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 United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team No. 303

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Is Petitioner a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction?

2. Did Petitioner's court-appointed attorney satisfy the relevant legal requirements?

STATEMENT OF THE CASE

I. Statement of the Facts

Petitioner attended the University of Rogers, where he met his wife Lorinda. Record on Appeal ("ROA") at 6. At the time, Petitioner was a non-Indian. *Id.* Lorinda was, and continues to be, a citizen of the Amantonka Nation—a federally-recognized tribe located in the State of Rogers. *Id.* Upon graduation, Petitioner and Lorinda married and moved into a tribal housing complex. *Id.* After two years of living and working on the Amantonka Nation Reservation, Petitioner applied to become a naturalized citizen of the Amantonka Nation. *Id.* Petitioner's application process was successful, and he took the oath of citizenship and received an Amantonka Nation ID card. *Id.* Unfortunately, Petitioner lost his job a year later and his marriage became strained. *Id.*

On June 15, 2017, Amantonka police visited Petitioner's home. *Id.* Allegedly, Petitioner had struck his wife with an open palm, causing her to fall and hit a coffee table, injuring her in the process. *Id.* Petitioner was arrested and taken to the Amantonka Nation Jail. *Id.* The next day, Petitioner was charged with Partner or Family Assault under the Amantonka criminal code. *Id.* at 6–7. During arraignment, Petitioner requested and received indigent defense counsel. *Id.* at 4. Petitioner's appointed attorney was a licensed member of the Amantonka Nation Bar Association. *Id.* at 7. However, the appointed attorney was not a member of a state or federal bar. *Id.*

II. Statement of the Proceedings

Once criminal proceedings began, Petitioner filed three pretrial motions. ROA at 3. The first motion sought dismissal of the charges on the grounds that Petitioner is a non-Indian and not subject to Amantonka Nation criminal jurisdiction. *Id.* The second motion

sought the appointment of an attorney pursuant to the requirements of the Violence Against Women Reauthorization Act of 2013 ("VAWA") *Id.* Petitioner filed this motion on the grounds that as a non-Indian, the Amantonka Nation may only prosecute him pursuant to the tribe's exercise of VAWA Special Domestic Violence Criminal Jurisdiction. *Id.* The third motion alleged that Petitioner's appointed attorney was insufficiently qualified to serve as his counsel. *Id.* Petitioner argued that the appointment of his counsel was a violation of the equal protection provision of the Indian Civil Rights Act ("ICRA") because non-Indians are entitled by VAWA to receive state bar licensed attorneys. *Id.* at 3–4. Respondent Chief Judge Elizabeth Nelson determined that Petitioner was an Indian and had been appointed adequate counsel. *Id.* Petitioner's pretrial motions were therefore denied, and the case proceeded to trial—where Petitioner was found by a jury verdict. *Id.* at 4–5.

Petitioner appealed the verdict to the Amantonka Supreme Court. *Id.* at 6. On appeal, Petitioner argued that for purposes of criminal jurisdiction, the federal definition of "Indian" is controlling, and that definition requires a person to have some degree of Indian blood. *Id.* at 7. The Amantonka Supreme Court disagreed, citing to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), for the proposition that tribes may define and control their own membership. *Id.* Because Petitioner is a naturalized citizen of the Amantonka Nation, the Amantonka Supreme Court determined that Petitioner is an Indian for criminal jurisdiction purposes. *Id.* Petitioner then argued that he was entitled to an attorney meeting the standards established by VAWA. *Id.* The Amantonka Supreme Court also rejected this argument, declaring that Petitioner is an Indian and was not prosecuted under VAWA Special Domestic Violence Criminal Jurisdiction. *Id.* Petitioner argued in the alternative that Amantonka law violates equal protection because it entitles Indians to less qualified public

defenders than those appointed to non-Indians. *Id.* The Amantonka Supreme Court rejected this argument, finding no material or relevant difference in the qualifications. *Id.* The Amantonka Supreme Court also noted that Petitioner's appointed counsel had a JD from an ABA accredited school, but admitted this was not required by Amantonka law. *Id.* Accordingly, Petitioner's conviction was affirmed. *Id.*

Petitioner then filed a petition in U.S. District Court for a writ of habeas corpus, pursuant to 25 U.S.C. § 1303. *Id.* at 8. The court agreed that Petitioner cannot be an Indian for criminal jurisdiction purposes, and therefore found that Petitioner was only subject to prosecution under VAWA's requirements. *Id.* Because the court determined that the Amantonka Nation failed to provide adequate counsel, per VAWA standards, the court granted the writ of habeas corpus. *Id.* This decision was appealed by Respondents to the U.S. Court of Appeals for the Thirteenth Circuit. *Id.* at 9. There, the court reversed the district court's decision and remanded the matter with instructions to deny the writ. *Id.* at 9.

Petitioner sought a writ of certiorari to the Supreme Court of the United Court. *Id.* at 10. Certiorari was granted. *Id.*

SUMMARY OF ARGUMENT

This case simply requires the recognition of longstanding and well-established precedents. While a tribe may define and control its own membership, this Court has never recognized a tribe's authority to determine who is an Indian for purposes of criminal jurisdiction. An overwhelming amount of jurisprudence has established that there are two requirements for an individual to be an Indian for criminal purposes—some amount of Indian blood and recognition as an Indian by a federally recognized tribe. It is undisputed that Petitioner has no amount of Indian blood and can therefore not be an Indian. Moreover,

allowing tribes to determine an individual's status as an Indian for criminal purposes would set a dangerous precedent. If tribes may choose who qualifies as an Indian, there will be no limit to who tribes may prosecute— circumventing this Court's rulings and Congress's plenary power.

Additionally, because Petitioner is a non-Indian, he was entitled to an attorney that met VAWA standards. According to VAWA, non-Indians must be appointed attorneys that have been licensed by appropriate jurisdictions. Because the Amantonka Nation licenses attorneys without effectively ensuring the competence or professional responsibility of its attorneys, the Amantonka Nation is not an appropriate licensing jurisdiction. The tribe is therefore under a duty to ensure appointed attorneys are licensed by a separate jurisdiction—a jurisdiction that meets VAWA's requirements. Here, the tribe failed to appoint Petitioner an appropriately licensed attorney, and the tribe violated its VAWA obligations.

Alternatively, even if this Court determines that Petitioner is an Indian, Amantonka law treats similarly situated individuals differently. Because of ICRA's equal protection provision, a fundamental right has been afforded to Indian defendants through the tribe's decision to exercise VAWA jurisdiction. Amantonka law therefore violates the equal protection provision of ICRA when it legally entitles Indian defendants to less qualified counsel than non-Indian defendants. Because a fundamental right is infringed, the law is subject to the strict scrutiny test—which it fails to pass.

ARGUMENT

I. PETITIONER IS A NON-INDIAN FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION

Before European nations arrived in North America, Indian tribes were "self-governing sovereign political communities" possessing "the inherent power to prescribe laws

for their members and to punish infractions of those laws." *U.S. v. Wheeler*, 435 U.S. 313, 322–23 (1978). This historical sovereignty is reflected in the "traditional understanding" of each tribe as "a distinct political society, separated from others, capable of managing its own affairs and governing itself." *U.S. v. Lara*, 541 U.S. 193, 204–05 (2004) (quoting *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 17 (1831)). Therefore, tribes possess inherent authority "over both their members and their territory." *Lara*, 541 U.S. at 204 (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)).

A. Tribal sovereignty has been limited in criminal jurisdiction matters

Despite possessing inherent authority, tribes no longer retain "the full attributes of sovereignty." *Wheeler*, 435 U.S. at 323. Tribes were divested of some aspects of their sovereignty through their incorporation within the territory of the United States and their acceptance of its protection. *Id.; see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (stating "[u]pon incorporation . . . the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."). Tribes also yielded some sovereign powers through specific treaty provisions. *Wheeler*, 435 U.S. at 323. Further, because Congress possesses plenary and exclusive power to legislate in respect to Indian tribes, tribal sovereignty may be limited by statute. *See Lara*, 541 U.S. at 200. However, tribes retain all aspects of sovereignty that have not been withdrawn by these various means. *Wheeler*, 435 U.S. at 323. Further, any limitation of tribal sovereignty may be removed or relaxed through Congressional action. *See Lara*, 541 U.S. at 207. These principles have led to an understanding of tribes as "domestic dependent nations." *Michigan*

v. Bay Mills Indian Community, 572 U.S. 782, 788 (2014) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)).

In accordance with the dependent status of tribes, inherent tribal sovereignty has been limited in criminal matters. Unlimited tribal sovereignty would of course allow tribes to prosecute any individual within tribal territory. However, tribes no longer possess unlimited tribal sovereignty in criminal matters. When tribes submitted to the sovereignty of the United States, they lost the inherent authority to prosecute non-Indian criminals. *See Oliphant*, 435 U.S. at 211–12. Tribes, therefore, no longer possess the power to enforce laws against all those who come within their territory. *Duro v. Reina*, 495 U.S. 676, 685–86 (1990). Although tribes retain sovereignty necessary to control their own internal relations and preserve their own unique customs and social order, such sovereignty ends at their political boundaries. *Id.*

However, Congress's plenary power includes the constitutional power to relax restrictions upon a tribe's inherent authority. *Lara*, 541 U.S. at 196, 200–07. Congress may therefore restore inherent tribal authority by granting criminal jurisdiction over non-Indians. Congress did just this when it enacted VAWA. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, § 904, 127 Stat. 120 (2013) (codified at 25 U.S.C. § 1304). However, because non-Indians are entitled to specific benefits under VAWA, a determination must still be made as to whether an individual is an Indian or non-Indian. This determination rests on the outcome of a longstanding and widely accepted test.

B. Under the widely accepted *Rogers* test, Petitioner is not an Indian

The commonly used test for determining whether an individual is an Indian for criminal jurisdiction purposes comes from a case in which this Court sought to define

"Indian" under the Indian Country Crimes Act, 18 U.S.C. § 1152. In *United States v. Rogers*, 45 U.S. 567 (1846), this Court sought to determine whether a white man—who had been adopted by an Indian tribe—was an Indian. This Court reasoned that the man was not an Indian because he lacked any degree of Indian blood. Numerous state and federal courts have built upon this Court's reasoning in *Rogers* and developed a definition of "Indian" containing two fundamental prongs: (1) the person possesses a degree of Indian blood or ancestry; and (2) the person is recognized as an Indian by a tribe or Indian community. Cohen's Handbook of Federal Indian Law § 3.03 (2017). Under this test, because both prongs are essential requirements, any individual failing to meet the first prong cannot be an Indian for criminal jurisdiction purposes. This test is widely accepted and has long been the standard under which these matters are decided.

While courts have differed on the percentage of Indian ancestry that is required to satisfy the first prong, it is well-settled that *some* blood and genetic descent is required. This means an individual must prove descent from those living in the United States prior to the arrival of European settlers. Due to the difficulty of proving such a lineage, this requirement is met even if there is a trace amount of lineage. Evidence that a parent, grandparent, or great-grandparent was an Indian generally satisfies this prong. *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005). However, it is well established that an individual who completely lacks any Indian ancestry cannot satisfy this threshold requirement. Here, Petitioner is such an individual. Because Petitioner completely lacks any Indian ancestry, he cannot be an Indian for criminal jurisdiction matters. Therefore, Petitioner could only be charged by the Amantonka Nation's exercise of VAWA special domestic violence criminal jurisdiction.

C. Allowing tribes to determine who is an Indian for criminal jurisdiction matters would set a dangerous precedent

Tribes should absolutely be permitted to define and control their own membership. However, this Court cannot extend tribal sovereignty to the point that tribes are able to determine who is an Indian for criminal jurisdiction purposes. Otherwise, tribes would be permitted to override Congress and circumvent VAWA's requirements. Therefore, this Court should continue to utilize the *Rogers* test and find the lack of Indian blood to be dispositive.

Here, Congress has restored inherent tribal authority in a very specific way. Congress has determined that tribes may now exercise criminal jurisdiction over non-Indians, but only for certain crimes and with very specific requirements for a defendant's rights. If tribes could also make their own determination of an individual's status as an Indian, there would be no limitation on who a tribe could prosecute. By keeping intact most of the limitations on tribal criminal jurisdiction over non-Indians, Congress reaffirmed the longstanding understanding that tribes generally may not prosecute individuals who have never consented to be governed by tribal authorities.

Tribes cannot circumvent this restriction by determining for themselves who may or may not be prosecuted. To hold otherwise would be to potentially subject anyone entering tribal territory to tribal prosecution—without the constitutional protections that would be afforded in state or federal court. This Court should reaffirm the limitations placed upon tribal sovereignty and refuse to extend tribal authority to the point that tribes may determine an individual's status as an Indian. "[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."

Oliphant, 435 U.S. at 210. To subject a such a person to a sovereignty outside of the United States, is a "serious step." *Lara*, 541 U.S. at 212 (Kennedy, J., concurring).

Therefore, although Petitioner is a naturalized member of the Amantonka Nation, he should not be viewed as an Indian for criminal jurisdiction purposes. Petitioner does not possess any degree of genetic Indian ancestry, and he can only be prosecuted under VAWA's special domestic violence criminal jurisdiction.

II. PETITIONER'S COURT APPOINTED ATTORNEY DID NOT MEET THE RELEVANT LEGAL REQUIREMENTS

Because the Amantonka Nation is not a jurisdiction that meets VAWA's standards, it could not appoint an attorney that was solely licensed by the Amantonka bar. By doing just this, the tribe violated its VAWA obligations, and Petitioner was denied his rights.

A. Tribes are required by VAWA to afford non-Indians specific rights

The Indian Civil Rights Act ("ICRA") generally restricts tribes from imposing a sentence, for any one offense, of imprisonment exceeding one year. 25 U.S.C. § 1302(a)(7)(B). And as noted above, tribes are generally prohibited from prosecuting non-Indians. While these limitations on tribal sovereignty apply to all tribes, they are subject to potential relaxation. Congress has enacted two amendments to ICRA that somewhat relax these limitations and allow tribes to exercise partially restored inherent authority. First, through the Tribal Law and Order Act ("TLOA"), Congress gave tribes the option of sentencing criminals, for any one offense, to prison for up to three years. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2258 (codified at 25 U.S.C. § 2801 et seq.). Second, through VAWA, tribes have the option of prosecuting non-Indian defendants for domestic violence. However, these partial restorations of inherent tribal authority are not automatic. Tribes wishing to exercise restored inherent authority under

either statute must provide criminal defendants with additional rights, above and beyond those required by ICRA.

For instance, tribes wishing to sentence a defendant to more than one year in prison are required to ensure the defendant receives "effective assistance of counsel at least equal to that guaranteed by the United States Constitution." 25 U.S.C. § 1302(c)(1). Further, if the defendant is indigent, the tribe must provide the defendant—at the tribe's expense—an appropriately licensed attorney. *See id. at* 1302(c)(2). Moreover, tribes choosing to prosecute a non-Indian defendant must give the defendant these exact same rights if "a term of imprisonment of *any* length *may* be imposed." 25 U.S.C. § 1304(d)(2) (emphasis added). Of course, tribes may also exercise tribal sovereignty by choosing to *not* utilize TLOA extended sentencing or VAWA criminal jurisdiction. By choosing to not exercise these restorations of criminal jurisdiction, tribes avoid the obligation to appoint indigent defendants effective counsel. Here, however, the Amantonka Nation has chosen to exercise VAWA jurisdiction. The tribe is therefore obliged to appoint indigent defense attorneys that are appropriately licensed under section 1302(c).

1. VAWA specifies the type of jurisdiction that may license attorneys appointed to non-Indian defendants

When the plain language of a statute is unambiguous, this Court's inquiry into the statute's meaning "'begins with the statutory text, and ends there as well.'" *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S.Ct. 617, 631 (2018) (quoting *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion)). Section 1302(c)(2) states that indigent defendants are entitled to an "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." According to the

plain meaning of the statute, a satisfactory attorney is an attorney that is licensed by a specific type of jurisdiction. Under the plain meaning of the statute, the jurisdiction must meet three requirements. First, the jurisdiction must be in the United States. Second, the jurisdiction must apply appropriate professional licensing standards. Third, the jurisdiction must effectively ensure the competence and professional responsibility of its licensed attorneys. Because there is no limiting language in terms of *which* attorneys the jurisdiction must effectively ensure to be competent and professionally responsible, the plain language of the statute is that a jurisdiction must effectively ensure *all* licensed attorneys are competent and professionally responsible.

2. The Amantonka Nation is not an appropriate licensing jurisdiction

To effectively ensure all attorneys are competent and professionally responsible, a licensing jurisdiction must impose standards upon its attorneys. This reality is reflected in the bar requirements of every state and U.S. territory.[1] To ensure competency, every jurisdiction requires some level of legal education as a prerequisite to take the bar. This is because education and experience directly affect a person's competency in legal matters. A few states allow for law office study in lieu of formal schooling, but no state completely lacks an educational component. Further, almost all jurisdictions require continuing legal education as a requirement for continued licensure. Likewise, to ensure professional responsibility, every jurisdiction evaluates the character and fitness of applicants prior to admission. Here, the Amantonka tribe has no such requirements for admittance. The tribe has instead chosen to outsource its duty to ensure the competency and professional responsibility of its attorneys. It has done this by admitting attorneys who have been licensed

[1] *See* NATIONAL CONFERENCE OF BAR EXAMINERS, *Bar Admission Guide*, http://www.ncbex.org/publications/bar-admissions-guide/ (last visited Jan. 13, 2019).

by *other* jurisdictions. *See* Amantonka Nation Code Title 2, Chapter 5, Sec. 501(a) (stating "[a]ny 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"). This means the Amantonka tribe relies on exterior jurisdictions to screen attorneys for competence and professional responsibility.

However, if a tribe relies on exterior jurisdictions to fulfill VAWA's requirements, the tribe has an obligation to ensure the exterior jurisdiction *itself* meets the section's requirements. This means a tribe may only rely on a screening jurisdiction that properly ensures the competency and professional responsibility of its attorneys. Of course, the best and easiest way for tribes to meet this obligation is to rely on state and federal jurisdictions. As previously explained, all state jurisdictions require some form of legal education and character and fitness examination. These jurisdictions certainly meet VAWA standards and can therefore be relied upon by tribes seeking to outsource the screening process.

All tribes seeking to exercise early VAWA jurisdiction came to this conclusion. Every tribe that was accepted into the 2013 VAWA Pilot Project mandated a state-bar licensed attorney for non-Indian defendants.[2] Further, many tribes that have enacted a tribal bar require any admitted attorney to be a member in good standing of a state or federal bar. The reasoning behind this requirement is simple. It is expensive and difficult for tribes to enact an adequate attorney screening process. By requiring prior membership in a state or federal bar, tribes can adequately ensure that all practicing attorneys are competent and professionally responsible without having to self-fund a screening process.

Here, however, the Amantonka Nation allows for admittance based on membership in another tribal bar. This does not meet VAWA's requirements because there is no way of

[2] *See* DEPARTMENT OF JUSTICE, *VAWA 2013 Pilot Project*, https://www.justice.gov/tribal/vawa-2013-pilot-project (last visited Jan. 13, 2019) (containing each participating tribe's application questionnaire).

ensuring that every tribal bar adequately screens its attorneys. As noted, tribes often do not have their own screening process because of the difficulty and cost. This means the Amantonka tribe is potentially outsourcing its screening responsibility to exterior jurisdictions that have no screening process. Therefore, reliance on a previous tribal bar membership can only be justified in two circumstances. First, the relied upon tribal bar has created its own adequate attorney screening process. Second, the relied upon tribal bar in turns relies upon a state or federal jurisdiction for the screening process. If a tribal bar does neither, the Amantonka Nation may not rely upon it to screen attorneys. Unfortunately, the Amantonka Code does not recognize this necessity, and therefore the tribe has failed to meet its obligation of ensuring the competence and professional responsibility of its attorneys.

Practically speaking, the tribe may easily remedy this VAWA violation. The tribe may amend its code and only admit attorneys who are members in good standing of any state or federal bar. Alternatively, the tribe may amend its code to allow members in good standing of any tribal bar that utilizes either of the acceptable manners for ensuring the competency and professional responsibility of its attorneys. Yet another option would be for the tribe to enact its own attorney screening process. However, until the code is amended to fix this violation, the Amantonka Code is not in compliance with VAWA's requirements. Therefore, the Amantonka Nation is not a satisfactory licensing jurisdiction under VAWA.

3. The Amantonka Nation violated VAWA by appointing Petitioner an attorney that was only licensed by the Amantonka bar

Because the Amantonka bar does not meet VAWA's requirements, any attorney that is solely licensed by this bar may not be appointed to a VAWA defendant. As a non-Indian, Petitioner is only subject to the Amantonka Nation's criminal jurisdiction under VAWA. Therefore, Petitioner could not be appointed any attorney that is solely licensed by the

Amantonka bar. Here, it is undisputed that Petitioner's appointed attorney was a member of the Amantonka bar but was not a member of any state or federal bar. Therefore, his appointed attorney did not satisfy the relevant legal requirements. As a result, Petitioner was denied his rights as mandated by VAWA and his conviction should be overturned.

B. Even if Petitioner is determined to be an Indian, the Amantonka Code violates the equal protection provision of ICRA

As separate sovereigns pre-existing the Constitution, tribes need not protect constitutional rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). However, tribal sovereignty was limited upon Congress's enactment of ICRA. 25 U.S.C. § 1301 *et seq.* ICRA requires all tribes to afford equal protection under the law to all persons falling within tribal jurisdiction. *See* 25 U.S.C. § 1302(a)(8). Equal protection means "that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Because tribes must treat all similarly situated individuals alike, tribes choosing to prosecute non-Indian defendants are necessarily mandated to treat other similarly situated individuals in the same manner. Here, this means the Amantonka Nation is required to treat Indian defendants, who are being prosecuted in the same court and facing the same sentences, in the way that it treats non-Indians. The Amantonka Code does not reflect this obligation.

1. ICRA equal protection violations should be judged by this Court's existing equal protection framework

This Court recognizes that a main purpose of ICRA was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans, and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 61. Therefore, this Court should judge tribal laws by the existing

constitutional equal protection framework. ICRA contains no language indicating that tribal laws should be judged by any other standard.

2. This Court has a clear equal protection framework

Statutes allegedly violating equal protection are generally subject to a rational basis test. *See Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012). However, "[s]tatutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right. . . ." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983). This higher level of scrutiny is referred to as strict scrutiny. *See Johnson v. California*, 543 U.S. 499, 505 (2005). Therefore, any law that interferes with a fundamental right is subject to strict scrutiny.

This Court has recognized the right to counsel in criminal proceedings, including the right to appointed counsel for indigent defendants, as fundamental. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *see also Luis v. U.S.*, 136 S.Ct. 1083, 1087 (2016) (stating "this Court's opinions often refer to the right to counsel as 'fundamental'") (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)). The right to counsel necessarily means "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). A law that interferes with an individual's right to the effective assistance of counsel is therefore subject to strict scrutiny. Under the strict scrutiny test, a law cannot be upheld unless it is narrowly tailored to further "compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005); *see also Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). The governing body enacting the law bears the burden to prove

the law is narrowly tailored and furthers a compelling governmental interest. *See Johnson*, 543 U.S. at 505.

3. The Amantonka Code does not treat similarly situated individuals alike

Under Amantonka law, two types of individuals are permitted to practice before Amantonka courts—previously licensed attorneys and lay counselors. Amantonka Nation Code, Title 2, Chapter 5, Sec. 501. Any "attorney at law" is eligible, provided the attorney is already a licensed member of a bar. *Id.* at 501(a). However, this is not an absolute prerequisite for admittance. A person may also be admitted as a lay counselor by meeting five basic requirements. *Id.* at 501(b). Regardless, Amantonka law refers to both types of admitted individuals as "attorneys." *See* Amantonka Nation Code, Title 2, Chapter 7, Canon 1 (stating "[a]s employed in this Code, the term "attorney" includes lay counselors").

Noticeably absent from the lay counselor requirements is any type of education or professional experience standard. Lay advocates do not need any formal legal education, professional legal experience, or even a high school degree. *See* Amantonka Nation Code, Title 2, Chapter 5, Sec. 501(b). As explained above, some form of legal education is a requirement in every state bar. Legal education and experience are so important that lay advocates are widely recognized as per se "ineffective counsel." *See Wheat v. U.S.*, 486 U.S. 153, 159 (1988); *see also Pilla v. American Bar Ass'n*, 542 F.2d 56, 58–59 (8th Cir. 1976); *United States v. Scott*, 521 F.2d 1188, 1191–92 (9th Cir. 1975); *United States v. Grismore*, 546 F.2d 844, 847 (10th Cir. 1976); *United States v. Jordan*, 508 F.2d 750, 753 (7th Cir. 1975).

Despite the inherent inadequacy of lay advocates as counsel, the Amantonka Nation allows lay advocate "attorneys" to practice as public defenders. *See* Amantonka Nation

Code, Title 2, Chapter 6, Sec. 607. Any person meeting the basic qualifications to serve as a lay advocate is further permitted to serve as an Amantonka public defender if the advocate (1) can physically carry out the duties of the office, and (2) has "training in Amantonka law and culture." *Id.* However, training in Amantonka law and culture does not transform a lay advocate into a qualified attorney capable of meeting the constitutional test for "effective assistance." The Amantonka code itself recognizes this reality.

Because tribes must appoint "effective counsel" to indigent non-Indians, Amantonka requires stricter qualifications for public defenders appointed to non-Indians. *See* Amantonka Nation Code, Title 2, Chapter 5, Sec. 503. Non-Indians are entitled to an attorney that holds a JD from an ABA accredited law school. *See* Amantonka Nation Code, Title 2, Chapter 6, Sec. 607(b). However, the Amantonka Code entitles Indian defendants to the lesser-qualified lay advocate public defenders. This is disparate treatment.

4. The Amantonka tribe is under a self-imposed obligation to ensure the effective assistance of counsel for all defendants facing a sentence of imprisonment

Although tribes are not generally required to protect a criminal defendant's full constitutional right to counsel, tribes that choose to prosecute non-Indian defendants are required by VAWA to protect this right if the defendant faces a sentence of imprisonment of any length. *See* 25 U.S.C. § 1304(d)(2). Because of ICRA's equal protection provision, this obligation is extended to *all similarly situated individuals within a tribe's jurisdiction*. When the Amantonka tribe chose to exercise VAWA jurisdiction over non-Indians, the tribe took on a self-imposed obligation to provide the same full constitutional protection to Indian defendants facing a sentence of imprisonment of any length.

Despite the tribe's self-imposed obligation to ensure effective assistance of counsel for all defendants, the tribe treats Indians worse than non-Indians. Non-Indian defendants are

given the benefit of an attorney that graduated from an ABA accredited law school, while Indian defendants are potentially left with an attorney that never graduated from high school. Both types of defendants are facing jailtime, and both types of defendants are being prosecuted in the same court. The disparity here is made even more egregious by the fact that the Amantonka Code requires all prosecutors to hold "an Associate of Arts degree or Bachelor of Arts degree from an accredited college in law and justice or similar field of study." Amantonka Nation Code, Title 2, Chapter 6, Sec. 602(1). Indian defendants are therefore not even entitled to an advocate with the same level of education as the person who is responsible for sending them to jail. Because similarly situated individuals are being treated differently by Amantonka law, the law violates equal protection.

This does not mean tribes may not continue to utilize lay advocates in tribal court. As noted above, tribes may exercise their sovereignty by choosing to exercise extended sentencing under TLOA or to prosecute non-Indians under VAWA. This necessarily means tribes may exercise their sovereignty by choosing to *not* exercise these powers. If tribes choose to not exercise these powers, they will remain under the general ICRA requirements, and will not have to provide any indigent defendant with counsel. Tribes will also not be required to ensure the "effective assistance of counsel" equal to that provided by the Constitution. Further, even if tribes choose to exercise VAWA jurisdiction, they will only be under an obligation to afford these rights to individuals who are similarly situated to VAWA defendants. They will not have to appoint indigent defendants counsel, or ensure the effective assistance of counsel, in prosecutions where the defendant does not face a sentence of imprisonment.

5. The Amantonka Code fails the strict scrutiny test

A law may only survive strict scrutiny if it is narrowly tailored to further a compelling governmental interest. Here, the Amantonka tribe has put forth no evidence its law is narrowly tailored or that it furthers a compelling governmental interest. Further, it is unlikely the tribe can ever meet this burden. The two best arguments for a potential compelling governmental interest here are cost and tribal sovereignty. Neither reason would justify this law.

If the tribe is attempting to save money by entitling Indians to lay advocates, this law must be struck down. VAWA authorizes funding for tribal governments to provide adequate counsel to indigent defendants. *See* 25 U.S.C. § 1304(f)(2). In creating this provision, Congress recognized the need to financially assist tribes in implementing VAWA's requirements. However, Congress did not include a provision allowing financially burdened tribes to only follow some of VAWA's requirements or to violate any preexisting ICRA requirements. Saving money does not qualify as a sufficiently compelling governmental interest. If high costs could justify this infringement, then states—who face enormous costs from their vast number of criminal cases—would be able to infringe upon this fundamental right as well. That has never been the case, and should not be the case in the tribal context.

Further, this violation cannot be justified by a need for tribal sovereignty. Tribes exercise tribal sovereignty by determining whether to utilize VAWA criminal jurisdiction. Any obligation that is imposed upon tribes after choosing to utilize VAWA is an obligation that is self-imposed. Because this choice is not thrust upon any tribe, tribes should not be able to avoid VAWA requirements at the expense of Indian defendants. Equal protection for every individual Indian far outweighs any benefit that may be gained by allowing tribes to infringe on a fundamental right.

Because there is no sufficiently compelling governmental interest justifying this law, the Amantonka Code is invalid on its face. If this Court determines that Petitioner is an Indian, then Petitioner was legally entitled to less protection under Amantonka law than a non-Indian. Therefore, Petitioner's conviction should be overturned.

CONCLUSION

Because Petitioner does not meet the threshold requirement of possessing some quantum of Indian blood, he cannot be classified as an Indian. As such, when the tribe chose to prosecute Petitioner, the tribe needed to appoint him an attorney that met VAWA standards. Because Petitioner was not appointed adequate counsel, he was denied the rights described by VAWA and his conviction should be overturned. Further, even if Petitioner is determined to be an Indian, Petitioner was denied equal protection under Amantonka law and his conviction should be overturned.