No. 19-231

IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM 2019

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 OF PETITIONER

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I. Can the Amantonka Nation exercise criminal jurisdiction over Reynolds, a naturalized citizen of the Amantonka Nation with no Indian heritage, absent a congressional grant of authority?

II. Whether the Amantonka Nation acted in compliance with the Indian Civil Rights Act, the Violence Against Women Act, and the Constitution's Equal Protections Requirements in appointing counsel for Reynolds specifically intended to only represent Indian defendants and who was not required to have passed a state bar examination?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Robert Reynolds ("Reynolds") is a non-Indian who became a naturalized citizen of the Amantonka Nation following his marriage to Lorinda Reynolds ("Lorinda"), a citizen of the Amantonka Nation. R. at 6. On June 15, 2017, Reynolds struck his wife with an open palm across her face causing his wife to fall in their apartment on the Amantonka Reservation and break her rib. R. at 2. This is the first time that police saw evidence of domestic violence. An officer from the Amantonka National police subsequently arrested Reynolds and transported him to the Amantonka Nation Jail. R. at 6. On June 16, 2017, the Amantonka Nation chief prosecutor filed a criminal complaint against Robert Reynolds accusing him of domestic violence against Lorinda Reynolds. R. at 3.

Robert Reynolds and Lorinda Reynolds met as students at Rogers University. R. at 6. At the time, Reynolds was a non-Indian with no Indian blood and Lorinda was a citizen of the Amantonka Nation, a federally-recognized tribe. R. at 6. Following their graduation from Rogers University, Robert Reynolds married Lorinda Reynolds. R. at 6. The two moved into an apartment in Amantonka's tribal housing complex and Reynolds got a job as a manager at the Amantonka shoe factory. R. at 6.

The Amantonka Nation Code provides a process whereby persons who marry a citizen of the Amantonka Nation may apply to become a naturalized citizen after they have lived on the Amantonka reservation for two years. R. at 12. The tribe requires that applicants seeking to become a naturalized citizen must complete a course in Amantonka Culture and a course in Amantonka law and government. R. at 6. Additionally, applicants must pass the Amantonka citizenship test and perform 100 hours of community service with a unit of the Amantonka Nation government. R. at 6.

Two years after Robert and Lorinda Reynolds got married, Robert Reynolds applied to become a naturalized citizen of the Amantonka Nation. R. at 6. Reynolds completed the Amantonka Nation citizenship process, was sworn in as a citizen of the Amantonka Nation, and was issued an Amantonka Nation ID card. R. at 6. Pursuant to the Amantonka Nation Code, as a naturalized citizen of the Amantonka Nation, Rogers was entitled to all the privileges afforded to all Amantonka citizens. R. at 12.

II. STATEMENT OF PROCEEDINGS

On June 16, 2017, the Chief Prosecutor for the Amantonka Nation, Amanda Flores, filed a criminal complaint against Robert Reynolds charging him with assaulting Lorinda Reynolds in violation of Title 5 section 244 of the Amantonka Nation Code. R. at 2.

Reynolds filed three pretrial motions in the District Court for the Amantonka Nation. First, Reynolds sought to have the charges against him dismissed on the grounds that he is a non-Indian and that the Amantonka Nation lacks criminal jurisdiction over non-Indians following the the U.S. Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*, 435 US 191 (1978). R. at 3. Second, Reynolds argued that he was a non-Indian accused of domestic violence against an Indian within Indian country and sought to have an attorney appointed to him pursuant to the Amantonka Nation's exercise of Special Domestic Violence Criminal Jurisdiction. R. at 3. Third, Reynolds argued that the counsel appointed by the Amantonka Nation was insufficiently qualified to represent him. R. at 3. Reynolds alleged that Title 2 Section 503 of the Amantonka Nation Code, which establishes different minimum qualifications for attorneys appointed to non-Indian and Indian defendants, constituted a violation of the Equal Protection requirements as set out in the 2013 revision of the Violence Against Women Act ("VAWA"). R. at 4.

The District Court denied all three of Reynolds' pretrial motions. The district court determined that, as a naturalized member of the Amantonka Nation, Reynolds was Indian. R. at

3. Accordingly, the court determined that it had inherent criminal jurisdiction over Reynolds and that VAWA 2013's Special Domestic Violence Criminal Jurisdiction ("SDVCJ") provision was unnecessary for the court to obtain jurisdiction. R. at 3. The District Court further determined that even if the standards under VAWA's SDVCJ provision applied, Reynolds' court appointed counsel was sufficiently qualified and, therefore, there was no equal protection violation. R. at 4.

Reynolds was subsequently found guilty by a jury in the Amantonka District Court. R. at 5. Reynolds made a motion to set aside the verdict on the same arguments that he made in his pretrial motion which the District Court denied. R. at 5. Reynolds subsequently appealed the verdict to the Supreme Court of the Amantonka Nation on the same grounds as advanced in his pretrial motions. R. at 6.

The Supreme Court of the Amantonka Nation rejected Reynolds' argument that under the federal definition of "Indian", which requires a person both possess some degree of Indian blood and be recognized as a member of a tribal community, he is a non-Indian for purposes of criminal jurisdiction. R. at 7. Instead, the court found that the U.S. Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978), which recognized a tribe's right to define and control its own membership, justified the Amantonka Nation's exercise of criminal jurisdiction over a naturalized citizen of the tribe. R. at 7. The court further rejected Reynolds' argument that that the different necessary minimum qualifications for Indians and non-Indians constituted a violation of VAWA's equal protection requirements and noted that the differences in the minimum qualifications were neither material nor relevant. R. at 7.

After exhausting all of his remedies within the tribal court system, Reynolds filed a petition to the U.S. District Court for the District of Rogers for a writ of habeas corpus under 25 USC §1303. R. at 8. Reynolds alleged in his petition to the court that, since he has no Indian

blood and the federal definition of Indian requires some degree of Indian blood, he cannot be considered Indian for purposes of criminal jurisdiction. R. at 8. He also reiterated his prior claim that the Amantonka Nation's failed to provide him with the indigent defense counsel required under VAWA 2013. R. at 8. The U.S. District Court for the District of Rogers found for Reynolds on both claims, and accordingly granted his petition for a writ of habeas corpus. R. at 8.

Respondents from the Amantonka Nation appealed the District Court's grant of habeas corpus to the U.S. Court of Appeals for the Thirteenth Circuit which issued a per curiam opinion reversing the U.S. District Court for the District of Rogers and remanding the case with instructions to deny the petition for a writ of habeas corpus. R. at 9. The Thirteen Circuit did not elaborate on the reasons for their decision to reverse the Rogers District Court beyond the reasons articulated by the Amantonka Nation Supreme Court. R. at 9.

SUMMARY OF ARGUMENT

Robert Reynolds is a non-Indian for purposes of criminal jurisdiction. This court's long standing precedent recognizes that a criminal defendant must have some Indian heritage to be considered Indian. *See United States v. Rogers,* 45 U.S. (4 How.) 567, 573 (1846); See also . *United States v. Bruce,* 394 F.3d 1215 (9th Cir. 2005)(interpreting the test from United States v. Rogers to additionally require a defendant to be recognized as Indian by a tribe or the government).

Federal courts and state courts have repeatedly recognized the test articulated in *United States v. Rogers* as the standard to determine whether a defendant is Indian for purposes of criminal jurisdiction in the context of the Major Crimes Act and the General Crimes Act -- neither of which, like the Violence Against Women Act, define who is Indian. *See, e.g. State v.*

Bonaparte, 114 Idaho 577 (Ct. App. 1988); *United States v. Lawrence*, 51 F.3d 150 (8th Cir.); *United States v. Nowlin,* 555 F. App'x 820 (10th Cir. 2014). This test is especially well suited to determine who is Indian for purposes of VAWA's Special Domestic Violence Criminal Jurisdiction, as VAWA ensures that non-Indian defendants would enjoy constitutional protections that Indian defendants would otherwise be deprived of. *See Santa Clara Pueblo v. Martinez,* 436 U. S. 49 (noting that Indian tribes are not bound by the Bill of Rights). It is clear both from the fact that VAWA specifically requires non-Indians receive the full constitutional protections that they would normally otherwise enjoy and that this Court previously noted this in restricting Indian criminal jurisdiction over non-Indians that Congress and the Judiciary are gravely concerned about U.S. persons being deprived of their constitutional rights.

While some observers have questioned whether the Rogers test inquiry into a defendant's Indian heritage constitutes a violation of the Constitution's equal protection requirements, this is not the case. The first prong of the Rogers test, whether a defendant has some quantum of Indian blood, along with the second prong of the Rogers test, whether a tribe or the government has recognized the defendant as an Indian, seeks to determine whether a defendant has a special relationship with the government flowing from the status of Indian tribes as separate sovereigns. This court and the political branches have repeatedly recognized the validity of blood quantum requirements in prior cases, rules, and regulations. *See e.g.* 25 U.S.C. §5129; *Morton v. Mancari*, 417 U.S. at 553 n. 24; 25 C.F.R. §83.7.

Any court applying the Rogers test would determine that Reynolds is not Indian for purposes of criminal jurisdiction. The Rogers test requires that a defendant both have some degree of Indian blood and be recognized by a tribe or the government as an Indian. Reynolds would likely satisfy the second prong of the Rogers test, political recognition as Indian, as he

was naturalized as a citizen of the Amantonka Nation and lived on the tribe's reservation. However, as Reynolds has no Indian blood, he would fail the first prong of the Rogers test. Since the Rogers test requires that a defendant satisfy both prongs to be considered Indian, the court should find that Reynolds is non-Indian for purposes of criminal jurisdiction.

Reynolds' court-appointed attorney did not satisfy the requirements necessary for a Tribal Court to criminally prosecute a non-Indian under VAWA's Special Domestic Violence Criminal Jurisdiction. Tribal courts, in order to prosecute a non-Indian under SDVCJ, must ensure defendants enjoy the full protection of the constitution. *See* 25 U.S.C. §1304(4). In Reynolds case, the Amantonka Tribe's failed to guarantee that Reynolds was appointed counsel equal to that which he would have received in state or federal court. The Amantonka Tribe provided Reynolds with a public defender that met the qualifications for an Indian defendant accused of a crime pursuant to the Amantonka Nation's criminal jurisdiction. However, the Tribe requires the lawyer to pass a tribal bar exam or another bar exam. Here the attorney only took the tribal bar and not the state bar. As a result, the attorney does not satisfy the requirements to criminally prosecute a non-Indian under VAWA's Special Domestic Violence Criminal Jurisdiction.

Additionally, the lower minimum qualifications for Reynolds court-appointed attorney as an Indian than he would have been entitled to as a non-Indian under the Amantonka Nation Code constitute a violation of the Constitution's equal protection requirements.

ARGUMENT

I. Reynolds, as A Non-Indian Later Naturalized as a Citizen of an Indian Tribe, Should Be Considered Non-Indian for Purposes of Criminal Jurisdiction

A person naturalized as a citizen of an Indian tribe with no Indian ancestry should be considered a non-Indian for purposes of criminal jurisdiction. It is established precedent that an

individual must both have (1) some degree of Indian blood and (2) tribal or government recognition as an Indian for purposes of criminal jurisdiction. *See United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (holding that a person with no Indian blood who is adopted into a tribe as an adult is not Indian for purposes of criminal jurisdiction); *See also United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) (elaborating on United States v. Rogers to lay out the two-pronged test).

Indian tribes have a well-established right to define their membership for tribal purposes. *See Montana v. United States*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership"); *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence"). However, as domestic dependent nations, tribes' sovereign power is necessarily constrained when in conflict with that of the United States. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

The United States has a strong sovereign interest in ensuring that all U.S. citizens enjoy the full breadth of protections enshrined in the Constitution. As the Indian Civil Rights Act ("ICRA") does not provide certain constitutional protections and ICRA does not give rise to a federal cause of action against the tribe for violating its provisions, the tribe's interest in criminally prosecuting persons adopted into the tribe is in direct conflict with the United States' interest in ensuring residents enjoy the full spectrum of constitutional protections. *See Santa Clara Pueblo*, 436 U.S. at 57, 61 (holding that ICRA the creation of a federal cause of action for violating ICRA would not be consistent with congressional intent and noting that the protections in ICRA are not identical to those in the Bill of Rights).

A. The Rogers test is the Proper Framework for Determining Whether Reynolds is an Indian for Purposes of Criminal Jurisdiction

The test first articulated in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) is the standard way in which courts determine whether a person is Indian for purposes of criminal jurisdiction. The Rogers test requires that a person both have some degree of Indian blood and have a sufficient link to an Indian tribe in order to be considered Indian for purposes of criminal jurisdiction. *United States v. Rogers*, 45 U.S. 567, 573. While there are a multitude of definitions for who is or is not considered an Indian for purposes of a specific statute or civil jurisdiction[1], the Rogers test has been widely adopted by courts to determine who is an Indian for purposes of criminal jurisdiction. S*ee, e.g., United States v. Zepeda*, 792 F.3d 1103, 1113 *(9th Cir. 2015)* cert. denied, 136 S.Ct. 1712 (the Ninth Circuit applying the Rogers test); *United States v. Dodge*, 538 F.2d 770, 786 (8th Cir.1976), cert. denied, 429 U.S. 1099 (the Eight Circuit); *United States v. Torres*, 733 F.2d 449, 456 (7th Cir.1984), cert. denied, 469 U.S. 864 (the Seventh Circuit); *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001) (the Tenth Circuit).

1. **The Court Should Follow Its Precedent in United States v. Rogers, 45 U.S. (4 How.) 567 (1846) and Determine that Reynolds' is Non-Indian**

The Court should follow its precedent in *Rogers*. There, the court considered a similar fact pattern to that of Reynolds. In that case, Rogers was a citizen of the United States naturalized as a citizen of the Cherokee Tribe as an adult who was charged with committing murder in Indian Country. *Rogers*, 45 U.S. at 571. The Court, interpreting a provision of the Indian Intercourse Act of 1834 stating that U.S. laws are not applicable to crimes committed by one Indian against another Indian, found Rogers to not be an Indian. *Id.* at 572. The Court noted that despite becoming a citizen of a tribe, thereby gaining certain privileges in the tribe and subjecting oneself to the tribe's laws, a person who becomes a citizen of an Indian tribe and has no Indian heritage is not considered Indian for purposes of criminal jurisdiction. *Id.* at 573-573.

[1] Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J.L. Reform 275, 278 (2001) (noting that according to one congressional survey federal legislation contains over thirty-three definitions of "Indian").

2. The Rogers test is Equally Applicable to VAWA 2013's SDVCJ As in the Context of the Major Crimes Act and the General Crimes Act

Courts have primarily considered whether a person is Indian for purposes of criminal jurisdiction in the context of the Major Crimes Act, 18 U.S.C. §1153, and the General Crimes Act, 18 U.S.C. §1152. Neither of these statutes contain a definition for who is an Indian for purposes of the statute, and therefore courts have had to intervene to interpret who is Indian for the purposes of these statutes. *United States v. Maggi*, 598 F.3d 1073, 1077 (9th Cir. 2010) *overruled on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015). In interpreting who is an Indian for purposes of these statutes, courts have looked to the twin prongs of the Rogers test: whether the person in question has some measure of Indian descent and that person's connection to an Indian tribe. *See* 1-3 Cohen's Handbook of Federal Indian Law § 3.03 (2017) (contrasting the definition of who is considered Indian for purposes of criminal jurisdiction with who is considered Indian for other purposes).

While the Major Crimes Act and General Crimes Act govern federal criminal jurisdiction, as opposed to tribal criminal jurisdiction, the Rogers test is equally applicable to an interpretation of who is Indian for purposes of VAWA 2013's SDVCJ, 25 U.S.C. §1304(6). As in the Major Crimes Act and the General Crimes, whether or not a person is considered Indian is an essential threshold question for whether VAWA's SDVCJ is applicable.

Prior to the passage of the VAWA 2013, tribes retained criminal jurisdiction over members and non-member Indians but lacked criminal jurisdiction over non-Indians. *United States v. Lara*, 541 U.S. 193, 199, 215, 221 (2004). In the 2013 revision of VAWA, Congress relaxed the restrictions on tribal criminal jurisdiction over non-Indians for domestic violence and related offenses in response to the alarming rate of domestic and sexual violence experienced by Native American women and lack of federal prosecutions for domestic violence perpetrated by

non-Indian men.[2] 25 U.S.C. 1304(6). However, the question of whether a defendant is Indian is still an essential question in interpreting VAWA 2013, as non-Indians subject to VAWA's SDVCJ enjoy certain procedural protections that Indian defendants would not. *Compare* 25 U.S.C. §1304 (incorporating the rights codified in the Indian Civil Rights Act of 1968, as well as supplementing those rights with the right to a trial by an impartial jury and "all other rights whose protection is necessary under the Constitution") *with* 25 U.S.C. §1302 (requiring a number of constitutional protections for proceedings in tribal courts, but not extending indigent defense for civil trials or the right to a jury trial).

Defendants facing criminal prosecution, and potential incarceration, risk one of the most severe government encroachments upon their liberty -- the deprivation of their freedom. *See Oliphant*, 435 U.S. at 210 ("The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty"). Congress deliberately provided additional procedural safeguards, including the right to an impartial jury, for non-Indians facing criminal prosecution under VAWA's SDVCJ. One reason for these additional procedural safeguards is the specter of bias against defendants without Indian heritage -- especially those accused of domestic violence against a member of the tribe. *Cf. Duro v. Reina*, 495 U.S. 676, 693 (addressing the possibility that non-member Indians may face bias in the court systems of other tribes).

Were the court today to rule that Reynolds is Indian for purposes of criminal jurisdiction, it would signal a significant expansion of Indian tribes' criminal jurisdiction over persons not generally considered "Indian." *United States v. Prentiss*, 273 F.3d 1277, 1282 (10th Cir. 2001).

[2] *See generally* Margaret H. Zhang, Special *Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. PA. L. REV. 243, 245-246 (2015) (noting that the majority of domestic violence crimes in Indian country are perpetrated by non-Indians on Indian victims and describing the jurisdictional gap in federal enforcement)

Some may argue that determining whether a person is Indian solely on the basis of tribal enrollment would serve as a recognition of tribal sovereignty. However, such a determination may motivate Congress to further infringe on tribal autonomy and self-government by seeking a legislative remedy. The Indian Civil Rights Act's incorporation of the Bill of Rights is tailored to "fit the unique political, cultural and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). A finding that Reynolds is Indian for purposes of VAWA's SDVCJ provision, and criminal jurisdiction in general, may motivate Congress to revise ICRA to fully apply the Bill of Rights to apply to Indian tribes.

3. The Rogers test is Consistent with the Constitution's Equal Protections Clause

The federal government's regulation of Indians as the subject of special federal attention is not rooted in a racial classification, but rather their status as a formerly sovereign people. *United States v. Antelope*, 430 U.S. 641, 646 (1977) (holding that the Major Crimes Act, subjecting persons to federal prosecution as Indians, does not violate the Fifth Amendment's Due Process Clause). The first prong in the Rogers test is intended to establish that a defendant has Indian heritage, while the second prong of the Rogers test looks to whether a defendant is sufficiently affiliated with a tribe to be considered Indian. *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015). Collectively, the two prongs of the Rogers test are intended to "identify individuals who share a special relationship with the federal government." *United States v. Maggi*, 598 F.3d 1073, 1078–79 (9th Cir. 2010).

Some scholars and judges have suggested that the first prong of the Rogers test, which examines a defendant's Indian heritage, constitutes racial discrimination in violation of equal protection law. *See. Zepeda*, 792 F.3d 1103, 1116 (9th Cir. 2015) (Kozinski, dissenting). *See also,* John Rockwell Snowden et. al., *American Indian Sovereignty and Naturalization: It's A*

Race Thing, 80 Neb. L. Rev. 171, 232 (2001); Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 Am. Indian L. J. 323, 333. Judge Kozinski argued in his *Zepeda* dissent that the majority's interpretation of the Rogers test in *Zepeda*, which overruled the court's prior holding in *United States v. Maggi*, 598 F.3d 1073 that a defendant must have blood traceable to a member of a federally recognized tribe to satisfy the first prong of the Rogers test, constituted "disturbing anomaly in the application of our equal protection law." *United States v. Zepeda*, 792 F.3d 1103, 1119 (9th Cir. 2015). Kozinski further argued that this interpretation of the first prong of the Rogers test constituted a racial classification that should be subject to strict scrutiny. *Id* at 1116. Judge Ikuda wrote separately in *Zepeda* to criticize the "blood quantum" requirement as inconsistent with tribal sovereignty and to emphasize the dark legacy of blood quantum tests to discriminate against persons of color. *Id* at 1119-1120.

Judges Kozinski and Ikuta are wrong that the blood quantum prong of the Rogers test is inconsistent with the Constitution's equal protections requirements. As this court previously held in *United States v. Antelope*, "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications," but rather Indians status as a seperate people. 430 U.S. 641, 645. In this respect, the blood quantum requirement in the first prong of the Rogers test is entirely separate from those raised by Judge Ikuta that constituted race based distinctions. *E.g.*, *Gentry v. McMinnis*, 33 Ky. (3 Dana) 382, 385 (1835) (regulating whether a person was a slave or free); *People v. Dean*, 14 Mich. 406, 413–15, 425 (1866) (regulating whether a person had the right to vote). Instead, the purposes of the blood quantum requirement, paired with the second prong of the Rogers test requiring a political relationship with a federally recognized tribe, serves to determine whether a person enjoys a

special relationship with the government stemming from their heritage as a member of a "once-sovereign political communit[y]" *United States v. Antelope*, 430 U.S. 641, 646.

Even if the Court were to determine that the variation of the Rogers test as applied in *Zepeda* constituted a violation of the Constitution's Equal Protections requirements, it is not bound by the Ninth Circuit's case law on this test. Judge Kozinski takes particular issue with the *Zepeda* court's determination that a defendant can satisfy the blood quantum requirement by demonstrating descent from any Indian person, whether or not they were a member of a federally recognized tribe. *United States v. Zepeda*, 792 F.3d 1103, 1116–17 (Kozinski dissenting). Were this Court similarly troubled by the decoupling of the blood quantum requirement from that of heritage to a member of a federally recognized tribe, it could simply require that a defendant prove their descent from a member of a federally recognized tribe. As the majority in Zepeda recognized, a general requirement that a person or persons demonstrate Indian descent is a standard feature of a number of foundational legislation surrounding Native Americans. *See* 25 U.S.C. §5129 (including in the definition of who is Indian "all other persons of one-half or more Indian blood); *see also* 25 C.F.R. §83.7(e) (requiring proof of descent from a a historic Indian tribe for federal acknowledgement of the tribe). Were the Court to find any variation on the blood quantum requirement in the Rogers test unconstitutional, it would be a departure from its own recent precedent and would invalidate a broad swath of regulations benefiting persons of Native American heritage. *See, Morton v. Mancari,* 417 U.S. at 553 n. 24, (1974) (upholding an Indian employment preference that required a person to have at least one quarter Indian blood and to be a member of a federally recognized tribe for eligibility). *See also* Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law,* 34 U. Mich. J.L. Reform 275 (2001) (noting that regulations requiring some quantum of Indian

blood include programs providing employment assistance, educational loans and grants, and hiring preferences for Indians).

B. A Court Applying the Rogers Test Would Find Reynolds to Be a Non-Indian

Any court applying the Rogers test would determine that Reynolds' is Indian for purposes of criminal jurisdiction. The generally accepted test, as derived from Rogers, requires a court to find both that (1) a person has some degree of Indian blood and (2) tribal or government recognition as Indian in order to be considered Indian. *United States v. Stymiest,* 581 F.3d 759, 762 (8th Cir. 2009). Since Reynolds has no quantum of Indian blood, he would not qualify as Indian under the first prong of the Rogers test. R. at 6. On the other hand, Reynolds would likely satisfy the second prong of the Rogers test, as his enrollment in the tribe and residence on the Amantonka Nation reservation suggest tribal recognition of Reynolds as an Indian. R. at 6, 12. However, no court applying the Rogers test would find Reynolds to be Indian, as the test requires that a criminal defendant satisfy both prongs to be considered Indian for purposes of criminal jurisdiction. *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) ("a jury may not find Indian heritage even if a person is a member of a particular tribe or pueblo; a showing of some "Indian blood" must also be shown").

1. Reynold Fails the First Prong of the Rogers Test as he has No Indian Blood, and is Therefore Non-Indian under VAWA's Special Domestic Violence Criminal Jurisdiction

In order to satisfy the first prong of the Rogers test, a defendant must have some Indian blood. Although it is clear that a defendant will fail the first prong of the Rogers test if they have no Indian blood at all, there is no uniform determination of what percentage of Indian blood is necessary to satisfy the first prong of the test. *Compare State v. Bonaparte,* 114 Idaho 577, 579 (Ct. App. 1988) (holding that a defendant must have a significant percentage of Indian blood to satisfy the first prong of the Rogers test) with *State v. Nobles*, 818 S.E.2d 129, 136 (N.C. Ct.

App.) (finding that 4.29% Indian blood satisfied the first prong of the Rogers test). A defendant must satisfy both prongs of the Rogers test to be considered Indian. *Bruce,* 394 F.3d at 1223.

No court would find that Reynolds has satisfied the first prong of the Rogers test. Reynolds has no Indian blood, and therefore cannot be considered Indian by any court administering the Rogers test to determine Indian status. R. at 6. As argued above, the Rogers test is the appropriate means of determining whether a defendant is Indian for purposes of criminal jurisdiction, and should accordingly be used in determining Reynolds Indian status in deciding whether a court must exercise VAWA's Special Domestic Violence Criminal Jurisdiction to try Reynolds. The court should therefore determine that Reynolds is not Indian for the purposes of this case.

2. Reynolds Would Likely Be Considered Indian under the Second Prong of the Rogers Test, but Would Still Be Considered Non-Indian under VAWA's Special Domestic Violence Criminal Jurisdiction Since He has No Indian Blood

Reynolds would most likely satisfy the second prong of the Rogers test -- recognition by a tribe or the government as Indian.

The second prong of the Rogers test evaluates whether a tribe or the U.S. government recognizes a person as Indian. This prong of the test seeks to evaluate whether the person in question has the sufficient political affiliation with an Indian tribe to be considered Indian for purposes of criminal jurisdiction. *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015). Courts have generally looked at four factors to determine whether an individual satisfies the second prong of the test:

> "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life."

See e.g., *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995); *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005); *United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014).

Courts are divided as to whether these factors should be considered in declining order of importance, whether a court may consider additional factors in evaluating this prong, and whether tribal enrollment is dispositive in determining tribal or government recognition as Indian. *Compare United States v. Stymiest*, 581 F.3d 759, 763-766 (8th Cir. 2009)(determining that these factors do not need to be considered in declining order of importance, but that tribal enrollment is dispositive of Indian status) *with United States v. Bruce*, 394 F.3d 1215, 1224-1225 (9th Cir. 2005)(balancing these factors in declining order of importance, and determining enrollment not to be dispositive of Indian status).

A court would more likely than not determine that Reynolds satisfies the second prong of the Rogers test. Were a court to apply the criteria articulated by the Eighth Circuit, Reynolds would be considered Indian under this prong since he is an enrolled member of the Amantonka Nation and the Eighth Circuit considers tribal enrollment as dispositive of Indian status. R. at 3. *Stymiest*, 581 F.3d at 764. However, even a court that does not consider tribal enrollment to be dispositive of Indian status would likely deem Reynolds Indian under *Rogers'* second prong.

Reynolds has satisfied every factor considered by courts for whether a person is recognized as Indian except for the second factor, government recognition though receipt of assistance. First, Reynolds is naturalized citizen of the Amantonka Nation, and as such has been added to the Tribe's membership roll. R. at 3, 12. Next, as an enrolled member of the tribe, Reynolds is entitled to all of the benefits afforded to Amantonka citizens. R. at 12. Finally, Reynolds resided in the Amantonka Nation's tribal housing complex on the Tribe's reservation

and worked on the reservation. R. at 3. It is unclear from the record whether Reynolds has received any government assistance only available to members of federally recognized tribes. While under the Ninth Circuit's approach to the second prong of the Rogers test tribal enrollment is not dispositive of Indian status, courts applying this approach do consider the four factors in declining order of importance. *Bruce*, 394 F.3d at 1224. As Reynolds satisfied the first, and most important factor, as an enrolled member of the Amantonka nation, as well as factors three and four, enjoyment of the benefits of tribal affiliation and social recognition as Indian, a court applying the Ninth Circuit's approach would more likely than not determine Reynolds satisfies the second prong of the Rogers test.

While a court would more likely than not determine Reynolds satisfies the second prong of the Rogers test, it would still consider him non-Indian for purposes of criminal jurisdiction since he has no Indian blood. A person who is adopted into the tribe as an adult without Indian blood is not considered Indian for purposes of criminal jurisdiction even if such a person may "become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages." *Rogers*, 45 U.S. at 572-573 (1846). As courts have interpreted the test articulated in *Rogers*, demonstrating solely that a person has a sufficient quantity of Indian blood or political recognition as an Indian is not sufficient. Rather, a court must determine that a person both has a sufficient quantity of Indian blood and political recognition as an Indian in order to treat that person as Indian for purposes of criminal jurisdiction. *United States v. Maggi*, 598 F.3d 1073, 1075 (9th Cir. 2010). Reynolds has no Indian blood. R. at 3. Therefore, Reynolds is not Indian for purposes of criminal jurisdiction, and is not Indian under VAWA's Special Domestic Violence Criminal Jurisdiction.

II. Reynolds' Court-Appointed Attorney Did Not Satisfy The Relevant Legal Requirements Under the Special Domestic Violence Criminal Jurisdiction Provision

of the Violence Against Women Act, the Indian Civil Rights Act, and the Fifth Amendment's Equal Protection Requirements

The attorney appointed to represent Reynolds was inadequate under the requirements of VAWA's Special Domestic Violence Criminal Jurisdiction and, alternatively, constituted a violation of the Constitution's Equal Protections requirements. The Amantonka Nation provided Reynolds' with an attorney that was a member of the Amantonka Nation bar, but Reynolds, as a non-Indian for purposes of criminal prosecution, was entitled to an attorney that had passed a state bar examination. However, even if this court were to find Reynolds to be Indian for purposes of criminal jurisdiction, Reynolds' appointed-counsel would still be legally insufficient under the Constitution's Equal Protection requirements. The Tribe, by requiring lower qualifications for attorneys appointed to Indian indigent defendants than those appointed to non-Indian indigent defendants, has established a two-tiered system of justice. The Amantonka Nation court system, having determined Reynolds to be non-Indian and appointed him an attorney according to this determination, deprived Reynolds of the rights he would have been entitled to as a non-Indian.

A. Reynolds' Court-Appointed Attorney Did Not Satisfy the Requirements Necessary for a Tribal Court to Criminally Prosecute a Non-Indian Under VAWA's Special Domestic Violence Criminal Jurisdiction

Congress, in its passage of the 2013 revision to the Violence Against Women Act and providing for special jurisdiction for Indian tribes to prosecute non-Indian perpetrators of domestic violence, relaxed the restrictions prohibiting Indian tribes from exercising criminal jurisdiction over non-Indians. *See Oliphant,* 435 U.S. at 192. ("Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress"). Congress relaxed the restrictions on tribal authority to prosecute non-Indians for domestic violence in response to the alarming levels of domestic violence experienced by Native American women and the large

percentage of violent crime in Indian country that the federal government failed to prosecute.[3] However, Congress also established certain minimum requirements that a tribe must satisfy in order to exercise criminal jurisdiction over non-Indians under VAWA's SDVCJ provision.

Indian tribes, as separate sovereigns, are not bound by the Constitution or Bill of Rights in tribal court proceedings. *Duro v. Reina*, 495 U.S. 676, 694; *Tom v. Sutton*, 533 F.2d 1101, 1102 (9th Cir. 1976); *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896). While Congress's passage of the Indian Civil Rights Act of 1968 required tribal courts to guarantee defendants certain additional rights similar to those enumerated in the Bill of Rights, ICRA is not coextensive with the Constitution. *See United States v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997) ("ICRA provides for a right to counsel, but does not extend that right to the limits of the Sixth Amendment"). *See Oliphant*, 435 U.S. at 194 n.4. (noting that ICRA does not require the same impartial jury requirements as the Sixth Amendment). In mandating that any tribe which seeks to prosecute a non-Indian for domestic violence provide certain additional procedural safeguards, Congress sought to ensure that non-Indian defendants who were to be criminally prosecuted in tribal courts would enjoy the same constitutional protections that such defendants would otherwise be entitled to under state jurisdiction. S. REP. No. 112-153, at 32 (2012) (noting that the provision of VAWA recognizing tribal jurisdiction over domestic violence "effectively guarantees that defendants will have the same rights in tribal court as in state court").

Tribal courts, in order to prosecute a non-Indian under SDVCJ, must ensure defendants enjoy the full protection of the constitution. *See* 25 U.S.C. §1304(4). In particular, the 2013 Violence Against Women Act requires that an Indian tribe prosecuting an indigent non-Indian

[3] ***See generally***, Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women through the Special Domestic Violence Criminal Jurisdiction Provision of VAWA*, 28 Colum. J. Gender & L. 197, 213 (2014) (discussing the high rate of domestic abuse perpetrated by non-Indians against Indian women, issues with federal prosecution of such offenses, and the motivations of Congress in establishing the Special Domestic Violence Criminal Jurisdiction provision of VAWA).

must provide such a defendant with a licensed attorney if "a term of imprisonment of any length may be imposed." *See* 25 U.S.C. §1304(2) (incorporating 25 U.S.C. §1302(c), which requires an Indian tribe to provide indigent counsel for persons to be sentenced to a term of imprisonment of more than a year). Pursuant to ICRA, as incorporated under VAWA to apply to all persons tried under SDVCJ, such an attorney must be "at least equal to that guaranteed by the United States Constitution." 25 U.S.C. §1304(2); 25 U.S.C. §1302(c)(1), (2). These additional protections demonstrate that while Congress has declined to apply the entirety of the Bill of Rights and Constitution to tribal justice systems out of respect for tribes' right to self-governance, this deference to tribal sovereignty does not supersede the constitutional protections afforded to defendants tried in state and federal courts.

In Reynolds case, the Amantonka Tribe's failed to guarantee that Reynolds was appointed counsel equal to that which he would have been entitled to in state or federal court. The Amantonka Tribe provided Reynolds with a public defender that met the necessary qualifications for an Indian defendant accused of a crime pursuant to the Amantonka Nation's criminal jurisdiction. R. 4. As previously noted, the Court should not consider Reynolds Indian for purposes of criminal jurisdiction since he lacks Indian heritage. R. at 6. However, even if the Amantonka Nation had provided Reynolds with the appropriate counsel due to a non-Indian criminal defendant charged with domestic violence, pursuant to Section 607(b) of the Amantonka Nation's code, Reynolds would still have had no guarantee that his counsel would have been equally qualified as the counsel to which he would have been entitled as an indigent defendant in state or federal court.

Neither the appointed-counsel that Reynolds received as an Indian criminal defendant, under Section 607(a) of the Amantonka Nation code, nor the appointed-counsel that Reynolds

should have received as a non-Indian criminal defendant, under Section 607(b) of the Amantonka Nation code, are required to have passed any state bar examinations. Tribal court systems and tribal law commonly differs dramatically from the structure and law of state and federal court systems. *Duro v. Reina*, 495 U.S. 676, 693 (1990); *Nevada v. Hicks*, 533 U.S. 353, 384 (2001). According to one survey, over 75% of tribes that had responded permitted advocates without a law degree or who are not members of a state bar to represent clients in tribal court.

Brief for The National Association of Criminal Defense Lawyers, et al. as Amicus Curiae n. 57, U.S. v. Bryant, 136 S.Ct. 1954 (2016).

The purpose of providing indigent defendants with an attorney is to ensure that they receive a fair trial. *Strickland v. Washington,* 466 U.S. 668, 689 (1984). In this circumstance, both the complexity of the federal government's Indian law jurisprudence and the lack of relevant case law necessitated that Reynolds be provided with a lawyer that had passed the state bar. A lawyer who had passed the state bar would have been better able to have represented Reynolds. Considering that both the Amantonka Nation District court and the Supreme Court of the Amantonka Nation both tried Reynolds under the novel theory, contrary to this Court's precedent in *United States v. Rogers*, that Reynolds was Indian for purposes of criminal jurisdiction, it was all but certain that Reynolds case would be appealed to federal court. An attorney that was required to have passed a state bar would have been better prepared to advocate on Reynolds behalf in federal court.

The Sixth Amendment does not extend indigent defendants the privilege of choosing what lawyer will be appointed to represent them. *Morris v. Slappy*, 461 U.S. 1 (1983). However, in the present case, the question before the court is not whether Reynolds should have been able to have chosen the lawyer to represent him but whether it would be fair to provide Reynolds with

a lawyer less qualified to represent him than he would otherwise been entitled to in state or federal court. Were this court to determine that Reynolds counsel in this case was adequate, it will set a precedent that detriments both tribes and non-Indian criminal defendants in the tribal justice system.

A finding that the counsel provided by the Amantonka Nation was adequate to comply with the requirements under VAWA and ICRA would likely spur a congressional "fix" to ensure that non-Indian defendants tried under Special Domestic Violence Criminal Jurisdiction receive counsel that has passed a state bar. Such congressional action would almost certainly seek to provide more stringent uniform standards to which tribal courts must adhere, thus eroding tribal sovereignty and infringing on the prerogatives of tribes to shape their own justice systems.

B. Were This Court to Determine that a Defendants Classification as Indian Constitutes a Racial Classification, the Differing Minimum Qualifications for Attorney's Appointed to Indigent Indian Defendants and to Indigent Non-Indian Defendants Would Constitute a Violation of the Constitution's Equal Protection Requirements.

The Due Process clause of the Fifth Amendment guarantees all persons' equal protection of the laws. *Harris v. McRae,* 448 U.S. 297, 321 (1980). The United States is accordingly prohibited from unfairly discriminating between individuals or groups. *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954). As previously noted, this Court should determine that Reynolds is non-Indian for purposes of criminal jurisdiction and thus should have been entitled to an appointed-counsel that met the qualifications for non-Indian defendants under VAWA. However, were the court to not use the Rogers test to determine whether Reynolds was Indian for purposes of criminal jurisdiction and were to conclude that Reynolds was Indian, the differing minimum qualifications for attorneys appointed to Indians and non-Indians would constitute a violation of the Constitution's equal protections requirements.

Generally, federal courts must respect the sovereignty of Indian tribes as separate sovereigns and therefore "avoid undue or intrusive interference in reviewing Tribal Court procedures." *Smith v. Confederated Tribes of the Warm Springs Reservation of Oregon*, 783 F.2d 1409 (9th Cir.), cert. denied, 479 U.S. 964 (1986). However, there are limitations to this principle and higher courts at times are forced to review Tribal Court decisions and procedures. *See Nevada v. Hicks*, 533 U.S. 353, 366, (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 439 (1997); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 (1978). In this case, such a review would be appropriate given the dramatic determination necessary to reach this point that Reynolds was Indian for purposes of criminal purposes despite lacking any Indian heritage.

This court has previously found that discrimination based on racial classification must be subject to strict scrutiny, as "contrary to our traditions and hence constitutionally suspect." *Walker v. Pointer*, 304 F. Supp. 56, 60 (N.D. Tex. 1969). In *Walker*, the court ruled that discriminatory classification by the government violates the Constitution. Similarly, in the case before the court today, Reynolds is being discriminated against solely based on a determination that he is Indian by having access to inferior counsel.

This court should subject the Amantonka Nation's failure to provide Reynolds with appointed-counsel of equal qualification to an attorney that would be appointed to a non-Indian to strict scrutiny. A practice reviewed under strict scrutiny will be upheld only if it can be demonstrated that the action in question has been precisely tailored to serve a compelling government interest. *Doe v. Department of Social Services*, 439 Mich. 650, 656 (Mich. 1992). Here, having a lawyer who did not pass the state bar represent a non-Indian does not serve a compelling government interest. In fact, it does the opposite by providing for inferior counsel solely on the basis of a defendant's classification as Indian.

Although courts have previously held that an indigent defendant does not have the right to a specific attorney, courts have also ruled that a substitution of counsel can be warranted if there is good cause. *Compare* ***United States. v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (holding that defendants do not have the right to a specific court appointed attorney) *with Martel v. Clair*, 565 U.S. 648, 658 (2012) (noting that a defendant can be eligible for the substitution of counsel when warranted by the "interests of justice"). This is just such a case where Reynolds should have been entitled to an attorney at least as qualified as that provided to a non-Indian defendant.

CONCLUSION

For all of the foregoing reasons, the judgment in Reynolds v. Smith et al. should be reversed and remanded with instructions to grant the petition for a writ of habeas corpus.