No. 16-

In the Supreme Court of the United States

NORBERT J. KELSEY,

Petitioner,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990), the Court held that Indian tribes' power to prosecute for offenses committed within the tribe's territory extends only to members of the tribe. In so doing, the Court reaffirmed its earliest tribal-law rule, that "the limitation upon [a tribe's] sovereignty amounts to the right of governing every person within their limits except themselves." *Fletcher v. Peck*, 10 U.S. 87, 147 (1810). In this case, Petitioner Norbert Kelsey was prosecuted by the Little River Band of Ottawa Indians (the Band), of which he is a member, for acts taking place outside the tribe's territory—that is, outside the Band's "limits." *Id.* The first question presented is:

(1) Whether Indian tribes may prosecute their members for acts that occur outside the tribe's territory absent Congressional authorization.

In addition, Petitioner Kelsey's conduct was, at the time of its alleged commission, plainly outside the Band's prosecutorial reach as defined by its own criminal jurisdiction statutes. To uphold the prosecution, the Tribal Court of Appeals rewrote the Band's law by jettisoning an unambiguous statutory limitation on its power and asserting jurisdiction over extraterritorial conduct not previously reached by its laws. Therefore, the second question presented is:

(2) Whether the Band's retroactive expansion of a narrow and precise jurisdictional statute to encompass an extraterritorial act previously outside its plain terms violates the due process protections of the Indian Civil Rights Act, 25 U.S.C. § 1302(a), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norbert J. Kelsey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

LIST OF PARTIES

All parties are listed in the caption of this petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 809 F.3d 849 (6th Cir. 2016). Pet. App. 125. The denial of rehearing en banc is not published. Pet. App. 73. The district court's opinion, Pet. App. 26–31, and magistrate judge's report and recommendation, Pet. App. 32–63, are not published.

The opinion of the Little River Band of Ottawa Indians Tribal Court of Appeals is not published. Pet. App. 64–70. The Little River Band of Ottawa Indians Tribal Court's order is not published. Pet. App. 71–72.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2016. Pet. App. 25. The court of appeals denied petitioner's timely petition for rehearing en banc on February 8, 2016. Pet. App. 73. Justice Kagan granted petitioner's motion to extend the time to file a petition for a writ of certiorari from May 8, 2016 to July 7, 2016. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution states:

   > No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Relevant provisions of the United States Code are reproduced at Pet. App. 74.

3. Relevant sections of the Little River Band of Ottawa Indians Law and Order Code—Criminal Offenses—Ordinance, Criminal Procedures—Ordinance, and the Little River Band of Ottawa Indians Constitution are reproduced at Pet. App. 75–79.

STATEMENT OF THE CASE

Petitioner Norbert Kelsey is an enrolled member of the Little River Band of Ottawa Indians. He was charged with and convicted of misdemeanor sexual assault under the Band's Criminal Offenses Ordinance for conduct that occurred outside the borders of the Band's reservation. Kelsey challenged the Band's jurisdiction to prosecute him for this extraterritorial conduct. The Tribal Court of Appeals nullified the Band's extraterritorial criminal jurisdiction ordinance—which by its plain terms did not extend jurisdiction to sexual assault committed outside the Band's territory—to affirm Kelsey's conviction. The district court granted Kelsey's petition for a writ of habeas corpus, finding that the Band had been divested of criminal jurisdiction outside its territory by its domestic dependent sovereign status. The Sixth Circuit reversed and upheld the Tribal Court's jurisdiction to prosecute Band members for extraterritorial conduct when necessary to protect self-government or control internal relations.

A. Legal Background

After incorporation into the United States, Indian tribes are no longer "possessed of the full attributes of sovereignty." *United States v. Kagama*, 118 U.S. 375, 381 (1886). Rather, tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As the Court articulated more than two centuries ago, "the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." *Fletcher v. Peck*, 10 U.S. 87, 147 (1810). As it has more recently held, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981).

Four modern decisions have set the boundaries of what criminal jurisdiction tribes retain to prosecute acts taking place *within* their territory. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court addressed whether the Suquamish Indian Tribe could prosecute two non-Indian residents of its reservation for conduct on tribal land. *Id.* at 194. The Court found that "[f]rom the earliest treaties . . . it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect." *Id.* at 197. It further found that, "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id.* at 210. Accordingly, it held that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* The Court concluded that "[t]his principle would have been

obvious a century ago when most Indian tribes were characterized by 'a want of fixed laws [and] of competent tribunals of justice . . . [and] should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents." *Id.*

In *United States v. Wheeler*, the Court considered the dual prosecution by tribal and federal authorities of a Navajo tribe member for acts taking place "on and within the Navajo Indian Reservation, Indian Country." 435 U.S. at 315 n.3. In that context, the Court confirmed that tribes' "right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *Id.* at 322. The Court found that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status." *Id.* at 325–26. The Court noted that "the Government has carefully abstained from attempting to regulate their domestic affairs, and from punishing crimes committed by one Indian against another *in the Indian country*." *Id.* & n.23 (quoting S. Rep. No. 268, 41st Cong., 3d Sess., 10 (1870)) (emphasis added). However, it held, "[t]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Id.* at 326.

In *Duro v. Reina*, 495 U.S. 676 (1990), the Court held that tribes cannot assert criminal jurisdiction over Indians who are members of a different tribe. *Id.* at 688. The Court found no jurisdiction of the Pima-Marcopa tribal courts over the prosecution of a member of the Torres-Martinez Band of Cahuilla Mission Indians for a murder committed within the Pima-Marcopa reservation. The Court held that "[c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." *Id.* at 693. A

tribe's criminal jurisdiction over members is "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government." *Id.* at 694. It could not be extended to Indians who are not tribe members and do not enjoy such rights. *Id.*

Congress responded to *Duro* by passing the "*Duro* fix" legislation contained in 25 U.S.C. § 1301(2), which established tribal power "to exercise criminal jurisdiction over all Indians," including those not members of the prosecuting tribe. Section 1301(2) defines "Indian" by reference to 18 U.S.C. § 1153, which criminalizes "offenses committed within Indian country." Section 1301(2) therefore restores to tribes the power to prosecute "[a]ny Indian who commits against the person or property of another Indian or any other person [an offense] . . . within the Indian country." 18 U.S.C. § 1153(a). Congress did not address extraterritorial jurisdiction.

In *United States v. Lara*, 541 U.S. 193 (2004), the Court held that the power to prosecute offenses by nonmember Indian within a tribe's territory was part of tribes' inherent sovereignty restored by Congress with the "*Duro* fix." *Id.* at 210. Therefore, a member of the Turtle Mountain Band of Chippewa Indians could be prosecuted by the Spirit Lake Tribe and the federal government for an assault taking place on the Spirit Lake reservation without triggering double jeopardy protections. *Id.* at 196.

Each of these cases considered a tribe's criminal jurisdiction only in the context of acts taking place within tribal territory. Their holdings only addressed the differences in power to prosecute member Indians, nonmember Indians, and non-Indians for conduct within territorial borders. None addressed the territorial scope of a tribe's jurisdiction to prosecute its members, and none contemplated that such retained jurisdiction would extend extraterritorially.

B. Factual and Procedural Background

Petitioner Norbert Kelsey is an enrolled member of the Little River Band of Ottawa Indians and a former member of its Tribal Council. Pet. App. 32. In July 2005, Kelsey attended an information meeting at the Band's community center. Pet. App. 3. Two years later, in June 2007, the Band charged Kelsey with misdemeanor sexual assault for acts taking place at the 2005 meeting. *Id.* Specifically, the complaint alleged that Kelsey pulled toward him a name badge worn by Heidi Foster—a nonmember Indian employee of the Band's health clinic—and in the process looked down her blouse. Pet. App. 34. For this act, Kelsey was convicted of misdemeanor sexual assault under the Band's Criminal Offenses Ordinance. *Id.* The parties agree that the offense took place in a building owned by the Band but not located within the Band's reservation. Pet. App. 19. Accordingly, the offense took place in the State of Michigan, not in tribal territory.

The Band's tribal courts' criminal jurisdiction is established in its Tribal Law and Order Criminal Offenses Ordinance, which defines what "constitute[s] forbidden criminal conduct against the Tribe." Crim. Offenses Ordinance § 4.01, Pet. App. 77. Section 4.03(a) of the Ordinance establishes the Band's "territorial jurisdiction" as including "all land within the limits of the Tribe's reservation . . . all land outside the boundaries of the Tribe's reservation held in trust by the United States [for the Tribe] . . . and all other land considered 'Indian country' as defined by 18 U.S.C. section 1151 that is associated with the Tribe." Pet. App. 77–78. The community center does not fall within the territory set out in Section 4.03(a). Pet. App. 19. Section 4.03(b) of the Ordinance defines the Band's extraterritorial criminal jurisdiction as reaching nine offenses punishable "wherever committed." Pet. App. 78. Sexual assault is not one of the enumerated crimes. Pet. App. 78.

C. Tribal Court Proceedings

Over Kelsey's objection to its jurisdiction, the Tribal Court convicted him of misdemeanor sexual assault and sentenced him to six months in jail and a one-year probationary period. Pet. App. 3 Kelsey appealed. The Tribal Court of Appeals reversed the Tribal Court's summary dismissal of his jurisdiction challenge and remanded the case for fact-finding on that issue. The Tribal Court denied Kelsey's jurisdictional challenge on remand. Pet. App. 71–72.

The Tribal Court of Appeals acknowledged that the Band's Criminal Offenses Ordinance limited the Band's "inherent authority" to jurisdiction over "land within the limits of the Tribe's reservation . . . and all lands considered 'Indian country' as defined by 18 U.S.C. § 1151." Pet. App. 68–69. However, the Tribal Court of Appeals found this Ordinance "unconstitutionally narrow in that it does not provide for the exercise of the inherent criminal jurisdiction over all tribal lands." Pet. App. 69. In other words, the court held that the Ordinance narrowed jurisdiction to something short of the power the court thought it ought to have. *Id.* It struck down the Ordinance and upheld Kelsey's conviction. Pet. App. 70.

D. District Court Proceedings

Kelsey filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Michigan challenging the Band's jurisdiction over extraterritorial conduct and the Band's retroactive expansion of jurisdiction under its criminal code. The petition was referred to a magistrate judge who recommended granting the writ. The magistrate judge found that the "necessary result" of tribes' domestic dependent sovereign status was that "they forsook the extensive sovereignty they had enjoyed before there existed an 'Indian Country,'" including jurisdiction to prosecute outside their territory. Pet. App. 59 The magistrate judge further found it

"evident that prior to the decision by the Tribal Court of Appeals, the tribe's Law and Order—Criminal Offenses Ordinance did not extend the territorial jurisdiction of the Tribe to the Community Center. The Tribal Court of Appeals did this by judicial fiat after the fact." Pet. App. 61–62. The retroactive nature of this decision rendered it an invalid ex post facto act.

The district court accepted the magistrate judge's report and recommendation over the Band's objections. Pet. App. 26–31. Because the district court found that the tribal courts lacked jurisdiction, it did not reach the due process issue. Pet. App. 30.

E. Opinion of the Court of Appeals

A panel of the Sixth Circuit reversed.

The panel first noted there was no dispute that Kelsey's conduct took place outside the boundaries of Indian country. Pet. App. 19. The panel thus assessed the question of extraterritorial criminal jurisdiction through three inquiries: "(1) do Indian tribes have inherent sovereign authority to exercise extraterritorial criminal jurisdiction? (2) If so, has that authority been expressly limited by Congress or treaty? And (3) if not, have the tribes been implicitly divested of that authority by virtue of their domestic dependent status?" Pet. App. 6.

The panel first found that governing precedent had not addressed the question of whether tribes have authority to prosecute members for extraterritorial acts. Noting the "relatively sparse area of law," the panel relied primarily on *Wheeler* and *Duro* to reach its holding. Pet. App. 7. In *Wheeler*, it found support for the "uncontroversial belief that tribes did not historically tip-toe around territorial borders in asserting their authority to enforce tribal laws." Pet. App. 7–8. Relying on *Duro*, the panel found tribes' "inherent authority to try and punish their members for off-reservation conduct is neither surprising nor hard to accept given the 'voluntary character of tribal

membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.'" Pet. App. 8.

The panel then addressed whether tribes have been implicitly divested of their extraterritorial criminal jurisdiction by virtue of their status as dependent sovereigns. The panel looked to the holding of *Montana v. United States* that the "exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Pet. App. 14 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)). Importing *Montana*'s holding to the context of extraterritorial criminal prosecution, the panel then asked whether Kelsey's conduct "clearly implicates core governmental concerns and substantially affects the tribe's ability to control its self-governance." Pet. App. 15. The panel found it did, deeming it "no run-of-the-mill criminal conduct, but conduct visited on the Band's employee by the Band's own elected official during an official tribal function: in pure form, this was an offense against the peace and dignity of the Band itself." *Id.* The panel concluded, "[w]hile certain applications of extraterritorial criminal jurisdiction might well be incompatible with the tribes' status as dependent sovereigns—that is, where they tangentially impact tribal self-governance or fail to implicate core internal relations—the instant exercise of criminal jurisdiction does not fall within that category." *Id.*

With regard to Kelsey's due process claim, the panel found that "fair notice protection has not been extended to an expansion of jurisdiction as opposed to a retroactive criminalization of *conduct*." Pet. App. 20. Because the panel found Kelsey was "subject to prosecution somewhere," he could not claim harm from the Band's expansion of its jurisdiction to reach him. *Id.* at 21.

Finally, it found the Tribal Court of Appeals' decision to be a "routine exercise of common law decisionmaking," and not an unexpected and indefensible retroactive construction. *Id.* at 23.

The Sixth Circuit denied rehearing en banc. Pet. App. 73.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance: whether tribe members are subject to prosecution by their tribes for conduct committed anywhere in the world and regardless of what other sovereigns may also punish their acts. Members of the twelve tribes within the Sixth Circuit are now subject to multiple prosecutions for conduct occurring outside of Indian country. This "unwarranted intrusion on personal liberty" is not borne by tribe members in any other Circuit. *Oliphant*, 435 U.S. at 210. Nor is it borne by non-Indians in any Circuit. The panel's unprecedented expansion of tribal jurisdiction to create this risk presents an important issue that warrants the Court's immediate consideration.

The Court has never held that Indian tribes retain the sovereign power to prosecute tribe members for acts taking place outside of the tribe's territory. Neither has any other court, whether applying tribal, state, or federal law. The panel below thus announced a new rule: that Indian tribes have criminal jurisdiction to prosecute their members for crimes that occur outside of tribal territory when necessary to protect self-government or control internal relations. Even assuming the "when necessary" qualification could provide the clear delineation necessary to satisfy the requirements of fair notice and due process, that rule stands in conflict with the Court's demarcation of Indian tribes' retained sovereignty. It also stands in conflict with the prevailing view of leading tribal law authorities across decades, which assert simply and consistently that "[t]he jurisdiction of the Indian tribe ceases at the border of the reservation." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 148 & n.236 (1942).

That view was shared by the Band, which plainly limited its prosecutorial reach to crimes taking place within its territory at the time the acts alleged took place, with the exception of nine specified offenses that could be prosecuted wherever they occurred. To uphold Kelsey's prosecution, the Tribal Court of Appeals struck down an unambiguous statutory limit on jurisdiction. Even if the Band could prospectively expand its criminal jurisdiction in this way, doing so retroactively by judicial alteration of a narrow and precise statute violates the due process guarantee of the Indian Civil Rights Act and is in conflict with *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

A. This Case Is An Appropriate Vehicle To Decide The Issue of Tribal Extraterritorial Criminal Jurisdiction Left Open By *Oliphant*, *Wheeler*, and *Duro*.

Oliphant, *Wheeler*, and *Duro* established the limits on tribes' inherent jurisdiction to try and punish offenders for acts within reservation boundaries. Those cases did not address the exercise of tribal criminal jurisdiction outside a tribe's territory. The Court has never held that such extraterritorial jurisdiction exists. The Sixth Circuit's decision finding that tribes may prosecute members for extraterritorial acts creates a new rule that is at odds with the Court's precedent and prior tribal practice..

From its earliest decisions, the Court has considered the bounds of tribal sovereignty and territory to be coextensive. *See Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 4 (1831) (tribes are "sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self government within that territory"); *Fletcher*, 10 U.S. at 147 ("[T]he limitation upon [Indian]

sovereignty amounts to the right of governing every person within their limits except themselves.").

In *Oliphant*, *Wheeler*, and *Duro* the Court clarified that tribes' dependent status places further limitations on their inherent power to prosecute nonmembers within their territory. In each case, the Court established that the crime took place on tribal land. Thus, the Court had no occasion to address what power, if any, tribes might have to prosecute crimes occurring outside their reservations.

This case squarely presents that question to this Court for the first time, no other Circuit ever having approved a tribe's unilateral expansion of its prosecutorial powers beyond its territorial limits. It is uncontested that the acts in question took place outside the Band's territory. It is also uncontested that, without extraterritorial criminal jurisdiction over its members, the Band could not prosecute Kelsey. Indeed, the Band had to strike down its own jurisdictional code after the conduct in question to prosecute Kelsey. This case is thus an ideal vehicle for the Court to answer whether tribes possess that extraterritorial power as a pure question of law. Because the issue is of exceptional importance to tribe members[1]—and because the panel's decision upsets centuries of common understanding among federal, state, and tribal authorities—the Court should resolve this issue now.

Recognizing that *Wheeler* and *Duro* do not address extraterritorial jurisdiction, the Sixth Circuit regardless held that "the reasoning behind tribal criminal jurisdiction in *Duro*—that a tribe's authority to prosecute its members is 'justified by the *voluntary character of tribal membership* and the concomitant right of participation in a tribal government'—provides ample

[1] Census data show that more than 300,000 people claiming Native American heritage live within the Sixth Circuit. *See* U .S. Census Bureau, 2010 Census Redistricting Data (Public Law 94–171) Summary File, Table P1 .

basis to validate the exercise of tribal criminal jurisdiction on the basis of membership" outside tribal territory. Pet. App. 8. The panel thus considered and rejected the long line of cases from the Court "which do consider territory as a significant factor in determining the contours of tribal sovereignty." Pet App. 9. Instead of following that precedent, it turned to the Court's holding in *Montana* with regard to the limits of *civil* jurisdiction over nonmembers within tribal land to decide that tribes have "inherent sovereign authority to prosecute members when necessary to protect tribal self-government or control internal relations" even outside their territory. Pet. App. 2.

The decision below now makes tribe members vulnerable to tribal prosecution no matter where they go and no matter what other sovereigns may also punish their acts—a burden they alone among United State citizens bear by virtue of their ancestral ties. All that is required of the tribe to invoke such power is an after-the-fact assertion that prosecution is necessary to protect tribal self-government or control internal relations. But the panel's decision gives little guidance to when that admittedly amorphous standard will be met. In this case, the panel looked to the factors of "conduct visited on the Band's employee by the Band's *own elected official* during an official tribal function." Pet. App. 15. But there is nothing about the crime itself that implicates tribal self-government or internal relations, and the factors on which the Sixth Circuit hangs its rule are too malleable to support jurisdiction. What if Kelsey were a tribal elder and not a member of government? What if Foster had not been a tribal employee? What if the conduct had taken place in a conference center the Band did not own? Would the Band be empowered to prosecute in any of these scenarios?

Such uncertainty in the area of criminal jurisdiction—and the court of appeals' unprecedented expansion of tribal judicial authority—requires the Court's immediate guidance.

B. Tribes Do Not Have Criminal Jurisdiction Over Tribe Members Outside Tribal Territory Without Congressional Authorization.

Review is also warranted because the panel's decision is incorrect. Tribal courts may not exercise criminal jurisdiction over tribe members for acts taking place outside of Indian country without express Congressional delegation.

Congress addressed tribal criminal authority directly in amending 28 U.S.C. § 1301 after *Duro* and expressly included a territorial limitation. Congress defined the extent of tribes' "powers of self-government" in criminal prosecutions as "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." 28 U.S.C. § 1301(2). It defined "Indian" by specific reference to 18 U.S.C. § 1153, which addresses "offenses committed within Indian country" and, specifically, "any Indian who commits [an offense] *within the Indian country*." 18 U.S.C. § 1153(a). Congress could not have ignored these clear territorial restrictions in the statutory language it chose to incorporate. It did nothing to diminish their limitations. Nor did it include or address extraterritorial prosecution as an equal inherent power of tribal self-government.

For more than two hundred years, the Court has defined the limits of tribal sovereignty by territorial bounds. Never has it held that tribal jurisdiction extends to members' off-reservation conduct. Instead, the Court has hewed closely to its original articulation of tribal authority as domestic dependent sovereigns as existing only "within their limits." *Fletcher*, 10 U.S. at 147. The "unique and limited" sovereignty that tribes retain "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 328 (2008).

The Sixth Circuit's opinion conflicts with the Court's precedent recognizing territorial limits to tribal jurisdiction in both civil and criminal actions. The Court repeatedly acknowledged

territorial limits in its early decisions addressing tribal criminal jurisdiction. In *Talton v. Mayes*, 163 U.S. 376 (1896), the Court held that the Cherokee Nation retained "the power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the Nation." *Id.* at 380–81 (also noting treaty rights of Cherokee to legislate "within their own country" and "to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the Nation . . . shall be the only parties, or where the cause of action shall arise in the Cherokee Nation").

In *Elk v. Wilkins*, 112 U.S. 94 (1884), the Court cited with approval the Western District of Arkansas's holding in *Ex parte Kenyon*, 5 Dill. 385 (C.C.W.D. Ark. 1878), that a tribal court did not have criminal jurisdiction because the act in question took place in the State of Kansas and not within tribal territory. The Court found that "because the place of the commission of the act was beyond the territorial limits of its jurisdiction . . . 'this alone would be conclusive of this case.'" *Elk*, 112 U.S. at 108. This understanding has persisted throughout the Court's decisions. *See DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 428 & n.2 (1975) ("If the lands in question are within a continuing 'reservation,' jurisdiction is in the tribe and the Federal Government . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State . . . .").[2]

[2] One exception proves the rule. In *Settler v. Lameer*, 507 F.2d 231 (1974), the Ninth Circuit upheld the right of the Yakima Indian Nation to enforce hunting and fishing regulations outside of its tribal territory. But it did so only because such rights were expressly reserved to the tribe by its governing treaty. The Ninth Circuit was clear that the treaty was the only basis for allowing such prosecutorial power. "Our holding that the Yakima Indian Nation may enforce its fishing regulations by making arrests and seizures off the reservation is a very narrow one. Off-reservation enforcement is limited strictly to violations of tribal fishing regulations." *Settler v. Lameer*, 507 F.2d 231, 240 (9th Cir. 1974)

The panel's decision also stands in conflict with the common understanding of tribal authorities regarding criminal jurisdiction. Such "common notions" inform understanding of the "intricate web of judicially made Indian law." *Oliphant*, 435 U.S. at 206. In 1934, Felix Cohen advised tribes that "[o]ffenses committed by Indians outside of the reservation are subject to the same state laws that apply to other citizens. Again, the Indian tribe is not concerned with such offenses." Felix Cohen, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 132 (2006 ed.); *see also* Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW 148 & n.236 (1942) ("The jurisdiction of the Indian tribe ceases at the border of the reservation.").[3] Modern treatises retain Cohen's understanding of tribal power. *See* William H. Canby, Jr., AMERICAN INDIAN LAW IN A NUTSHELL 194 (6th ed. 2015) ("The jurisdiction of a tribe is generally confined to crimes committed within the geographical limits of its reservation . . . ."); David H. Getches, et al., FEDERAL INDIAN LAW 484 (2011) ("The first determination is whether the crime occurred in Indian country. If it did not, the inquiry is over: the state courts have jurisdiction; the federal and tribal courts have none."); National American Indian Court Judges Association, JUSTICE AND THE AMERICAN INDIAN 4–5 (1974) ("A tribal court has jurisdiction over all offenses which violate tribal law and which are committed on the reservation . . . [N]o court has jurisdiction to enforce tribal ordinances off a reservation.").

Similarly, a 1939 Opinion of the Solicitor of the Interior Department reflects this understanding. The Opinion found "[t]hat the original sovereignty of an Indian tribe extended to the punishment of a member . . . for depredations or other forms of misconduct committed outside

[3] A more recent edition of Cohen's classic treatise posits that "[t]ribal court jurisdiction *may* also exist for claims that arise outside Indian country, although the scope of such jurisdiction is more constrained." *See* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.01(2)(d) (2012) (emphasis added). It is Cohen's original and unequivocal historical statements that carry more weight in demonstrating the "common notions of the day." *Oliphant*, 435 U.S. at 206.

the territory of the tribe cannot be challenged." Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, April 27, 1939 at 9. But the Opinion also found that "the existing Law and Order Regulations and tribal codes restrict the jurisdiction of Indian courts to acts committed within an Indian reservation . . . ." *Id.* at 16. Further, a 1934 Opinion of the Soclitor of the Interior found that "[t]he jurisdiction of the Indian tribe ceases at the border of the reservation." Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW 148 n.235 (1942 ed.) (quoting Powers of Indian Tribes, 55 I.D. 14 at 806 n.2 (1934)).

Consideration of tribal courts' civil jurisdiction has applied the same territorial restrictions. *See Nevada v. Hicks*, 533 U.S. 353, 370 (2001) (land ownership status is "a factor significant enough that it 'may sometimes be . . . dispositive'" to the question of whether nonmember activities on that land implicate tribal self-government or internal relations). Even *Montana*, from which the Sixth Circuit draws its rule of extraterritorial criminal jurisdiction, only considered hunting and fishing within reservation boundaries and found that, while the tribe had an interest in regulating nonmember conduct on tribal land, it did not have a similar interest in regulating conduct taking place on land held in fee by nonmembers, even within reservation boundaries. "This delineation of members and nonmembers, tribal land and non-Indian fee land, stem[s] from the dependent nature of tribal sovereignty." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001). Thus, "while Indian tribes *within 'Indian country'* are a good deal more than 'private, voluntary organizations,'" sovereignty outside tribal territory is significantly diminished. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added). Tribal courts have more extensive jurisdiction in civil matters than in criminal prosecutions. *Strate v. A-1 Contractors*, 520 U.S. 436, 449 (1997). The significance of land status is thus heightened in determining a tribe's criminal jurisdiction.

Limitation of tribal jurisdiction in the traditional territorial manner is not arbitrary. First, territory is the foundation of authority for any sovereign. Restatement (Third) of Foreign Relations Law § 402. Second, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). "The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country where they are committed. No other nation therefore has any right to punish them . . . ." Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS 840 (1883). A tribe's exercise of criminal jurisdiction outside of its territory is necessarily an intrusion into the jurisdiction of another sovereign—the state where the crime took place. "Because no individual state can claim to represent the rights of other states, punishment of criminal offenses must be instituted by the sovereign against which the offense was committed." Lea Brilmayer, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 321 (1986). But "the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Wheeler*, 435 U.S. at 326. The powers to prescribe and enforce criminal laws that tribes retain involve "only the relations among members of a tribe" and not relations between the tribe and other sovereigns—precisely the relationship at issue when a tribe asserts criminal jurisdiction over a person within the territory of one of the states. *Id.*

Further, "Indian courts differ from traditional American courts in a number of significant respects." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). The Bill of Rights does not apply to tribes of its own force, and the Indian Civil Rights Act of 1968's protections "are not equivalent to their constitutional counterparts." *Duro*, 495 U.S. at 693;

United States v. Bryant, 136 S. Ct. 1954, 1964 (2016) (Sixth Amendment protections do not apply in tribal courts). There is no dispute that Indians outside of tribal territory are subject to state and federal jurisdiction as are any other citizens. *Mescalero Apache Tribe*, 411 U.S. at 148–49. Limiting tribal court jurisdiction ensures that tribe members receive the Constitutional protections of those courts when charged with acts taking place outside of Indian country. Allowing the Band's unprecedented expansion of its jurisdiction, in contrast, means that U.S. citizens may be tried and convicted in proceedings that deviate from Constitutional minimums, even though the relevant acts unquestionably took place in non-tribal territory.

The panel's opinion also creates a vague and unworkable rule of criminal jurisdiction. The panel holds that tribes may assert criminal jurisdiction to punish off-reservation conduct when necessary to protect tribal self-government or control internal relations. This is necessarily a post-hoc inquiry that leaves tribe members with little notice as to whether and where the tribe's jurisdiction will apply. Here, the panel found that standard met because of Kelsey's status as a member of the Tribal Council, the victim's status as a tribal employee, and the fact that the events took place during a tribal elders' meeting at the tribal community center. Pet. App. 15. Under these circumstances, the panel termed misdemeanor sexual assault "an offense against the peace and dignity of the Band itself." *Id.* But these circumstances offer up no reliable jurisdictional rule.

A separate inquiry will be required in every case. Further, a tribe member is without notice that he is subject to tribal prosecution until *after* tribal jurisdiction is asserted and the conduct's impact on self-government or internal relations established—by, it must be noted, the tribe itself. The Court rejected a similar case-by-case "contacts test" in *Duro*. 495 U.S. at 697. Criminal jurisdiction—particularly that to be exercised by courts unbound by full constitutional protections—requires a predictable, predetermined, bright-line rule.

Finally, the Sixth Circuit's assertion that the assault at issue here threatens tribal self-government and internal relations conflicts with the Court's precedent. Kelsey was charged with misdemeanor sexual assault—a crime that in no way implicates the Band's governance except in the fact that it is conduct the Band has criminalized. The nine crimes the Band identified as requiring extraterritorial reach—including abuse of office, election fraud, obstruction of justice, and theft from a tribal organization—have a direct impact on tribal affairs. Pet. App. 78. While the criminalized conduct is surely reprehensible, it is one of the quintessential "crimes against private individuals or their property [that] must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it." *United States v. Bowman*, 260 U.S. 94, 95–96 (1922). If self-governance is implicated simply by a tribe enforcing criminal law against its members, the limitation swallows the Sixth Circuit's rule.

C. The Sixth Circuit's Opinion Cannot Be Squared With The Court's Precedent Regarding Retroactive Expansion Of Criminal Laws And Is In Conflict With Decisions Of Other Lower Courts.

The Indian Civil Rights Act applies due process standards to tribal court proceedings. 25 U.S.C. §§ 1302(a)(8)–(9). Thus, tribal courts are bound by "[t]he fundamental principle that the required criminal law must have existed when the conduct in issue occurred . . . to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." *Bouie*, 378 U.S. at 354. Here, the Tribal Court of Appeals retroactively expanded the Band's criminal jurisdiction to cover conduct that it did not reach before Kelsey's prosecution. It did so by voiding the "narrow and precise" statute that established the bounds of its criminal authority. *Id.* at 352. This retroactive judicial act subjected Kelsey to increased punishment after the fact "because now the State of Michigan and the Band could punish [him] for the same action" and deprived him of an affirmative jurisdictional defense. Pet. App. 20 The panel's determination that rewriting the statute that

establishes what crimes may be prosecuted after the fact does not violate due process is in conflict with the Court's precedent and decisions of other Courts of Appeals.

The panel's holding that fair notice protections reach only retroactive criminalization of conduct, not jurisdiction, is in conflict with the Court's precedent and the decisions of other courts. The panel held that "fair notice protection has not been extended to an expansion of jurisdiction as opposed to a retroactive criminalization of *conduct*." Pet. App. 21. The panel further held that Kelsey's "conduct was criminal, regardless of where it occurred" and fair notice protections did not apply because Kelsey was "'subject to prosecution somewhere.'" Pet. App. 21. (quoting *United States v. al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011)). Contrary to the panel's view, the Court recognizes a constitutional prohibition against acts that not only "make innocent acts criminal" but also "aggravate an offense . . . either by the legal definition of the offense or by the nature and amount of the punishment imposed for its commission." *Beazell v. State of Ohio*, 269 U.S. 167, 70 (1925). Indeed, "[i]t is settled, by decisions of the Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which *makes more burdensome the punishment for a crime*, after its commission, or which *deprives one charged with crime of any defense available according to law at the time when the act was committed*, is prohibited ex post facto." *Beazell*, 269 U.S. at 169–70 (emphasis added); *Calder v. Bull*, 3 U.S. 386, 390 (1798) (detailing these four types of laws prohibited by the Ex Post Facto clause). "It is the effect, not the form, of the law that determines whether it is *ex post facto*." *Weaver v. Graham*, 450 U.S. 24, 31 (1981).

Retroactively expanding the Band's criminal jurisdiction implicates two categories of prohibited ex post facto lawmaking. First, Kelsey was subjected to a retroactive increase in

punishment because at the time of the conduct, the Band had no authority to punish him. Second, Kelsey was denied the affirmative defense that the Band lacked jurisdiction to prosecute him.

Allowing the Band to exercise criminal jurisdiction after the fact increased the potential quantum of punishment for his actions because double jeopardy protections do not guard against punishment by the Band and a state for the same action. *See Lara*, 541 U.S. at 210. Thus, expanding criminal jurisdiction can increase no punishment to some punishment, or some punishment to more punishment. This "attaches criminal penalties to what previously had been innocent conduct," invoking due process concerns. *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001).

Other courts recognize this kind of retroactive expansion of jurisdiction as a harm protected against by the fair notice requirement. In *Helton v. Fauver*, 930 F.2d 1040 (3d Cir. 1991), the Third Circuit recognized a due process violation where the New Jersey Supreme Court reinterpreted the state's juvenile jurisdiction statute to permit the juvenile court to waive jurisdiction over a sixteen-year-old defendant after he was charged. *Id.* at 1044. The defendant was deprived of fair notice by the New Jersey Supreme Court's unexpected ruling because he faced a harsher punishment in adult court and lost a defense against that court's jurisdiction. *Id.* at 1052. The California Supreme Court recognized and prevented a similar violation in *People v. Morante*, 975 P.2d 1071 (Cal. 1999). There, the court declined to apply retroactively its decision reinterpreting the state's conspiracy statute by eliminating an element of the offense requiring that an attempt be made in California. *Id.* at 431. In fact, the Sixth Circuit has recognized that the fair warning principles underlying *Bouie* "proscribe judicially enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing a criminal act." *Dale v. Haeberlin*, 878 F.2d 930, 934 (6th

Cir. 1989); *United States v. Beals*, 698 F.3d 248, 272–73 (6th Cir. 2012) (recognizing *Dale*'s relevance to retroactive increase of mandatory minimum sentences).

The decision below presents the same problems as these cases. The Tribal Court of Appeals increased Kelsey's potential punishment after the fact and removed a possible jurisdictional defense. The panel's holding that this did not violate due process cannot be squared with the holdings of other courts or the Court's guiding precedent. The Court should step in to resolve the conflict.

The panel also erred in holding that the tribal court of appeals' striking down a narrow and precise jurisdiction statute did not run afoul of due process. A primary purpose of the ex post facto prohibition is to allow citizens to rely on statutes until they are explicitly changed. *Weaver*, 450 U.S. at 28–29. The purpose of the Band's Law and Order Criminal Offenses Ordinance is "to give fair warning of the nature of conduct declared to constitute criminal offenses" under Band law. Pet. App. 77. The Ordinance's jurisdiction provisions define which offenses "constitute forbidden criminal conduct against the Tribe" and specify that "[p]ersons committing such offenses may be tried and punished by the Tribal Court as provided for by this Ordinance." *Id.* At the time Kelsey was prosecuted, the Ordinance limited criminal jurisdiction to the Band's reservation, trust land, and Indian country—which did not include the community center. Pet. App. 77–78. The Ordinance then listed nine offenses over which the Band's criminal jurisdiction would extend "wherever committed." Pet. App. 78. Sexual assault was not one of the nine offenses. Thus, the only way that the Tribal Court of Appeals could affirm Kelsey's conviction was to declare § 4.03 "unconstitutionally narrow in that it does not provide for the exercise of the inherent criminal jurisdiction over all tribal lands" and strike it down. Pet. App. 69.

This was an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" prohibited by *Bouie*, 378 U.S. at 352. The panel aligns this case with the "routine exercise of common law decisionmaking" because of two additional legislative provisions: (1) Article I of the Tribal Constitution, which defined the Band's territory to include "all lands which are now or hereinafter owned by or reserved for the Tribe" and stated that the Band's "jurisdiction. . . shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law;" and (2) the Band's Criminal Procedure Ordinance § 8.08, which stated that "[t]he Tribal Court shall have jurisdiction over any action . . . that is made a criminal offense under the applicable Tribal Code and that occurred within the territorial jurisdiction of the Tribe as defined in the Constitution." Pet. App. 75–76, 79. But these additional provisions do not contradict or override § 4.03's clear statutory delineation of what crimes the Band would and would not prosecute outside its territory.

Further, the Tribal Constitution defines the Band's possible jurisdiction as limited by exercise of the Band's sovereign powers—including the lawmaking that created the Criminal Offenses Ordinance. Pet. App. 75. Section 8.08 of the Criminal Procedures Ordinance similarly limits jurisdiction to conduct "made a criminal offense under applicable Tribal Code." Pet. App. 79. Both recognize that the extent of criminal jurisdiction is ultimately subject to the Tribal Council's lawmaking powers, manifested in the Criminal Offenses Code and its jurisdictional provisions. That statute's "narrow and precise" limitation of which crimes will and will not be prosecuted extraterritorially, created through the Band's retained sovereign power to prescribe criminal law over its members, controlled.

The Indian Civil Rights Act's guarantee of due process protections in tribal courts was enacted to protect Indians from "'arbitrary and unjust actions of tribal governments.'" *Santa Clara*

Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5–6 (1967)). Whatever the territorial limits on tribes' power to prosecute their members may be, they must be exercised consistent with due process values. Rewriting criminal laws after the fact to allow punishment for conduct that the tribe had previously expressly declined to reach violates due process and the protections guaranteed to tribe members under the Indian Civil Rights Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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