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 Writ of Certiorari to the
U.S. Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team 180

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

CONSTITUTIONAL PROVISIONS:

OTHER AUTHORITIES:

QUESTIONS PRESENTED

1. Is Petitioner is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction?
2. Does Petitioner's court-appointed attorney satisfied the relevant legal requirements?

STATEMENT OF THE CASE

I. Statement of Facts

The Amantonka Nation ("the Nation") is a federally-recognized tribe whose reservation is located in the State of Rogers. ROA at 6.[1] On June 15, 2017, Robert Reynolds ("Petitioner") knowingly struck and injured his wife, Lorinda Reynolds, at their shared apartment in tribal housing on the Amantonka Nation Reservation ("the reservation"). *Id.*at 2. Lorinda Reynolds suffered a cracked rib after Petitioner's blow caused her to fall into a coffee table. *Id.* at 6.

The Reynolds met while they were both students at the University of Rogers. *Id.* Petitioner was a non-Indian and Lorinda Reynolds was and is a member of the Nation residing in the State of Rogers. *Id.* They married and moved onto the reservation after graduation. Lorinda worked as an accountant at the Amantonka casino and Petitioner as a manager in the Amantonka shoe factory. *Id.* at 6. Petitioner voluntarily became a naturalized citizen of the Nation, pursuant to Title 3, Chapter 2 of the Amantonka Nation Code. He completed the naturalization process, which includes courses in Amantonka law and culture, a citizenship test, and 100 hours of community service with the Nation's government, and took the oath of citizenship, after which he received his Amantonka Nation ID card. *Id.* at 2.

One year later, Petitioner lost his job and was unemployed for ten months before finding work at a distribution center that opened on the reservation. *Id.* at 6. During his unemployment, Petitioner began drinking heavily and verbally abusing Lorinda Reynolds. *Id*. The Amantonka Nation police were called to the house more than once and first found evidence of physical abuse on June 15, 2017. *Id.* Police arrested Petitioner, transported him to

1 ROA refers to record of appeal

Amantonka Nation Jail, and charged him with violating Title 5, Section 244 of the Amantonka Nation Code. *Id.*

II. Statement of Proceedings

The Nation's chief prosecutor filed criminal charges against Petitioner in Amantonka District Court on June 16, 2017 for violating Title 5 Section 244 of the Amantonka Nation Code, "Partner or family member assault." *Id.* at 3. Petitioner filed three pretrial motions, each of which was denied by the Amantonka District Court. *Id.* The first motion sought to have the charges dismissed on the grounds that Petitioner is not an Indian for the purposes of criminal jurisdiction, and tribes lack criminal jurisdiction over non-Indians pursuant to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *Id.* Petitioner argues that for purposes of criminal jurisdiction, the federal definition of "Indian" requires that a person possess some degree of Indian blood and be recognized as a member of a tribal community. *Id.* at 7. The Amantonka District Court found that because he is an Amantonka citizen, he is an Indian. *Id.* at 3. The second motion sought to have an attorney appointed to him as a non-Indian accused of domestic violence in Indian country[2] under the Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304 (2013) (hereinafter "VAWA 2013"). Because he is an Indian and therefore not subject to the Special Domestic Violence Criminal Jurisdiction ("SDVCJ") provisions of VAWA 2013, the motion was denied. *Id.*

The third pretrial motion alleged that the court-appointed indigent defense counsel was insufficiently qualified and violated equal protection requirements. Petitioner alleged VAWA 2013 mandates attorneys appointed to represent defendants charged under the Nation's SDVCJ must be members of a state bar association, not solely the Amantonka Nation Bar Association.

[2] Indian country is a designation defined in 18 U.S.C. § 1151 (1948). That Amantonka tribal housing is situated within Indian country is not disputed here.

The Amantonka District Court found that even if VAWA 2013 applied to Petitioner, his counsel was sufficiently qualified. *Id.* at 4. At trial, the jury returned a verdict of guilty. *Id.* at 5. Petitioner made a motion to set aside the verdict for the same reasons alleged in the pretrial motions. *Id.* The motion was denied. *Id.* Petitioner was sentenced to seven months incarceration, $5,300 in restitution, batterer rehabilitation and alcohol treatment, and a $1,500 fine. *Id.* The court dropped the protection order against Petitioner at the victim's request and granted Petitioner's motion to continue his bond while his appeal was pending. *Id.*

Petitioner appealed to the Supreme Court of the Amantonka Nation, raising the same arguments as in his pretrial motion. The court rejected Petitioner's argument and found that, per *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978), a tribe has the right to define and control its own membership. *Id.* at 7. The Nation recognizes as citizens persons married to tribal members who complete the naturalization process, including Petitioner. *Id.* The court also found that because Petitioner is an Indian, his contention that he is subject to the non-Indian provisions of VAWA 2013 is moot. *Id.* Finally, the court found Petitioner's contention, that if he were found to be an Indian his court-appointed attorney would be less qualified that an attorney appointed to a non-Indian, was without merit. *Id.* The court found that there were no facts to support a difference between a state bar exam and the Amantonka Nation bar exam, nor that his counsel had committed any errors. *Id.* Therefore, the court affirmed Petitioner's conviction. *Id*.

Petitioner filed a petition for a writ of habeas corpus to the U.S. District Court for the District of Rogers under 25 U.S.C. § 1303 (1968). *Id.* at 8. He alleged his conviction was in violation of the U.S. Constitution's Fifth Amendment, the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (2010) (hereinafter "ICRA"), and VAWA 2013. *Id*. The court found that Petitioner is not an Indian for the purposes of criminal jurisdiction because he has no Indian

blood, that he therefore fell under the Nation's SDVCJ, and that the Nation failed to provide him with proper indigent defense counsel required by VAWA 2013. *Id.* The Amantonka Nation appealed to the U.S. Court of Appeals for the Thirteenth Circuit, which reversed and remanded the U.S. District Court's opinion for the reasons cited by the Amantonka Nation Supreme Court. *Id*. at 9. Petitioner appealed to the Supreme Court of the United States.

III. Jurisdictional Statement

The U.S. Court of Appeals for the Thirteenth Circuit entered judgement on August 20, 2018 when it remanded the case with instructions to deny Petitioner's petition for a writ of habeas corpus. This Court has jurisdiction under 28 U.S.C. § 1254 (1988).

SUMMARY OF THE ARGUMENT

The Nation has always retained its power to prosecute members as a matter of inherent sovereignty. When the Court ruled in *Oliphant* that tribes may not prosecute non-Indians, it did not purport to restrict tribes' prosecution powers over members nor to prescribe a race-based definition of who is subject to tribal criminal jurisdiction. 435 U.S. 191. Further, while the Court has addressed who is an Indian for federal criminal jurisdiction, most notably in *United States v. Rogers*, 45 U.S. 567 (1846), it has never handed down similar restrictions regarding who qualifies as an Indian for tribal criminal jurisdiction. To the contrary, the Court has respected tribes' sovereign right to define their own membership, *see, e.g., Martinez*, 436 U.S. at 72, and consistently affirmed their inherent power to criminally prosecute their members. *E.g. United States v. Wheeler*, 435 U.S. 313, 323 (1978). Thus, the Nation may define its members as it sees fit and prosecute them under its longstanding sovereign authority, never extinguished or derogated. The Nation therefore would have had the power to prosecute Petitioner before Congress passed VAWA 2013.

The passage and enactment of VAWA 2013 did not limit or alter that authority. Nothing in that law, nor in any previous congressional enactment, purported to limit a tribe's criminal jurisdiction over its members nor prescribe new criminal procedures to previously authorized tribal court proceedings. Rather, the statute defines SDVCJ over non-Indians as "criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise." 25 U.S.C. § 1304(a)(6) (2013). Because the Nation previously could have exercised jurisdiction over Petitioner, he is entitled to none of the "non-Indian" provisions of the law, and is therefore an Indian for the purpose of SDVCJ. This result finds support in at least three decades of Executive Branch policy and congressional intent seeking to bolster and expand tribal criminal authority. Finally, a finding that Petitioner is a non-Indian for the purpose of SDVCJ would entitle him to protections not available to tribal members of Native American ancestry, thus propagating a purely race-based definition of "Indian" in violation of equal protection and this Court's precedent that "Indian" is a political, and not a racial classification. *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

As Petitioner is an Indian, he is subject only to the requirements of ICRA and the Amantonka Nation Code. However, even if Petitioner is found to be a non-Indian for SDVCJ, his counsel satisfied the federal requirements set forth in VAWA 2013, the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (codified as amended in scattered sections of 25 U.S.C.) (hereinafter "TLOA"), and the Sixth Amendment. The language in both VAWA 2013 and TLOA includes intentional ambiguity about licensing standards. S. Rep. No. 111-93, at 17 (2009). Legislative history indicates Congress's intent to allow tribal courts to determine the licensing standards of the attorneys who practice before them, as has been the case for decades. *Id.* This left each tribe with the discretion to determine whether they would follow state standards or create their own licensing systems, *id.*, which the Nation did. Because

Petitioner's attorney met the Nation's standards, his representation was legally sufficient. Stripping tribes of the ability to set professional licensing standards would impinge on tribal sovereignty and the Nation's ability to freely regulate its courts.

While Petitioner argues that for SDVCJ, court-appointed indigent counsel must be a member of a state bar, the Amantonka Nation Code's regulations compare favorably with several presumably sufficient state bar association standards. Indeed, Petitioner's counsel satisfied requirements more stringent than those propagated by state bars Petitioner contends would be sufficient. For instance, many state bar associations do not require a Juris Doctor to sit for the bar exam, or if they do, it need not be from an accredited law school. *See, e.g.* Fla. Ct. R. Relating to Admissions to the Bar, Rule 4-13 1, (2018); N.Y. Ct. App. Admission of Attorneys and Counselors at Law, Rule 520; Wash. Ct. APR 3(b) (2017). The Nation's requirements for SDVCJ counsel require both of those elements, making them even stricter and therefore prima facie sufficient. Amantonka Nation Code, Title 2, Chapter 5.

Furthermore, it is standard practice for tribal courts to determine the licensing of the attorneys and advocates who practice before them. For instance, the jurisprudence of the Navajo and Hopi Nations shows decades of deference to tribal courts and bar associations in standardizing and regulating the practice of law in their sovereignties. *See, In re Battles*, 1982 Navajo App. LEXIS 11, 23 (1982); *In re Practice of Law in the Courts of Navajo Nation,* LEXIS 43 (Navajo App. 1983); *Boos v. Yazzie*, 1990 Navajo Sup. LEXIS 2 (1990); *In re Sekayumptewa*, 2000 Hopi App. LEXIS 5, 5 (2000). Accordingly, because Petitioner's court-appointed counsel satisfied the requirements of the Amantonka Nation Code, Petitioner was adequately represented.

In addition to clear legislative intent and judicial precedent, a policy analysis of the implications of requiring additional licensing for tribally-barred attorneys urges upholding the

present standards. A reversal of current practices would likely lead to a reduction in the number of Native American attorneys, already highly underrepresented in the legal profession. For all these reasons, the Court should find that Petitioner's indigent counsel satisfied all relevant legal requirements and was therefore qualified to represent Petitioner.

ARGUMENT

I. Petitioner is an Indian for the purpose of SDVCJ.

A. The Amantonka Nation's power to prosecute Petitioner arises from its inherent sovereignty, never extinguished or divested by Congress.

The basis of a tribe's prosecutorial authority has significant implications for tribes and tribal court defendants. *United States v. Lara*, 541 U.S. 193, 201 (2004). In *Lara*, an Indian convicted in tribal court could be prosecuted for the same offense in federal court without violating double jeopardy because the tribe's prosecution rested on its inherent sovereignty, rather than a delegation of federal power. *Id*. Here, the source of the Nation's prosecution power determines how Petitioner may be prosecuted, and in particular whether he is entitled to the criminal rights extended to non-Indians by VAWA 2013. It is undisputed that the Nation generally may not try non-Indians. *Oliphant*, 435 US at 208. Thus, if Petitioner is found to be a non-Indian, the Nation may only prosecute him under VAWA 2013 and he is entitled to the rights granted to non-Indian defendants therein. Therefore, the question is whether the Nation's prosecution of Petitioner arises from VAWA 2013 or from its inherent sovereignty to prosecute its members. Because the Nation's prosecution of Petitioner rests on its inherent sovereignty to prosecute its members, he is not entitled to the non-Indian provisions of VAWA 2013.

If Petitioner is an Indian for the purpose of tribal jurisdiction, he is only entitled to the protections afforded by ICRA and the Amantonka Nation Code. If Petitioner were found to be a non-Indian, however, he may only be prosecuted under the non-Indian provisions of VAWA

2013 and is thus entitled to the supplementary rights in 25 U.S.C. §1304(d) (2013). Namely, he would be entitled to (1) ICRA rights otherwise only available to defendants facing more than one year's imprisonment; (2) a jury pool that does not exclude non-Indians; and (3) a shifting group of constitutional rights, as appropriate. 25 U.S.C. §1304(d) (2013); Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 35,961, 35963-4 (June 14, 2013). Even where these protections are of indeterminate value to Petitioner, they nonetheless present a departure from normal tribal court proceedings and therefore would create a procedural burden on the Nation. For instance, establishing bifurcated jury systems that included non-Indians for the first time created considerable logical difficulties for several tribes implementing SDVCJ. Nat'l Cong. of Am. Indians, VAWA 2013 Special Domestic Violence Criminal Jurisdiction Five-Year Report 66-67 (2018) (hereinafter "Five-Year Report").

As "distinct, independent political communities, retaining their original natural rights," *Worcester v. Georgia*, 31 U.S. 515, 557 (1832), Native American tribes possess all sovereign powers not divested by Congress through treaty, statute, or implication. *Wheeler*, 435 U.S. at 323. This Court has recognized that a tribe's criminal authority over members arises from its inherent sovereignty rather than delegation of federal power. *Id.* at 322 ("[Tribes'] right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions."). These powers are subject to defeasance, as in *Oliphant*, where the Court ruled that Congress and the Executive Branch had impliedly divested Native American tribes of the power to prosecute nonmembers. 435 U.S. at 208. However, they remain intact unless explicitly or implicitly extinguished. *Wheeler*, 435 U.S. at 323.

This Court has always upheld the inherent sovereign right of Native American tribes to define and prosecute their own members. Petitioner relies on *Oliphant* to support the proposition that the Nation may not exert criminal jurisdiction over him, but the *Oliphant* Court did not limit tribes' power to prosecute members, nor did it define who is an Indian for tribal criminal jurisdiction. 435 U.S. 191. Rather, the Court's reasoning for excluding non-Indians from tribal prosecution rested largely on two propositions: (1) that tribes' prosecution of nonmembers would be an exercise of external political sovereignty "inconsistent with their status," *Id.* at 208, and (2) that subjecting nonmembers to tribal jurisdiction would bring them under the criminal authority of an alien sovereign in violation of their "basic criminal rights," *Id.* at 211. Neither of these propositions bear on a tribe's prosecution of its own members, since such a prosecution would be an exercise in strictly internal governance and the prosecuting sovereign would not be alien to a tribal member. Indeed, the Court later interpreted *Oliphant* as restricting tribal prosecution based on membership, rather than any prescribed definition of "Indian" for tribal criminal jurisdiction. *Duro v. Reina*, 495 U.S. 676, 685 (1990) *superseded by statute*, 25 U.S.C. § 1301 (1990) ("The rationale of our decisions in *Oliphant* and *Wheeler*, as well as subsequent cases, compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members.").

Moreover, while the Court has prescribed a definition of "Indian" for the purpose of federal criminal jurisdiction, it has never ruled on who is an Indian for tribal jurisdiction, a separate question of internal tribal governance. *See* Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 Am. Indian L. Rev. 337, 384. *Rogers*, 45 U.S. 567, is often cited as applying a two-factor test for Indian status based on (1) blood quantum and (2) tribal recognition as an Indian. *Eg. United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). However, *Rogers*

addressed whether a person of non-Indian dissent who had been adopted into the Cherokee tribe could be tried in *federal* court, not tribal court. 45 U.S. at 572. Indeed, the Court in *Rogers* confined itself to an interpretation of 18 U.S.C. § 1152 (1948), which exempted from federal jurisdiction "offenses by one Indian against the person or property of another Indian." *Rogers*, 45 U.S. at 573. While it arguably handed down a catch-all definition of "Indian" for federal criminal jurisdiction, *Stymiest*, 581 F.3d at 762; *Bruce*, 394 F.3d at 1223, the *Rogers* Court did not speak to *tribal* criminal jurisdiction. 45 U.S. 567. Moreover, the Court's guiding concern in *Rogers* — that allowing defendants of non-Native American descent to escape federal jurisdiction would promote lawlessness in Indian country — does not support exempting those defendants from concurrent tribal criminal jurisdiction. *Id*. at 573. The only federal case to directly address who is an Indian for tribal criminal jurisdiction, *Las Vegas Tribe of Paiute Indians v. Phebus,* 5 F.Supp.3d 1221, 1234 (D. Nev. 2014), reserved the question for the jury in tribal court. Rolnick, *supra* at 397 (claiming *Phebus* is the only federal case to address "the scope of the Indian category for purposes of tribal jurisdiction").

Each time the Court has addressed whether a tribe may prosecute its own members as it defines them, it has answered unequivocally in the affirmative. *E.g. Wheeler*, 435 U.S. at 322; *Duro,* 495 U.S. at 685. The Court has recognized that a tribe's ability to define its membership for tribal purposes is among its most fundamental sovereign powers. *Martinez*, 436 U.S. at 72 n.30 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."). This power is likewise vital and well-recognized when it comes to criminal prosecution: *Wheeler*, decided 16 days after *Oliphant*, affirmed a tribe's retained power to try its own members: "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members." *Wheeler*, 435 U.S. at 322. Far from including a stray remark or aberrant comment,

the *Wheeler* Court was "consistent in describing retained tribal sovereignty over the defendant in terms of a tribe's power over its members." *Duro*, 495 U.S. at 685 (emphasis omitted).

Nothing in this Court's precedent prescribes whom a tribe may prosecute as a member nor insinuates any race-based division among members. Rather, as early as 1897, the Court suggested that membership may be dispositive of Indian status for tribal criminal jurisdiction. *Nofire v. United* States, 164 U.S. 657, 662 (1897). In *Nofire*, the Court held that the Cherokee Nation could exercise jurisdiction over two Cherokee men accused of murdering a white man adopted as a tribal citizen because *both the defendants and the victim were Indians*. *Id*. The Court reasoned that just as tribal adoption marked the victim as an Indian, adoption likewise would have made him subject to prosecution as a defendant: "Suppose, during his lifetime, the Cherokee Nation had asserted jurisdiction over him as an adopted citizen; would he not have been estopped from denying such citizenship?" *Id.* at 661. This Court has had many opportunities to limit tribes' criminal jurisdiction to members of Native American ancestry it has never done so. It has likewise never prescribed a definition of "Indian" for tribal criminal jurisdiction, but rather has treated membership as dispositive of a defendant's amenability to such jurisdiction.

The Nation's prosecution of Petitioner therefore rests not on any recent delegation or affirmation of sovereignty by Congress, but rather on the inherent power of Native American tribes, long recognized by this Court, to afford criminal justice among tribal members. The Nation exercised its inherent power to define its membership in Title 3, Chapter 2 of the Amantonka Nation Code, laying out the process for naturalization. Having willingly undertaken and completed this process, Petitioner now qualifies for the Nation's purposes as a member. He is subject to prosecution not based on VAWA 2013, but based on the Nation's

retained sovereignty to prosecute its own members. For the purpose of tribal criminal jurisdiction, he is therefore an Indian.

Petitioner may not escape tribal prosecution by reason of his genetic makeup. In particular, the Court's concerns in *Oliphant*, 435 U.S. at 208-211, are inapposite to Petitioner's case. The Nation is not an alien sovereign to Petitioner, as he lived on tribal land, married into the tribe, found employment with tribal businesses, and completed an extensive training in tribal law and culture during his naturalization process. Furthermore, the Nation has retained the authority to adjudicate offenses committed between members as a matter of internal political governance since long before the establishment of the United States, and this power has never been derogated nor extinguished. That Petitioner does not share the genetic makeup of other Amantonka citizens has no bearing on this power. Federal law allows the Nation to define its membership, and the Court has refrained from incursions into this sensitive area of tribal government. *Martinez*, 436 U.S. at 72. While *Rogers* controls who is an Indian for federal criminal jurisdiction, 45 U.S. at 572, any limits on whom among its members a tribe may prosecute, and how, are a separate and far more intrusive matter. Thus, inasmuch as the Rogers District Court in this case applied the blood quantum factor of the *Rogers* test to determine Petitioner was not subject to the Nation's criminal jurisdiction as an Indian, it improperly conflated federal and tribal jurisdiction.

The Nation's standard for membership is well-defined and based on longstanding custom. The issue is whether the Nation may exercise over Petitioner its unimpeached authority to prosecute its members. This Court has repeatedly ruled that it may. Therefore, the Nation's prosecution of Petitioner rests not on any recent congressional affirmation of its authority, but rather on its original inherent sovereignty.

B. The Amantonka Nation may prosecute Petitioner as it would any tribal member of Indian descent.

i. Congress has never purported to extend additional criminal protections to tribal members of non-Native American ancestry.

Because the Nation's prosecution of Petitioner arises from its retained sovereignty, it need not afford him the protections extended to non-Indians prosecuted under SDVCJ. At least since *Talton v. Mayes*, 163 U.S. 376, 385 (1896), holding that the Constitution does not apply to tribal proceedings, the Court has recognized that prosecutions arising from a tribe's inherent sovereignty are not subject to the same requirements and procedures as state and federal prosecutions. Petitioner contends, however, that VAWA 2013 extends to him additional protections not available to defendants of Native American ancestry. However, by defining SDVCJ as "criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise," 25 U.S.C.§1304(a)(6) (2013), the law specifically excludes tribal members such as Petitioner, who may be prosecuted under the Nation's retained sovereignty. Thus, Petitioner is entitled to none of the non-Indian requirements of VAWA 2013.

While Congress codified a definition of Indian in 1990, Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, 104 Stat. 1856 (codified as 25 U.S.C. § 1301 (1990)), it did not intend an all-purpose definition of Indian for tribal criminal jurisdiction and should not be read as the outer bound of a tribe's prosecutorial authority. H.R. Rep. No. 102-61, at 1 (1991). Responding to the Court's ruling in *Duro*, that tribes lack criminal jurisdiction over members of other Native American tribes, 495 U.S. at 685, Congress sought to make explicit tribal criminal jurisdiction over "nonmember Indians." H.R. Rep. No. 102-61, at 1 (1991) ("The purpose of H.R. 972 is to recognize and affirm the power of Indian tribes to

exercise misdemeanor criminal jurisdiction over all Indians."). The so-called "*Duro* fix" therefore sought to expand, rather than contract tribal criminal jurisdiction. The new definition, codified in 25 U.S.C. §1301(4) (1990), should be read in that light: "'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." Ostensibly, by referring to the case law interpreting 18 U.S.C. § 1153 (2013), this provision imports the *Rogers* test into tribal jurisdiction. However, the legislative history makes clear this definition was enacted in order to add to the pool of people over whom tribal courts could exercise criminal jurisdiction rather than subtract from it. H.R. Rep. No. 102-61, at 1 (1991). Thus, though the enactment sought to "provide[] some consistency between federal and tribal criminal prosecutions with regard to the class of persons subject to such prosecutions," this effort toward consistency was limited to the "class of persons" — namely "nonmember Indians" — whom Congress sought to put on notice that they could be prosecuted by any tribe. *Id.* at 4. Indeed, this Court interpreted the *Duro* fix as "*relaxing restrictions* on the bounds of the inherent tribal authority that the United States recognizes." *Lara*, 541 U.S. at 207 (emphasis added). Nothing in the law nor in the legislative history indicates Congress intended to limit a tribe's prosecutorial power or exempt persons such as Petitioner from tribal criminal jurisdiction.

VAWA 2013 likewise represented an expansion of tribal criminal jurisdiction, and did not purport to institute new procedures for defendants previously subject to tribal prosecution. S. Rep. No. 112-153, at 9 (2012). By limiting SDVCJ to cases where a tribe "could not otherwise exercise" criminal jurisdiction, the law excludes defendants previously subject to tribal prosecution. 25 U.S.C. §1304(a)(6) (2013). That the law intended to add to, rather than displace tribal criminal jurisdiction is further evidenced by the stipulation that SDVCJ comes

not at the expense of but "in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title." 25 U.S.C. §1304(b)(1) (2013). The legislative history likewise describes the enactment as a "jurisdictional expansion [that] is narrowly crafted and satisfies a clearly identified need." S. Rep. No. 112-153, at 10 (2012). VAWA 2013 should be read in accordance with Congressional intent to expand tribal jurisdiction, rather than placing new limits on it.

Instead, Petitioner seeks to infer from VAWA 2013 a limitation on tribal jurisdiction where Congress intended an expansion, albeit a limited one. Congress may only derogate tribal sovereignty by speaking unambiguously and expressly. Felix S. Cohen, Cohen's Handbook of Federal Indian Law 114 (Nell Jessup Newton et al. eds., 2012). "Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767 (1985). Thus, interpreting either the *Duro* fix or VAWA 2013 to impose new procedural requirements on the Nation would have the effect of derogating tribal authority without the explicit intent of Congress, in contravention of the well-established canons of construction of federal Indian law. Cohen, *supra*, at 115-16. Effectively, Petitioner's interpretation would force the Nation to discriminate among its members based on descent where it was previously free to prosecute them uniformly, thus creating an undue and unintended burden on the Nation's courts. A more rational reading of the *Duro* fix and VAWA 2013 would leave undisturbed the Nation's preexisting authority to prosecute its members, subject only to the protections afforded by ICRA and the Amantonka Nation Code. Any jurisdiction recognized by Congress as part of these enactments, including SDVCJ, should be read as supplementing rather than supplanting the Nation's inherent criminal justice powers.

Because Petitioner was previously subject to the Nation's criminal jurisdiction, he is not now, after the passage of VAWA 2013, the beneficiary of additional criminal procedures. Prior to the passage of VAWA 2013, the Nation was empowered to bring its members to trial without regard to their genetic makeup. Nothing in that enactment indicated an intent by Congress to distinguish among tribal members based on their ancestry. Therefore, the Nation remains free to hold Petitioner accountable for his crimes as it would any member of Native American ancestry. Consequently, Petitioner is an Indian for the purpose of SDVCJ.

ii. Extending to Petitioner the "non-Indian" protections of VAWA 2013 due to his genetic makeup would undermine tribal sovereignty and equal protection of the laws.

Reading VAWA 2013 as extending additional criminal protections to Petitioner would flout at least three decades of federal policy expanding tribal criminal jurisdiction and authority. "While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch, and lower federal courts… carries considerable weight." *Oliphant*, 435 U.S. at 208. At least since the early 1990s, Congress and the Executive Branch in tandem have presumed that tribal criminal authority should expand as tribal courts become better funded and equipped. *See Lara*, 541 U.S. at 208 (describing recent Congressional policy as seeking "greater tribal autonomy within the framework of a 'government-to-government relationship' with federal agencies"). Though the Court is not bound by this presumption, "judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensable principle." Cohen, *supra*, at 110. Against this backdrop, then, VAWA 2013 should not be misinterpreted to impose new restrictions on the Nation's criminal authority.

Though federal policy in favor of stronger, more independent tribal government dates back at least to the Indian Reorganization Act of 1934, 25 U.S.C. § 5101 et. seq. (1934), the

last thirty years of federal policy prove instructive. In 1994, President William J. Clinton directed each executive department and agency to pursue "a government-to-government relationship" with federally recognized tribes. Memorandum on Government-to-Government Relationships With Native American Tribal Governments, 59 Fed. Reg. 22,951 (Apr. 29, 1994). He expanded this directive in Exec. Order No. 1,3175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), which affirmed tribes' "inherent sovereign powers over their members" and ordered federal agencies to "encourage Indian tribes to develop their own policies to achieve program objectives." Continuing this policy, President Barack H. Obama issued Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (June 26, 2013) establishing the White House Council on Native American Affairs "to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes." Thus, the policy of the Executive Branch has long favored increased recognition of tribal sovereignty and expansion of tribal authority.

Congress has been a strong partner to this policy, acting numerous times since the *Duro* fix to expand the reach and power of tribal courts. In 1993, it passed the Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (codified as amended in scattered sections of 25 U.S.C.), establishing and funding the Office of Tribal Justice Support within the Bureau of Indian Affairs "to further the development, operation, and enhancement of tribal justice systems and Courts of Indian Offenses." 25 U.S.C. § 3611(a) (2005). In 2010 with the passage of TLOA, Congress expanded tribal courts' sentencing authority and furnished additional support for tribal law enforcement.

Petitioner's assertion that he is entitled to the non-Indian provisions of VAWA 2013 flatly contravenes decades of Executive and congressional policy toward stronger and more empowered tribal courts. Petitioner contends that Congress, in VAWA 2013, meant to

prescribe new restrictions on existing tribal criminal procedure of which he may avail himself. However, this reading contradicts a longstanding congressional policy of expanding tribal authority and self-government, besides belying the specific intent of the legislation to bolster law enforcement within tribal lands. *See* S. Rep. No. 112-153, at 8 (2012) ("This legislation bolsters existing efforts to confront the ongoing epidemic of violence on tribal land by… recognizing limited concurrent tribal jurisdiction to investigate, prosecute, convict, and sentence non-Indian persons."). Furthermore, in applying federal court-style procedures to defendants in tribal courts whom tribes could previously prosecute without such procedures, Petitioner's application of VAWA 2013, if successful, would have a "Westernizing" effect on tribal courts by making them further resemble state and federal courts. *See* Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 Am. Indian L. Rev. 421, 421 (2014) ("The hard-won and well-deserved victory of expanded jurisdictional authority under the VAWA came at the price of stringent and expensive requirements on tribal judicial systems and the potential further 'Westernization' of tribal courts.").

Finally, holding Petitioner to be a non-Indian for the purpose of SDVCJ would read an equal protection violation into VAWA 2013, as Petitioner would be entitled to additional criminal protections not available to members of Native American descent. "A person can be an Indian for one purpose, but not for another." Cohen, *supra* at 172. Thus, while petitioner may be an Indian for the purpose of federal criminal jurisdiction, whether he is an Indian for tribal criminal jurisdiction is a separate question with its own equal protection considerations. Rolnick, *supra*, at 384. To avoid a reading of the law that runs afoul of the equal protection guarantees of ICRA and the Fifth Amendment, the Court must find that Petitioner is an Indian for the purpose of SCDVJ.

Practically all of federal Indian law relies on the fact that Indian is a political status rather than a racial classification. *Mancari*, 417 U.S. at 552. ("If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased.") In *United States v. Antelope*, 430 U.S. 641, 646 (1977), the Court applied this distinction to criminal jurisdiction by holding that differential criminal treatment of Native Americans does not violate due process or equal protection because "Indian" is not a racial category but a political affiliation. In that case, two members of the Coeur d'Alene tribe convicted of murder under the 18 U.S.C. § 1152 (1948) argued their Fifth Amendment right to equal protection of the laws was violated because they were tried in federal court, whereas a non-Indian indicted for the same crime would be tried in state court against a higher burden of proof. *Id.* at 642-643. The Court held "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 therefore equal protection was not violated. *Id.* at 646.

Here, Petitioner seeks to apply a definition of "Indian" for tribal criminal jurisdiction that rests solely on race. It is undisputed in this case that the Nation could prosecute any member of Native American descent for the same crime as Petitioner without the protections stipulated in VAWA 2013. Petitioner only claims non-Indian status based on his genetic makeup, contending that his race entitles him to rights not available to members of Native American ancestry. In contrast to *Antelope*, where the Court ruled that the defendants could be subjected to differential treatment based on their tribal membership rather than their race, *Id.*, here Petitioner seeks differential treatment *only* on the basis of race. Therefore, finding Petitioner to be a non-Indian for the purpose of SDVCJ would be to endorse a definition of Indian for tribal jurisdiction that confers special treatment on tribal members of non-Native

American descent. Such a decision would destabilize the corpus of federal Indian law by introducing a purely race-based standard for who is an Indian. The Court should therefore find that Petitioner is an Indian for SDVCJ.

II. Petitioner's court-appointed attorney satisfied the relevant legal requirements.

A. Petitioner's court-appointed attorney satisfies federal requirements for indigent defense attorneys under VAWA 2013.

In determining whether Petitioner's counsel was sufficient, the relevant legal standards are the requirements set by the Amantonka Nation Code. In 25 U.S.C. § 1304(d)(2) (2013), VAWA 2013 guarantees non-Indian defendants "if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title." In turn, 25 U.S.C. §1302(c) (2010) requires defendants receive "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" (emphasis added). These requirements clearly mandate that counsel need only be licensed to practice law by *a* bar association in a United States jurisdiction, provided it meets the law's standards, not expressly a state bar association. Several other nations have also chosen to meet this requirement by requiring admission in their tribal bar association, including the Pascua Yaqui, Tulalip, Eastern Band of Cherokee Indians, and Sault Ste. Marie. Five-Year Report at 61. Therefore, membership in and licensure by the Amantonka Nation Bar Association explicitly satisfies VAWA 2013.

Moreover, the legislative history of the licensing requirement in 25 U.S.C. § 1302(c) (2010) demonstrates that Congress did not intend to require state bar membership for tribal indigent defense counsel. S. Rep. 111-93, at 17 n. 57 (2009). In considering the language as part of the enactment of TLOA, the Committee on Indian Affairs received recommendations

that tribal public defenders be required to graduate from an accredited law school and be licensed by a state supreme court. *Id.* However, the Committee rejected those recommendations, explaining, "The Committee notes that the States of California, Maine, New York, Vermont, Virginia, Washington and Wyoming do not require attorneys to graduate from an accredited law school in order to practice law or serve as a judge." *Id.* The Committee explained the intent of the licensing requirements as enacted: protecting individuals' rights and "acknowled[ing] and strengthen[ing] tribal self-government." *Id.* Further, "[w]hether the standard employed is a state, federal, or tribal standard will be a decision for the tribal government. Several tribal governments have developed their own tribal law standards and others have adopted state licensing standards." *Id.* Thus, Congress' clear intent was to allow tribal courts to determine their own licensing standards. *Id.* The Committee recommended, but did not dictate, that the Bureau of Indian Affairs and Department of Justice consult with tribal governments to determine and develop the proper licensing standards "where a tribe chooses not to adopt state standards." *Id.* This choice again expressly acknowledges Congress's intent to allow tribal courts the autonomy to determine and enforce their own licensing standards.

It is clear also that Petitioner's counsel satisfied constitutional requirements. This Court has repeatedly affirmed that tribal courts are constrained by ICRA and not the Constitution, including the Sixth Amendment. *Martinez*, 436 U.S. at 56 ("As separate sovereigns preexisting the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority"); *Talton*, 163 U.S. at 384 (holding that the Fifth Amendment grand jury requirement did not apply to tribal courts, as the Constitution had no application to Indian tribes). However, even if the Sixth Amendment applied, Petitioner's claim of defective counsel would still be without merit. Federal courts, including this Court, have regularly held that to show a Sixth Amendment violation, a party

must demonstrate their representation was actually defective. *E.g. Padilla v. Kentucky*, 559 U.S. 356 (2010); *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Decoster*, 624 F.2d 196 (D.C. Cir. 1976); *United States v. Marshank,* 777 F. Supp. 1507 (N.D. Cal. 1991). As Petitioner's indigent counsel has committed no errors, which is uncontested by Petitioner, ROA at 7, the Court must hold that representation was sufficient.

Furthermore, where federal courts have questioned whether a tribal attorney satisfies a Sixth Amendment analysis, tribal bar admission has been found presumptively sufficient, and the relevant question is instead, "whether the defendant's tribal attorney was licensed by a federal or state bar association, as opposed to being a 'lay advocate'." *United States v. No Moccasin*, 2013 U.S. Dist. LEXIS 138116, *4 (D.S.D., Sept. 26, 2013), citing *United States v. Red Bird*, 287 F.3d 709, 713–16 (8th Cir. 2002) and *United States v. Killeaney,* 2007 U.S. Dist. LEXIS 92763, 2007 WL 4459348 at **4-9 (D.S.D. Dec. 17, 2007). Because Petitioner's counsel was a member of a bar association and not simply a "lay advocate," representation was adequate on this front. This point was underscored in the Five-Year Report, which found that tribes who did not previously provide indigent counsel or which had previously used a team of lay advocates "therefore had to establish a new system or modify their existing system to meet this requirement of VAWA 2013. Some tribes hired a licensed attorney full time to serve as tribal public defender, while others contracted with outside attorneys to represent their defendants as needed." Five-Year Report at 61-62. Notably, none of the tribes who already required membership in a tribal bar association changed or supplemented their licensing requirements to implement SDVCJ. *Id.* Furthermore, in more than 100 SDVCJ prosecutions, no defendants filed a petition for a writ of habeas corpus, indicating overall satisfaction with the quality of tribal indigent representation. *Id.* at 1.

An evaluation of the requirements of state bar associations further demonstrates that the Amantonka Nation Bar Association's standards satisfy the requirement for "appropriate professional licensing standards" that "effectively ensure[] the competence and professional responsibility of its licensed attorneys." 25 U.S.C. § 1302(c) (2010). The standards set forth in the Amantonka Nation Code are substantially similar to those of several state bar associations, and in some cases, provide for higher standards. For example, Arizona requires a J.D. from an ABA-accredited law school, an age over 21, good moral character, and emotional and physical ability to practice law in order to sit for the bar exam. A.R.S. Sup. Ct. Rules, Rule 34(b) (2017). Washington state requires either a J.D. from an ABA-accredited law school or completion of their APR 6 Law Clerk Program, a J.D. from any U.S. law school and a LL.M., any qualifying degree from a foreign university of law school and an LL.M., or previous admission to the practice of law in any jurisdiction "where the common law of England is the basis of its jurisprudence" and three years of legal experience. Wash. Ct. APR 3(b) (2017). Florida requires a J.D. or LL.B., or proof of 10 years of practice in another U.S. state or territory, good standing in that jurisdiction's bar, and a representative work product. Fla. Ct. R. Relating to Admissions to the Bar, Rule 4-13 1 (2018). As a final example, New York provides several modes of qualification for their bar exam: a J.D. from an ABA-approved law school, a combination of at least 28 hours of study at such a school and four years of a clerkship or study in a law office, a J.D. from a non-ABA-accredited law school and five years of practice, an equivalent foreign law study program, or application prior to a J.D. conferral through the Pro Bono Scholars Program. N.Y. Ct. App. Admission of Attorneys and Counselors at Law, Rule 520.

Presuming certification by any of the aforementioned state bar associations would meet the relevant legal requirements, so too would certification by the Nation prove legally

sufficient. Notably, while Petitioner was charged as an Indian outside the auspices of SDVCJ, his attorney satisfied the Nation's requirement for SDCVJ counsel set out in the Amantonka Nation Code, Title 2, Chapter 6. That section requires that counsel for defendants charged under the Nation's SDVCJ must have both graduated from an ABA-accredited law school and passed the Amantonka Nation Bar Exam. These requirements go beyond those of several of the aforementioned state bar associations whose licensing standards Petitioner contends would have been sufficient.

The requirements of the Amantonka Nation Code that indigent defense counsel for tribal members be barred by the Nation therefore satisfies the requirements of VAWA 2013. The intentional ambiguity as to licensing standards in 25 U.S.C. § 1302(c) (2010) reserves and affirms the power of tribes such as the Nation to exercise their sovereignty while adhering to the letter and intention of VAWA 2013 and TLOA. Olufemi Adisa, *Attorney Licensure & Professionalism: Developing a Tribal Bar Association*, University of North Dakota School of Law Tribal Judicial Institute (Jan. 13, 2019), https://law.und.edu/npilc/tji/_files/docs/attorney-licensure-tribal-bar-associations-2015.pdf. ("[T]ribal bar associations have an important role to play under the prevailing Tribal Law and Order Act of 2010 (TLOA) environment… [The licensure requirement] provides an opportunity for tribes to protect their sovereignty. Since the law is vague as to licensure and training, tribes could institute a tribal bar association to license attorneys and judges according to their national need while fulfilling the TLOA requirement.") The Nation's ability to exercise the inherent sovereignty over the attorneys practicing in their courts therefore should not be infringed.

B. The courts of the Nation have the right to determine who qualifies to practice in their courts and Petitioner's court-appointed counsel satisfies the requirements set forth by the Nation.

It is standard practice for tribes to determine who may practice law in their courts, and consequently, the Nation's courts and bar association have the right to determine the appropriate qualifications. Kirke Kickingbird, Striving for the Independence of Native American Tribal Courts, American Bar Association at 1 (2017). Approximately 275 tribes have their own court systems, several of which have mandatory tribal bar associations. *Id.* Several nations' bar associations were established decades ago and standard practice has established repeatedly that a sovereignty's own courts have the right to determine who may be licensed to practice in their courts and how. Adisa *supra*, at 5. This practice can and should be applied to the federal standards described in the VAWA 2013 and TLOA.

Tribal courts such as those of the Navajo Nation have interpreted tribal and federal law as affirming their sovereign power to regulate the practice of law in their nations. For example, in 1982, the Navajo Nation Court of Appeals found that "the Courts of the Navajo Nation [have] *the full and sole authority to regulate the practice of law* within the Navajo Nation, without limitation... it is the responsibility of the judges to make rules for the operation of the courts." *Battles*, 1982 Navajo App. LEXIS at 23 (emphasis added). The court added that the Navajo Nation never purported to abdicate its power to neighboring jurisdictions, including the states it intersects with. *Id.* at 22. The following year, the Court of Appeals elaborated, "It is proper for the courts to permit the bar association to set admission standards since it is in actuality a partner in the process of regulating the practice of law. Normally the standards set by the bar will be strictly followed, and special exceptions based upon considerations of necessity, equity and justice will be rare." *In re Practice of Law,* 1983 Navajo App. LEXIS 43

at 5. The Court elaborated, "The courts, and only the courts, have ultimate authority [over the practice of law in the Navajo Nation]," *Id.* However, the court has delegated responsibility for the screening of attorneys to the Navajo Nation Bar Association [NNBA]. *Id.* at 4. Thus, where a court defers to its respective bar association to set admission standards, those will be respected as the appropriate criteria.

In 1990, the Navajo Nation Supreme Court affirmed the tribal courts' self-determination in setting admission requirements, grounding that self-determination in longstanding tradition: "The Navajo Nation courts have the power to appoint any active member of the NNBA to represent an indigent party, including a defendant charged with crimes in a Navajo court.... Before the Navajo people adopted the adversarial system, a Navajo who was charged with allegations against the public order always had the right to have someone speak on his behalf. Legal counsel shall be allowed to appear in any proceedings before the Courts of the Navajo Nation provided that the legal counsel is a member in good standing of the Navajo Nation Bar Association." *Boos*, 1990 Navajo Sup. LEXIS at 8.

The Navajo Nation is not alone in reserving for its courts the power to determine the requirements for their bar admissions. The same holds true for the Hopi Tribe, for instance. In 2000, the Hopi Appellate Court found that "the Hopi Tribal Court has authority to set conditions under which Petitioner may practice as a legal advocate… [tribal statute] gives both the trial and appellate courts the authority 'to control… the conduct of it[s] ministerial officers…' Section 1.9.1(c) defines officers of the court to include 'Attorneys who are members of the Bar of the Hopi Tribe.'" *Sekayumptewa*, 2000 Hopi App. LEXIS at 5 (internal citations omitted). The Hopi Nation's finding that its courts have the authority to set their own conditions for legal practice further supports the conclusion that tribes, such as the Nation,

should not have that right infringed, as such an infringement would overturn decades of tribal law precedent and violate tribal sovereignty.

Accordingly, whether Petitioner's court-appointed attorney satisfies the requirements for indigent defense attorneys under SDVCJ should be evaluated according to the standards set by the Nation's courts and the Amantonka Nation Code. The Amantonka Nation Code provides that any attorney practicing before the Nation's courts "must be admitted to practice and enrolled as an attorney of the [Amantonka] District Court," and that "any attorney at law who is a member in good standing of the bar of *any tribal, state, or federal court* shall be eligible for admission to practice before the District Court upon approval of the Chief Judge, and successful completion of a bar examination administered as prescribed by the Amantonka Nation's Executive Board." Amantonka Nation Code, Title 2, Chapter 5. Attorneys and Lay Counselors, Sec. 501 (emphasis added). The subsequent chapter provides:

> Sec. 607. Qualifications. (a) To be eligible to serve as a public defender or assistant public defender, a person shall: (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, during their probationary period, a bar examination administered as prescribed by the Amantonka Nation's Executive Board; and (6) Must have training in Amantonka law and culture. (b) A public defender who holds a JD degree from an ABA accredited law school, has taken and passed the Amantonka Nation Bar Exam, and who has taken the oath of office and passed a background check, is sufficiently qualified under the Indian Civil Rights Act to represent a defendant imprisoned

more than one year and any defendant charged under the Nation's Special Domestic Violence Criminal Jurisdiction.

Amantonka Nation Code, Title 2, Chapter 6. District Court Prosecutor and Public Defender. The Nation thus requires that counsel be a member of any bar, including the Amantonka Nation Bar Association, to be indigent defense counsel or for SDCVJ, rather than a member of a state bar association. Petitioner's attorney satisfied the requirements for both normal proceedings and SDVCJ. Therefore, Petitioner's attorney was qualified to represent him, whether he is found to be Indian or non-Indian for criminal jurisdiction purposes.

C. Restricting indigent defense counsel to only those who have passed state bar exams, not only tribal bar examinations, would exacerbate the lack of Native American attorneys.

In addition to the clearly established legal precedent of tribal sovereignty with regard to attorney qualifications and a plain reading of ICRA and VAWA 2013's legal counsel requirements, policy concerns suggest upholding the ability of tribes to enforce their own licensing standards. As the American Bar Association has noted, "There are only 2,640 Native Americans attorneys in the United States, comprising 0.2 percent of the more than 1.2 million attorneys in the United States," Mary Smith, Native American Attorneys Systematically Excluded in the Legal Profession, Human Rights Magazine, American Bar Association 1 (2014), compared to an approximate Native American population of 1% in the United States as a whole. Tina Norris, Paula L. Vines & Elizabeth M. Hoeffel, The American Indian and Alaska Native Population: 2010, United States Census Bureau 1 (2012). Systematic exclusion of Native Americans by the legal profession is well established: "The ABA did not permit tribal court practitioners to be full members of the ABA until 2014." Kickingbird, *supra,* at 1.

Of the Native Americans who do enter the legal profession, a resounding 63 percent practice Indian law, many of whom are members of a tribal bar association. Smith, *supra*, at 1. This is in part due to personal choice and in part due to societal pressure to give back to one's own community. *Id.* Even those attorneys who wish to practice outside of Indian law are often forced into Indian law practice – either by the choice of their managers at their multi-practice firm or because "the only jobs for which they were recruited were jobs related to Indian law." *Id.* Therefore, any change to the regulation of tribal judicial sovereignty would directly impact Native American attorneys by altering the licensing environment under which the majority work.

Once Native Americans do enter the legal profession, "A significant percentage of Native American attorneys experience demeaning comments, harassment, and discrimination." *Id.* Further dismissal of the qualifications of tribal court-barred attorneys could further these anti-indigenous behaviors, which could lead to self-selection out of the profession. Disregarding the credentials Native American lawyers achieve by passing a tribal bar examination would exacerbate this discrimination by placing the hurdle of passing an additional bar exam in the way of their ability to practice law and potentially lead Native American lawyers to discontinue their practice. Lawyers who have passed the Nation' bar exam, such as Petitioner's counsel, should not be required to overcome an additional barrier to their practice, especially when the regulations of the Amantonka Nation Bar Association clearly satisfy federal standards and regulations.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the U.S. Court of Appeals for the Thirteenth Circuit denying Petitioner's petition for a writ of habeas corpus.

Petitioner's Indian status for tribal jurisdiction is a matter of internal tribal governance, rather than federal criminal jurisdiction. Consequently, the Court's precedent in *Martinez*, 436 U.S. at 72, and *Wheeler*, 435 U.S. at 322, affirms the Nation's right to hold Petitioner accountable for his crimes without regard to his genetic makeup. Even if Petitioner were a non-Indian for the purpose of SDVCJ, the Nation retains its sovereign right to set the licensing standards for attorneys that practice in its courts, and the Amantonka Nation Code's extensive rules governing its attorney's qualifications and conduct ensure their competence and professional responsibility. Therefore, Petitioner's court-appointed attorney met all the relevant legal requirements, whether or not he is found to be an Indian.