforts to recall the members of the 2011 Tribal Council.[33] On November 7, 2011, the petitioners submitted a recall petition to the UAIC Tribal Election Committee, an independently elected body that administers and oversees Tribal elections.[34] The recall effort was premised on allegations that the Tribal Council had mismanaged the Tribe's funds.[35] The petitioners issued a press release to mass-media

---

[30] ER 343.

[31] ER 334.

[32] ER 121-25.

[33] ER 2, 4-7. The 2011 Tribal Council included Gene Whitehouse, Brenda Adams, Calvin Moman, David Keyser, and Kim DuBach. ER 4-5 at ¶8. Keyser and DuBach were subsequently replaced by John Williams and Danny Rey. ER 4 at ¶7. The Petition names only the current members of the Tribal Council in their official capacities.

[34] ER 4-5 at ¶8.

[35] ER 5-6 at ¶10.

outlets on November 7, 2011 stating, among other things, that the Tribal Council had engaged in "questionable financial practices" and "cover-ups of financial misdealings." According to the release, the Council also had "fraudulently" refused to conduct a financial audit of the tribe's finances, and the Tribe's elections were "dishonest and rigged." [36]

On November 11, 2011, the Election Committee rejected the recall petition on numerous grounds, including failure to obtain the requisite support of 40% of the Tribal membership.[37] The petitioners then issued another press release alleging that the recall petition had been unlawfully "scuttle[ed]" by the Tribal Council.[38] This release was also distributed to numerous news outlets.[39]

D. The Tribal Council findings

The statements made in the two press releases pertained to internal Tribal affairs and the Tribal Council addressed their legality under Tribal law. The Council ultimately determined that the

---

[36] ER 345, 347.

[37] ER 6-7 at ¶¶12-13.

[38] ER 349.

[39] ER 119-120.

petitioners had violated the Defamation Ordinance and related provisions. Thus, on November 15, 2011, the Council sent each petitioner a "Notice of Discipline and Proposed Withholding of Per Capita" ("the Notices").[40] The focal point of the notice was the alleged violation of the Defamation Ordinance.

The Notices recounted the contents of the two press releases and explained in detail how their distribution outside of the Tribe violated the Defamation Ordinance.[41] For example, the Notices explained that assertions about the Council's failure to conduct a forensic audit were entirely false, given that such audits were performed each year and that the audits were made available to all Tribal members.[42] The Notices also summarized numerous news articles that had reported the defamatory statements, including articles in the *Sacramento Bee*, the *Modesto Bee*, and the *Auburn Journal*.[43] The Council concluded that petitioners' misrepresentations "ha[d] a negative impact on our economic development activities, . . . the interest of our tribal members,

---

[40] ER 7-8 at ¶¶15-17; ER 97-125.

[41] ER 7-8 at ¶¶15-17; ER 97-125.

[42] ER 7-8 at ¶¶15-17; ER 97-125.

[43] ER 7-8 at ¶¶15-17; ER 97-125.

and casino financials, at a time when bank financing is necessary for our continued business operations at Thunder Valley Casino."[44]

The Notice also identified several defamatory quotations attributed to petitioner Tavares in the news articles.[45] For example, in an article published by the California Tribal Political Alliance, Tavares stated: "It's time for this outrageous rip-off of our tribe to end."[46] In a YubaNet.com[47] article, Tavares claimed that "the majority of the Tribe favors ousting the current Council and getting rid of the lawyer and his cronies who have been sucking the Tribe dry."[48] The Council noted that the claim regarding the Tribe's financial instability "greatly alarmed the banks that are financing the casino and our potential business partners."[49]

---

[44] ER 170.

[45] ER 163-72. These quotations were in addition to those made in the press releases.

[46] ER 118.

[47] YubaNet.com is an online news outlet based in Nevada City, California that covers current events. *See* YubaNet.com, www.yubanet.com (last visited Dec. 19, 2014).

[48] ER 118.

[49] ER 118.

Each Notice also set forth the Tribal Council's twofold disciplinary decision. *First*, effective on the date of the Notices, the Council temporarily banned the petitioners from certain Tribal lands and facilities.[50] The ban was to last two years for petitioners Caesar, Dolly Suehead, and Barbara Suehead, and ten years for petitioner Tavares.[51] These exclusions covered tribally sponsored events, Tribal properties, and surrounding facilities including the Tribal Offices, Thunder Valley Casino, the UAIC School, health and wellness facilities at the Rancheria, and the Park at the Rancheria.[52] The exclusion did not bar the petitioners from visiting the twenty-one of thirty-three parcels on the Rancheria that are now owned by individuals (including many Tribal members), and thus petitioners were not excluded from their own homes or from the rest of the tribal residential community.[53] They have

---

[50] ER 97-125.

[51] ER 97-125. The ban for Tavares was more severe because of the numerous defamatory statements she had made to the media, and also because of the prior discipline associated with her removal as Council Chairperson. ER 171, 121-25.

[52] ER 97-125.

[53] ER 91 ¶19; RFJN Exs. 1-5. Aside from the twelve Tribe-owned parcels of the Rancheria, the exclusion also applies to a handful of Tribe-owned facilities outside of the Rancheria, including the Tribal administrative offices, a Tribal school, and the Thunder Valley Casino.

remained free to visit and interact with all tribal members and thus have not been excluded from the social world of the Tribe.

Second, the Council stated its intention to withhold per-capita distributions from each petitioner. The withholding was to last six months for Caesar and for Dolly and Barbara Suehead, and four years for Tavares.[54] The proposed withholding was subject to a review process.[55] That process and the authority to suspend per-capita distributions are codified in the Tribe's revenue allocation plan, which was approved by the Secretary of the Interior as required by the Indian Gaming Regulatory Act.[56] Accordingly, the Notices advised each petitioner of her right to contest the proposed withholding at a hearing before the Tribal Council, and of her right to have an attorney present at that hearing.[57]

The Council held hearings on the per-capita withholdings on November 22, 2011.[58] Tavares, Caesar, and Dolly Suehead,

---

[54] ER 98, 103, 152, 163.

[55] ER 126-28.

[56] *See* 25 U.S.C. § 2710(b)(3); ER 365-71.

[57] ER 97-125.

[58] ER 129-72.

accompanied by counsel, each made only a brief appearance and chose not to participate actively in the hearings.[59] Although the petitioners had the opportunity to be heard and to discuss the allegations against them, their counsel instead only left a signed statement for the Council's consideration.[60] On November 29, 2011, the Tribal Council issued a ten-page "Notice of Tribal Council Findings & Action" for each petitioner ("the Findings").[61] The Findings addressed in detail, and rejected, the arguments presented in each petitioner's written statement.[62] The Council therefore confirmed the suspensions of per-capita distributions for the periods set out in the Notices.

E. Appeals Board rulings

The petitioners then appealed to the UAIC Appeals Board, which is comprised of three tribal members appointed by the Tribal Council, two of whom were appointed during Tavares's tenure on the Council.[63] The petitioners' consolidated appeal argued that the Defamation

---

[59] Petitioner Barbara Suehead did not attend the hearing. *See* ER 129-39.

[60] ER 129-39; *see also* ER 173-206.

[61] ER 129-72.

[62] ER 129-72.

[63] ER 334.

Ordinance is invalid under the UAIC Constitution and under federal law, and further claimed that the petitioners had been denied due process in challenging their discipline.[64] Petitioners did not challenge the findings regarding the violation of another tribal law imposing a duty "to refrain from damaging or harming tribal programs or filing . . . false information in connection with a tribal program."[65]

On May 23, 2012, the Appeals Board issued four rulings affirming the Findings as to each petitioner. Each of the 30-page rulings carefully considered and rejected the petitioners' arguments under both tribal law and the ICRA.[66] The crux of the rulings was that (1) the Defamation Ordinance is facially valid and was properly applied under both Tribal law and the ICRA; and (2) the Tribe had not violated petitioners' right to due process because petitioners were given proper notice and a meaningful opportunity to be heard.

---

[64] *See* ER 207-38.

[65] ER 207-38; 337; 406.

[66] The Board rulings for each petitioner were substantially similar because, with the exception of certain facts unique to each petitioner, the allegations and applicable law were effectively identical. Moreover, the petitioners had submitted a single consolidated appeal.

Among other findings, the Board explored the history and purpose of the Defamation Ordinance. The Board explained that the Ordinance "was important for the Tribe as we weathered challenges to our federal [recognition] in 1996 as well as during the dozens of county and city meetings we participated in to defend our tribal government and its right to conduct Indian gaming."[67] The Ordinance "continues to be an important fundamental tenet, as our Tribe, which was only recently restored in 1994, strives to foster important governmental relationships and business ventures, including our casino."[68] The Board therefore held that the Ordinance is "supported by a compelling interest of fostering strong and stable communications with the public at large, who include valuable Thunder Valley Casino customers, as well as business partners, local, state, and federal governments, and California voters whose support of Indian gaming is a crucial component of our ability to continue gaming."[69]

The Board concluded that the Ordinance was valid under the UAIC Constitution and consistent with the Constitution's free-speech

---

[67] ER 343.

[68] ER 343.

[69] ER 344.

guarantee. The Board also agreed with the Tribal Council's findings that petitioners' defamatory remarks in non-tribal forums violated the Ordinance.[70] Finally, the Board held that the petitioners had not been denied due process and had been afforded ample notice and opportunity to be heard regarding their discipline.[71]

Although the Board affirmed the Findings in their entirety, it reduced the duration of Tavares's per-capita withholding by six months (to three-and-a-half years), and reduced the other petitioners' withholdings by one month (to five months each).[72]

F. The habeas-corpus petition and district-court order

On October 10, 2013, petitioners filed a petition for writ of habeas corpus in the district court under 25 U.S.C. § 1303 of the Indian Civil Rights Act (ICRA).[73] Petitioners allege that the discipline imposed upon them violated their free-speech and due-process rights under the ICRA. The respondents filed a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), arguing

---

[70] ER 345-57.

[71] ER 358-60.

[72] ER 269, 300, 332, 364.

[73] ER 1.

that: (1) the Petition was moot as to petitioners Dolly Suehead, Barbara Suehead, and Donna Caesar because their disciplinary periods already had expired; (2) petitioners had failed to satisfy the jurisdictional "detention" requirement of § 1303; (3) there could be no jurisdiction under § 1303 because the underlying proceedings were civil rather than criminal; (4) the Court lacked jurisdiction over unexhausted claims; and (5) there could be no jurisdiction under *Ex Parte Young*.[74]

After full briefing and oral argument, the district court granted respondents' motion to dismiss on the ground that there was no "detention" under § 1303. The court's 18-page order began by addressing two leading authorities regarding the scope of § 1303, *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010), and *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996). In *Jeffredo*, this Court held that neither permanent disenrollment from a tribe nor the exclusion from certain tribal facilities are a sufficiently severe restraint on liberty to confer jurisdiction under § 1303. *Jeffredo*, 599 F.3d at 919. In *Poodry*, the Second Circuit considered a petition on behalf of tribal members who had been convicted of treason,

[74] 209 U.S. 123 (1908).

permanently banished from all tribal lands, ordered evicted from their homes, dispossessed of their land, and permanently stripped of their tribal citizenship. *Poodry*, 85 F.3d at 877-78. The Second Circuit held that these restraints were severe enough to confer § 1303 jurisdiction.

The district court held that petitioners' discipline was, "in many ways, not as severe a restraint on liberty" as the punishments in *Jeffredo* (where § 1303 jurisdiction was not found) and *Poodry* (where it was).[75] The court noted that the petitioners here retained the right to vote and the right to receive tribal medical benefits.[76] The court also emphasized that all petitioners remain members of the Tribe and are free to visit the many parcels of Rancheria land that are owned by individuals (including many tribal members).[77] The petitioners, the court observed, "are not confined to a particular area."[78] Finally, the court noted that the exclusions at issue were temporary rather than permanent, and that no federal court ever had "asserted jurisdiction to

---

[75] ER 534.

[76] ER 527.

[77] ER 534.

[78] ER 534.

review a tribe's decision to temporarily exclude members from all tribal lands."[79]

The district court accordingly held that petitioners had failed to demonstrate a restraint on liberty severe enough to invoke subject-matter jurisdiction.[80] This holding, the court noted, was consistent with numerous circuit and district-court opinions declining to exercise jurisdiction under § 1303.[81] The court also recognized that "Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly *restrained*."[82] Having found no subject-matter jurisdiction, the court declined to reach respondents' other arguments (reasserted here as alternative grounds of affirmance).[83]

---

[79] ER 535.

[80] ER 536-37.

[81] *See* ER 536.

[82] ER 535 (citing *Santa Clara Pueblo*, 436 U.S. at 72 (emphasis in district-court order)). The district court also rejected petitioners' claim that the *Ex Parte Young* doctrine provided an independent basis for jurisdiction. ER 537. Petitioners have not raised this argument on appeal, and therefore have abandoned it.

[83] ER 537.

V. SUMMARY OF ARGUMENT

1. The petitioners have not met their heavy burden of showing the "severe restraint on liberty" necessary to confer jurisdiction under § 1303. They were not convicted of any crime, nor were they incarcerated or physically detained in any way. Instead, petitioners were temporarily excluded from certain tribal facilities and their distributions of casino revenue were temporarily suspended. They have retained their medical benefits and the right to vote in tribal elections. They have not been evicted from their homes, and they may visit the homes and residential properties of other tribal members, including those located within the boundaries of the historic Rancheria. Indeed, petitioner Dolly Suehead owns a parcel of the Rancheria that is not subject to exclusion.[84] In total, the exclusion applies to only twelve of the thirty-three Rancheria parcels, as well as certain non-Rancheria land such as the Casino. These limited restraints are insufficient to confer jurisdiction under § 1303.

2. The district court correctly relied on both *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010), and *Shenandoah v. United*

[84] See RFJN Ex. 4 (Parcel 040-300-021-000).

States Department of Interior, 159 F.3d 708 (2d Cir. 1998). Those cases involved permanent exclusion from tribal lands and permanent disenrollment from the tribe; yet both courts still held that there could be no jurisdiction under § 1303. The discipline here was even less severe than in *Jeffredo* and *Shenandoah*.

3. The district court correctly ruled that *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), is distinguishable. The *Poodry* petitioners were convicted of treason, sentenced to permanent banishment from all tribal lands, stripped of their tribal citizenship, denied tribal medical benefits, dispossessed of their real property, and physically threatened. The *Poodry* court ruled that these extreme punishments were enough to warrant federal review; but no such circumstances exist here.

4. The merits of petitioners' free-speech and due-process claims are not before this Court and are not relevant to the jurisdictional inquiry.

5. Even if the petitioners could establish a severe restraint on liberty, there still would be no jurisdiction under § 1303 because federal courts may only review tribal criminal proceedings, not civil ones. The

UAIC does not have a penal code and does not institute criminal proceedings. It has no jail. All criminal investigation, enforcement, and adjudication falls under either county, state, or federal jurisdiction. Here, the petitioners were disciplined for violating a civil defamation ordinance and thus there can be no jurisdiction under § 1303.

6. The Petition is moot as to Dolly Suehead, Barbara Suehead, and Donna Caesar. Their discipline expired over a year ago. They have failed to establish that any exceptions to the mootness doctrines apply, and their claims therefore must be dismissed.

7. Even if there were jurisdiction over some claims in the Petition, petitioners have not exhausted their tribal remedies as to other claims. Specifically, neither their equal-protection claim nor their claims regarding an alleged "slush fund" were raised in the tribal courts, and those claims must be dismissed for failure to exhaust.

VI. COUNTERSTATEMENT OF THE STANDARD OF REVIEW

This Court "review[s] the district court's grant of a motion to dismiss under [Federal Rule of Civil Procedure] 12(b)(1) de novo and reviews factual findings relevant to that determination for clear error." *Viewtech, Inc. v. United States*, 653 F.3d 1103-04 (9th Cir. 2011).

VII. ARGUMENT

A. The scope of federal jurisdiction over ICRA violations must be construed narrowly to promote tribal sovereignty.

1. The ICRA prohibits tribes from abridging certain individual rights.

As "separate sovereigns pre-existing the Constitution," Indian tribes are not subject to the Constitution's restraints against the federal and state governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Tribes thus have the "power to make their own substantive law in internal matters." *Id.* at 55. Congress has plenary authority to limit or modify these powers of tribal self-government, *Talton v. Mayes*, 163 U.S. 376 (1896), and it exercised that power in passing the Indian Civil Rights Act of 1968 (ICRA).

The ICRA codified certain individual rights that no Indian tribe may infringe. *See* 25 U.S.C. § 1302(a)(1)-(10). Congress initially considered a proposal to apply the full Bill of Rights directly to tribal governments.[85] But tribes resisted this proposal as an undue incursion into tribal sovereignty that failed to take into account the differences

[85] *See* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. Legis. 557, 589-590 (1972).

between tribal and non-tribal culture and traditions.[86] Thus, the ICRA ultimately included rights similar to, but not co-extensive with, those in the Bill of Rights. *See Santa Clara Pueblo*, 436 U.S. at 57. For example, ICRA contains no prohibition against the establishment of religion; nor does it provide a right to a republican form of government or a right to bear arms. *See* 25 U.S.C. § 1302.

2. In *Santa Clara Pueblo*, the Supreme Court strictly limited the availability of federal review of alleged ICRA violations.

In the years after ICRA's passage, some federal courts heard civil actions premised on alleged ICRA violations. William C. Canby, Jr., American Indian Law in a Nutshell 401 (5th ed. 2009). These courts discerned in the ICRA an implied right of action for equitable relief against a tribe or its officials, even though the only express right of action under ICRA is a petition for a writ of habeas corpus. *Id.*; *see* 25 U.S.C. § 1303.

In *Santa Clara Pueblo*, the Supreme Court ruled that there is no implied remedy for ICRA violations and that the only avenue for federal relief is a habeas-corpus petition under § 1303. The majority opinion by

---

[86] *Id.*

Justice Marshall began its analysis by "bear[ing] in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself," and the Court therefore "[trod] lightly in the absence of clear indications of legislative intent." *Id.* at 59-60. The Court then analyzed ICRA's structure and legislative history to determine whether Congress intended to permit a federal civil suit to enforce the ICRA.

In reviewing the ICRA's text, the Court discerned "[t]wo distinct and competing purposes . . . [:] strengthening the position of individual tribal members vis-à-vis the tribe, [and] . . . promot[ing] the well-established federal policy of furthering Indian self-government." *Id.* at 62 (internal quotation marks omitted). In this regard, the Court stressed that Congress had rejected the "wholesale" extension of constitutional requirements, as had initially been proposed, and instead selectively incorporated and modified provisions of the Bill of Rights "to fit the unique political, cultural, and economic needs of tribal governments." *Id.* at 62.[87]

[87] Citing Subcommittee on Constitutional Rights of the Senate

The Court also recognized that ICRA advanced tribal autonomy by deferring to and strengthening tribal courts. "Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply." *Id.* at 65. The Court further noted that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Id.* The ICRA strengthened these capable tribal institutions by funding further training of Indian judges. *Id.* at 63-64. These components of the ICRA "manifest a congressional purpose to protect tribal sovereignty from undue interference," and counseled against an implied right of action. *Id.* at 63.

Finally, the Court addressed the legislative history underlying the ICRA's habeas-corpus provision, § 1303. The Court noted that this narrow avenue of relief was a less intrusive remedy than federal *de novo* review of tribal convictions, which had been initially proposed and

---

Committee on the Judiciary, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S.Res. 194, 89th Cong., 2d Sess., 8-11, 25 (Comm. Print 1966).

rejected. *Id*. at 67. Congress also had "considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context." *Id*. at 67. This history, the Court held, "indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provision of § 1303." *Id*. at 70.

Accordingly, in light of ICRA's "dual objectives," the Court declined to infer a cause of action that, "while serving one legislative purpose" (individual rights) would "disserve the other" (tribal self-government). *Id*. at 64.

3. *Santa Clara Pueblo* and settled canons of Indian law require restraint in construing the scope of § 1303.

Petitioners seek relief under an expansive view of the ICRA's habeas-corpus provision, and one which would upset the delicate statutory balance identified in *Santa Clara Pueblo*. Specifically, they seek review of a tribe's ruling regarding a civil-defamation ordinance, even though they were not incarcerated, disenrolled, or excluded from their tribe. But this Court must heed the ICRA's "dual objectives" when assessing the scope of federal review for ICRA violations. The narrow habeas remedy was included in ICRA to "avoid[] undue or precipitous

interference in the affairs of the Indian people." *Santa Clara Pueblo*, 436 U.S. at 67. And in the nearly forty years since *Santa Clara Pueblo*, no federal court has accepted petitioners' broad view of § 1303, nor has Congress expanded the scope of jurisdiction over ICRA claims.[88]

This cautious approach to ICRA jurisdiction is reinforced by settled canons of Indian law. One such canon mandates that "federal statutes and regulations relating to tribes and tribal activities must be construed . . . in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy encouraging tribal independence." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982) (internal quotation marks omitted). A related canon requires "a clear expression of Congressional intent . . . before a court may construe a federal statute so as to impair tribal sovereignty." *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007).[89]

---

[88] Critics of ICRA and *Santa Clara Pueblo* "have introduced legislation to waive tribal sovereign immunity for ICRA claims and to allow federal court review of tribal decisions under ICRA," but none have passed. *See* Cohen at 986 & n.57. The U.S. Commission on Civil Rights did not recommend enactment of such legislation. *Id.*

[89] *See also United States v. Errol D., Jr.*, 292 F.3d 1159, 1164 (9th Cir. 2002) (applying canon to reduce the "incursion into the tribal

These canons reflect "the values of structural sovereignty, not judicial solicitude for powerless minorities," *Cohen's Handbook of Federal Indian Law* at 117 (Nell Jessup Newton ed., 2012) ("Cohen"),[90] and they retain their force even "in an age when tribes have increasing political clout and sophistication." *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (internal quotation marks omitted). Therefore, "even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." *Fisher v. District Court*, 424 U.S. 382, 390-91 (1976).[91]

---

sovereignty" effected by the Indian Major Crimes Act); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195-96 (10th Cir. 2002) ("We . . . do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so.").

[90] The Cohen *Handbook* has been recognized as the leading authority on Indian Law and is routinely cited by the Supreme Court and lower federal courts. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 55; *Jeffredo*, 599 F.3d at 918.

[91] The Supreme Court has likewise cautioned that 28 U.S.C. § 2254, which permits federal habeas review of state-court convictions, should be construed narrowly because "comity and federalism concerns . . .

In sum, "Indian sovereignty . . . [is] a backdrop" against which the ICRA must be read, *Santa Clara Pueblo*, 436 U.S. at 60, and for the reasons discussed below petitioners have not established jurisdiction under § 1303.

B. Petitioners have failed to show a severe restraint on their liberty.

The district court held that petitioners' detention was not severe enough to confer jurisdiction under § 1303. That ruling followed this Court's precedent and was consistent with all other federal court decisions under § 1303. It should be affirmed.

1. Petitioners bear the burden of establishing a "severe restraint on liberty."

a. Federal Rule of Civil Procedure 12(b)(1)

In opposing a motion to dismiss under Rule 12(b)(1), "[t]he burden of establishing subject matter jurisdiction rests on the party asserting

---

inform a court's construction of a statute in determining a question of jurisdiction." *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 512 n.16 (1982). "The federal writ of habeas corpus, representing as it does a profound interference with state judicial systems and the finality of state decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns." *Id.* at 515-16; *see also, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("[W]e have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings.").

that the court has jurisdiction." *In re Wilshire Courtyard*, 729 F.3d 1279, 1284 (9th Cir. 2013). "In effect, the court presumes *lack* of jurisdiction until plaintiff proves otherwise." Schwarzer *et al*, *Federal Civil Procedure Before Trial* at 9:77.10 (2014) (emphasis in original). "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In those circumstances, "[t]he court need not presume the truthfulness of the plaintiff's allegations." *Id.*

b. 25 U.S.C. § 1303

Under § 1303, "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." The jurisdictional "detention" requirement of § 1303 is as broad as, but no broader than, the "custody" requirement in other federal habeas statutes. *See Jeffredo*, 599 F.3d at 918. Although "detention" under § 1303 does not require actual imprisonment, it does require a "severe actual or potential restraint on liberty." *Id.* at 919. In other habeas statutes, severe restraints are those that are "not shared by the public generally"

and that "significantly restrain [a] petitioner's liberty to do those things which in this country free men are entitled to do." *Jones v. Cunningham*, 371 U.S. 236, 240, 243 (1963). A sufficient restraint also exists if the petitioner cannot "come and go as he pleases." *Hensley v. Municipal Ct.*, 411 U.S. 345, 351 (1973).

In the tribal context, federal courts have undertaken a fact-intensive inquiry into the alleged restraints to determine whether jurisdiction exists under § 1303. This Court has therefore held that the exclusion from certain tribal facilities (including a health clinic), and the denial of access to tribal schools is insufficient to confer § 1303 jurisdiction. *Jeffredo*, 599 F.3d at 919. The Second Circuit has similarly held that the loss of one's "voice" in the community, loss of health insurance, loss of access to tribal health and recreation facilities, loss of quarterly distributions to tribal members, and loss of one's place on the tribe's membership rolls are insufficient to meet the heavy burden of establishing jurisdiction under § 1303. *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 714 (2d Cir. 1998) (cited with approval in *Jeffredo*, 599 F.3d at 919).

As discussed below, the district court correctly followed this precedent by examining the specific restraints in this case and concluding that there can be no jurisdiction under § 1303.

2. Under *Jeffredo*, the "actual restraints" imposed on petitioners are insufficient to confer jurisdiction under § 1303.

This Court has set a demanding standard for establishing detention under § 1303, and the discipline in this case falls well short of that standard. The controlling precedent—and one that petitioners barely mention—is *Jeffredo*. There, the petitioners had been permanently disenrolled because they were not lineal descendants of a tribal member. *Jeffredo*, 599 F.3d at 917. As a result, the petitioners also were denied access to certain tribal facilities, including the senior citizens' center and the health clinic. *Id.* at 918-19. Their children were forbidden from attending the tribal school, and they also were stripped of over $250,000 per year in casino revenue. *Id.* at 918-19, 922 & n.1 (Wilken, D.J., dissenting). The petitioners claimed, among other things, that these "actual restraints," which were permanent, amounted to detention under § 1303. *Id.* at 918. The district court dismissed for lack of jurisdiction.

On appeal, the petitioners argued that three separate restraints amounted, independently, to "detention" under § 1303: (1) the actual restraints discussed above, (2) the potential that the petitioners would be excluded permanently and completely from their homes and all tribal lands, and (3) their disenrollment from the tribe. *Jeffredo*, 599 F.3d at 918. This Court rejected all three contentions and its first holding applies directly to this matter.[92]

The Court held that the denial of access to certain facilities (the "actual restraints") were insufficient under § 1303, and it catalogued the many freedoms that the petitioners retained.

> In the case before us, the denial of access to certain facilities does not pose a severe actual or potential restraint on the Appellants' liberty. Appellants have not been banished from the reservation. Appellants have never been arrested, imprisoned, fined, or otherwise held by the Tribe. Appellants have not been evicted from their homes or suffered destruction of their property. No personal restraint (other than access to these facilities) has been imposed on them as a result of the Tribe's actions. Their movements have not been restricted on the Reservation.

---

[92] *Jeffredo* also held that neither the petitioners' "potential restraints" nor their lost citizenship were sufficiently severe under § 1303. Petitioners here have not alleged any potential restraints, nor have they been disenrolled, and so these holdings do not directly apply.

Jeffredo, 599 F.3d at 919. *Jeffredo* therefore endorsed a fact-specific analysis of the restraints before it, and refused to exercise jurisdiction absent a genuine showing of a pervasive and severe restraint on liberty.

The discipline in this case is much less severe than the discipline that this Court found insufficient to confer jurisdiction in *Jeffredo*. Indeed, the petitioners here retain every freedom that the *Jeffredo* Court identified as bearing on its decision to affirm the judgment of dismissal in that case. The Tribal Council imposed only two forms of discipline on petitioners: temporary denial of per-capita revenue and temporary exclusion from certain tribal facilities. The exclusion applied only to "Tribal properties and/or surrounding facilities, including, but not limited to, the Tribal Offices, Thunder Valley Casino, the UAIC School, Health and Wellness facilities at the Rancheria, and/or the Park at the Rancheria."[93] There is no dispute that this exclusion imposes *some* restraint on the petitioners, but a careful assessment of the scope of the discipline shows that it falls far short of the severe restraints needed to confer federal jurisdiction.

[93] ER 130-72.

First, the petitioners retain their tribal medical benefits, and none of the discipline extends to the petitioners' children, grandchildren, or other dependents, who remain free to attend the tribal school and to visit other tribal facilities.[94] *Second*, the petitioners are free to visit any of the individually-owned parcels within the historic Rancheria, including those owned by tribal members (such as petitioner Dolly Suehead). The exclusion extends only to the twelve Rancheria parcels owned by the UAIC, and *no tribal members live on the UAIC-owned land* that is subject to the exclusion.[95] *Third*, each petitioner retains the right to vote, via absentee ballot, in any Tribal election.[96] *Fourth*, each petitioner has remained a member of the Tribe, even during the disciplinary period.[97] *Finally*, unlike in *Jeffredo*, the exclusion from Tribal facilities is temporary, rather than permanent. In light of these undisputed facts, the discipline in this case is even less severe than the discipline found non-severe in *Jeffredo* and cannot be reviewed under § 1303.

---

[94] ER 130-72; *see also* ER 91 at ¶18; RFJN Exs. 1-5.

[95] RFJN Exs. 1-5.

[96] ER 91 at ¶17.

[97] ER 91 at ¶18.

Petitioners essentially ignore *Jeffredo* and suggest that its holding can only apply to cases arising from "tribal membership decisions." Appellants' Opening Brief (AOB) at 22. But as set forth above, *Jeffredo* expressly separated its opinion into three independent holdings, only one of which addressed the "actual" physical restraints alleged by the petitioners. The analysis and holding in that regard said nothing about the underlying lineage dispute. Indeed, many district courts have followed *Jeffredo* and denied jurisdiction under § 1303, even where the underlying proceedings were disciplinary and *not* based on ancestry.[98] In short, *Jeffredo*'s holding extends beyond petitions regarding membership claims. It applies here and forecloses jurisdiction over this action.

---

[98] *See Mitchell v. Seneca Nat. of Indians*, 12-CV-119-A, 2013 WL 1337299 (W.D.N.Y. Mar. 29, 2013) (tribal member disciplined after being criminally charged in federal court); *id.* at *3, *4 (citing *Jeffredo*, 599 F.3d at 919); *Lewis v. White Mt. Apache Tribe*, CV-12-8073-PCT-SRB, 2013 WL 510111 (D. Ariz. Jan. 24, 2013) *report and recommendation adopted,* CV12-8073-PCT-SRB, 2013 WL 530551 (D. Ariz. Feb. 12, 2013) (tribal member denied ability to run for tribal office); *id.* at *5-*6 (discussing *Jeffredo* in detail); *Poulson v. Tribal Court for the Ute Indian Tribe of the Uintah & Ouray Reservation*, 2:12-CV-497 BSJ, 2013 WL 1367045 (D. Utah Apr. 4, 2013) (addressing "temporary suspension of one's license to practice as a tribal court advocate"); *id.* at *2 (discussing *Jeffredo* as basis for dismissal).

3. The Second Circuit, under analogous facts, applied the same standard as this Court to dismiss a § 1303 petition for lack of jurisdiction.

Jeffredo's reliance on the Second Circuit's *Shenandoah* ruling further undermines petitioners' claim that *Jeffredo* is not controlling here. *Jeffredo* cited and discussed *Shenandoah* in support of its holding[99]—yet *Shenandoah* did not involve a lineage dispute. Instead, the *Shenandoah* petitioners (like the petitioners here) alleged that they had been disciplined in connection with a tribal political dispute. They alleged that they had been terminated from employment positions, excluded from the health center, stripped of quarterly distributions, banished from business and recreational facilities, removed from the tribal-membership rolls, and prohibited from speaking to other tribal members. *Id.* at 714. But the court affirmed the dismissal of the § 1303 claim because the petitioners had not been "banished from the [tribe], deprived of tribal membership, convicted of any crime," or subjected to physical removal from tribal territory. *Id.* Accordingly, *Shenandoah*, like *Jeffredo*, properly assessed the specific restraints at issue and

[99] *See Jeffredo*, 599 F.3d at 919.

concluded that they were insufficient to establish jurisdiction under § 1303.[100]

Moreover, the discipline in *Shenandoah*, like that in *Jeffredo*, was more severe than the discipline in this case.[101] The petitioners here were not removed from the membership rolls, did not lose the right to vote in Tribal elections, were not terminated from any employment

---

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

[101] Petitioners claim that *Shenandoah* is inapposite because here, unlike in *Shenandoah*, petitioners have been both "banished" and "convicted" of a crime. AOB at 34. This argument is meritless. First, mere incantation of the term "banishment" is no substitute for a careful review of the actual restraints at issue in this case. As discussed above, the restraints here are nearly identical to those in *Shenandoah* and are in fact *less severe* in several respects, including the fact that petitioners were not disenrolled. Second, as discussed in further detail in section VII.D., petitioners were not convicted of any crime because the Tribe does not even prosecute crimes. Petitioners also claim that *Shenandoah* is inapposite because there was no allegation that the tribal actions against the *Shenandoah* petitioners "were taken against them in retaliation for their speaking their minds and without notice or hearing." AOB at 34. But this argument conflates the jurisdictional inquiry with the merits. The alleged free-speech and due-process violations are not before this Court. *See infra* section VII.C.

positions, did not lose access to healthcare, and were not prohibited from speaking to other tribal members. Moreover, the exclusions here were temporary, while those in *Shenandoah* were permanent. Under *Shenandoah*—which this Court cited with approval in *Jeffredo*[102]—the petitioners in this case were not "detained" within the meaning of § 1303.[103]

---

[102] *Jeffredo*, 599 F.3d at 919.

[103] *Mitchell v. Seneca Nation of Indians*, 2013 WL 1337299 (W.D.N.Y. Mar. 29, 2013), recently applied the Second Circuit's construction of § 1303 to dismiss a petition substantially similar to the one at issue here. The tribe in *Mitchell* had (1) barred Mitchell from entering any tribal buildings or businesses; (2) suspended annuity payments pending resolution of criminal charges; (3) revoked his tribal business license; and (4) prohibited all tribal businesses from working with him. *Id.* In dismissing the petition, the *Mitchell* court noted that "short of an order of permanent banishment, federal courts have been reluctant to find tribal restraints severe enough to warrant habeas review." *Id.* at *3. Citing *Jeffredo*, the court recognized that "[e]ven orders of disenrollment from a tribe have been found insufficient to satisfy the detention requirement of ICRA." *Id.* The court also relied on *Shenandoah*, noting that "[a]lthough the restrictions were serious, the Circuit found that they were not as severe as the permanent orders of banishment in *Poodry*." *Id.* The *Mitchell* court then held that "[t]he collective restrictions imposed on Mitchell do not come close to the severity imposed in *Poodry* and found to be 'custody.'" *Id.* at *3. Finally, citing both *Shenandoah* and *Jeffredo*, the court held that "barring access to Nation buildings is not a restraint severe enough to permit habeas corpus review." *Id.* at *4.

4. *Poodry* does not apply because the petitioners were not permanently banished and stripped of their tribal citizenship.

While glossing over *Jeffredo* and *Shenandoah*, the petitioners rely primarily on *Poodry* (and two district-court cases that that have followed it). But, for the reasons explained below, and despite petitioners' conclusory claim that their discipline amounted to "banishment," *Poodry* is inapposite.

a. The permanent banishment in *Poodry* was significantly more severe than the discipline in this case.

In *Poodry*, the petitioners were convicted of the criminal offense of treason and were permanently banished. Among other things, the banishment order stripped petitioners of their membership in the tribe and their access to tribal medical benefits. The order also excluded the petitioners from all 7,500 acres of tribal land and decreed that they be removed from their tribal homes. *Id.* at 878. The *Poodry* court also stressed facts in the record evincing a direct threat to the petitioners' physical security and comfort: the banishment notices had been served by aggressive groups of fifteen to twenty-five people; the petitioners had been threatened or assaulted by tribal authorities; and the petitioners had been denied electrical services. *Id.* at 895.The court held that these

restraints were enough to trigger jurisdiction because the banishment amounted to a "coerced and peremptory deprivation of the petitioners' membership in the tribe and their social and cultural affiliation." *Poodry*, 85 F.3d at 895.

Petitioners claim that *Poodry* applies here because they too were "banished." But the mere incantation of that term—which has been defined in numerous ways and which can vary by tribe[104]—is not a substitute for the kind of fact-specific inquiry demanded by *Jeffredo*, *Shenandoah*, and by *Poodry* itself.[105] The expulsion in *Poodry* was permanent and comprehensive; it extended to all 7,500 acres of tribal lands including the petitioners' own homes and was accompanied by the

---

[104] Professor Kunesh has surveyed tribal banishment traditions and identified a rich variety of practices. The Cheyenne, for example, have used ostracism and ridicule among other forms of expulsion and discipline. *See* Kunesh, 37 N.M. L. Rev. at 96. The Navajo practice of "shunning" usually severs the member's ties with his family and relatives. *Id*. at 96. Other forms of banishment require restitution, mental health counseling, and/or rehabilitation services. *Id*. at 93-94.

[105] Petitioners' repeatedly claim that they were "banished," but fail to actually unpack what the discipline entails. *See, e.g.*, AOB at 1 ("the punishment was severe: banishment from the tribe for a period of ten years"); *id*. at 2 (stating that petitioners were "'banished' by appellees for up to 10 years from all tribal lands and facilities"); *id*. at 34 (describing discipline as "'banishment' of tribal members as punishment").

deprivation of petitioners' tribal citizenship. The *Poodry* court found that such a sweeping expulsion "works a destruction of one's social, cultural, and political existence." *Id.* at 897. The court also likened the banishment orders to denationalization and a "'total destruction of the individual's status in organized society.'" *Id.* at 896 (quoting *Trop v. Dulles*, 356 U.S. 86, 104 (1958)).

In contrast, the petitioners here were not "banished" within the meaning of *Poodry* because they were not stripped of their tribal citizenship, none of their discipline is permanent, and they enjoy unfettered access to the residential parcels of the historic Rancheria.[106] The land owned by individual Tribal members was not subject to the exclusion order, and only twelve of the thirty-three parcels of the historic Rancheria were subject to exclusion.[107] Accordingly, unlike the petitioners in *Poodry*, the petitioners here were not excluded from the Tribe's central and historic residential community—let alone from their own homes. Nor, as in *Poodry*, were any of the petitioners stripped of

[106] ER 91.

[107] ER 91; RFJN Exs. 1-5.

their Tribal lands.[108] Finally, there is no evidence of physical aggression, threats, or the denial of basic services. Instead, the discipline was imposed pursuant to a thorough and peaceful assessment of the petitioners' violation of civil Tribal ordinances.

While conceding that the *Poodry* expulsion differed because it was permanent (and while ignoring all other distinctions), Tavares argues that her ten-year discipline is "long enough." AOB at 32. But the question is not whether ten years is long enough; it is whether the *restraints imposed* were *severe* enough. Like the magic word "banishment," the petitioners' repeated references to the ten-year duration is no substitute for the fact-specific inquiry that *Jeffredo*, *Shenandoah*, and *Poodry* all require. And as set forth above, the actual restraints here are less severe than in any of those cases (two of which were dismissed for lack of jurisdiction).

In short, the petitioners were not permanently "banished" like the petitioners in *Poodry*, and nothing in that case supports jurisdiction here.

---

[108] ER 91; *contra Poodry*, 85 F.3d at 878.

b. *Poodry* has been roundly criticized by scholars and has only been followed by two district courts.

Although the Second Circuit's *Poodry* decision is easily distinguishable and this Court need not disapprove it to affirm here, numerous scholars have already criticized it. The Cohen editors have described *Poodry* (and two district-court decisions that have followed it)[109] as "attempts to circumvent exclusive tribal jurisdiction [that] disrupt the delicate balance of tribal and federal interests established by Congress as explicated in [*Santa Clara Pueblo*]. They also can insert federal courts into precisely the types of internal tribal decisions that most implicate tribal sovereignty." Cohen at 987 (citing *Poodry*, *Quair*, and *Sweet*). Another commentator has argued that *Poodry* went "too far in rejecting . . . tribal cultural norms as a meaningful source of judicial guidance in the context of intra-tribal dispute [and] . . . unabashedly

---

[109] Petitioners rely on those district-court decisions which, like *Poodry*, all involved both permanent banishment and permanent disenrollment from the tribe. *See Quair v. Sisco*, 359 F. Supp. 2d 948, 962 (E.D. Cal. 2004) ("*Quair I*"); *Quair v. Sisco*, No. 02-5891, 2007 WL 1490571 at *2 (E.D. Cal. May 21, 2007) ("*Quair II*"); *Sweet v. Hinzman*, 634 F. Supp. 2d 1196, 1199 (W.D. Wash. 2008). These cases—all of which pre-date *Jeffredo*—are inapposite for the same reasons that *Poodry* is inapposite: here the petitioners were not permanently banished from all tribal lands and activities, nor were they stripped of their tribal citizenship.

substituted its own legal and cultural bias for the U.S. legal system." Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. Rev. 85, 124 (2007). Several other scholars have likewise concluded that *Poodry* was wrongly decided.[110] These informed critiques—premised largely on ICRA's purpose and the Indian interpretative canons—provide yet another reason why *Poodry*'s reasoning should not be applied here.

5. The district court's dismissal was consistent with jurisdictional standards for non-ICRA habeas petitions.

Petitioners also rely on cases assessing the scope of non-ICRA habeas jurisdiction. These arguments should be rejected.

---

[110]Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 Wash. L. Rev. 941, 973 (2011) ("Binding U.S. Supreme Court precedent and deference to tribal sovereignty require that courts decline habeas jurisdiction over banishment actions."); Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 Hamline L. Rev. 97, 120 (2007) ("It is not reasonable to conclude that tribes are the gatekeepers of membership, but at the same time do not have the authority to exile those who are not fulfilling their duties as tribal members."); Brendan Ludwick, *The Scope of Federal Authority over Tribal Membership Disputes and the Problem of Disenrollment*, 51 Fed. Law. 37, 39 (2004) ("Allowing habeas review of banishment orders under the ICRA, the Second Circuit [in *Poodry*] departed from the principle articulated in *Santa Clara* [*Pueblo*]: that Indian tribes, as sovereign nations, should have the exclusive right to determine tribal membership.").

First, *Jeffredo* (and all other cases discussed above), recognized that "[t]he term 'detention' in [§ 1303] must be interpreted similarly to the 'in custody' requirement in other habeas contexts." *Jeffredo*, 599 F.3d at 918. Petitioners do not claim (nor could they) that *Jeffredo* is inconsistent with non-ICRA habeas standards; indeed, *Jeffredo* applied the jurisdictional standard from *Jones v. Cunningham*, 371 U.S. 236 (1963), which addressed petitions under 28 U.S.C. § 2241. *Id.* at 919. Accordingly, reference to non-ICRA habeas precedent cannot displace *Jeffredo*'s holding and its application to this case.

Second, the restraints in this case are materially distinct from those addressed in the non-ICRA precedent cited by petitioners. For example, petitioners repeatedly invoke *Jones v. Cunningham* to claim that the exclusions here "significantly restrain their liberty." AOB 29. But again, petitioners resort to slogans instead of analysis. In *Jones*, the Supreme Court held that a petitioner on parole had satisfied the "custody" requirement. In support of that holding, the Court catalogued the extensive restraints at issue and stressed, for example, that "Petitioner is confined . . . to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without

permission. He must periodically report to his parole officer [and] permit the officer to visit his home and job at any time . . . ." *Id.* at 242. Moreover, the petitioner "must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison." *Id.* The Supreme Court held that these and other restraints were sufficiently severe.

None of these restrictions, or anything like them, has been imposed on the petitioners here, and thus *Jones* and its progeny do not require reversal.[111]

C. Petitioners' substantive ICRA claims are not before the Court.

Petitioners devote nearly half of their brief to an irrelevant argument that the Tribe violated their rights to free speech and due

[111] Petitioners' reliance on district court orders addressing military-induction cases is even further afield. *See, e.g.*, AOB 29. The severity of the restraints in such cases is self-evident: the petitioners are ordered to report for duty at a specific location; to join and remain with a designated military unit; and, in most cases, to travel overseas to wage war. Moreover, in one case cited by petitioners, the United States Attorney had ordered the inductee to report for duty or face indictment. *See Ex Parte Fabiani*, 105 F. Supp. 139, 148 (E.D. Pa. 1952). Under such circumstances, the petitioner was not "free to go where he pleases" and thus habeas relief was available. *Id.* No such restraints are present in this case.

process under the ICRA. *See* AOB at 10-21. These arguments are not properly before the Court.

The jurisdictional inquiry under § 1303, like any threshold jurisdictional question, is separate and apart from the merits of the underlying claims. Unless and until a party establishes jurisdiction, a court is powerless to reach the merits. *See, e.g.*, *Wilson v. Belleque*, 554 F.3d 816, 821 (9th Cir. 2009). Under § 1303, the jurisdictional test is whether a petitioner can show an actual or potential severe restraint on liberty. No court has reviewed (or could review) the merits of a petitioner's ICRA claim without first confirming its own jurisdiction. And no court has considered (or could consider) the merits of an ICRA claim as a factor in its jurisdictional analysis. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 72 (not reaching equal-protection claim where there was no ICRA jurisdiction).

Accordingly, the Court must disregard petitioners' substantive arguments regarding alleged free-speech and due-process violations—arguments that the UAIC Tribal Council and Appeals Board carefully and thoroughly adjudicated.

D. There is no jurisdiction over the Petition because the underlying proceedings and sanctions were civil, not criminal in nature.

Even if petitioners' discipline were a sufficiently severe restraint on liberty, the Petition could have been properly dismissed on the ground that the underlying proceedings were civil rather than criminal.[112]

To establish jurisdiction under § 1303, a petitioner must show that the detention was imposed via criminal as opposed to civil proceedings. Before Congress enacted the ICRA, a "legislative investigation [had] revealed that the most serious abuses of tribal power had occurred in the administration of *criminal justice*." *Santa Clara Pueblo*, 436 U.S. at 71 (emphasis added). "In light of this finding . . . Congress chose at this stage to provide for federal review only in habeas corpus proceedings." *Id.* Thus, § 1303 is the exclusive vehicle for "federal-court review of tribal criminal proceedings." *Santa Clara Pueblo*, 436 U.S. at 67 (emphasis added); *see also id.* ("Congress

---

[112] The district court did not reach this issue, but this Court "may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt." *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (per curiam).

considered and rejected proposals for federal review of alleged violations of the [ICRA] arising in a civil context"). As Judge Canby has explained, "the effectuation of the non-criminal portions of the Indian Civil Rights Act lies exclusively with [tribal courts]." Canby at 405. [113]

The proceedings in this case were not criminal. The UAIC does not investigate, enforce, or adjudicate criminal actions.[114] There is no Tribal police force, no Tribal jail, and no criminal code.[115] Instead, all criminal investigation, enforcement, and adjudication falls under either county or state jurisdiction.[116] Indeed, under 18 U.S.C. § 1162 (commonly referred to as "Public Law 280"), Congress granted several states, including California, "broad criminal jurisdiction" to prosecute almost all crimes in Indian country. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), *superseded by statute on other*

---

[113] *See also Quair I*, 359 F. Supp. 2d at 963 (stating that a § 1303 petitioner "must establish that the decision which they are requesting this court to review is criminal and not civil in nature"); *Alire v. Jackson*, 65 F. Supp. 2d 1124, 1127 (D. Or. 1999) ("[T]he writ of habeas corpus available under section 1303 is limited to unlawful detentions arising out of tribal criminal decisions.").

[114] ER 90.

[115] ER 90.

[116] ER 90.

grounds as recognized in Michigan v. Bay Mills Indian Comm., 134 S. Ct. 2024 (2014).

The Tribe's lack of criminal infrastructure is apparent from the specific violation, proceedings, and discipline in this case. *First*, the Defamation Ordinance is civil. The Ordinance is not part of any criminal code, but is included among provisions designed to "promote the health, education, and general welfare of the Tribe."[117] *Second*, nothing in the Tribal proceedings suggests that the violations or proceedings were criminal. For example, none of the numerous notices and rulings issued by the Tribal authorities in this matter referred to the underlying conduct as criminal. *Cf. Poodry*, 85 F.3d at 889 (noting that "[t]he documents that the members of the Council of Chiefs served upon the petitioners . . . indicate that the respondents themselves view the petitioners' conduct as 'criminal'" in part because they were "'convicted'" of treason).[118] *Third*, the sanction itself was not criminal in

---

[117] ER 406.

[118] Although the *Poodry* court did not conclusively rule on the issue because it determined that the proceedings under review were criminal, that court noted that "two factors . . . favor the respondents' position that § 1303 applies only in the context of a criminal charge or prosecution." *Poodry*, 85 F.3d at 887. First, *Poodry* cited Supreme Court precedent limiting federal review of another sovereign's decision (*i.e.*, a

nature. The petitioners were not incarcerated or otherwise physically detained, nor were they placed on any form of probation or formal supervision. *See Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (holding that Tribe acted "within its civil jurisdiction" when it excluded a non-member from tribal lands).

In sum, the violations, proceedings, and sanctions in this case were civil, and the Tribe does not even have criminal ordinances or criminal enforcement institutions. The civil nature of this dispute is yet another reason why the district court lacked jurisdiction.

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

In the district court, respondents argued that the petitions of Dolly Suehead, Barbara Suehead, and Donna Caesar are moot because they are no longer under any restraint.[119] The district court did not reach this argument, but mootness is properly before this Court.[120]

---

state-court judgment) to criminal convictions. *Id.* at 887 (discussing *Lehman*, 458 U.S. 502). Second, the court noted that a proposed ICRA remedial scheme, which ultimately was not passed, would have permitted a direct appeal only for criminal actions. The court thus observed that § 1303 (the codified remedial scheme) could reasonably be construed as being limited to criminal actions as well. *Id.*

[119] ER 65-86.

[120] *See Atel Fin. Corp.*, 321 F.3d at 926.

"Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case." *Burke v. Barnes,* 479 U.S. 361, 363 (1987). "A case is moot where the issues before the court no longer present a live controversy or the parties lack a cognizable interest in the outcome of the suit." *Stout v. Te-Moak Tribe of W. Shoshone*, 217 F.3d 846 (9th Cir. 2000). "[T]he plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (internal quotation marks omitted).

Petitioners Dolly Suehead, Barbara Suehead, and Donna Caesar have no cognizable interest in the outcome of this action because they are no longer subject to Tribal discipline. Their per-capita suspensions ended on May 1, 2012, and their exclusion from Tribal properties ended on November 15, 2013.[121] Thus, even if these petitioners once were "detained" by the Tribal Council, they have since been "released." Their petitions are therefore moot and, as discussed below, no exceptions to the doctrine apply.

[121] *See* ER 90; ER 372-77.

1. The petitioners have not shown that any collateral consequences arise from their discipline.

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

A criminal conviction under state or federal law triggers a presumption of collateral consequences. *See Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994), *superseded on other grounds by* 28 U.S.C. § 2253(c). But "[t]he Supreme Court has distinguished between 'substantial civil penalties' that result from a criminal conviction, such as the inability to engage in certain businesses, to serve as an official of a labor union, to vote in state elections, and to serve as a juror, and 'non-statutory consequences' [of other discipline] such as the effect on

employment prospects or the sentence imposed in future criminal proceedings." *Wilson*, 319 F.3d at 480 (quoting *Lane v. Williams*, 455 U.S. 624, 632-33 (1982)). Non-statutory consequences include, for example, "'discretionary decisions' that 'are not governed by the mere presence or absence of a recorded violation.'" *Id.*

Here, there is no basis for applying the presumption of collateral consequences. The petitioners are not challenging a criminal conviction under state or federal law, or even under Tribal law, as discussed more fully in section VII.D., above. The violations at issue involve a civil ordinance, civil proceedings, and a finding of civil liability with no attendant incarceration.[122] Moreover, nothing in the Tribal Constitution, ordinances, or any other Tribal law imposes any actual or potential disability on the petitioners as a result of the underlying findings or discipline. In short, there is no "statutory consequence" to the liability findings and thus no presumption of collateral consequences. *See Wilson*, 319 F.3d at 480 (holding that there is no

[122] ER 90.

presumption of collateral consequences for a challenge to prison disciplinary proceedings).[123]

Without the benefit of a presumption, the burden is on petitioners to show that actual collateral consequences flow from the Tribal Council's actions. *Wilson*, 319 F.3d at 480-83. They have failed to meet that burden. Now that the discipline has expired for three of the petitioners, none of the past discipline has any effect on their right to receive Tribal services, serve on Tribal committees, hold Tribal office, or obtain employment.[124] Nor does the discipline automatically increase the length or severity of any future civil discipline or criminal punishment.[125] Even if there were a *potential* effect on petitioners' "sentence imposed in a future criminal proceeding" (which there is not), that potential would be a "nonstatutory consequence" that cannot defeat mootness. *See Lane*, 455 U.S. at 632-33.

---

[123] *See also Diaz v. Duckworth*, 143 F.3d 345, 346 (7th Cir. 1998) (holding that the collateral-consequences presumption is limited to criminal convictions).

[124] *See* ER 91; *compare Carafas v. LaVallee*, 391 U.S. 234, 237 (1968) (finding collateral consequences for petitioner who, as a result of criminal conviction, could not engage in certain businesses, serve as a union official for a specified period of time, vote in any state election, or serve as a juror).

[125] *See* ER 91.

In the district court, petitioners primarily claimed that, under California law, they could potentially be denied certain business licenses.[126] They pointed to California Business and Professions Code § 480(a)(2), which provides that "[a] [licensing] board *may* deny a license . . . on the grounds that the applicant has . . . [d]one any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another."[127] The petitioners presented no argument or evidence that they have applied for or been denied such a license, or that the defamatory conduct in this case would qualify as an act of "dishonesty, fraud, or deceit" under § 480(a)(2). Moreover, § 480(a)(2) is discretionary because a licensing board "may" deny a license to an applicant who has committed a qualifying act. But "discretionary decisions" affecting employment are non-statutory consequences that cannot defeat mootness. *Lane*, 455 U.S. at 632-33.[128] Furthermore, dismissal of this action would not limit the petitioners' right to argue before a licensing

---

[126] ER 495.

[127] Emphasis added.

[128] *See also Wilson*, 319 F.3d at 482 (rejecting alleged collateral consequences because they were premised on "discretionary decisions and therefore speculative").

board that their conduct is not a qualifying act under § 480(a)(2). In short, petitioners have not identified any cognizable collateral consequences, and their claims remain moot.

2. The alleged harm is not capable of repetition while evading review.

In the district court, petitioners also sought to invoke the capable-of-repetition exception to the mootness doctrine, but they failed to meet their burden of showing that the exception applies here.

"A case otherwise moot will still be heard if it presents an issue that is capable of repetition while evading review . . . [but] [t]his exception applies only in exceptional circumstances." *Pub. Utilities Comm'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1459 (9th Cir. 1996) (internal quotation marks omitted). To fit this exception, a controversy must meet two requirements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, *and* (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* (internal quotation marks omitted) (emphasis added). To satisfy the first prong, a party must show that the controversy is "inherently limited in duration such that it is likely always to become moot before

federal court litigation is completed." *W. Coast Seafood Processors Ass'n v. NRDC*, 643 F.3d 701, 705 (9th Cir. 2011) (internal quotation marks omitted).

The facts here fail both prongs. *First*, the discipline imposed in this case—ranging from two to ten years—is not inherently too short to be litigated. *Second*, there is no reasonable expectation that these same petitioners will be subject to the same harm. Petitioners rely solely on a 2013 letter from the Tribal Council's Chairman, Gene Whitehouse, updating the Tribe on the status of this lawsuit and opining that the suit is baseless.[129] Petitioners claim that this letter shows that they may be further disciplined for filing the lawsuit. But nothing in the letter states or even suggests that the Council is contemplating additional disciplinary proceedings against any of the petitioners. Petitioners point to no other justification for the speculation that they would again be subjected to the same discipline.

In sum, petitioners have not carried their burden of showing collateral consequences or that the alleged harm is capable of repetition while evading review. No exception to the mootness doctrine applies,

[129] *See* ER 497-84.

and the Petition should be dismissed as to Donna Caesar, Barbara Suehead, and Dolly Suehead.

F. The petitioners have failed to exhaust tribal remedies.

Even if there were jurisdiction over some claims in the Petition, petitioners have not exhausted their tribal remedies as to other claims. "The Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998) (citing *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986)). Accordingly, if a tribal petitioner fails to raise a particular claim to the tribal authorities, a federal court cannot exercise jurisdiction over that claim in the first instance. For example, in *Selam* the Ninth Circuit refused to reach a tribal petitioner's argument that she was denied the right to confront witnesses in her criminal trial, given that the petitioner had not raised that argument to the tribal appeals board. 134 F.3d at 953-54.

Here, the petitioners assert two unexhausted claims. *First*, the Petition devotes several paragraphs to an alleged "secret slush fund"

established by the 2011 Tribal Council.[130] According to the Petition, the Council established this fund by "misappropriating millions of dollars in tribal revenues," and the fund only benefits the 2011 Tribal Council and the Tribe's counsel, Howard Dickstein.[131] These allegations bear no relevance to the Petition's three claims—*i.e.*, unlawful "banishment," unlawful denial of a fair trial, and unlawful denial of benefits—because neither the defamatory statements nor the discipline relate or refer in any way to this fund.[132] But more importantly for the purposes of this appeal, the "slush fund" allegations are unexhausted because they were not raised to the Tribal Council, the Appeals Board, or any other tribal body.[133] Indeed, the petitioners concede that they were not aware of this fund until "late 2012," long after they had challenged the Tribal Council's findings.[134] If the petitioners believe that the alleged fund was established unlawfully, the Tribe must be given the first opportunity to resolve any complaints about it. *See U.S. ex rel. Cobell v. Cobell*, 503

---

[130] *See* ER 10-12 at ¶¶25-27.

[131] ER 11 at ¶26.

[132] ER 12-16 at ¶¶28-48.

[133] *See* ER 173-206.

[134] ER 10-11 at ¶25.

F.2d 790, 793 (9th Cir. 1974) (holding that tribal exhaustion is necessary so that federal courts "'would intervene only in those instances in which local conflicts cannot be resolved locally'" (citation omitted)).

Second, the petitioners assert an unexhausted (and conclusory) equal-protection claim. The Petition seems to allege that the 2011 Tribal Council "violated [P]etitioners' rights to equal protection" by allegedly taking action in response to petitioners' exercise of their free-speech rights.[135] As with the "slush fund" allegations, petitioners did not raise this equal-protection claim before the Tribal Council, the Appeals Board, or any other tribal body.[136] The Court would therefore lack jurisdiction over that claim and any claim related to the "slush fund," even if the Petition did not already suffer from the jurisdictional defects discussed above. *Selam*, 134 F.3d at 953.

VIII. CONCLUSION

Petitioners ask the Court to expand federal jurisdiction to cover claims for temporary exclusion from tribal facilities. Accepting that

---

[135] ER 13 at ¶34; *see also* ER 13 at ¶35 (alleging that petitioners were denied the right to vote and/or to run for tribal office, and thus were also "denied . . . equal protection under the law").

[136] *See* ER 173-206.

invitation would not only improperly infringe on tribal autonomy, but would be contrary to the jurisdictional limits set by the ICRA, the Supreme Court, and this Court in *Jeffredo*. The district court's judgment of dismissal should be affirmed.

DATED: December 19, 2014

s/Elliot R. Peters
Elliot R. Peters
Jesse Basbaum
Keker & Van Nest LLP

Attorneys for Appellees
GENE WHITEHOUSE; CALVIN MOMAN; BRENDA ADAMS; JOHN WILLIAMS; AND DANNY REY

STATEMENT OF RELATED CASES

Appellees know of no related cases in this Court.

Date: December 19, 2014

/s/ Elliot R. Peters
Elliot R. Peters
KEKER & VAN NEST LLP
Attorney for Appellees
GENE WHITEHOUSE; CALVIN MOMAN; BRENDA ADAMS; JOHN WILLIAMS; AND DANNY REY

[THIS PAGE INTENTIONALLY LEFT BLANK]

West's Annotated California Codes
Business and Professions Code (Refs & Annos)
Division 1.5. Denial, Suspension and Revocation of Licenses (Refs & Annos)
Chapter 2. Denial of Licenses (Refs & Annos)

West's Ann.Cal.Bus. & Prof.Code § 480

§ 480. Acts disqualifying applicant

Effective: January 1, 2009 to December 31, 2014
Currentness

(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

(1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

(2) Done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another.

(3)(A) Done any act that if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

(B) The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions, or duties of the business or profession for which application is made.

(b) Notwithstanding any other provision of this code, no person shall be denied a license solely on the basis that he or she has been convicted of a felony if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code or that he or she has been convicted of a misdemeanor if he or she has met all applicable requirements of the criteria of rehabilitation developed by the board to evaluate the rehabilitation of a person when considering the denial of a license under subdivision (a) of Section 482.

(c) A board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact required to be revealed in the application for the license.

Credits
(Added by Stats.1974, c. 1321, p. 2874, § 4. Amended by Stats.1976, c. 947, p. 2167, § 1; Stats.1979, c. 876, p. 3057, § 2; Stats.2008, c. 179 (S.B.1498), § 2.)

Notes of Decisions (9)

West's Ann. Cal. Bus. & Prof. Code § 480, CA BUS & PROF § 480
Current with all 2014 Reg.Sess. laws, Res. Ch. 1 of 2013-2014 2nd Ex.Sess., and all propositions on 2014 ballots

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 53. Indians (Refs & Annos)

18 U.S.C.A. § 1162

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

Effective: July 29, 2010
Currentness

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General--

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

CREDIT(S)

(Added Aug. 15, 1953, c. 505, § 2, 67 Stat. 588; amended Aug. 24, 1954, c. 910, § 1, 68 Stat. 795; Aug. 8, 1958, Pub.L. 85-615, § 1, 72 Stat. 545; Nov. 25, 1970, Pub.L. 91-523, §§ 1, 2, 84 Stat. 1358; July 29, 2010, Pub.L. 111-211, Title II, § 221(b), 124 Stat. 2272.)

Notes of Decisions (49)

18 U.S.C.A. § 1162, 18 USCA § 1162
Current through P.L. 113-185 approved 10-6-14

End of Document

United States Code Annotated
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter LXXI. Delaware Tribe and Absentee Delaware Tribe of Western Oklahoma: Distribution of Judgment Fund

25 U.S.C.A. § 1291

§ 1291. Disposition of funds

Currentness

The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298, and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be necessary in effecting the provisions of this subchapter, shall be distributed as provided herein.

CREDIT(S)

(Pub.L. 92-456, § 1, Oct. 3, 1972, 86 Stat. 762.)

Notes of Decisions (10)

25 U.S.C.A. § 1291, 25 USCA § 1291
Current through P.L. 113-185 approved 10-6-14

End of Document

United States Code Annotated
Title 25. Indians
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1302

§ 1302. Constitutional rights

Effective: July 29, 2010
Currentness

(a) In general

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding--

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant--

(1) to serve the sentence--

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term “offense” means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

CREDIT(S)

(Pub.L. 90-284, Title II, § 202, Apr. 11, 1968, 82 Stat. 77; Pub.L. 99-570, Title IV, § 4217, Oct. 27, 1986, 100 Stat. 3207-146; Pub.L. 111-211, Title II, § 234(a), July 29, 2010, 124 Stat. 2279.)

Notes of Decisions (475)

25 U.S.C.A. § 1302, 25 USCA § 1302
Current through P.L. 113-185 approved 10-6-14

End of Document

United States Code Annotated
Title 25. Indians
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)

25 U.S.C.A. § 1303

§ 1303. Habeas corpus

Currentness

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

CREDIT(S)

(Pub.L. 90-284, Title II, § 203, Apr. 11, 1968, 82 Stat. 78.)

Notes of Decisions (58)

25 U.S.C.A. § 1303, 25 USCA § 1303
Current through P.L. 113-185 approved 10-6-14

End of Document

United States Code Annotated
Title 25. Indians
Chapter 29. Indian Gaming Regulation (Refs & Annos)

25 U.S.C.A. § 2710

§ 2710. Tribal gaming ordinances

Currentness

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section [1]

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

CREDIT(S)

(Pub.L. 100-497, § 11, Oct. 17, 1988, 102 Stat. 2472.)

VALIDITY

<The United States Supreme Court has held that the grant of federal court jurisdiction in provision of the Indian Gaming Regulatory Act, section 11(d)(7) of Pub.L. 100-497, abrogating the States' Eleventh Amendment sovereign immunity, was unconstitutional. Seminole Tribe of Florida v. Florida, U.S.Fla.1996, 116 S.Ct. 1114, 517 U.S. 44, 134 L.Ed.2d 252.>

Notes of Decisions (197)

Footnotes

1 So in original. Probably should be followed by a comma.

2 So in original. Probably should not be capitalized.

25 U.S.C.A. § 2710, 25 USCA § 2710

Current through P.L. 113-185 approved 10-6-14

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2241

§ 2241. Power to grant writ

Effective: January 28, 2008
Currentness

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811; Dec. 30, 2005, Pub.L. 109-148, Div. A, Title X, § 1005(e)(1), 119 Stat. 2741; Jan. 6, 2006, Pub.L. 109-163, Div. A, Title XIV, § 1405(e)(1), 119 Stat. 3477; Oct. 17, 2006, Pub.L. 109-366, § 7(a), 120 Stat. 2635; Jan. 28, 2008, Pub.L. 110-181, Div. A, Title X, § 1063(f), 122 Stat. 323.)

VALIDITY

<The United States Supreme Court has held a provision of this section, as added and amended by section 1005(e)(1) of Pub.L. 109-148 and section 7(a) of Pub.L. 109-366 (28 U.S.C.A. § 2241(e)), denying federal courts jurisdiction to hear habeas corpus action by an alien detained and determined to be enemy combatant, or awaiting such determination, an unconstitutional suspension of the writ of habeas corpus under the Suspension Clause, Art. I, § 9, clause 2. Boumediene v. Bush, U.S.2008, 128 S.Ct. 2229, 553 U.S. 723, 171 L.Ed.2d 41.>

Notes of Decisions (2010)

28 U.S.C.A. § 2241, 28 USCA § 2241
Current through P.L. 113-185 approved 10-6-14

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2253

§ 2253. Appeal

Effective: April 24, 1996
Currentness

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 113, 63 Stat. 105; Oct. 31, 1951, c. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub.L. 104-132, Title I, § 102, 110 Stat. 1217.)

Notes of Decisions (1297)

28 U.S.C.A. § 2253, 28 USCA § 2253
Current through P.L. 113-185 approved 10-6-14

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts

Effective: April 24, 1996
Currentness

<Notes of Decisions for 28 USCA § 2254 are displayed in three separate documents. Notes of Decisions for subdivisions I to XIV are contained in this document. For Notes of Decisions for subdivisions XIV to end, see documents for 28 USCA § 2254, post.>

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 104, 110 Stat. 1218.)

Notes of Decisions (8699)

28 U.S.C.A. § 2254, 28 USCA § 2254
Current through P.L. 113-185 approved 10-6-14

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 12 are displayed in two separate documents. Notes of Decisions for subdivisions I to VII are contained in this document. For Notes of Decisions for subdivisions VIII to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 12.>

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must

be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule.

(2) ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). 1. Compare [former] Equity Rules 12 (Issue of Subpoena--Time for Answer) and 31 (Reply--When Required--When Cause at Issue); 4 Mont.Rev.Codes Ann. (1935) §§ 9107, 9158; N.Y.C. P.A. (1937) § 263; N.Y.R.C.P. (1937) Rules 109-111.

2. U.S.C., Title 28, § 763 (now § 547) (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant shall have 60 days within which to answer or otherwise defend. This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule. In so far as any statutes not excepted in rule 81 provide a different time for a defendant to defend, such statutes are modified. See U.S.C., Title 28, [former] § 45 (District courts; practice and procedure in certain cases under the interstate commerce laws) (30 days).

3. Compare the last sentence of [former] Equity Rule 29 (Defenses--How Presented) and N.Y.C.P.A. (1937) § 283. See Rule 15(a) for time within which to plead to an amended pleading.

Note to Subdivisions (b) and (d). 1. See generally [former] Equity Rules 29 (Defenses--How Presented), 33 (Testing Sufficiency of Defense), 43 (Defect of Parties--Resisting Objection), and 44 (Defect of Parties--Tardy Objection); N.Y.C.P.A. (1937) §§ 277-280; N.Y.R.C.P. (1937) Rules 106-112; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 25, r.r. 1-4; Clark, *Code Pleading*, 1928, pp. 371-381.

2. For provisions authorizing defenses to be made in the answer or reply see *English Rules Under the Judicature Act*, (The Annual Practice, 1937) O. 25, r.r. 1-4; 1 Miss.Code Ann. (1930) §§ 378, 379. Compare Equity Rule 29 (Defenses--How Presented); U.S.C.A., Title 28, [former] § 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws). U.S.C., Title 28, [former] § 45, substantially continued by this rule, provides: "No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed." Compare Calif.Code Civ.Proc., (Deering, 1937) § 433; 4 Nev.Comp.Laws (Hillyer, 1929) § 8600. For provisions that the defendant may demur and answer at the same time, see Calif.Code Civ.Proc. (Deering, 1937) § 431; 4 Nev.Comp.Laws (Hillyer, 1929) § 8598.

3. [Former] Equity Rule 29 (Defenses--How Presented) abolished demurrers and provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing "at the discretion of the court." Likewise many state practices have abolished the demurrer, or retain it only to attack substantial and not formal defects. See 6 Tenn.Code Ann. (Williams, 1934) § 8784; Ala.Code Ann. (Michie, 1928) § 9479; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 15-18; Kansas Gen.Stat.Ann. (1935) §§ 60-705, 60-706.

Note to Subdivision (c). Compare [former] Equity Rule 33 (Testing Sufficiency of Defense); N.Y.R.C.P. (1937) Rules 111 and 112.

Note to Subdivisions (e) and (f). Compare [former] Equity Rules 20 (Further and Particular Statement in Pleading May be Required) and 21 (Scandal and Impertinence); *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r.r. 7, 7a, 7b, 8; 4 Mont.Rev.Codes Ann. (1935) §§ 9166, 9167; N.Y.C.P.A. (1937) § 247; N.Y.C.P.A. (1937) Rules 103, 115, 116, 117; Wyo.Rev.Stat.Ann. (Courtright, 1931) §§ 89-1033, 89-1034.

Note to Subdivision (g). Compare Rules of the District Court of the United States for the District of Columbia (1937) Equity Rule 11; N.M. Rules of Pleading, Practice and Procedure, 38 N.M.Rep. vii. [105-408] (1934); Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI(e) and (f).

Note to Subdivision (h). Compare Calif.Code Civ.Proc. (Deering, 1937) § 434; 2 Minn.Stat. (Mason, 1927) § 9252; N.Y.C.P.A. (1937) §§ 278 and 279; Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI(e). This rule continues U.S.C.A., Title 28, former § 80 [now 1359, 1447, 1919] (Dismissal or remand) (of action over which district court lacks jurisdiction), while U.S.C.A., Title 28, § 399 (Amendments to show diverse citizenship) is continued by Rule 15.

1946 Amendment

Note. Subdivision (a). Various minor alterations in language have been made to improve the statement of the rule. All references to bills of particulars have been stricken in accordance with changes made in subdivision (e).

Subdivision (b). The addition of defense (7), "failure to join an indispensable party", cures an omission in the rules which are silent as to the mode of raising such failure. See Commentary, *Manner of Raising Objection of Non-Joinder of Indispensable Party*, 1940, 2 Fed.Rules Serv. 658, and, 1942, 5 Fed.Rules Serv. 820. In one case, *United States v. Metropolitan Life Ins. Co.*, E.D.Pa.1941, 36 F.Supp. 399, the failure to join an indispensable party was raised under Rule 12(c).

Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. *Samara v. United States*, C.C.A.2, 1942, 129 F.2d 594, certiorari denied 63 S.Ct. 258, 317 U.S. 686, 87 L.Ed. 549; *Boro Hall Corp. v. General Motors Corp.*, C.C.A.2, 1942, 124 F.2d 822, certiorari denied 63 S.Ct. 436, 317 U.S. 695, 87 L.Ed. 556. See, also, *Kithcart v. Metropolitan Life Ins. Co.*, C.C.A.8, 1945, 150 F.2d 997.

It has also been suggested that this practice could be justified on the ground that the federal rules permit "speaking" motions. The Committee entertains the view that on motion under Rule 12(b)(6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments, and, of course, in such a situation, when the case reaches the circuit court of appeals, that court should treat the motion in the same way. The Committee believes that such practice, however, should be tied to the summary judgment rule. The term "speaking motion" is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion.

The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment, rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact on conflicting proof would be left uncertain.

The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone.

Under group (1) are: *Boro Hall Corp. v. General Motors Corp.*, C.C.A.2, 1942, 124 F.2d 822, certiorari denied 1943, 63 S.Ct. 436, 317 U.S. 695, 87 L.Ed. 556; *Gallup v. Caldwell*, C.C.A.3, 1941, 120 F.2d 90; *Central Mexico Light & Power Co. v. Munch*, C.C.A.2, 1940, 116 F.2d 85; *National Labor Relations Board v. Montgomery Ward & Co.*, 1944, 144 F.2d 528, 79 U.S.App.D.C. 200, certiorari denied 1944, 65 S.Ct. 134, 323 U.S. 774, 89 L.Ed. 619; *Urquhart v. American-La France Foamite Corp.*, 1944, 144 F.2d 542, 79 U.S.App.D.C. 219; *Samara v. United States*, C.C.A.2, 1942, 129 F.2d 594; *Cohen v. American Window Glass Co.*, C.C.A.2, 1942, 126 F.2d 111; *Sperry Products Inc. v. Association of American Railroads*, C.C.A.2, 1942, 132 F.2d 408; *Joint Council Dining Car Employees Local 370 v. Delaware, Lackawanna and Western R. Co.*, C.C.A.2, 1946, 157 F.2d 417; *Weeks v. Bareco Oil Co.*, C.C.A.7, 1941, 125 F.2d 84; *Carroll v. Morrison Hotel Corp.*, C.C.A.7, 1945, 149 F.2d 404; *Victory v. Manning*, C.C.A.3, 1942, 128 F.2d 415; *Locals No. 1470, No. 1469, and No. 1512 of International Longshoremen's Association v. Southern Pacific Co.*, C.C.A.5, 1942, 131 F.2d 605; *Lucking v. Delano*, C.C.A.6, 1942, 129 F.2d 283; *San Francisco Lodge No. 68 of International Association of Machinists v. Forrestal*, Cal.1944, 58 F.Supp. 466; *Benson v. Export Equipment Corp.*, 1945, 164 P.2d 380, 49 N.M. 356, construing New Mexico rule identical with Rule 12(b)(6); *F. E. Myers & Bros. Co. v. Gould Pumps, Inc.*, W.D.N.Y.1946, 9 Fed.Rules Serv. 12b.33, Case 2, 5 F.R.D. 132. Cf. *Kohler v. Jacobs*, C.C.A.5, 1943, 138 F.2d 440; *Cohen v. United States*, C.C.A.8, 1942, 129 F.2d 733.

Under group (2) are: *Sparks v. England*, C.C.A.8, 1940, 113 F.2d 579; *Continental Collieries, Inc. v. Shober*, C.C.A.3, 1942, 130 F.2d 631; *Downey v. Palmer*, C.C.A.2, 1940, 114 F.2d 116; *DeLoach v. Crowley's Inc.*, C.C.A.5, 1942, 128 F.2d 378; *Leimer v. State Mutual Life Assurance Co. of Worcester, Mass.*, C.C.A.8, 1940, 108 F.2d 302; *Rossiter v. Vogel*, C.C.A.2, 1943, 134 F.2d 908, compare s.c., C.C.A.2, 1945, 148 F.2d 292; *Karl Kiefer Machine Co. v. United States Bottlers Machinery Co.*, C.C.A.7, 1940, 113 F.2d 356; *Chicago Metallic Mfg. Co. v. Edward Katzinger Co.*, C.C.A.7, 1941, 123 F.2d 518; *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc.*, C.C.A.8, 1942, 131 F.2d 419; *Publicity Bldg. Realty Corp. v. Hannegan*, C.C.A.8, 1943, 139 F.2d 583; *Dioguardi v. Durning*, C.C.A.2, 1944, 139 F.2d 774; *Package Closure Corp. v. Sealright Co., Inc.*, C.C.A.2, 1944, 141 F.2d 972; *Tahir Erk v. Glenn L. Martin Co.*, C.C.A.4, 1941, 116 F.2d 865; *Bell v. Preferred Life Assurance Society of Montgomery, Ala.*, 1943, 64 S.Ct. 5, 320 U.S. 238, 88 L.Ed. 15.

The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion

for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion.

Subdivision (c). The sentence appended to subdivision (c) performs the same function and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

Subdivision (d). The change here was made necessary because of the addition of defense (7) in subdivision (b).

Subdivision (e). References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for more definite statement to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. *Slusher v. Jones,* E.D.Ky.1943, 7 Fed.Rules Serv. 12e.231, Case 5, 3 F.R.D. 168; *Best Foods, Inc. v. General Mills, Inc.,* D.Del.1943, 7 Fed.Rules Serv. 12e.231, Case 7, 3 F.R.D. 275; *Braden v. Callaway,* E.D.Tenn.1943, 8 Fed.Rules Serv. 12e.231, Case 1 (". . . most courts . . . conclude that the definiteness required is only such as will be sufficient for the party to prepare responsive pleadings"). Accordingly, the reference to the 20 day time limit has also been eliminated, since the purpose of this present provision is to state a time period where the motion for a bill is made for the purpose of preparing for trial.

Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. See general discussion and cases cited in 1 Moore's *Federal Practice,* 1938, Cum.Supplement, § 12.07, under "Page 657"; also, Holtzoff, *New Federal Procedure and the Courts,* 1940, 35-41. And compare vote of Second Circuit Conference of Circuit and District Judges, June 1940, recommending the abolition of the bill of particulars; *Sun Valley Mfg. Co. v. Mylish,* E.D.Pa.1944, 8 Fed.Rules Serv. 12e.231, Case 6 ("Our experience . . . has demonstrated not only that 'the office of the bill of particulars is fast becoming obsolete' . . . but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether."); *Walling v. American Steamship Co.,* W.D.N.Y.1945, 4 F.R.D. 355, 8 Fed.Rules Serv. 12e.244, Case 8 (". . . the adoption of the rule was ill advised. It has led to confusion, duplication and delay.") The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words "or to prepare for trial"--eliminated by the proposed amendment--have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See *Walling v. Alabama Pipe Co.,* W.D.Mo.1942, 3 F.R.D. 159, 6 Fed.Rules Serv. 12e.244, Case 7; *Fleming v. Mason & Dixon Lines, Inc.,* E.D.Tenn.1941, 42 F.Supp. 230; *Kellogg Co. v. National Biscuit Co.,* D.N.J.1941, 38 F.Supp. 643; *Brown v. H. L. Green Co.,* S.D.N.Y.1943, 7 Fed.Rules Serv. 12e.231, Case 6; *Pedersen v. Standard Accident Ins. Co.,* W.D.Mo.1945, 8 Fed.Rules Serv. 12e.231, Case 8; *Bowles v. Ohse,* D.Neb.1945, 4 F.R.D. 403, 9 Fed.Rules Serv. 12e.231, Case 1; *Klages v. Cohen,* E.D.N.Y.1945, 9 Fed.Rules Serv. 8a.25, Case 4; *Bowles v. Lawrence,* D.Mass.1945, 8 Fed.Rules Serv. 12e.231, Case 19; *McKinney Tool & Mfg. Co. v. Hoyt,* N.D.Ohio 1945, 9 Fed.Rules Serv. 12e.235, Case 1; *Bowles v. Jack,* D.Minn.1945, 5 F.R.D. 1, 9 Fed.Rules Serv. 12e.244, Case 9. And it has been urged from the bench that the phrase be stricken, *Poole v. White,* N.D.W.Va.1941, 5 Fed.Rules Serv. 12e.231, Case 4, 2 F.R.D. 40. See also *Bowles v. Gabel,* W.D.Mo.1946, 9 Fed.Rules Serv. 12e.244, Case 10. ("The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.").

Subdivision (f). This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See *Dysart v. Remington-Rand, Inc.,* D.Conn.1939, 31 F.Supp. 296; *Eastman Kodak Co. v. McAuley,* S.D.N.Y.1941, 4 Fed.Rules Serv., 12f.21, Case 8, 2 F.R.D. 21; *Schenley Distillers Corp. v. Renken,* E.D.S.C.1940, 34 F.Supp. 678; *Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co.,* S.D.N.Y.1944, 3 F.R.D. 440; *United States v. Turner Milk Co.,* N.D.Ill.1941, 4 Fed.Rules Serv. 12b.51, Case 3, 1 F.R.D. 643; *Teiger v. Stephan Oderwald, Inc.,* S.D.N.Y.1940, 31 F.Supp. 626; *Teplitsky v. Pennsylvania R. Co.,* N.D.Ill.1941, 38 F.Supp. 535; *Callagher v.*

Carroll, E.D.N.Y.1939, 27 F.Supp. 568; *United States v. Palmer,* S.D.N.Y.1939, 28 F.Supp. 936. And see *Indemnity Ins. Co. of North America v. Pan American Airways, Inc.,* S.D.N.Y.1944, 58 F.Supp. 338; Commentary, *Modes of Attacking Insufficient Defenses in the Answer,* 901, 1939, 1 Fed.Rules Serv. 669, 1940, 2 Fed.Rules Serv. 640.

Subdivision (g). The change in title conforms with the companion provision in subdivision (h).

The alteration of the "except" clause requires that other than provided in subdivision (h) a party who resorts to a motion to raise defenses specified in the rule, must include in one motion all that are then available to him. Under the original rule defenses which could be raised by motion were divided into two groups which could be the subjects of two successive motions.

Subdivision (h). The addition of the phrase relating to indispensable parties is one of necessity.

1963 Amendment

This amendment conforms to the amendment of Rule 4(e). See also the Advisory Committee's Note to amended Rule 4(b).

1966 Amendment

Subdivision (b)(7). The terminology of this subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption "Subdivision (c)."

Subdivision (g). Subdivision (g) has forbidden a defendant who makes a preanswer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not in fact include therein. Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

Subdivision (h). The question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Subdivision (h) called for waiver of "* * * defenses and objections which he [defendant] does not present * * * by motion * * * or, if he has made no motion, in his answer * * *." If the clause "if he has made no motion," was read literally, it seemed that the omitted defense was waived and could not be pleaded in the answer. On the other hand, the clause might be read as adding nothing of substance to the preceding words; in that event it appeared that a defense was not waived by reason of being omitted from the motion and might be set up in the answer. The decisions were divided. Favoring waiver, see *Keef v. Derounian,* 6 F.R.D. 11 (N.D.Ill.1946); *Elbinger v. Precision Metal Workers Corp.,* 18 F.R.D. 467 (E.D.Wis.1956); see also *Rensing v. Turner Aviation Corp.,* 166 F.Supp. 790 (N.D.Ill.1958); *P. Beiersdorf & Co. v. Duke Laboratories, Inc.,* 10 F.R.D. 282 (S.D.N.Y.1950); *Neset v. Christensen,* 92 F.Supp. 78 (E.D.N.Y.1950). Opposing waiver, see *Phillips v. Baker,* 121 F.2d 752 (9th Cir.1941); *Crum v. Graham,* 32 F.R.D. 173 (D.Mont.1963) (regretfully following the Phillips case); see also *Birnbaum v. Birrell,* 9 F.R.D. 72 (S.D.N.Y.1948); *Johnson v. Joseph Schlitz Brewing Co.,* 33 F.Supp. 176 (E.D.Tenn.1940); cf. *Carter v. American Bus Lines, Inc.,* 22 F.R.D. 323 (D.Neb.1958).

Amended subdivision (h)(1)(A) eliminates the ambiguity and states that certain specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived. The specified defenses are lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b)(2)-(5)). A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

By amended subdivision (h)(1)(B), the specified defenses, even if not waived by the operation of (A), are waived by the failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.

Since the language of the subdivisions is made clear, the party is put on fair notice of the effect of his actions and omissions and can guard himself against unintended waiver. It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver as there provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and failure to state a legal defense to a claim (see Rule 12(b)(6), (7), (f)), as well as the defense of lack of jurisdiction over the subject matter (see Rule 12(b)(1)), are expressly preserved against waiver by amended subdivision (h)(2) and (3).

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Subdivision (a) is divided into paragraphs for greater clarity, and paragraph (1)(B) is added to reflect amendments to Rule 4. Consistent with Rule 4(d)(3), a defendant that timely waives service is allowed 60 days from the date the request was mailed in which to respond to the complaint, with an additional 30 days afforded if the request was sent out of the country. Service is timely waived if the waiver is returned within the time specified in the request (30 days after the request was mailed, or 60 days if mailed out of the country) and before being formally served with process. Sometimes a plaintiff may attempt to serve a defendant with process while also sending the defendant a request for waiver of service; if the defendant executes the waiver of service within the time specified and before being served with process, it should have the longer time to respond afforded by waiving service.

The date of sending the request is to be inserted by the plaintiff on the face of the request for waiver and on the waiver itself. This date is used to measure the return day for the waiver form, so that the plaintiff can know on a day certain whether formal service of process will be necessary; it is also a useful date to measure the time for answer when service is waived. The defendant who returns the waiver is given additional time for answer in order to assure that it loses nothing by waiving service of process.

2000 Amendment

Rule 12(a)(3)(B) is added to complement the addition of Rule 4(i)(2)(B). The purposes that underlie the requirement that service be made on the United States in an action that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.

An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

GAP Report

No changes are recommended for Rule 12 as published.

2007 Amendment

The language of Rule 12 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 12(a)(4)(A) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

2009 Amendments

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Notes of Decisions (4100)

Fed. Rules Civ. Proc. Rule 12, 28 U.S.C.A., FRCP Rule 12
Including Amendments Received Through 12-1-14

End of Document

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,116 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook.

Date: December 19, 2014

/s/ Elliot R. Peters
Elliot R. Peters
KEKER & VAN NEST LLP
Attorney for Appellees
GENE WHITEHOUSE; CALVIN MOMAN; BRENDA ADAMS; JOHN WILLIAMS; AND DANNY REY

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Elliot R. Peters
Elliot R. Peters