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

Respondent.

On Writ of Certiorari to the Supreme Court of the United States

BRIEF FOR THE PETITIONER

TEAM #146

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Questions presented

1. Is Mr. Reynolds a non-Indian for the purposes of Special Domestic Violence Criminal Jurisdiction authorized by the Violence Against Women Reauthorization Act of 2013?
2. Did Mr. Reynolds' court-appointed attorney satisfy the relevant legal requirements?

STATEMENT OF THE CASE

A. Statement of the Facts

Robert R. Reynolds, Appellant in this case, has no ancestry connecting him to the Amantonka Nation nor any other Indian tribe. (R. at 6.) Mr. Reynolds met his wife, Lorinda, while they were both studying at the University of Rogers. (*Id.*) Mrs. Reynolds is and has been an enrolled member of the Amantonka Nation which is a federally recognized Indian tribe. (*Id.*) After graduation, the Reynolds' married and moved into an apartment in a tribal housing complex on the Amantonka Nation's reservation located within the State of Rogers. (*Id.*) Mr. Reynolds began working at the Amantonka shoe factory. (*Id.*)

Two years after the couple married and moved onto the Nation's reservation, Mr. Reynolds applied to become a naturalized citizen of the Amantonka Nation pursuant to the Nation's naturalization statute. (*Id.*) Mr. Reynolds successfully completed the naturalization process, took the oath of citizenship, and received an Amantonka Nation ID card. (*Id.*)

One year later, Mr. Reynolds lost his job and was unemployed for ten months. (*Id.*) During that time he began drinking heavily and became verbally abusive towards Mrs. Reynolds resulting in calls to the Amantonka police. (*Id.*) On June 15, 2017, the Amantonka Nation police responded to a call at the Reynolds' apartment. (*Id.*) Mr. Reynolds struck Mrs. Reynolds with an open palm across the face causing her to fall onto a coffee table cracking a rib. (*Id.*) This was the first and only evidence of any physical abuse in the marriage. (*Id.*) The responding officer arrested Mr. Reynolds and transported him to the Amantonka Nation jail. (*Id.*) Mr. Reynolds received indigent counsel defense, but the Amantonka Nation Code does not require admittance to a state bar. (R. at 4.) Mr. Reynolds and his wife are now in couples counseling. (R. at 5.)

B. Statement of the Proceedings

On June 16, 2017, the Amantonka Nation's chief prosecutor charged Mr. Reynolds with violating Title IV § 244 of the Amantonka Nation Code in the District Court for the Amantonka Nation. (R. at 6.) On July 5, 2017, the district court denied Mr. Reynolds' three pretrial motions. (R. at 3–4.) The motions argued (1) that the Amantonka Nation did not have criminal jurisdiction over Mr. Reynolds because he is a non-Indian; (2) that Mr. Reynolds was entitled to counsel as a non-Indian since the crime fell under the Nation's Special Domestic Violence Criminal Jurisdiction (SDVCJ) granted by the Violence Against Women Reauthorization Act of 2013; and (3) that Mr. Reynolds' court appointed counsel was insufficiently qualified to represent him and the appointment violated relevant Equal Protection requirements. (*Id.*) The court reasoned that Mr. Reynolds was an Indian because he was a citizen of the Amantonka Nation, and as an Indian was not covered by VAWA 2013's Special Domestic Violence Criminal Jurisdiction. (*Id.*)

On August 14, 2017, Mr. Reynolds trial began, and the jury ultimately returned a guilty verdict. (R. at 5.) Mr. Reynolds moved to set aside the verdict with arguments identical to his pretrial motions; however, on August 23, 2017, the chief judge denied the motion and sentenced Mr. Reynolds to seven months of incarceration, $5300 restitution, batterer rehabilitation and alcohol treatment programs, and a $1500 fine. (*Id.*) Mr. Reynolds promptly appealed to the Supreme Court of the Amantonka Nation. (R. at 6.) On November 27, 2017, the supreme court affirmed the lower court's decision to deny the motions. (R. at 7.) Similar to reasoning of the lower court, the supreme court held that Mr. Reynolds was an Indian because the tribe has a right to define its own membership, which supersedes the federal definition of "Indian." (*Id.*)

Mr. Reynolds then filed a petition for a Writ of Habeas Corpus in the U.S. District Court for the District of Rogers, alleging a violation of his federal civil rights guaranteed by the U.S. Constitution's Fifth Amendment, the Indian Civil Rights Act, and the Violence Against Women Reauthorization Act of 2013. (R. at 8.) The U.S. District Court for the District of Rogers granted the petition for a Writ of Habeas Corpus on March 7, 2018, arguing that to be an Indian, Mr. Reynolds was required to have Indian blood. (*Id.*)

The Amantonka Nation appealed to the U.S. Court of Appeals for the Thirteenth Circuit, and on August 20, 2018, the court of appeals reversed the district court decision and remanded with instructions to deny the petition for a Writ of Habeas Corpus. (R. at 9.) Mr. Reynolds subsequently appealed to the Supreme Court of the United States, and on October 15, 2018, the Court granted the petition for a Writ of Certiorari with argument limited to (1) whether Mr. Reynolds is a non-Indian for the purposes of Special Domestic Violence Criminal Jurisdiction, and (2) whether Mr. Reynolds' court-appointed attorney satisfied the relevant legal requirements. (R. at 10.)

SUMMARY OF THE ARGUMENT

The U.S. Court of Appeals for the Thirteenth Circuit erred in concluding that Mr. Reynolds was an Indian for purposes of the Violence Against Women Reauthorization Act of 2013's grant of Special Domestic Violence Criminal Jurisdiction. Congress plenary power recognized and affirmed tribes' inherent sovereign authority to exercise Special Domestic Violence Criminal Jurisdiction over non-Indian defendants which was previously restricted by the Implicit Divestiture doctrine. Despite emanating from tribal sovereignty, the scope of

the newly relaxed restrictions on tribal sovereignty must be interpreted through the federal definitions used within applicable federal law.

The federal definition for "Indian" has been judicially established, and has not been overturned in any jurisdiction. The Rogers Test is a two-prong analysis of which one prong requires a degree of Indian blood. Since it is undisputed that Mr. Reynolds does not possess Indian blood, he fails the Rogers Test.

Consequently, Mr. Reynolds is not an Indian for the purposes of Special Domestic Violence Criminal Jurisdiction established by VAWA 2013.

The Supreme Court of the Amantonka Nation improperly concluded that Mr. Reynolds is an Indian on the basis that tribes maintain the right to determine their citizenry. Membership in an Indian Tribe is distinct from legal status as an Indian, and VAWA 2013 requires that a defendant be an Indian as understood through the Major Crimes Act not by political affiliation with a federally recognized tribe.

Consequently, this Court should reverse the decision below and find Mr. Reynolds to be a non-Indian for the purposes of Special Domestic Violence Criminal Jurisdiction granted through the Violence Against Women Reauthorization Act of 2013.

As a non-Indian defendant under VAWA 2013, Mr. Reynolds must be provided counsel that is licensed by a jurisdiction in the United States with appropriate licensing standards. The Amantonka Nation, as a licensing entity, does not meet this requirement because of its inconsistent licensing standards across its public defender program. Other tribes have supplemented their licensing requirements following implementation of VAWA 2013, and similar adjustments would bring the Amantonka Nation into compliance. In this

instance, however, Mr. Reynolds court-appointed counsel did not meet the requirements for indigent defense counsel established under VAWA 2013.

Alternatively, if the Court finds Mr. Reynolds to be Indian, his representation violates Equal Protection because the amendments to ICRA under VAWA 2013 allow legal defense of Indians to be inferior to that of non-Indians in certain circumstances. The racial classification does not survive strict scrutiny because reducing one race to inferior status can always be avoided with a narrower construction of the federal statute.

ARGUMENT

1. REYNOLDS IS A NON-INDIAN UNDER VAWA 2013 BECAUSE FEDERAL LAW REQUIRES INDIAN BLOOD AND NOT POLITICAL AFFILIATION WITH A TRIBE.

The U.S. Court of Appeals for the Thirteenth Circuit erred in concluding that Mr. Reynolds was an Indian for purposes of the Violence Against Women Reauthorization Act of 2013's grant of Special Domestic Violence Criminal Jurisdiction. Congress properly used their plenary power to recognize and affirm tribes' inherent sovereignty to exercise Special Domestic Violence Criminal Jurisdiction over non-Indian defendants which they were unable to do in the wake of the Implicit Divestiture doctrine. Despite flowing from tribal sovereignty, the extent to which Congress relaxed restrictions on tribal sovereignty must be interpreted through the federal definitions used within the Act.

The federal definition for "Indian" has been determined by judge made law. The *Rogers* Test is a two-prong analysis of which one prong requires Indian ancestry. Since it is undisputed that Mr. Reynolds does not possess Indian ancestry, he fails the *Rogers* Test. Mr. Reynolds is not an Indian as understood through federal law.

The Supreme Court of the Amantonka Nation's conclusion that Mr. Reynolds is an Indian since tribes maintain the right to determine their citizenry was erroneous because membership in an Indian Tribe is distinct from legal status as an Indian.

Consequently, this Court should reverse the decision below and find Mr. Reynolds to be a non-Indian for the purposes of Special Domestic Violence Criminal Jurisdiction granted through the Violence Against Women Reauthorization Act of 2013.

A. Congress' plenary power relaxing restrictions on tribal sovereignty requires that the Act at issue must be interpreted using federal definitions.

The first concern is what definition of "Indian" governs actions under VAWA 2013.

Congress' plenary power over tribal relations has "been exercised by Congress from the beginning" of tribal and United States government relations. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). This power is "not subject to be controlled by the judicial department of the government." *Id.* The powers of Indian tribes are "'inherent powers of a limited sovereignty which has never been extinguished.'" *United States v. Wheeler,* 435 U.S. 313, 322 (1978) (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945)). When the tribes were incorporated into the United States, they "necessarily lost some of their sovereign powers they had previously exercised" to the United States' "overriding sovereignty." *Duro v. Reina*, 495 U.S. 676, 698 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (quoting *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823)). Tribes exist as "domestic dependent nations" and in "a state of pupilage" to the United States, but are "quasi-sovereign tribal entities." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

For federally recognized tribes, there are three exceptions to sovereignty typically enjoyed by an independent nation. The first is that tribes may not engage in foreign commerce or foreign relations. *See Worcester v. Georgia*, 31 U.S. 515, 559 (1832).[1] The second is that tribes need permission from Congress to alienate fee simple title. *See Johnson*,

[1] "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer." *Id*.

21 U.S. at 574. Third, Congress may strip a tribe of any other aspect of sovereignty at its pleasure. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

Oliphant is a crucial case for tribal criminal jurisdiction over non-Indians. Specifically in criminal cases, tribes do not have jurisdiction "over non-Indians absent affirmative delegation of such power by Congress," and tribes "necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 208–10. Following land cession and acknowledging dependence on the United States government, tribes retain "quasi-sovereign" authority, but the retained powers are "not such that they are limited only by specific restrictions in treaties or congressional enactments." *Id.* at 208 (citing *Cherokee Nation v. Georgia,* 30 U.S. 1, 15 (1831)). However, the sovereignty over non-Indians in criminal matters was removed by implicit divesture and must be returned through the delegation of federal authority.[2] *See United States v. Lara*, 541 U.S. 193, 205–06 (2004).

The appellants voiced two major concerns also shared by other non-Indians during the self-determination era (an era that allowed tribes more freedom to manage local and tribal issues), which was that tribal courts had insufficient due process rights and inferior court systems compared to state and federal court systems. *See generally Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976). This was believed to be mostly curtailed following the passage of the Indian Civil Rights Act of 1968 (ICRA) "which extend[ed] certain basic procedural rights to anyone tried in Indian tribal court." *Oliphant*, 435 U.S. at 211–12. However, the Court acknowledged that even after the passage of ICRA, and even if Indian tribal court systems

[2] "[T]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe." *Wheeler*, 435 U.S. at 326.

became sophisticated or identical with state court systems, it has "little relevance" to their conclusion that Indian tribes never had inherent jurisdiction to "punish non-Indians." *Id.*

The Violence Against Women Act (VAWA) was initially enacted by Congress in 1994 and reauthorized in 2013. Violence Against Women Reauthorization Act of 2013, 127 Stat. at 121-22 (codified at 25 U.S.C. § 1304). VAWA 2013 relaxed restrictions on inherent tribal sovereignty to allow participating tribes to prosecute non-Indians for crimes of domestic violence against Indian partners. *See* 25 U.S.C. § 1304. Prior to the Act, non-Indians could commit crimes of domestic violence in Indian Country without being subject to the jurisdiction of a tribe, a state, or the federal government. For tribes that chose to exercise that prosecutorial jurisdiction, VAWA 2013 established 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). Rather than a delegation of federal jurisdiction, VAWA 2013 merely relaxed restrictions placed on the inherent sovereign authority of tribes. *See Lara*, 541 U.S. at 194. The Act further reinforces this notion by ensuring that the Tribal exercise of special domestic violence criminal jurisdiction is concurrent with State and federal jurisdiction. 25 U.S.C. § 1304(b)(2). If the special domestic violence criminal jurisdiction were a delegation of federal authority, then creating concurrent jurisdiction over such crimes would be violative of the Double Jeopardy clause.

VAWA 2013 created an exception for the jurisdiction, however, for instances in which neither the defendant nor the victim is Indian. 25 U.S.C. § 1304(b)(4). By including this exception, Congress stopped short of relaxing all restrictions placed on the prosecutorial jurisdiction of tribes. Rather, Congress established boundaries on the renewed jurisdiction;

the borders of which must be discerned through interpreting federal statutory and case law. The relevant statutory definition of "Indian" is found in ICRA within which VAWA 2013 was codified. ICRA defines an Indian as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 19, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4). The referenced code is known as the Major Crimes Act (MCA), and it does not proffer a definition for "Indian." Rather, the MCA is an exhaustive list of crimes for which the federal government may exercise jurisdiction if any of them is committed by an Indian within Indian Country. *See* 18 U.S.C. § 1153. Consequently, it has been left to the courts to determine what necessary factors define the unique legal status of Indian through the interpretation of federal law.

The Amantonka Nation and the Court of Appeals for the Thirteenth Circuit erroneously applied a tribal definition for Indian in Mr. Reynolds' case. In order to determine whether Mr. Reynolds is an Indian for the purposes of special domestic violence criminal jurisdiction authorized by VAWA 2013 it is necessary to apply the definitions of the terms of the Act that are established within federal law. Since it is Congress that enjoys plenary power over tribes (and not the contrary) the operative definitions must be interpreted and understood in the context of federal law and not tribal law. For tribes to invoke federal law using tribally-created definitions is to grant tribes the power to defy Congressional intent and expand their sovereign authority beyond that which has been authorized by Congress.

Because Congress properly used their plenary power to grant SDVCJ to tribes over non-Indians through VAWA 2013, the Court must use the federal definition of "Indian" in determining whether Mr. Reynolds is an Indian for the purposes of VAWA 2013. Although

SDVCJ flows from the inherent sovereignty of the tribe, the sovereign authority to prosecute such crimes was subject to the Implicit Divestiture doctrine and not made available to tribes until Congress relaxed restrictions on tribes' sovereign authority. Consequently, the Court must consider only the plain meaning of the terms in the Act as used and understood by Congress and not through a lens created by internal tribal law.

B. Reynolds is a non-Indian because the *Rogers* Test requires Indian blood for legal status as an Indian, and it is undisputed that he has none.

The second concern is how the federal government, absent a clear definition in a statute, defines "Indian."

VAWA did not provide a new definition of "Indian." 25 U.S.C. § 1304. Unlike "Indian Country" or "Indian Tribe," an "Indian" is not statutorily defined. Instead, "Indian" has a judicially determined definition. Federal jurisdictional statutes use the general term "Indian." *See* 18 U.S.C. §§ 1152–1153. The Court has said that the term "Indian" "does not speak of members of a tribe, but of the race generally, —of the family of Indians." *Duro*, 495 U.S. at 689 (quoting *United States v. Rogers*, 45 U.S. 567, 573 (1846)). Other major federal criminal laws that are specifically applicable only in Indian Country like the Indian Country Crimes Act (ICCA) and the Major Crimes Act (MCA) do not define "Indian." *See* 18 U.S.C. §§ 1152–1153.

The Indian Civil Rights Act also does not define "Indian," instead pointing to the Major Crimes Act definition that an Indian is "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, [United States Code] if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4) (2016).

The test for Indian status for the purposes of federal criminal statutes is from *United States v. Rogers*. In the 1846 case, Rogers was a white man who had acquired Cherokee citizenship after marrying a Cherokee citizen. *Rogers*, 45 U.S. at 568. He argued that federal courts had no criminal jurisdiction over him both because of his tribal citizenship status and that his crime was committed in Cherokee territory. *Id.* The Supreme Court rejected his claim, stating that "it [is] very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be" considered a tribal member. *Rogers*, 45 U.S. at 573. The two-prong test derived from this ruling considers (1) the degree of Indian blood; and (2) tribal or government recognition as an Indian. *See Id.*

Several circuits and states have expanded the *Rogers* Test by adding a four- or five-part test to the second prong that includes the weighing of different factors, including tribal enrollment, and enjoyment of benefits of tribal affiliation. *See, e.g. United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2004); *United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004). There is a circuit split on whether the factors should be ranked and assessed by importance. *Compare United States v. Cruz*, 554 F.3d 840 (9th Cir. 2012) (requiring a rigid four-factor test applied in declining order of importance) with *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009) (holding that "there is no single correct way to instruct a jury" on how to weigh the importance of the factors). However, the State of Rogers is not in the Eighth or Ninth Circuit, nor is the second prong of the *Rogers* Test at issue in this case.

Here, VAWA 2013 does not define "Indian," despite defining "Indian Country" and "Indian Tribe." 25 U.S.C. § 1302. Rather, VAWA 2013 refers to the understanding of Indian in the MCA which does not state an applicable definition that can be used for determining who the law may be applied to. Therefore, the only applicable law for determining whether

Mr. Reynolds is an Indian for the purposes of Special Domestic Violence Criminal Jurisdiction is found in judicially created law, i.e. the *Rogers* Test. As *Rogers* has not been overturned, and other Indian criminal statutes, like ICCA and MCA, still use the *Rogers* Test, it should also be used under VAWA 2013.

While the requisite blood quantum to satisfy the *Rogers* Test varies from jurisdiction to jurisdiction, all jurisdictions agree that some degree of Indian blood is required to be considered an "Indian" for federal purposes.[3] Depending on the Court's view on the second prong of the *Rogers* Test, it is likely that Mr. Reynolds has sufficient contacts with the tribe to pass. However, it is undisputed that Mr. Reynolds has no Indian blood. (R at 8.). Because he fails the first prong of the *Rogers* Test, there is no reason to address which circuit's interpretation or expansion of the second prong is more valuable or just.

Because *Rogers* has not been overturned and the first prong of the *Rogers* Test requires at least some Indian blood that Mr. Reynolds does not have, he is not an "Indian" under federal criminal statutes.

C. Tribal membership ordinances are irrelevant because political affiliation with a tribe is distinct from legal status as an Indian under VAWA 2013.

The Court of Appeals for the Thirteenth Circuit erred in using the explanation from the Supreme Court of the Amantonka Nation that allowed the tribe's citizenship to supersede the federal definition of "Indian," because VAWA 2013 does not concern citizenship.

[3] Amongst lower courts there is a debate about how much blood is required to satisfy the first prong of the *Rogers* Test. While in cases as late as the 1960s required a "substantial percentage of Indian blood," but in *Bruce* the Ninth Circuit found that ⅛ blood was acceptable. *See Makah Indian Tribe v. Clallam County*, 440 P.2d 442, 444 (Wash. 1968)); *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2004).

The Supreme Court of the Amantonka Nation pointed to *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978) as holding that a tribe has the right to define and control its own membership. *See id.* While the conclusion is not wholly erroneous, the application in this instance is misplaced. *Santa Clara Pueblo* concerned Martinez, a mother, who was an enrolled member of the Santa Clara Pueblo Tribe. *Id.* at 52–53. The tribe had an ordinance requiring that the children of female members of the tribe be entirely of Santa Clara Pueblo descent in order to be eligible for membership in the tribe. *Id.* There was no similar restriction on the offspring of male members. *Id*. Martinez brought action seeking declaratory and injunctive relief against the enforcement of the tribe's ordinance. *Id.* The case was ultimately decided for the tribe on the basis of sovereign immunity. *Id.* at 59. The Court, however, assured that tribes do retain the authority to make and enforce their own substantive law in internal matters such as restricting membership to exclude descendants of tribal members. *See id.* at 55.

Here, VAWA 2013 mentions "Indians" and "Non-Indians" but not "Tribal Members" when referring to victims and defendants. 25 U.S.C. § 1304. While Mr. Reynolds did take the proper steps to become a member of the Amantonka Nation, that does not negate the language of VAWA 2013. (R. at 5.)

It is true that membership has started to take precedent over blood quantum in receiving government services. *See, e.g.*, 42 C.F.R. § 136a.16 (2010) (outlining the Indian Health Service procedure to verify tribal citizenship); 7 C.F.R. § 253.6(b)(1) (detailing the procedure for food stamps eligibility); 25 C.F.R. § 23.71(b) (implying importance of tribal citizenship for government service eligibility). However, the use of membership defining what constitutes an "Indian" has not extended to criminal jurisdiction. Despite the Court

noting in *Santa Clara Pueblo* that "the most serious abuses of tribal power had occurred in the administration of criminal justice," that case was not about the administration of criminal justice—it was about a civil ordinance outlining citizenship restrictions. *Santa Clara Pueblo,* 436 U.S. at 98. Moreover, courts have repeatedly recognized persons as Indians distinct from their political affiliation to a tribe when interpreting and applying federal law. *See Bd. of Comm'rs of Creek Cry. v. Seber*, 130 F.2d 663 (10th Cir. 1942) (Unenrolled Indians of Creek ancestry sought and won declaratory judgment to establish tax exempt status granted through Congressional Act); *Bruce*, 394 F.3d (Noting that unenrolled Indians are eligible for a wide range of federal benefits directed to persons recognized by the Secretary of the Interior as Indians without statutory reference to enrollment).

Application of VAWA 2013 is dependent on the defendant's status as an Indian or non-Indian, not upon whether or not he is an enrolled member of a tribe. Consequently, his membership with the Amantonka Nation does not confer upon him the legal status of Indian as used in VAWA 2013 and federal law at large. Since *Santa Clara Pueblo* is not relevant to VAWA 2013, the federal definition of "Indian" as well as the Rogers Test should hold, and the Court should view Mr. Reynolds as a non-Indian for purposes of the Amantonka Nation's special domestic violence criminal jurisdiction.

II. MR. REYNOLDS' COURT-APOINTED ATTORNEY DID NOT SATISFY THE RELEVANT LEGAL REQUIREMENTS FOR INDIGENT COUNSEL REGARDLESS OF HIS STATUS AS AN INDIAN.

As a non-Indian defendant under VAWA 2013, Mr. Reynolds must be provided counsel that is licensed by a jurisdiction in the United States with appropriate licensing

standards. The Amantonka Nation, as a licensing entity, does not meet this requirement because of its inconsistent licensing standards across its public defender program. Consequently, Mr. Reynolds court-appointed counsel did not meet the requirements for indigent defense counsel established under VAWA 2013.

Alternatively, if the Court finds Mr. Reynolds to be Indian, his representation violates Equal Protection because the amendments to ICRA under VAWA 2013 allow legal defense of Indians to be inferior to that of non-Indians in certain circumstances. The racial classification does not survive strict scrutiny because reducing one race to inferior status can always be avoided with a narrower construction of the federal statute.

A. Mr. Reynolds' court-appointed attorney did not satisfy the righs guaranteed by VAWA 2013 because the Amantonka Nation does not apply appropriate professional licensing standards.

VAWA 2013 is an amendment to ICRA that creates an exception for rights of defendants where the defendant is a non-Indian. Before the amendment, ICRA only required tribes to guarantee an indigent defendant the right to counsel where "an Indian tribe . . . imposes a total term of imprisonment of more than 1 year on a defendant[.]" 25 U.S.C. § 1302(c). Under VAWA 2013, this same protection extended to non-Indian defendants "if a term of imprisonment of *any length* may be imposed[.]" 25 U.S.C. § 1304(d)(2) (emphasis added). ICRA additionally requires that the defense attorney appointed to an indigent defendant must be "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards[.]" 25 U.S.C. § 1302(c)(2).

Mr. Reynolds' court-appointed defender was licensed to practice by the Amantonka Nation bar. To serve as a public defender, the Amantonka Nation requires that a person "(1) [b]e at least 21 years of age; (2) [b]e of high moral character and integrity; (3) [n]ot have been dishonorably discharged from the Armed Services; (4) [b]e physically able to carry out the duties of the office; (5) [s]uccessfully completed . . . a bar examination administered as prescribed by the Amantonka Nation's Executive Board; and (6) [m]ust have training in Amantonka law and culture." Amantonka Nation Code § 607(a). While the Amantonka Nation does require that public defenders who represent indigent defendants prosecuted under ICRA and charged under Special Domestic Violence Criminal Jurisdiction hold a JD degree from an ABA accredited law school, such credentials are not required for persons who serve as public defenders at large. Amantonka Nation Code § 607(b). Because the Amantonka Nation does not apply consistent standards throughout its public defender program, it does not qualify under ICRA as a "jurisdiction in the United States that applies appropriate professional licensing standards[.]" 25 U.S.C. § 1302(c)(2). Consequently, Mr. Reynolds' court-appointed counsel was not adequately licensed as required by VAWA 2013.

Other tribes have improved their licensing standards in order to meet the requirements established by VAWA 2013. The Confederated Tribes of the Umatilla Indian Reservation, Tulalip Tribes, and Pascua Yaqui all require attorneys to be licensed by State and federal bars after TLOA and VAWA 2013 were passed. Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1801 (2016). For example, "the [Pascua Yaqui] tribe now requires attorneys to be law trained and licensed in state and federal court in order to represent clients accused of felony-level and SDVCJ offenses." *Id.*

By incorporating the same practices, the Amantonka Nation would more likely comply with the requirements for indigent counsel established by VAWA 2013.

In conclusion, while Mr. Reynolds' court-appointed counsel held a JD from an ABA accredited law school, he was not licensed by a jurisdiction that meets the requirements necessary to represent indigent defendants prosecuted under VAWA 2013.

B. Alternatively, Mr. Reynolds' court-appointed attorney violated Equal Protection because the government permitted lower standards for Indians compared to non-Indians when they passed ICRA.

Alternatively, if the Court finds that Mr. Reynolds is an Indian for the purpose of Special Domestic Violence Criminal Jurisdiction, there is a violation of Equal Protection because of the unequal standard between what is statutorily required for attorneys for Indians and non-Indians. ICRA creates a justice system where Indians, who are citizens of the United States, are subject to criminal prosecution without the full protection of the U.S. Constitution, solely because of their race. Non-Indians in certain circumstances are allowed the "right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution" under ICRA that an Indian is not required to have. 25 U.S.C. § 1302(c).

When looking at claims of equal protection under either the Fifth Amendment or the Fourteenth Amendment, the first step is to determine what class is being targeted by a state's action. If the classification is racial, it receives strict scrutiny. *See, e.g., Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial

scrutiny."); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (stating that state and local affirmative action programs must meet strict scrutiny). Specifically, the Court has said that "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand,* 515 U.S. at 229–30.

Strict scrutiny requires a compelling interest, and that the law in question is narrowly tailored to fit that government interest. *See Grutter v. Bollinger* 539 U.S. 306, 327 (2003) ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."). The Court has expressed that a law or government action that makes one race inferior to another, or creates a stigma, it is not a tight enough fit to satisfy strict scrutiny. *See id.*; *Richmond v. J.A. Croson Co*. 488 U.S. 469 (1989). Granting an exemption from the rule that strict scrutiny applies to all racial classifications would undermine the Courts "unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987).

A landmark case that can affect the racial status of Indians is *Morton v. Mancari*. This case involved an equal rights challenge to the hiring preference of Native Americans for positions in the Bureau of Indian Affairs (BIA). *Morton v. Mancari*, 417 U.S. 535, 537 (1974). Instead of deeming laws targeting Indian affairs as an invidious racial classification, which would "effectively erase[]" an entire title of the United States Code when applying strict scrutiny, the Court said that the preference did not constitute racial discrimination. *Morton v. Mancari*, 417 U.S. 535, 552–3 (1974). The Court added that the preference would not even be considered racial, because "[t]he preference, as applied, is granted to Indians not

as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). In a footnote, the Court explained that the classification was "political rather than racial in nature," because the hiring preference only applied to tribal members, even though this would exclude individuals who were racially Indians but not a member of a federally recognized tribe. *Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974).

Here, the class is Indians compared to non-Indians, which is a classification drawn on racial lines. While *Morton* opens the door for a political classification for Indians, which would receive rational basis review instead of strict scrutiny, the preference statute and ICRA are not comparable. *Morton* was justified because it targeted tribal members and not "Indians" as a racial group. *Morton v. Mancari*, 417 U.S. 535, 554 (1974). However, as expressed earlier, following the expansion of VAWA 2013 that amended ICRA, the sentencing and constitutional rights requirements are drawn on strictly racial lines. The next step in determining jurisdiction would be determining the defendant's status based on the *Rogers* Test. This requires some amount of blood, which can be seen as a "proxy for race." *Rice v. Cayetano*, 528 U.S. 495, 496 (2000).

Because certain crimes are still bound by the *Rogers* Test, this is a racial, not political, classification. If Congress had intended for ICRA to be political, they would have defined "Indian" not by the Major Crime Act (18 U.S.C. § 1153), but by tribal membership. Congress has had the plenary power to change this for over 50 years since the passage of ICRA, and have chosen not to act. This inaction is in spite of the recent passage of laws that tamper with Indian sovereignty like TLOA and VAWA 2013.

Because ICRA is drawn on racial lines, it should be viewed using strict scrutiny. Here, the compelling interest is to encourage tribal self-government and to preserve the quasi-sovereign status of Indian nations. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). However, ICRA is not narrowly tailored to fulfill that interest because it impermissibly allows one race to be treated as though it were inferior to another. When an Indian is sentenced for a domestic violence offense for a sentence of under a year, they are not extended the same protections as a non-Indian who is sentenced for the identical crime. *See generally* 25 U.S.C. §§ 1302, 1304. This is a harm to Indians who, as citizens of the United States, should be protected on an equal level to other non-Indian citizens. To sentence an Indian under a criminal statute at unequal requirements of accreditation or effective assistance is not a celebration of quasi-sovereignty—it is the creation of an inferior class.

There are multiple ways to implement a tighter fit to the compelling interest of self-government that would not make Indians an inferior class in their own tribal system. This includes statutorily defining "Indian" to require political affiliation with a federally recognized Indian tribe. As long as statutes were written to apply to tribes or tribal members instead of "Indians," the government action would remain political and not racial, therefore only invoking rational basis review and more than likely surviving a constitutional challenge.

Because ICRA makes Indians an inferior class in regard to constitutional requirements, and there are alternatives that fit the compelling interest with a tighter fit, ICRA does not pass strict scrutiny. Consequently, any application of ICRA is violative of Mr. Reynolds' Equal Protection rights.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the court of appeal's ruling and find for Mr. Reynolds.

Dated: 1/14/2019

Respectfully submitted,

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Team #146