No. 19-231

In the Supreme Court of the United States

ROBERT R. REYNOLDS,

Petitioner,

v.

WILLIAM SMITH, Chief Probation officer, Amantonka Nation Probation Services;
JOHN MITCHELL, President, Amantonka Nation
ELIZABETH NELSON, Chief Judge, Amantonka Nation District Court,

Respondents.

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

BRIEF FOR RESPONDENTS

Team Number 102

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
QUESTION PRESENTED 1
STATEMENT OF THE CASE 2
I. STATEMENT OF PROCEEDING 2
II. STATEMENT OF FACTS 3
SUMMARY OF THE ARGUMENT 3
ARGUMENT 4
I. MR. REYNOLDS IS AN INDIAN FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION 4
A. The Amantonka Nation Has Inherent Criminal Jurisdiction Over Mr. Reynolds Because He Is A Member of the Nation and Committed A Crime Within Indian Country 5
B. Language of the Violence Against Women Act and The Indian Civil Rights Act Show Mr. Reynolds is an Indian for Purposes of Special Domestic Violence Criminal Jurisdiction. 7
C. *Rogers*' Treatment of Race Goes Against The Policy Of Self-Determination And Should Not Be Used To Determine A Tribe's Jurisdiction Over Its Own Members 11
II. THE EQUAL PROTECTION CLAUSE OF THE INDIAN CIVIL RIGHTS ACT IS NOT VIOLATED WHEN A TRIBAL CODE HAS DIFFERENT LEGAL REQUIREMENTS THEN THOSE PRESCRIBED IN THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 13
A. The Amantonka Nation is not Restrained by the Constitution of the United States, but rather the Indian Civil Rights Act. 13
B. Petitioner's Equal Protection Rights Were Not Violated Because Petitioner's Court Appointed Counsel Was Sufficiently Qualified under the SDVCJ Standards 16

C. The Amantonka Nation did not Violate Petitioners Equal Protection Rights, even If the Court Finds Petitioner's Court-Appointed Counsel was not Qualified under the Special Domestic Violence Criminal Jurisdiction. 18

CONCLUSION.....21

TABLE OF AUTHORITIES

CASES

Board of County Comm'rs v. Seber, 318 U.S. 705 (1943) 18

Elk v. Wilkin, 112 U.S. 94 (1884) 11

Ex parte Crow Dog, 109 U.S. 556 (1883) 11

Fisher v. District Court, 424 U.S. 383 (1976) 20, 21

Duro v. Reina, 495 U.S. 676 (1990) 4

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 9, 10, 13

Morton v. Mancari, 417 U.S. 535 (1974) 6, 8, 18, 19, 20

Nevada v. Hicks, 533 U.S. 353 (2001) 14, 15

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 5, 7

Roff v. Burney, 168 U.S. 218 (1987) 6, 13, 14

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1987) ..... passim

Simmons v. Eagle Seelatsee, 384 U.S. 209 (1966) 19

Talton v. Mayes, 163 U.S. 376 (1896) 14, 15

United States v. Antelope, 430 U.S. 641 (1977) 10, 11, 13, 20, 21

United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005) 4

United States v. Cruz, 554 F.3d 840 (9th Cir. 2009) 4

United States v. Kagama, 118 U.S. 375 (1886) 6, 13, 14

United States v. Lara, 541 U.S. 193 (2004) 5, 11

United States v. Mazurie, 419 U.S. 544 (1975) 6

United States v. Quiver, 241 U.S. 602 (1916) 14

United States v. Rogers, 45 U.S. 567 (1846) ..... passim

United States v. Wheeler, 435 U.S. 313 (1978) ..... passim

Williams v. Lee, 358 U.S. 217 (1959) 6, 14, 19

Worcester v. Georgia, 31 U.S. 515 (1832) 6, 14

CONSTITUTION

U.S. Const. am. 5. ..... passim

U.S. Const. am. 14. ..... passim

STATUTES

18 U.S.C. § 1153 ..... passim

25 U.S.C. § 1301..... passim

25 U.S.C. § 1304..... passim

25 U.S.C. § 5304.....8

25 U.S.C. § 1452.....8

Tribal Law and Order Act of 2010, 111 P.L. 211, 124 Stat. 2258 (2010) 16

Violence Against Women Reauthorization Act of 2013, 113 P.L. 4, 127 Stat. 54 (2013) ..... passim

RULES AND REGULATIONS

TRIBAL LAW

Amantonka Nation Code, Title 2, Chapter 1, Section 105(a) 5

Amantonka Nation Code, Title 2, Chapter 6, Section 607 16

Amantonka Nation Code, Title 2, Chapter 7 17

Amantonka Nation Code, Title 3, Chapter 2 6

TREATISES

Cohen's Handbook of Federal Indian Law (2017) 8, 11, 12, 14

OTHER AUTHORITIES

Kevin K Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C.L. Rev. 779 (2006) 11, 12

Newton, Tribal Courts Praxis: *One Year in the Life of Twenty Tribal Courts*, 22 Am. Indian L. Rev. 285 (1998). 15

Department of Justice, *VAWA 2013 and Tribal Jurisdiction Over Crimes of Domestic Violence* (June 14, 2013) 16

QUESTIONS PRESENTED

1. Under 25 U.S.C. 1304, is a person a non-Indian for the purposes of a Tribe's special domestic violence criminal jurisdiction when that person has no Indian heritage but is a citizen of the Tribe?
2. Under the Equal Protection Clause, of the Indian Civil Rights Act, is an Indian person's rights violated when a tribal code has different legal requirements then those prescribed to non-Indians in the Violence Against Women Reauthorization Act of 2013.

STATEMENT OF THE CASE

I. STATEMENT OF PROCEEDINGS

On June 16, 2017, the Chief Prosecutor of the Amantonka Nation, filed a complaint against Robert R. Reynolds, stating Defendant knowingly struck his wife, Lorinda Reynolds, causing her injury, in direct violation of Title 5 Section 244 of the Amantonka Nation Code. In the District Court for the Amantonka Nation, Defendant filed three pretrial motions. First, Defendant sought to have the charges dismissed on the grounds that he is a non-Indian and that the Amantonka Nation lacks criminal jurisdiction over non-Indians. Second, Defendant sought to have an attorney appointed to him alleging that as a non-Indian he falls within the Amantonka Nation's exercise of Special Domestic Violence Criminal Jurisdiction. Lastly, Defendant alleged that the court-appointed counsel appointed to him was insufficiently qualified and therefore violated relevant Equal Protection requirements. The District Court for the Amantonka Nation denied all three of Defendant's pretrial motions.

A jury returned a verdict of guilty, finding Defendant violated Title 5 Section 244 of the Amantonka Nation Code. Defendant made a motion to set aside the verdict reiterating the same pretrial motions and the Chief Judge denied. On August 23, 2017, the District Court for the

Amantonka Nation issued an Order Entering Judgment and Sentence. Defendant appealed to The Supreme Court of the Amantonka Nation raising the arguments he raised in his pretrial motions. The Supreme Court of the Amantonka Nation affirmed Defendant's conviction.

Having exhausted his tribal remedies, Defendant filed a petition in the U.S. District Court the District of Rogers, alleging that his conviction is in violation of his federal civil rights as guaranteed in the United States Constitution, the Indian Civil Rights Act, and the Violence Against Women Act of 2013. On March 7, 2018, the U.S. District Court for the District of Rogers granted the petition for a writ of habeas corpus. On August 20, 2018, the U.S. Court of Appeals for the Thirteenth Circuit, reversed the decision of the U.S. District Court and remanded with instruction to deny the petition for writ of habeas corpus. Defendant filed a petition for a Writ of Certiorari to the Supreme Court of the United States which was granted on October 15, 2018.

II. STATEMENT OF FACTS

Petitioner Robert R. Reynolds and Lorinda, petitioner's wife, met while in college. After graduation, they were married, and both found jobs on the Amantonka Nation Reservation where Lorinda is a citizen. Mr. Reynolds was a non-member, non-Indian at the time. Two years after marrying Lorinda, Mr. Reynolds successfully completed the Amantonka Nation's naturalization process, took the oath of citizenship, and received an Amantonka Nation ID card. Since moving to the Amantonka Nation Reservation, both Mr. Reynolds and Lorinda have lived in the tribal housing complex and have been employed on the reservation, except for 10 months when Mr. Reynolds was unemployed.

During this period of unemployment, Mr. Reynold developed a drinking problem and became abusive toward Lorinda. On June 15th, 2017, Amantonka police were called to the

Reynolds' apartment and observed signs of physical abuse. Mr. Reynolds had struck Lorinda across the face, causing her to fall and cracking a rib. Mr. Reynolds was transported to the Amantonka Jail, and was prosecuted in Amantonka Nation District Court, as outlined in the previous section.

SUMMARY OF THE ARGUMENT

Mr. Reynolds first argues that he is a non-Indian for purposes of the Amantonka Nation's criminal jurisdiction. Because of this, Mr. Reynolds contends that the Nation did not have jurisdiction to prosecute him under the Nation's inherent authority to prosecute Indians for crimes committed within its borders. Instead, Mr. Reynolds argues that the Nation only has authority to prosecute him though its special domestic violence criminal jurisdiction as outlined in 25 U.S.C. 1304.

Mr. Reynolds' argument is flawed for three main reasons. First, the Nation has inherent criminal jurisdiction over its citizens. Mr. Reynolds underwent the process to become an Amantonka Nation citizen, took an oath to the Nation, and was added to the Tribal rolls. Because Mr. Reynolds has voluntarily become a citizen, the Nation has inherent authority over him. Second, language within the Violence Against Women Reauthorization Act of 2013 and the Indian Civil Rights Act, as well as opinions from this Court interpreting them, support the conclusion that Tribes have inherent authority over all their members. Finally, the test imposed by *Rogers* that a person "be of the family of Indians" is in direct opposition with Congressional intent and relationships with Tribes and should not be applied in this case.

Mr. Reynolds argues that the attorney appointed to represent him was inadequate as a matter of law. First, Mr. Reynolds claims he is a non-Indian, and therefore, the Amantonka Nation's criminal jurisdiction over him must rest on the exercise of the Nations Special

Domestic Violence Criminal Jurisdiction. This argument is flawed because Mr. Reynolds underwent the process to become an Amantonka Nation Citizen. As an Amantonka Nation Citizen the Special Domestic Violence Criminal Jurisdiction does not apply. However, the counsel appointed to Mr. Reynolds, sufficiently met the requirements required by the Special Domestic Violence Criminal Jurisdiction regardless of his status as an Indian.

Mr. Reynolds further contends that if he is classified as an Indian the fact that the attorney, he is entitled to is less qualified than the attorney which a non-Indian is entitled to, in in and of itself a violation of equal protection. Mr. Reynolds equal protection rights were not violated because "Indian" is not a racial classification and therefore can not constitute racial discrimination. The distinction between an Indian and non-Indian under the Violence Against Women Reauthorization can be rationally tied to the fulfillment of Congress' unique obligation toward the Indians, and such legislative judgments should not be disturbed.

ARGUMENT

I. MR. REYNOLDS IS AN INDIAN FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION.

"At first glance, there appears to be something odd about a court of law in a diverse nation such as ours deciding whether a specific individual is or is not 'an Indian.'" *United States v. Cruz*, 554 F.3d 840, 842 (9th Cir. 2009). "The exercise of criminal jurisdiction over Indians and Indian country 'is governed by a complex patchwork of federal, state, and tribal law' which is better explained by history than by logic." *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (*quoting Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990)). In this complex patchwork, the Punnett square is appropriate tool in understanding when Tribes have criminal jurisdiction over a person. The Punnett square is a square diagram used in biology to determine the probabilities of offspring inheriting certain genotypes. For criminal jurisdiction purposes,

however, Tribes must use the pairs of member/non-member and Indian/non-Indian when making their square to determine if they have criminal jurisdiction. Three boxes have clear answers: Tribes have inherent criminal jurisdiction over member Indians *United States v. Wheeler*, 435 U.S. 313 (1978); and non-member Indians. *United States v. Lara*, 541 U.S. 193 (2004) (recognizing Congress's authority to restore inherent tribal jurisdiction over non-member Indians). Tribal jurisdiction in another box, over non-member non-Indians, only exists when specifically approved by Congress. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978) ("From the earliest treaties with these tribes, 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").

Today, the Amantonka Nation is asking this Court to fill in the final square and reach the unsurprising conclusion that Tribes have inherent criminal jurisdiction over all of their members, even those who are non-Indian. This result will be clear by first examining the Nation's inherent criminal jurisdiction over members. Next, the language authorizing Tribes to exercise special domestic violence criminal jurisdiction over non-Indians and other statutes support the conclusion that Tribes have inherent criminal jurisdiction over all members, regardless of race. Finally, the test developed by this Court in *United States v. Rogers*, 45 U.S. 567 (1846) to determine whether someone is an Indian is no longer relevant and its rationale does not support Congress's goal of tribal self-determination.

A. <u>The Amantonka Nation Has Inherent Criminal Jurisdiction Over Mr. Reynolds Because He Is A Member of the Nation and Committed A Crime Within Indian Country.</u>

The Amantonka Nation and Court have jurisdiction to enforce its laws against its members for crimes committed within the boundaries of the Amantonka Nation. Amantonka Nation

Code, Title 2, Sec. 105(a). This Court supports the Amantonka Nation's jurisdiction by recognizing that Tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (*citing Worcester v. Georgia*, 31 U.S. 515, 557 (1832)). "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members." *United States v. Wheeler,* 435 U.S. 313, 322 (1978). This inherent authority is not because Indians are "a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Despite Congress's plenary authority, Tribes are a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama,* 118 U.S. 375, 381-82 (1886). This inherent authority includes the power to create law regarding membership. *See Roff v. Burney*, 168 U.S. 218 (1897); *see also Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1987). It also includes the authority to enforce those laws in their own forums. *Williams v. Lee*, 358 U.S. 217 (1959). "[F]ar from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of a tribe, Congress has repeatedly recognized that power and declined to disturb it." *Wheeler*, 435 U.S. at 325. Taken together, this Court's precedent clearly supports the proposition that Tribes have the authority to determine their own membership and apply their laws to their members, regardless of heritage.

The Amantonka Nation has established a naturalization process. Amantonka Nation Code, Title 3, Ch 2. Mr. Reynolds used this process to become a naturalized citizen of the Amantonka Nation. *Reynolds v. Amantonka Nation*, Supreme Court of the Amantonka Nation, No. 17-198. To become a citizen, Mr. Reynolds had to: "a) Complete a course in Amantonka culture; 2) Complete a course in Amantonka law and government; c) Pass the Amantonka citizenship test; and 4) Perform 100 hours of community service with a unit of the Amantonka Nation

government." Amantonka Nation Code Title 3, Sec. 202. Upon completing these requirements, Mr. Reynolds took an oath of citizenship, was added to the Amantonka Nation roll, and was issued an Amantonka Nation ID card. *Reynolds*, No. 17-198; Code Title 3, Sec 203. Mr. Reynolds is clearly a member of the Amantonka Nation. *Reynolds*, No. 17-198.

There is no question that Mr. Reynolds assaulted another member of the Amantonka Nation or that the assault occurred within the Nation's boundaries. *Reynolds*, No. 17-198. It is then, under this Court's precedent, "undisputed" that the Amantonka Nation has the power to enforce its criminal laws against Mr. Reynolds as a citizen of the Nation. *Wheeler*, 435 U.S. at 322. Despite clearly filling in the final Punnett square, Mr. Reynolds asserts that he is not an Indian and is not subject to the Tribe's inherent criminal jurisdiction but is a non-Indian under the Nation's special domestic violence criminal jurisdiction.

B. Language of the Violence Against Women Act and The Indian Civil Rights Act Show Mr. Reynolds is an Indian for Purposes of Special Domestic Violence Criminal Jurisdiction.

Mr. Reynolds argues that, despite seeking citizenship of the Nation, demonstrating knowledge of the Nation's laws, taking an oath of citizenship to the Nation, and enjoying privileges of citizenship within the nation, he is not subject to the Nation's inherent criminal jurisdiction because he is not an "Indian." Mr. Reynolds begins this argument by stating that tribes do not have criminal jurisdiction over non-Indian defendants. *Oliphant*, 435 U.S. at 208. Mr. Reynolds argues that "the federal definition of 'Indian'" which requires a person to possess some degree of Indian blood and be recognized by a member of a tribal community in order to be an Indian. *Reynolds v. Amantonka Nation*, No. 17-198. Mr. Reynolds claims he is not an Indian by birth, so he is not an Indian for criminal jurisdiction purposes.

Instead, Mr. Reynolds argues, the Amantonka Nation only has criminal jurisdiction though the amendments to ICRA made by the Violence Against Women Reauthorization Act of 2013, 113 P.L. 4, 127 Stat. 54 (VAWA). VAWA amended the Indian Civil Rights Act (ICRA) to state that "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons." 25 U.S.C. § 1304(b)(1). This provision does not alter tribes' existing inherent criminal jurisdiction, but "recognized and affirmed" all tribal authority under 25 U.S.C. § 1301 and § 1303. 25 U.S.C. § 1304(b)(1). Congress defined "special domestic violence criminal jurisdiction" to be "the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise." 25 U.S.C. 1304(a)(6). Therefore, the question is not whether the Amantonka Nation has criminal jurisdiction over Mr. Reynolds, but whether it had criminal jurisdiction over him before the passage of this amendment as an Indian.

There is no single federal definition for who is an Indian. Cohen's Handbook of Federal Indian Law, §3.03(4) (2017). Earlier Congressional definitions of Indian status included blood quantum. For example, the Indian Reorganization Act defined Indians as members of recognized tribes and "shall further include all other persons of one-half or more Indian blood" on June 1, 1934. However, more recent legislation does not impose this requirement. The Indian Self-Determination Act of 1975 defines an Indian only as "a person who is a member of an Indian tribe" and makes no mention of heritage or blood, though the Tribe must be federally recognized. 25 U.S.C. § 5304(d). Similarly, the Indian Financing Act defines Indians as "any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government . . . ." 25 U.S.C. § 1452(b). The emphasis on federal

recognition and no longer imposing a "blood" requirement makes sense considering Congress's effort to treat tribes not as "a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." *Morton*, 417 U.S. at 554.

ICRA inscrutably defines "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code . . . ." 25 U.S.C. 1301(4). However, 18 U.S.C. § 1153, commonly known as the Major Crimes Act (MCA), does not actually define "Indian." *See*18 U.S.C. § 1153. Congress has not provided a definition for who is "Indian" in criminal contexts. Instead, the test was developed by this Court 173 years ago in *United States v. Rogers*, 45 U.S. 567 (1846).

In *Rogers*, a member of the Cherokee Nation was charged for the murder of another Cherokee member in federal district court. *Rogers*, 45 U.S. at 571. Both the victim and defendant were "of the white race" but had been adopted by the Cherokee Nation. *Id*. at 573. Rogers claimed that, since he and the victim had been adopted by the Cherokee, they were both Indians under the law and fell under the exemption provided in the Trade and Intercourse Act of 1834. *Id.* at 572. This Act specifically denied the United States criminal jurisdiction over "crimes committed by one Indian against the person or property of another Indian." *Id*. This Court disagreed, stating that "[w]hatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibilities to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress." *Id*. at 573. Despite the similarities between *Rogers* and the present case, *Rogers* is not controlling and does not provide a relevant definition for who is an Indian.

Legislation must be read against a backdrop of Indian sovereignty. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 172 (1973). ICRA has "two 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'" *Martinez*, 436 U.S. at 62 (*quoting Martin*, 417 U.S. at 551). "ICRA also manifest[s] a purpose to protect tribal sovereignty from undue interference." *Martinez*, 436 U.S. at 63. Since Congress chose to use VAWA to amend ICRA and place special domestic violence criminal jurisdiction within it, this Court should apply the same congressional purposes to these amendments. These purposes include "preventing injustices perpetrated by tribal government, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." *Id*. at 66-67.

These purposes are found in the language of the statute itself, specifically the section describing the "Nature of the criminal jurisdiction." 25 U.S.C. § 1304(b). In it, Congress states "in addition to all powers of self-government recognized and affirmed by [25 U.S.C. § 1301 and 1303], the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons." 25 U.S.C. 1304(b)(1). Clearly, Congress sought to reinforce Tribal ability to prosecute individuals who commit acts of domestic violence against their members, in keeping with the federal policy of self-determination.

To apply the *Rogers* test would defeat that policy and "disturb the balance between the dual statutory objectives" within ICRA. *Martinez*, 436 U.S. at 66. Requiring tribes to meet the *Rogers* test before they can exercise their inherent criminal jurisdiction over their members would change all Tribes' substantive law. It would impose a racial classification into Tribal

criminal law that the federal government does not even uphold. *United States v. Antelope*, 430 U.S. 641, 646 ("Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe"). And it is this treatment of race which provides the other reason why *Rogers* is inapplicable.

C. *Rogers*' Treatment of Race Goes Against The Policy Of Self-Determination And Should Not Be Used To Determine A Tribe's Jurisdiction Over Its Own Members

This Court is once again considering whether to intrude into Tribal sovereignty through the 25 U.S.C. 1301 and 18 U.S.C. 1153. These statutes, and this Court's use of the *Rogers* test, seem to run counter to the federal policy of self-determination:

> [E]ven though it seems to represent an anachronistic legal regime from a bygone era, the Major Crimes Act is an even greater obstacle to tribal self-governance in the twenty-first century than when it was first enacted in the nineteenth century. Indeed, while its mere existence is anachronistic in light of prevailing policy, its steady expansion means that it undermines tribal self-governance today more than ever.

Kevin K Washburn, Federal Criminal Law and Tribal Self-Determination, 84 N.C.L. Rev. 779, 784 (2006). The Amantonka Nation acknowledges that a ruling today may go against precedent set by *Rogers*. However, "the change at issue here is a limited one . . . concerning the power to prosecute a tribe's own members – a power that this Court has called 'inherent.'" *Lara*, 541 U.S. at 204. And it is not the first time this Court has been asked to follow Congress in an evolving relationship with Tribes. "Congress has in fact authorized at different times very different Indian policies . . . Such major policy changes inevitable involve major changes in the metes and bounds of tribal sovereignty." *United States v. Lara*, 541 U.S. 193, 202 (2004).

Dramatic policy changes make clear why the rationale behind *Rogers* is no longer relevant. *Rogers* was decided almost 40 years before *Ex parte Crow Dog* and the Major Crimes Act. 109 U.S. 556 (1883); 18 U.S.C. § 1153. At the time of the *Rogers* Court, being Indian and

being a United States citizen were mutually exclusive. *Rogers*, 45 U.S. at 573. "Indian naturalization was conditioned on the severing of tribal ties, renouncing tribal citizenship, and the removal of federal protection . . . ." Cohen's, 1-14(3). Because of this separation, the *Rogers* Court stated that white men sought adoption into a tribe to escape U.S. law:

> And it would perhaps be difficult to preserve peace among them, if white men of every description might at pleasure settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.

Rogers, 45 U.S. at 573. Even after the passage of the 14th Amendment, Indians were born under tribal authority, not the authority of the United States. *Elk v. Wilkins*, 112 U.S. 94 (1884).

To the *Rogers* Court, Tribes were an "unfortunate race" who needed the federal government to "enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices." *Id.*at 572. The Court's perceived differences among the races was the sole factor for the *Rogers* court. "He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian . . . [the law] does not speak of members of a tribe, but of the race generally, -- of the family of Indians . . . ." *Id.* at 573. However, the relationship between the United States and Tribes has changed to such a degree that the rationale behind *Rogers* should have no bearing in this case.

Indians were naturalized by Congress in 1924, conferring full United States citizenship. 43 Stat. 253. This Act "lessened the controversy among Indians by severing United States citizenship from questions of tribal citizenship and assimilation." Cohen's, § 14.01(3). Congress has been committed to Tribal self-determination and self-governance since 1961. *Id.*

at §1.07. "Indeed, during the last thirty-five years, Congress, the courts, and the executive branch have established a new federal Indian policy in favor of the preservation and reinvigoration of tribal governments." Washburn 84 N.C.L. Rev. at 784.

This Court should interpret 25 U.S.C. 1304 "against the backdrop of tribal sovereignty,' *McClanahan,* 411 U.S. at 172, considering the federal government's commitment to self-determination and should recognize a Tribe's inherent "power to enforce their criminal laws against tribe members." *Wheeler,* 435 U.S. at 322. And this Court should recognize that this inherent authority is not based on being "of the family of Indians" *Rogers,* 45 U.S. 573, but because of enrollment in the Tribe. *United States v. Antelope,* 430 U.S. at 646. This Court should find that the Amantonka Nation has inherent criminal jurisdiction over Mr. Reynolds because he is a citizen of their Nation, and, by their terms, he is an Indian.

II. THE EQUAL PROTECTION CLAUSE OF THE INDIAN CIVIL RIGHTS ACT IS NOT VIOLATED WHEN A TRIBAL CODE HAS DIFFERENT LEGAL REQUIREMENTS THEN THOSE PRESCRIBED IN THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013.

Petitioner, Robert R. Reynolds, argues that the attorney appointed to represent him was inadequate as a matter of law. R. at 7. As an Indian, Mr. Reynolds, argues that the attorney appointed to him is less qualified than the attorney to which non-Indians are entitled which is in and of itself a violation of equal protection. *Id*. Mr. Reynolds has produced no facts to point to any errors allegedly committed by his defense counsel. As a matter of law, the Violence Against Women Act of 2013 is not a violation of an individual's equal protection rights.

A. The Amantonka Nation is not Restrained by the Constitution of the United States, but rather the Indian Civil Rights Act.

Indian Tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Santa Clara Pueblo v. Martinez,* 436 U.S.

49, 55 (1978) (citing *Wocester v. Georgia*, 6 Pet. 515, 559 (1832). Although no longer "possessed of the full attributes of sovereignty," tribes remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382 (1886). The United States Supreme Court has repeatedly recognized the federal government's long-standing policy of encouraging tribal self-government. Therefore, tribes have the power to make their own substantive law in internal matters, and to enforce that law in their own forums. *Santa Clara Pueblo*, 436 U.S. at 55. *See Roff v. Burney*, 168 U.S. 218 (1897) (membership); *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations); *Williams v. Lee*, 358 U.S. 217 (1959).

The Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders. *Kagama*, 118 U.S. at 378. As separate sovereigns pre-existing the Constitution of the United States, tribes have historically been regarded as unconstrained by those constitutional provisions which specifically limit the authority of federal and state government. *Santa Clara Pueblo*, 436 U.S. at 56. The Supreme Court of the United States held in *Talton v. Mayes*, that the Fifth Amendment did not apply to the powers of local self-government enjoyed by tribes. 163 U.S. 376 (1896). In ensuing years, the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights as well as the Fourteen Amendment. *Santa Clara Pueblo*, 436 U.S. at 56. It has been understood for more than a century that the Bill of Rights and the Fourteen Amendment do not apply to Indian tribes. *Nevada v. Hicks*, 533 U.S. 353, 383 (2001). The Court in *Talton* recognized, that although tribes possesses attributes of local self-government, all rights are subject to the supreme legislative authority of the United States. *Talton*, 163 U.S. at 384. Congress, therefore, has plenary authority to limit, modify or

eliminate the powers of local self-government which the tribes otherwise possess. *Santa Clara Pueblo*, 436 at 57.

Throughout the United States history Congress has limited, modified, and eliminated tribe's power of self-government. The Civil Rights Act of 1968 represents an exercise of that authority. *Civil Rights Act of 1968*, 90 P.L. 284, §201-203, 82 Stat. 73, 77 (1968). In 1961, a congressional committee began hearings into the matter of civil rights of persons under the authority of Indian tribes. Cohen's Handbook of Federal Indian Law §14.04 (2017). The committee contemplated a bill that would have imposed the same restraints on tribes as the Constitution imposes on the federal government. *Id*. Eventually the Congressional committee decided to limit the bill imposing certain restraints but not all. *Id*. Title II of Act April 11, 1968, P.L. 90-284, which appears generally as 25 U.S.C. § 1301 et seq., is popularly known as the "Indian Civil Rights Act of 1968." 25 U.S.C. §1301 et seq.

In the Indian Civil Rights Act, Congress acted to modify the effect of *Talton* and subsequent cases by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment. *Santa Clara Pueblo*, 436 U.S. at 57. There is a trend by tribal courts towards the view that they "have leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U.S. Supreme Court precedents" word for word. Hicks, 533 U.S. at 384 (citing Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 344, n. 238 (1998).

Since federal constitutional restraints do not apply to tribal governments, individuals subject to tribal authority must invoke other sources of individual rights. Specifically, an individual can turn to the tribe's own constitution and codes or the Indian Civil Rights Act.

Mr. Reynolds is subject to tribal authority as a member of the Amantonka Nation committing a crime within the boundaries of the reservation. If the Court finds that Mr. Reynolds is a non-Indian, he is still subject to the tribal authority of the Amantonka Nation under the Special Domestic Violence Jurisdiction. Therefore, the only individual rights that Mr. Reynolds can allege were violated are those found within the Amantonka Nation's Constitution, the Amantonka Nation Code, or the Indian Civil Rights Act.

The Indian Civil Rights Act provides that (a) No Indian tribe in exercising powers of self-government shall: (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.

B. Petitioner's Equal Protection Rights Were Not Violated Because Petitioner's Court Appointed Counsel Was Sufficiently Qualified under the SDVCJ Standards.

The Violence Against Women Reauthorization Act of 2013 (VAWA) accords defendants' certain individual rights in criminal proceedings when said individual falls within their special domestic violence criminal jurisdiction. Specifically, the participating tribe shall provide the defendant:

> (1) all applicable rights under this Act; (2) if a term of imprisonment of any length may be imposed, all rights described in section 202(c); (3) the right to a trial by an impartial jury…; and (4) all other rights whose protection is necessary under the Constitution of the United States…

Violence Against Women Reauthorization Act of 2013, 113 P.L. 4, § 904, 127 Stat. 54, 122 (2013). The United States Department of Justice issued that pursuant to the VAWA a tribe must protect the right of defendants under the Indian Civil Rights Act, and those rights described in the Tribal Law and Order Act of 2010. The Department of Justice, *VAWA 2013 and Tribal Jurisdiction Over Crimes of Domestic Violence*, (June 14, 2013)

https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf

The Tribal Law and Order Act of 2010 requires that when an Indain 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; (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.

Tribal Law and Order Act of 2010, 111 P.L. 211, §234, 124 Stat. 2258, 2280 (2010).

Mr. Reynolds received court-appointed counsel. R. at 4. The attorney appointed to Mr. Reynolds was qualified to represent him under Title 2, Chapter 6, of the Amantonka Nation Code. R. at 4. Section 607 of the Amantonka Nation Code, requires that a public defender:

> (1) be at least 21 years of age; (2), be of high moral character and integrity, (3), not have been dishonorably discharged from the Armed Services; (4) be physically able to carry out the duties of the office; (5) successfully completed… a bar examination administered as prescribed by the Amantonka Nation's Executive Board; and (6) have training in Amantonka law and culture.

R. at 8. Petitioner argues that the Equal Protection clause requires his attorney possess the same qualifications as is required by law to represent non-Indians in the VAWA. *Id*. Specifically, Petitioner argues that the VAWA requires the attorneys who are appointed to represent non-Indians be a member of a state bar association.

The Amantonka Nation's Special Domestic Violence Criminal Jurisdiction (SDVCJ) provides that when the tribe imposes a sentence of imprisonment for one year or greater, the

tribe most provide an indigent defendant with counsel who is 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. R. at 8. The portion of relevant law to Mr. Reynolds argument is "any jurisdiction in the United States." The Amantonka Nation is a jurisdiction within the United States of America.

Title 2, Chapter 6 of the Amantonka Nation Code requires that a public defender, practicing within the Amantonka Nation, successfully complete the bar examination administered by the Amantonka Nation's Executive Board. This qualification is not dispositive from the qualification in VAWA requiring a public defender to be licensed to practice law by any jurisdiction in the United States. Petitioner's attorney successfully completed the bar examination administered by the Amantonka Nation's Executive Board, therefore, she was licensed to practice law in a jurisdiction of the United States.

Title 2, Chapter 7 of the Amantonka Nation is an extensive Code of Ethics for Attorneys and Lay Counselors. R. at 8-12. The Amantonka Nation requires all its attorneys whether SDVCJ or not to comply with the Code of Ethics. Therefore, all defenses attorneys within the Amantonka Nation's jurisdiction meet the professional licensing standards, competence and professional responsibility required by VAWA. This Court should find that Mr. Reynolds claim is invalid because his court appointed counsel sufficiently qualified even if the SDVCJ standards applied.

C. <u>The Amantonka Nation Did Not Violate Petitioners Equal Protection Rights, Even If the Court Finds Petitioner's Court-Appointed Counsel was not Qualified Under The Special Domestic Violence Criminal Jurisdiction</u>.

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption

of a "guardian-ward" status, to legislate on behalf of federally recongized Indian tribes. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The plenary power of Congress to deal with special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. *Id*. "Literally every piece of legislation dealing with Indian tribes and reservations" single out for special treatment a group of individuals living on or near reservations. *Id*. at 552. If the laws, deprived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code would be effectively erased.

On numerous occasions the Supreme Court of the United States has specifically upheld legislation that single out Indians for particular and special treatment, See, e.g. *Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943); *Simmons v. Eagle Seelatsee*, 384 U.S. 209 (1966); *Williams v. Lee*, 358 U.S. 217 (1959). This unique legal status is long standing and its sources are diverse. *Morton*, 417 U.S. at 555. It is in this historical and legal lens that the Constitutional validity of the VAWA is to be determined.

In *Morton v. Mancari*, the United States Supreme Court, addressed the issue of whether an Indian preference law was in violation of the Due Process Clause of the 5th Amendment. *Morton*, 417 U.S. at 538. The preference law stated that BIA's policy would be to grant preference to qualified Indians not only in the initial hiring stage but also when individuals were competing for a promotion within the Bureau. *Id*. Appellees in this case were federal employees who claimed if not repealed, the statute was unconstitutional because it violated the Due Process Clause. *Id*. The Court held that contrary to the characterization made by appellees, this preference did not constitute "racial discrimination" going on to say it is not even a "racial" preference. *Id*. at 553. Instead it is an employment criterion reasonably designed to further the

cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. *Id*. at 554. The preference as applied, is granted to Indians, not as a discrete racial group but rather as memebrs of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. *Id*. at 555. If the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. *Id*.

In *Fisher v. District Court*, 424 U.S. 383 (1976), the Court held that members of the Northern Cheyenne Tribe could be denied access to Montana State courts in connection with an adoption proceeding arising on their reservation. Unlike *Mancari*, the Indian plaintiffs in *Fisher* were being denied a benefit or privilege available to non-Indians; nevertheless, a unanimous Court dismissed the claim of racial discrimination. The Court concluded that the tribal court did not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Norther Cheyenne Tribe under federal laws. *Id*. at 390.

In *United States v. Antelope*, Appellees argued their convictions under the Major Crimes Act were unlawful as products of invidious racial discrimination, because if a non-Indian had committed the crime, the case would have been prosecuted under the law of the State. *United States v. Antelope*, 430 U.S. 641 (1977). The Court recognized that both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interest in self-government, whereas the case before it dealt with federal regulation of criminal conduct within Indian Country. *Id*. at 646. The principles reaffirmed in those case point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classification. *Id*. Rather, such regulation is rooted in the unique status of Indians as a separate sovereign people. *Id*. In conclusion the Court found that Appellees were not subjected to

federal criminal jurisdiction because they were of Indian race but because they were enrolled memebrs of the Coeur d'Alene Tribe. *Id*. Subsequently the federal criminal statutes enforced under the Major Crimes Act were based neither in whole nor in part upon impermissible racial classification. *Id*. at 647.

This Court should follow its long line of precedent and find that the term Indian is not a racial classification but rather a classification political classification. Similar to the employment preference addressed in *Morton*, the VAWA was created to further the cause of Indian self-government. The differential in the VAWA between Indians and non-Indians is not that of a discrete racial group but rather as members of a quasi-sovereign tribal entity. Specifically, the difference is a result of the Amantonka Nation already having jurisdiction over their members. The VAWA act simply expands the Amantonka Nation's self-governmental powers to include non-Indians who commit domestic violence crimes within their boundaries.

Petitioner claims that being an Indian for classification in the VAWA is a detriment because he is denied the same protections as an individual who is a non-Indian. Similarly, the individuals in *Fisher* were being denied a benefit or privilege availed to non-Indians. This Court shall follow the precedent of *Fisher* and dismiss the claim of racial discrimination because the trial court did not derive from the race of Mr. Reynolds but rather from the quasi-sovereign status of the Amantonka Nation.

Lastly, this Court shall follow the precedent in *Antelope* and find that while this case deals with regulation of criminal conduct within Indian Country the classification is still that of a quasi-sovereign. The VAWA is similar to the Major Crimes Act in that it is expanding the type of crimes that can be convicted in Indian Country. While Major Crimes Act was the expansion

of federal jurisdiction in Indian country, the VAWA expands the tribe's jurisdiction. In enacting the VAWA Congress was acting within their plenary power to limit, modify, or eliminate the powers of local self-government which tribes otherwise possess. The VAWA is not based in whole nor in part upon impermissible racial classification but rather as an expansion of self-government as a quasi-sovereign.

CONCLUSION

The Amantonka Nation Code does not apply to Mr. Reynolds because of his racial status as an Indian but rather because he is an enrolled member of the Amantonka Nation. Similarly, the VAWA does not apply to Mr. Reynolds because of his enrollment status not his racial status. Petitioner's court-appointed attorney satisfied the relevant legal requirements of the Amantonka Nation Code and the Indian Civil Rights Act. This Court should find that Mr. Reynolds Equal Protection rights were not violated.