No. 19-231

IN THE

Supreme Court of the United States

ROBERT R. REYNOLDS,

Petitioner,

v.

WILLIAM SMITH, CHIEF PROBATION OFFICER,
AMANTONKA NATION POBATION SERVICES
JOHN MITCHELL, PRESIDENT, AMANTONKA NATION
ELIZABEHT 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 RESPONDENTS

Team Number 368

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QUESTIONS PRESENTED

I. Whether Petitioner is classified as an Indian or a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction?

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

STATEMENT OF THE CASE

I. STATEMENT OF PROCEEDINGS

The District Court for the Amantonka Nation filed suit against Robert R. Reynolds ("petitioner") in June 2017 alleging he violated Title 5 section 244 of the Amantonka Nation Code. R. at 2. Petitioner filed three pre-trial motions: first, that the charges be dismissed because he is a non-Indian and thus the Amantonka Nation lacks criminal jurisdiction over him. R. at 3. The District Court denied this motion, finding that petitioner is an Indian because he is a voluntarily naturalized citizen of the Amantonka Nation. R. at 3. Second, petitioner sought a court-appointed attorney under 25 U.S.C. § 1302 *et seq*. R. at 3. The Court denied this motion, finding that as an Indian, petitioner is not entitled to an attorney under 25 U.S.C. § 1304. R. at 3. Finally, petitioner alleged that his court-appointed counsel lacked sufficient qualifications to serve as his counsel and thus violated his right to equal protection. R. at 3. The Court again denied this motion, finding that his counsel was sufficiently qualified under Title 2, Chapter 6 of the Nation Code and thus there was no violation of equal protection. R. at 4.

The District Court convicted petitioner in August 2017 after the jury returned a guilty verdict. R. at 5. Petitioner moved to set aside the verdict, repeating his pre-trial motions; this motion was denied. R. at 5. Petitioner then appealed to the Supreme Court of the Amantonka Nation, again repeating his pre-trial motions. R. at 7. The Supreme Court rejected petitioner's arguments for the same reasons that the District Court rejected them. R. at 7.

Petitioner next filed a petition in the Rogers State District Court for a Writ of Habeas Corpus, alleging that the tribal conviction violated his Constitutional rights, as well as his rights under 25 U.S.C. § 1302 *et seq*. R. at 8. The motion was granted because the Court

found petitioner to be a non-Indian. R. at 8. The U.S. Court of Appeals for the Thirteenth Circuit then reversed this decision for the reasons articulated by the Amantonka Nation Courts. R. at 9. Petitioner then moved for a Writ of Certiorari to the Supreme Court of the United States. R. at 10. The Supreme Court granted the petition to decide two issues: 1) whether petitioner is an Indian or non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction, and 2) whether petitioner's court-appointed attorney satisfied the relevant legal requirements? R. at 10.

II. STATEMENT OF FACTS

This case is about providing Indian victims of domestic violence with justice and holding perpetrators of violence against Indians on Indian land accountable for their criminal actions. The Amantonka Nation is a federally recognized tribe located within the State of Rogers. R. at 6. Petitioner married his wife, Lorinda, a citizen of the Amantonka Nation, and then applied and completed the process to become a naturalized citizen of the Amantonka Nation. R. at 6. He took an oath of citizenship and received and carried his Amantonka Nation Identification card. R. at 6, 7. After losing his job, petitioner began abusing alcohol and verbally abusing his wife. R. at 6. The Amantonka Nation police responded to several calls at the petitioner's apartment during petitioner's time of unemployment. R. at 6. Responding to a call on June 15, 2017, the police found evidence that petitioner had physically abused his wife. R. at 6. According to the evidence presented at trial, petitioner struck his wife with an open palm with enough brute force that she fell to the ground. R. at 6. As Lorinda fell, her torso hit a coffee table and she received a cracked rib. R. at 6.

The Amantonka Nation filed charges against petitioner for violating the Nation Code (R. at 2), finding jurisdiction over petitioner because he is an Indian and therefore his crime does not fall under 25 U.S.C. § 1304. R. at 3. Petitioner was appointed indigent counsel (R. at 4) who, like all other currently serving Amantonka Nation public defenders, possesses a law degree from an ABA-accredited law school and is a member in good standing of the Amantonka Nation Bar Association. R. at 7. Petitioner was found guilty and sentenced to seven months incarceration, financial restitution to his wife, participation in rehabilitation and treatment programs, and a $1500 fine. R. at 5.

SUMMARY OF ARGUMENT

Under current law, the two-pronged *Rogers* test determines whether or not Petitioner is an Indian for purposes of Special Domestic Violence Criminal Jurisdiction. While Petitioner likely passes the political recognition prong of the *Rogers* test on account of his Amantonka citizenship, he fails the descent prong because he has no Indian ancestry. However, the Supreme Court should remove the descent requirement of *Rogers* from American law for three reasons. First, the descent requirement of the *Rogers* test is based on outdated precedent that contradicts the Court's more recent holdings in *Mancari* and *Antelope*. Second, the descent requirement amounts to a racial classification and violates equal protection. Third, alternative approaches to defining "Indian" for purposes of criminal jurisdiction would better advance the State's interest in tailoring tribal jurisdiction to individuals with sufficient ties to a tribe without resorting to a racial classification. The easiest such alternative is to rely solely on the political recognition prong of the *Rogers* to

define “Indian.” Under this approach, Petitioner would qualify as an Indian for purposes of Special Domestic Violence Criminal Jurisdiction.

If the petitioner is an Indian, then his court-appointed counsel fulfilled - even exceeded - the relevant legal requirements. Because the Amantonka Nation’s ability to prosecute petitioner is an exercise of the Nation’s inherent power that pre-dates the Constitution (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)), the rights guaranteed by the Constitution do not extend to petitioner in tribal proceedings. *Nevada v. Hicks*, 533 U.S. 353, 385 (2001). Rather, 25 U.S.C. § 1302 (2018) governs, which mandates that an indigent defendant be appointed counsel only if he or she may receive a sentence of imprisonment of more than one year. § 1302 (c). Petitioner is not entitled to counsel under § 1302 (c) because his sentence involved imprisonment for only seven months.

Neither is petitioner entitled to counsel under § 1302 (a) (8). The Supreme Court has clarified that alleged tribal violations of due process and equal proceedings under § 1302 are best adjudicated in tribal courts as opposed to in federal forums. *Martinez* at 71.

If petitioner is not an Indian, then 25 U.S.C. § 1304 governs and the Supreme Court should first look to the legislative history of the Act, as in *Martinez*. The Court should then weigh the impact that its holding would have on these legislative goals, as in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). The legislative history of § 1304 reveals two goals: that of strengthening and legitimizing the tribal judicial system, and that of ensuring the rights of indigent defendants. 159 CONG. REC. 480 (2013). By finding that the petitioner’s legal rights were not fulfilled, the Supreme Court would infringe greatly on tribal self-government while having no practical bearing on defendant’s rights in the courtroom. Alternatively, finding that petitioner’s legal rights were fulfilled would strengthen tribal self-

government while having no impact on petitioner's rights. Consequently, the Supreme Court should find that the Amantonka Nation provided petitioner with counsel that fulfilled the legal requirements of § 1304.

ARGUMENT

I. Under current law, Petitioner is not an Indian for purposes of special domestic violence criminal jurisdiction, but because that law relies on an impermissible racial classification, it should be changed.

I.A. The *Rogers* test defines "Indian" for purposes of special domestic violence criminal jurisdiction

Whether or not Petitioner is an Indian is important for determining whether the Tribe exercised criminal jurisdiction over Petitioner under Special Domestic Violence Criminal Jurisdiction [hereinafter, S.D.V.C.J.) or through its "inherent power … to exercise criminal jurisdiction over all Indians." *See* 25 U.S.C. § 1301 (2) (2018). This determination matters because if the Tribe is relying on S.D.V.C.J. to exercise jurisdiction over Petitioner, then Petitioner may be entitled to special legal protections pursuant to the Violence Against Women Reauthorization Act of 2013 [hereinafter, V.A.W.A. 2013). *See* 25 U.S.C. § 1304 (d) (2018). S.D.V.C.J. is defined as "the criminal jurisdiction that a participating tribe may exercise under [25 U.S.C. § 1304] but could not otherwise exercise." *See* 25 U.S.C. § 1304 (a) (6) (2018). Because the Tribe has inherent power to exercise criminal jurisdiction over all Indians, this means that S.D.V.C.J. only applies if Petitioner is a non-Indian.

For purposes of S.D.V.C.J., "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." *See* 25 U.S.C. § 1301 (4) (2018). However, 18 U.S.C. § 1153, also known as the Major Crimes Act [hereinafter, M.C.A.], provides no statutory definition of "Indian." *See* 18 U.S.C. § 1153 (2018). This means that the definition of "Indian" for purposes of S.D.V.C.J. derives from case law. The Supreme Court has not yet weighed-in on the definition of "Indian" relative to the M.C.A. and so lower federal courts have labored to forge such a definition. *See*

Cohen's Handbook of Federal Indian Law § (4) (Nell Jessup Newton ed., 2017) [hereinafter, Cohen's Handbook]. As a starting point, the circuit courts have looked to the Supreme Court's 1846 ruling in *United States v. Rogers*, which held that a non-racially Indian tribe member was not subject to an exemption from federal criminal jurisdiction reserved for crimes committed by one Indian against another Indian in Indian country. *See United States v. Zepeda,*792 F.3d 1103, 1118 (9th Cir. 2015) (citing *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846)). From this holding, the Eighth, Ninth, and Tenth Circuits – which encompass the vast majority of federally recognized tribes – have all adopted versions of the two-pronged *Rogers* test to determine whether or not someone is an Indian for purposes of the M.C.A. *See United States v. Stymiest*,581 F.3d 759 (8thCir. 2009); *United States v. Nowlin,*555 F. App'x 820 (10thCir. 2014); *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015).

The *Rogers* test stipulates that someone is an Indian for purposes of the M.C.A. if they (1) have some minimal degree of Indian ancestry and (2) are recognized by the federal government or their tribe as an Indian. *See United States v. Broncheau,*597 F.2d 1260 (9th Cir. 1979). The second prong of the test is generally subdivided into the following four factors: (1) tribal enrollment; (2) government recognition 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 United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005). The circuits have disagreed on what amount of Indian ancestry satisfies the first prong, whether the factors of the second prong should be considered in descending order of importance, and whether the factors of the second prong are an exhaustive list of all relevant factors. *See* Katharine C. Oakley, *Defining*

Indian Status for the Purpose of Federal Criminal Jurisdiction, 35 Am. Ind. L. Rev., 177 (comparing the Eighth and Ninth circuit approaches to the political recognition prong of the *Rogers* test). However, the circuits have all agreed on the basics of the test: to be considered an Indian for purposes of criminal jurisdiction, an individual must be a descendant of Indians and politically recognized as an Indian.

Petitioner likely meets the political recognition requirement of the *Rogers* test, but not the descent requirement. Petitioner has clearly been recognized as an Indian by the Tribe because he is an enrolled member of the Tribe and courts have held that tribal enrollment is sufficient (but not necessary) to fulfill the second prong of the *Rogers* test. *See Bruce*394 F.3d at 1222-23. Even if enrollment were not dispositive of political recognition, though, Petitioner has also met the fourth factor of the second prong of *Rogers* (social recognition) because he lived on the reservation in tribal complex housing and worked two different jobs on the reservation. However, because Petitioner has no Indian ancestry, he cannot meet the descent prong of the *Rogers* test. Thus, if the descent prong of the *Rogers* test is good law, then Petitioner is not an Indian for purposes of S.D.V.C.J. However, as the next sections argue, the descent prong of the *Rogers* test should not be used to determine whether or not someone is an Indian for purposes of S.D.V.C.J. because: (1) the *Rogers* test is based on outdated precedent; (2) the descent prong of the *Rogers* test should be subjected to strict scrutiny judicial review because it raises equal protection concerns; and (3) there are alternatives to the *Rogers* test that better achieve its purpose, meaning the descent prong of the *Rogers* test is not narrowly tailored to achieve its purpose and thus violates equal protection.

I.B. The *Rogers* test is based on outdated precedent that has been contradicted by more recent holdings

The *Rogers* test is ripe for judicial reinterpretation because it relies on extremely old precedent that contradicts more recent Supreme Court decisions. *Rogers* was authored by Chief Justice Taney over 170 years ago and grounds the meaning of "Indian" in outdated and offensive concepts of race. In defining "Indian" for purposes of criminal jurisdiction under the 1834 Indian Intercourse Act, the Court wrote that the law "does not speak of members of a tribe, but of the race generally" and justified the federal government's exercise of power over "this unfortunate race" partly on an impulse to "enlighten their minds" and "to save them if possible from the consequences of their own vices." *See Zepeda,* 792 F.3d at 1118 (quoting *Rogers* 45 U.S. (4 How.) at 572, 573). As Judge Kozinski noted in his concurrence with the *Zepeda* court, "reliance on pre-civil war precedent laden with dubious racial undertones seems an odd course for our circuit law to have followed, especially in light of the Supreme Court's much more recent holdings in *Mancari* and *Antelope*." *Id*.

As Judge Kozinski recognized, two different Supreme Court cases seem to contradict the race-based definition of Indian advanced in *Rogers*. In the 1974 case *Morton v. Mancari*, non-Indian employees of the Bureau of Indian Affairs (B.I.A.) challenged a federal law which gave hiring preferences to "Indians" within the B.I.A. as a violation of the anti-discrimination provision of the Equal Employment Opportunities Act of 1972 and the Due Process Clause of the Fifth Amendment. *See Morton v. Mancari*, 417 U.S. 535 (1974). The Court noted that "literally every piece of legislation dealing with Indian tribes and reservations … single out for special treatment a constituency of tribal Indians" and that if these laws were found to be invidious racial discrimination, then "an entire Title of the United States Code (25 U.S.C.) would be effectively erased." *Id* at 552. The Court went on to

hold that the B.I.A. Indian hiring preference did not constitute racial discrimination because it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 553. In making this determination, the *Mancari* court relied upon an understanding that Congress could target Indians for legislation because of its plenary power to "deal with the special problems of Indians" under the Indian Commerce Clause and the Treaty Clause of the Constitution as well as under the normative commitment Congress has made to Indians through various treaties. *Id.* at 551-52; U.S. Const. art. I § 2 Cl. 2; U.S. Const. art. II § 2 Cl. 2. In other words, *Mancari* established that the federal government's laws targeting Indians do not violate equal protection under the Fifth Amendment Due Process Clause only because "Indian" is a political rather than a racial categorization.

Three years later, the Supreme Court confirmed the reasoning of *Mancari* in the context of defining "Indian" for purposes of the M.C.A. In *United States v. Antelope*, three Indian defendants challenged the M.C.A. as a violation of equal protection under the Fifth Amendment Due Process Clause because the M.C.A. subjected the defendants to federal prosecution by virtue of their status as Indians, which, due to differences in Idaho law and federal law, put the defendants at a disadvantage. *See United States v. Antelope,* 430 U.S. 641 (1977). The Court held that no such violation of equal protection existed because "federal legislation with respect to Indian tribes … is not based upon impermissible racial categories" but rather "is rooted in the unique status of Indians as a 'separate people' with their own political institutions." *Id* at 645, 646.

In *Mancari* and *Antelope*, the Supreme Court has thus twice held that laws singling out Indians for special treatment do not violate equal protection because "Indian" is a

political, not a racial category. These rulings do not sit well with the logic of *Rogers*, which held that a non-racial Indian could not be considered an Indian for purposes of tribal criminal jurisdiction because the 1834 Indian Intercourse Act spoke of Indians as a race, not as quasi-sovereign political entities. The discrepancy between these rulings can be explained partly by the evolution of both equal protection law and social norms that has occurred since *Rogers* was decided in 1846. However, it makes little sense for federal courts to use precedent as old as *Rogers* as the starting point for determining who counts as an Indian for purposes of tribal criminal jurisdiction when more recent precedent seems to contradict its holding. As the next section of this brief argues, by relying on the outdated precedent of *Rogers*, the *Rogers* test violates equal protection as it is currently understood.

The Supreme Court can and should reconcile the holding of *Rogers* with the holdings of *Mancari* and *Antelope* and thus sidestep the equal protection concerns inherent in *Rogers* by limiting the holding of the case to "the limited proposition that 'a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian' when the adoption occurs for the purpose of evading prosecution." *Zepeda*, 792 F.3d at 1118 (quoting *Rogers* 45 U.S. (4 How.) 567). This would then mean that a non-racial Indian who enrolled in a tribe for reasons other than evading prosecution, as Petitioner did, could be considered an Indian without violating the holding of *Rogers*. If the Court rejects this reading of *Rogers*, it should overturn *Rogers* as violative of equal protection.

I.C. The *Rogers* test violates equal protection

The Court has held that the Constitution – and therefore the equal protection requirements of the Fifth Amendment – do not generally apply to tribal governments. *See*

Talton v. Mayes, 163 U.S. 376 (1896). However, for purposes of determining the extent of federal criminal jurisdiction over Indians pursuant to 25 U.S.C. § 1153, the Constitution and its corresponding equal protection doctrine does apply. Under the equal protection doctrine, the Court has established a three-tier system for judicial review of laws that discriminate between different classes of individuals. Laws that discriminate on the basis of race or ethnicity are subject to the highest level of scrutiny (strict scrutiny). *See e.g. Adarand Constructors v. Peña*, 515 U.S. 200 (1995). The Supreme Court has never precisely defined what constitutes a "racial classification" for purposes of equal protection. *See* Stephen Menendien, *What Constitutes a "Racial Classification"?*, 24 Temp. Pol. & Civ. Rts. L. Rev. 81 (2014). However, a survey of the Court's racial classification jurisprudence suggests that racial classifications generally feature five elements: (1) an official government label (2) proclaiming or identifying the race of (3) a particular individual, (4) which is then the basis for allocating benefits or imposing burdens, (5) on the person classified. *Id.* at 102. Federal laws targeting Indians for special treatment seem to meet all five of these elements but for the logic of *Mancari* and *Antelope*; only by conceiving of "Indian" as a political designation can the government avoid strict scrutiny review of laws targeting Indians.

The descent prong of the *Rogers* test completely undermines this understanding of "Indian" as a political designation. First, it is worth noting that the blood quantum requirement of the *Rogers* test is closely associated with racism. Historically, blood quantum requirements in American law have been used to achieve racist policy objectives. *See* Quintin Cushner and Jon M. Sands, *Blood Shall Not Tell*, The Federal Lawyer, April 2012, 31 – 36. As Judge Ikuta remarked in her concurrence in *Zepeda*, state governments have used blood quantum requirements first to determine who was a slave and who was free and later to:

define "persons of color" for purposes of segregation; deny minorities the right to vote; prohibit interracial marriage; prevent non-white people from becoming naturalized citizens and owning land; and, to intern Japanese people during the Second World War. *See Zepeda*, 792 F.3d at 1120. Because of its close association with these historically racist policies, blood quantum requirements have disappeared from nearly every corner of American jurisprudence. The Supreme Court recently affirmed its opposition to "[a]ncestral tracing of this sort" in laws that enable race-based distinctions to be drawn. *Id.*at 1120 (quoting *Rice v. Cayetano*, 528 U.S. 495, (2000)). This suggests that the descent prong of the *Rogers* test is a vestige of racist policies and is out of step with recent developments in American law.

In addition to its association with historically racist policy objective, the descent prong *Rogers* test is also "an overt racial classification" and as such should be subjected to strict scrutiny review. *See Zepeda*, 792 F.3d at 1117. If Indians are singled out for special treatment solely by virtue of their political status, then anyone who is a citizen of a federally recognized tribe should be treated the same because they share the same political status. Yet, under the first prong of the *Rogers* test, not all enrolled tribal members are subject to federal criminal jurisdiction pursuant to 25 U.S.C. § 1153; only tribal members with some minimal degree of Indian blood are considered Indians. This is significant because some tribes allow individuals to become enrolled tribal members either without Indian ancestry, as the Amantonka Tribe does, or with a degree of Indian ancestry below the threshold required for the first prong of the *Rogers* test, as the Cherokee Nation does. *See* Amantonka Nation Code Title 3, Chapter 2, § 201; *See* Cherokee Nation Code Title 11. This means that the *Rogers* test "ineluctably treats identically situated individuals *within* a tribe differently from one

another solely based on their immutable racial characteristics." *See Zepeda*, 792 F.3d at 1117.

The instant case serves as a textbook example of how the *Rogers* test treats otherwise identically situated individuals differently on the basis of their race. Petitioner and his spouse are both politically recognized as Indians by the Amantonka Nation. Both are enrolled members of the Tribe and participate in the social life of the Tribe by virtue of living and working on the reservation. From the standpoint of the Tribe, then, both Petitioner and his spouse are Indians; politically speaking, they are identical. Yet for purposes of criminal jurisdiction, the *Rogers* test would treat Petitioner and his spouse differently because Petitioner has no Indian blood while his spouse does. That means Petitioner could escape tribal criminal jurisdiction under the tribe's inherent power because he is not considered an Indian for purposes of criminal jurisdiction, meaning the alleged crime was commitment by a non-Indian against an Indian. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). The tribe could then only reach Petitioner under S.D.V.C.J. and Petitioner would therefore be afforded extra legal protections. However, if the roles were reversed and Petitioner were the victim of domestic violence at the hands of his spouse, she would be subject to tribal criminal jurisdiction under the tribe's inherent power because under the *Rogers* test, she is considered an Indian. This means she would not be entitled to the additional legal protections afforded to defendants under S.D.V.C.J. In the context of domestic violence cases, then, the *Rogers* test's descent prong effectively denies "racial" Indians the legal protections that someone who is politically but not racially Indian would receive.

The *Rogers* test's descent prong thus clearly raises equal protection concerns and should accordingly be subjected to judicial review under a standard of strict scrutiny. In order

for a racial classification to survive strict scrutiny review, it must be demonstrated that (1) there is a compelling state interest that justifies the classification and (2) the government's means of achieving that interest are narrowly tailored to the government's objective. *See e.g. Adarand Constructors,* 515 U.S. 200. The *Rogers* test likely meets the first prong of strict scrutiny review because the federal government needs to determine who counts as an Indian for purposes of criminal jurisdiction in order to "make tribal jurisdiction broad enough to provide for public safety, express cultural norms, and make individuals accountable to society, but narrow enough to prevent relative strangers from being prosecuted by tribes' potentially different and unfamiliar legal systems." *See* Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 Am. Indian L. Rev. 337, 345 (2015) [hereinafter Rolnick, *Beyond Citizenship and Blood*]. Accordingly, the state's interest in ensuring that tribal criminal jurisdiction is neither too broad nor too narrow justifies creating a classification of Indian – only those with sufficient ties to a tribe (Indians) should be subjected to its jurisdiction. However, the *Rogers* test almost certainly fails the second prong of strict scrutiny review because it is not narrowly tailored; it is possible to achieve the aforementioned goal without resorting to a definition of Indian rooted in race.

I.D. Using the political recognition prong of *Rogers* to define "Indian" for the purpose of criminal jurisdiction would better enable Congress to optimally tailor tribal criminal jurisdiction without resorting to a racial classification.

There are several possible alternative approaches to define "Indian" for the purpose of criminal jurisdiction that would allow Congress to tailor tribal criminal jurisdiction to only individuals with sufficient ties to a tribe without resorting to racial classifications. *See e.g.* Rolnick, *Beyond Citizenship and Blood* (arguing for a "community recognition standard" that

would extend tribal criminal jurisdiction to anyone recognized by the tribe as a member of the community); Indian Law & Order Comm'n, a Roadmap for Making Native America Safer: Report to the President &. Congress of the United States 9 (2013) (recommending that tribes be permitted to opt out of federal jurisdiction in favor of restoring jurisdiction over all people who commit crimes in the tribe's territory). This brief will make the case for the simplest such approach: keep the political prong of the *Rogers* test while dropping the descent prong, as advocated for by Judges Kozinsky and Ikuta in *Zepeda. See Zepeda* 792 F.3d at 1117. This would then mean that an "Indian" is anyone who is recognized by a federally recognized tribe or the federal government as an Indian.

This has two main advantages. First, it would not be a major change in how courts determine who is an Indian for purposes of criminal jurisdiction because the second prong of the *Rogers* test is already used in each of Circuits with large Native American populations. This means that no one who currently counts as an Indian under the *Rogers* test would lose their status as an Indian because they necessarily have already passed the second prong of the *Rogers* test. Second, this test would subject more individuals who have substantial ties to tribal communities to the jurisdiction of those tribes, thereby enhancing tribal sovereignty. Currently, the descent prong of the *Rogers* test makes it possible for an individual to be enrolled as a member of a federally recognized tribe without counting as an Indian for purposes of tribal jurisdiction if their blood quantum is too small. This contradicts the Court's ruling that the tribes should be able to determine the legal requirements for tribal membership in that for purposes of criminal jurisdiction, the government may ignore a tribe's determination that someone is an Indian if that person's blood quantum is too small. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). If the Court rejected the descent prong

of *Rogers* while maintaining the political prong, this problem would disappear because all enrolled tribal citizens could count as Indians for purposes of criminal jurisdiction regardless of their blood quantum. Moreover, because tribal enrollment is voluntary, enrolled tribal citizens can be said to have consented to the jurisdiction of the tribe. Accordingly, subjecting tribal citizens to tribal jurisdiction can by no means be construed as subjecting a stranger to "a potentially different and unfamiliar legal system." *See* Rolnick, *Beyond Citizenship and Blood*, 345.

Overall, then, using the political recognition prong of the *Rogers* test to determine who counts as an Indian for purposes of tribal criminal jurisdiction would ensure: (1) that everyone who is classified as an Indian under the current regime is still classified as an Indian; and (2) that all tribal citizens are classified as Indians for purposes of criminal jurisdiction. Thus, the political recognition prong of the *Rogers* test covers the same individuals as the *Rogers* test in its current form and then some, meaning the government need not resort to a race-based definition of Indian in order to narrowly tailor the extent of tribal jurisdiction.

II. Whether or not petitioner is an Indian, his court-appointed counsel fulfills the relevant legal requirements

II. A. If petitioner is an Indian, then 25 U.S.C. § 1302 (2018) governs

II. A. 1. Petitioner's court-appointed counsel fulfills the legal requirements of § 1302 (c) because he received a prison sentence of less than one year.

If the petitioner is an Indian, then the Amantonka Nation satisfied the relevant legal requirements for court-appointed indigent defense. According to 25 U.S.C. § 1302 (c) (2018) and the United States Supreme Court, a tribe must provide an indigent Indian defendant with

a public defender only if the tribe imposes a term of imprisonment of more than one year on the defendant. *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016).

The rights accorded to indigent defendants in tribal court therefore differ from those accorded to indigent defendants in state or federal court. The United States Constitution mandates that an indigent criminal defendant only be sentenced to a term of imprisonment if the state has accorded him or her the right to court-appointed counsel. U.S. Const. Amend. XIV, § 1; U.S. Const. Amend. XI, § 1; *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979). As the Supreme Court observed in *Nevada v. Hicks*, 533 U.S. 353, 385 (2001), “it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.” Because tribes pre-exist the Constitution, and the Constitution was established to dictate federal and state authority, the federal government has long recognized that Indian tribes have inherent powers of local self-government. *Martinez*, 436 U.S. at 56; *see also Talton*, 163 U.S. at 380-84. A tribe’s ability to punish tribal offenses perpetrated by and against its own members remains part of this inherent sovereignty, not given up by nature of the tribes’ “dependent status” on the United States federal government. *United States v. Wheeler*, 435 U.S. 313, 326-28 (1978). Although Congress has exercised its power to tighten and release restrictions upon the tribe’s sovereignty, a tribe’s ability to bring suit against one of its own members remains an exercise of its inherent power. *United States v. Lara*, 541 U.S. 193, 205 (2004). Subsequently, when a Native American tribe prosecutes its own member, it does so independently of the federal government and the United States Constitution. *Wheeler*, 435 U.S. at 328. Thus the protections of the Bill of Rights and the Fourteenth Amendment do not automatically apply to tribal court proceedings.

While the Supreme Court has held that the Constitution "does not dictate the metes and bounds of tribal autonomy," Congress has passed legislation monitoring the rights of Indian defendants in tribal court. *Lara*, 541 U.S. at 205. Federal code requires that any time an Indian tribe impose a term of more than one year of imprisonment on a defendant, the tribe must provide the defendant with "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution." 25 U.S.C. 1302(c)(1). The Supreme Court has upheld the validity of this requirement in *Bryant*, 136 S. Ct. at 1966, holding that a tribal proceeding in compliance with 25 U.S.C. 1302 "sufficiently ensures the reliability of tribal-court convictions." Consequently, the Supreme Court allowed tribal convictions, in which counsel was not provided to an indigent defendant, to count as predicate convictions in a federal prosecution. *Id.* Thus United States code and the Supreme Court agree that indigent defendants imprisoned for less than one year do not have the right to court-appointed counsel.

By providing the petitioner with counsel, even though petitioner was not sentenced to a year or more imprisonment, the Amantonka Nation complied with - even exceeded - the legal requirements set out in 25 U.S.C. 1302(c) and validated by the United States Supreme Court. According to the Supreme Court's reasoning in *Hicks*, *Martinez*, *Talton*, *Wheeler,* and *Lara*, the Amantonka Nation's ability to prosecute its own members for tribal offenses stems from their inherent sovereign power. Because this inherent power predates the Constitution, the tribal court does not need to provide petitioner with the rights guaranteed by the Constitution. Accordingly, petitioner's arguments that his Fifth Amendment right is violated by the Amantonka Nation's proceeding against him is invalid; he is not afforded the

guarantees of the United States Bill of Rights or the Fourteenth Amendment while in tribal court.

Rather than the Constitution, 25 U.S.C. § 1302 governs petitioner's rights as an indigent Indian defendant in tribal court. Since petitioner was sentenced to seven months incarceration (R. at 5), he does not meet the standard expressed in § 1302 (c) for a court-appointed counsel. As held in *Bryant*, denying the assistance of court-appointed counsel to an indigent Indian defendant in tribal court is valid so long as the defendant's subsequent imprisonment does not exceed one year.

II. A. 2. Petitioner's court-appointed counsel fulfills the legal requirements of § 1302 (a) (8) because the right to due process and equal protection in tribal proceedings does not include the right to counsel when a term of imprisonment of less than one year is imposed.

As an indigent Indian defendant in tribal court sentenced to less than one year's imprisonment, petitioner did not merit court-appointed counsel under 25 U.S.C. § 1302 (c) (2018). In addition to exceeding the requirements set out in § 1302 (c), petitioner's court-appointed counsel also fulfilled the requirements established in 25 U.S.C. 1302 (a) (8). This section of the federal code requires that any tribe exercising its inherent powers of self-government shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." This guarantee, however, does not afford the petitioner with the exact same guarantees of equal protection and due process as he would receive under the United States Constitution. *Oliphant*, 435 U.S. at 194. The Supreme Court has urged caution and restraint in adjudicating alleged violations of § 1302 (a) (8) in federal court in order to promote and preserve the self-government of tribes. *Martinez* at 65, 68. The rights to due process and

equal protection under § 1302 (a) (8) thus must be analyzed under tribal law, as opposed to federal Constitutional law.

The Supreme Court in *Martinez* analyzed the legislative history of § 1302 by analyzing the legislative history of the federal code. The Court paid particular attention to several Indian representatives present at the 1965 congressional hearings who spoke against a proposed provision to the act that would allow the Attorney General to review any alleged violation of the code. The Crow Tribe representative, Mr. Real Bird, argued that this federal oversight "would in effect subject the tribal sovereignty of self-government to the Federal government… and subject the tribe to a multitude of investigations and threat of court action." *Martinez* at 68 (citation omitted). Similarly, the Mescalero Apache Tribal Council argued that this proposed provision would allow one "perpetually dissatisfied individual Indian" to "disrupt the whole of a tribal government." *Id.* The legislature responded by eliminating the provision for Attorney General review of alleged violations from 25 U.S.C. § 1302. *Id.*

The Supreme Court of *Martinez* interpreted from the vehement objections by the Indians and the subsequent elimination of the provision to mean that the legislature intended to protect tribal self-government. *Id* at 65, 68. The Court explained that 25 U.S.C. § 1302 (a) (8) "selectively incorporated and in some instances modified" the protections provided in the United States Constitution's Bill of Rights so "to fit the unique political, cultural, and economic needs of tribal governments." *Id.* at 62. The flexibility of the provision further served the goal of promoting self-government of tribes by avoiding the imposition of "serious financial burdens" on tribes. *Id.* at 65. The Supreme Court repeated their refrain that "Congress' authority over Indian matters is extraordinarily broad, and the role of courts in

adjudicating relations between and among tribes and their members correspondingly restrained." *Id.* at 71. Consequently, the Court determined that unless and until Congress clarified its intent to interfere in tribal matters, the Court would not allow a federal cause of action for an alleged violation of 25 U.S.C. § 1302 (a) (8). *Id.* The Supreme Court of *Bryant* followed this logic and concluded that a tribal conviction, in which a defendant was sentenced without counsel to less than one-year imprisonment, was not in violation of 25 U.S.C. § 1302 (a) (8). *Id.* at 1966.

Consequently, the petitioner's court-appointed counsel fulfills the legal requirements set out in 25 U.S.C. § 1302 (a) (8). The rights guaranteed to the petitioner under § 1302 (a) (8) are not identical to those set out in the United States Constitution and its Amendments. *Oliphant* at 194. Rather, the right to due process and equal protection must be interpreted within the context of promoting tribal self-government, as held in *Martinez* and *Bryant*. The Amantonka Nation actually exceeded the requirements of 25 U.S.C. § 1302 (a) (8) by providing defendant with counsel even though he was only sentenced to seven months imprisonment. R. at 5. The Supreme Court already ruled in *Bryant* that this absence of counsel did not violate 25 U.S.C. § 1302. *Id.* at 1966. Petitioner had court-appointed counsel who both possesses a Juris Doctor from an ABA-accredited law school and is a member in good standing of the Amantonka Nation bar. The Amantonka Nation provided the petitioner with this learned counsel because of the Nation's unique values, and not because to do otherwise would violate 25 U.S.C. § 1302 (a) (8).

The Amantonka Nation is committed to providing all defendants with equal protection and due process under their laws. Their code reflects this dedication: Title 2, Chapter 7, Canon 5, Part 3 of their code mandates, "Representation should not be denied

people because they are unable to pay for legal services." Accordingly, the code provides that all indigent defendants qualify for appointment of a public defender. Title 2 Chapter 5, Sec. 503(2) and (3). The Nation went above and beyond the requirements of 25 U.S.C. § 1302 both in their code and their practice. For the Supreme Court to hold otherwise would be in direct conflict with the Court's previous holdings in *Martinez* and *Bryant,* in which the Court urged and practiced restraint in interference with tribal proceedings.

Petitioner correctly observes that the Amantonka Nation Code attributes to Indian indigent defendants a differently-qualified public defender than those provided for non-Indian indigent defendants. Under Title 2, Chapter 6, Section 607 (a) and (b), the Amantonka Nation provides that non-Indian defendants shall be provided a public defender who possesses a J.D. from an ABA-accredited law school; the same requirement is not imposed on public defenders appointed to Indian defendants. This distinction, however, does not violate the guarantees of equal protection and due process under 25 U.S.C. § 1302 (a) (8), as petitioner contends. Rather, the distinction aligns with the legislative intent found by *Martinez*: that the act promote tribal self-government and avoid the imposition of undue financial burden on tribal governments. *Id.* at 65. The slightly different eligibility requirements for Indian and non-Indian defendants moderate the financial burden on the Amantonka Nation judicial system. Although currently all public defenders employed by the Amantonka Nation possess J.D.s (R. at 7), the Nation has the flexibility to hire public defenders that do not possess J.D.s as needed. That non-Indian defendants require a public defender with a J.D. is a consequence of heightened standards for tribal proceedings against non-Indians, as stated in 25 U.S.C. § 1304. Since § 1302 (a) (8) does not speak explicitly of the requirements for tribes who allow counsel even when not required by the statute, the

court should not interfere now. As reasoned in *Martinez* at 71, unless and until Congress speaks explicitly on the role of the federal government in interfering with tribal self-government, the Supreme Court should not and will not impose.

Additionally, this distinction promotes the congressional goal of promoting self-governing tribal governments. The court in *Martinez* explained that providing a federal forum to debate apparent violations of the right to due process and equal protection interferes with this goal. *Id.* at 59. To weigh in on this issue at all, let alone dictate the application of equal protection and due process in tribal proceedings goes against the legislative intent of 25 USC 1302. The standards for equal protection and due process, *Talton*, *Wheeler*, and *Lara* remind us, do not parallel those standards set out in the United States Constitution. In interpreting the requirements of 25 USC 1302(a)(8), the Amantonka Nation exercises their sovereign power. It is inadvisable for the federal courts to interfere when legislative history tells us that 25 U.S.C. § 1302 was deliberately written to minimize federal interference with alleged violations of the code. *Santa Clara Pueblo* at 65.

Petitioner will likely argue that providing Indians with differently qualified public defenders than those provided to non-Indians is a racially motivated inequality that cannot persist. If the Supreme Court were to weigh in on this alleged violation of 25 U.S.C. § 1302 (a) (8), despite the precedent that warns against federal interference in tribal self-government, the Court would find that the Amantonka Nation did not actually contravene the petitioner's right to due process and equal protection under the laws. The Supreme Court has held that denying Indians certain provisions that non-Indians are entitled to is justified when it furthers legislative goals intended to benefit Indians. *Fisher v. District Court of Sixteenth Judicial District*, 424 U.S. 382, 390-91 (1976). In *Fisher*, respondent Indians argued that by denying

them access to state courts to resolve their dispute, the federal government was engaging in "impermissible racial discrimination." *Id.* at 390. The court denied this argument, stating that "disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." *Id.* at 390-91. Similarly, the Supreme Court in *Morton v. Mancari*, asserted that the classification of Indians that results in their different treatment than non-Indians is not a violation of the rights to due process and equal protection under the laws so long as the treatment was "reasonable and rationally designed to further Indian self-government." *Id.* at 555. The Court further asserted that the distinction between Indian and non-Indian was "not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554.

In providing non-Indians with guaranteed counsel possessing J.D.s from ABA-accredited law schools, the Amantonka Nation Code does not engage in "impermissible racial discrimination." *Fisher* at 390. The differently qualified public defenders guaranteed for non-Indians as opposed to for Indians is not based in racial differences, but rather is based in terms of membership and non-membership in the "quasi-sovereign foreign entit[y]." *Morton* at 554. Under the reasoning found in *Fisher* and *Morton*, this kind of differential treatment is acceptable when it advances the promotion of Indian self-government. In choosing not to intervene on what petitioner argues is a violation of his right to due process and equal protection under the law, the Supreme Court ultimately upholds the sovereignty of the Amantonka Tribe by allowing them to determine defendants' rights and establish their Code and practices in accordance with their needs and priorities

Finally, petitioner's argument fails because his court-appointed counsel, like all other public defenders currently employed by the Amantonka Nation, possesses a J.D. from an ABA-accredited law school. His right to due process and equal opportunity were thus not violated; and his court-appointed counsel fulfilled - if not exceeded - the legal requirements set out in 25 U.S.C. § 1302.

II. B. If petitioner is not an Indian, then 25 U.S.C. § 1304 (2018) governs.

II. B. 1. In deciding whether or not the legal requirements for court-appointed counsel were met, the Supreme Court will interpret the practical extent of the rights set out in § 1304.

If petitioner is classified as a non-Indian, then 25 U.S.C. § 1304 (2018) governs. This code recognizes participating tribes' inherent power "to exercise special domestic violence criminal jurisdiction over all persons." § 1304 (b) (1). The recognition of this inherent power comes with additional safeguards designed to protect the rights of non-Indian indigent defendants. § 1304 (d) (2). The Supreme Court has withheld comment on the validity of these additional provisions (*Bryant*, 136 S. Ct. at 1961 n.5), likely because precedent dictates that the United States Constitution does not constrain tribal governments' inherent sovereign powers. *See generally Nevada v. Hicks*, 533 U.S. 353 (2001); *Martinez*, 436 U.S. 49 (1978). However, the Supreme Court has acknowledged that the Constitution empowers Congress to restrict and relax the inherent sovereign powers of tribal governments. *Martinez*, 436 U.S.at 57; *United States v. Lara*, 541 U.S. 193, 210 (2004). Requiring that tribal governments provide increased rights to defendants prosecuted under 25 U.S.C. § 1304 serves as a valid exercise of Congress's power over tribal governments. Nonetheless, by arguing that his counsel did not meet the legal requirements of 25 U.S.C. § 1304 (d) (2) (2018), the petitioner

attempts to increase the burdens already placed on tribal judicial systems. It remains up to the interpretation of the Supreme Court to decide the practical implications and burdens that § 1304 (d) forces upon tribal governments.

II. B. 2. When faced with dual legislative intentions in a single case, the Supreme Court chooses the holding that least conflicts with the congressional intentions.

The Supreme Court will find that petitioner's court-appointed counsel met the necessary legal requirements of 25 U.S.C. § 1304 (d) (2) (2018). Requiring the Amantonka Nation public defenders to maintain membership in a state bar association would tremendously detract from the Act's goals of promoting tribal self-government and reliable convictions; whereas allowing the Nation's public defenders to continue serving with only membership in the Nation bar would not actually deprive the petitioner of his rights. When legislative history reveals dual intentions, the Supreme Court weighs the potential impact of its holding on the congressional goals and chooses the outcome that is least damaging to both intentions.

In *Martinez*, the Supreme Court faced a dispute involving competing statutory purposes: that of promoting Indians' civil rights and that of upholding tribal self-government. *Id.*at 59-61. The Court weighed the impact of imposing a federal cause of action on alleged discrimination against female Indians and ultimately found that such federal interference would tremendously detract from Indian self-government. *Id.* at 72. Declining to impose a federal cause of action, meanwhile, did not severely impact Indian civil rights because tribal forums are better positioned than federal forums to determine issues involving Indian custom and tradition. *Id.*at 71.

Similarly, in deciding *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), the Court faced dual legislative intentions in determining whether to allow or disallow the adoption of an Indian child by a non-Indian family. The Indian biological father had relinquished his parental rights while the female child was in utero; he did not participate in the baby's life until he heard that the child's non-Indian mother was voluntarily putting the child up for adoption with a non-Indian family. *Id.* at 637. The biological father then protested the adoption of the child, invoking 25 U.S.C. §§ 1901-1963, commonly known as the Indian Child Welfare Act of 1978. *Id.* The Court analyzed the Act's legislative history, determining that it was designed to protect Indian children (§ 1901 (3)) as well as to "preserve the cultural identity and heritage of Indian tribes" by preventing the unwarranted removal of Indian children from their families by nontribal agencies. *Adoptive Couple* at 655. The Court compared the impact of the child's adoption on these two goals, and the majority ultimately allowed the adoption to proceed, deciding the adoption was more beneficial for the protection of Indian children than it was detrimental to tribal cultural preservation. *Id*. The majority was particularly persuaded by the fact that no member of the biological father's family or tribe sought to adopt the child. *Id.* at 645-55. Additionally, the Court reasoned that "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]'" by terminating the Indian parent's parental rights. *Id.*at 651-52 (quoting from 25 U.S.C. § 1912 (d)). Furthermore, the court feared that disallowing this voluntary adoption of an Indian child to a non-Indian family would make prospective adoptive parents hesitate before adopting any child of Indian descent. *Id.* at 655.

II. B. 3. 25 U.S.C. § 1304 prioritizes the efficiency and legitimacy of tribal justice systems as well as the rights of indigent defendants.

In the case at bar, the Supreme Court is challenged once again to prioritize competing legislative intentions. As in *Martinez,* the Court must first look to the legislative history of the Act in question, which reveals that 25 U.S.C. § 1304 was enacted "to improve the effectiveness and efficiency of tribal justice systems and also recognize tribal authorities with respect to domestic violence in Indian country." 159 CONG. REC. 480 (2013) (statement of Sen. Leahy). The record also contains identical letters submitted by multiple tribes, including the Samish Indian Nation and the Pueblo of Tesuque, which argue: "The current justice system in place on Indian lands handcuffs the local tribal justice system. Non-Native men who abuse Native women hide behind these federal laws and court decisions, walking the streets of Indian country free of consequences, while denying justice to Native women and their families." *Id.*The priority of legitimate, impactful justice for Indian victims of domestic violence manifests in the Act itself, which attributes to defendants "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent powers of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."25 U.S.C. § 1304 (d) (4).

The Act and its history contain an additional priority relevant to the case at hand: that of securing the rights of indigent defendants in tribal courts. Responding to the concern that non-Indian defendants would be denied their Constitutional rights in tribal proceedings under § 1304, Senator Udall stated: "defendants would essentially have the same rights in tribal court as they do in State court." 159 CONG. REC. 480 (2013). Consequently, 25 U.S.C. § 1304 (d) (2) mandates that if any term of imprisonment is imposed, the participating tribe must:

> (1) provide to the defendant the right to effective assistance of counsel as guaranteed by the United States Constitution; and
> (2) at expense of tribal government, provide indigent defendant assistance of 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[.]

25 U.S.C. § 1302 (c). In determining whether or not the legal requirements for petitioner's court-appointed counsel were met, the Court should weigh the impact of its holding on both legislative goals: that of promoting and legitimizing the tribal justice system, and that of securing the rights of defendants.

II B. 4. Imposing additional requirements on tribal court-appointed counsel would damage the goal of promoting the tribal justice system, while it would have little impact on the petitioner's rights.

Petitioner contends that his counsel is unqualified because she is a member of the Amantonka Nation bar and not a member of a state bar. R. at 7. Requiring that the Nation's public defenders become members of a state bar, however, would damage the legislative goal of 25 U.S.C. § 1304 of promoting the legitimacy of tribal government. Requiring membership in a state bar association would impose state legislation and state licensing standards into an area reserved for the federal government. As stated in *Rice v. Olson*, 324 U.S. 786, 789 (1945), "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Only six states of the fifty-one in the union have jurisdiction over offenses committed by or against Indians within the borders of Indian country; Rogers is not one of those states. 18 U.S.C. § 1162 (a) (2018). States can only assume jurisdiction over Indian country "with the consent of the Indian tribe occupying the particular Indian country." 25 U.S.C. § 1321 (a) (1) (2018). Assuming the Amantonka Nation has not consented to Rogers State jurisdiction, imposing state legislation regarding state bar

membership on the Nation would give the state rights to which it is not entitled. This would detract from tribal self-government by adding further limitations to the Amantonka Nation's justice system; it would also delegitimize the Nation's judicial proceedings by implying that their licensing standards are inadequate. This clearly violates the legislative intent behind 25 U.S.C. § 1304.

The imposition of heightened licensing requirements on tribal public defenders would also obstruct the legislative goal of providing justice to victims of domestic violence. Petitioner's actions are identical to those targeted by the Act (R. at 7): Congresswoman Moore, speaking at a debate in the House the day the Act was reauthorized, said: "The paradigmatic example of a crime covered by [this section] would be an assault by a non-Indian husband against his wife in their home on the reservation." 159 CONG. REC. 707 (2013). Increasing the standards necessary for tribal governments to prosecute non-Indians under § 1304 would cripple tribal governments in their capacity to realize the purposes of the Act. Membership in a state bar association bears an extremely high cost that cannot be pushed onto already financially vulnerable tribal governments. Requiring heightened standards would prevent the Amantonka Nation, and countless other tribes, from providing justice to Native victims of domestic violence.

Imposing greater requirements on the public defenders' qualifications in the tribal judicial system would destroy the legislative intent of the act of legitimizing the justice system; it would also bear little to no impact on the petitioner's actual rights. In conjunction with 25 U.S.C. § 1302 (c) (1), 25 U.S.C. § 1304 (d) (2) guarantees the defendant the Constitutional right to effective assistance of counsel. Petitioner, however, provides no proof of his counsel's errors or inadequacies. To find a violation of the Sixth Amendment, a two-

part test must be fulfilled. *Strickland v. Washington*, 466 U.S. 668 (1984). First, the party alleging a violation must show that his or her counsel committed egregious errors.*Id.* at 687. Second, the party must demonstrate that counsel's mistakes deprived the party of a fair trial with reliable results. *Id.* Petitioner's complaint does not maintain that his counsel has committed any errors; nor does he show any connection between his counsel's actions and the outcome of his case. R. at 7.

The only circumstances in which the court finds a per se violation of the Sixth Amendment involve a lawyer that does not belong to any bar association. *See Solina v. United States*, 708 F.2d 160, 161, 169 (2nd Cir. 1983) (holding that the Sixth Amendment was violated when counsel had not passed any bar exam). *See also United States v. Bradford*, 238 F.2d 395, 396-97 (2nd Cir. 1956) (holding that the Sixth Amendment was not violated when counsel, who was admitted to practice in New York State Court but not in federal court, served as a public defender in federal court). The facts at hand do not qualify for a per se violation of the Sixth Amendment: petitioner's counsel is a member in good standing of the Amantonka Nation bar association. R. at 7. The requirements set out by 25 U.S.C. § 1304 (d) (2) stipulate that the defense attorney be "licensed to practice law by any jurisdiction in the United States that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C. § 1302 (c) (2). The Amantonka Nation applies strict licensing standards as outlined in Title 2 Chapters 5-7 of their Code. Petitioner has not provided any facts to support his claim that the Amantonka Nation's licensing standards are less than those of a state bar association. R. at 7. Nor has petitioner provided any precedent or legislation that sets a minimum for membership in a bar association.

Opposing counsel might argue that the Amantonka Nation is not a "jurisdiction in the United States" (1302 (c) (2)). While it is true that the Amantonka Nation acts in accordance to its inherent sovereign power that pre-dates the Constitution, as opposed to acting as an arm of the federal government (*Wheeler*, 435 U.S. at 328), the Supreme Court has already made it clear that tribal convictions are valid convictions in federal court. *Bryant*, 136 S. Ct. at 1966. This indicates that tribal governments qualify as jurisdictions in the United States.

Determining the legal requirements set out in 25 U.S.C. § 1304 requires the Supreme Court to disentangle "the complex patchwork of federal, state, and tribal law" that governs Indian country. *Bryant,* 136 S. Ct. at 1960 (2018) (quoting *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990)). To decide that the Amantonka Nation does not count as a jurisdiction in the United States capable of licensing its public defenders would delegitimize the authority and the independence of the tribal court, thereby obstructing justice for Indian victims of domestic assault. Raising the standards required to serve as counsel under 25 U.S.C. § 1304 would not affect the rights afforded to the petitioner. Thus, the Supreme Court should find that petitioner's counsel met the legal requirements.

CONCLUSION

For all of the foregoing reasons, the judgment in *Reynolds v. Smith et al.* in the U.S. Court of Appeals for the Thirteenth Circuit should be affirmed. The Court should reverse the decision of the U.S. District Court for the District of Rogers and remand with instructions to deny the petition for the writ of habeas corpus.

Respectfully submitted,

January 2018 *Counsel for the Respondents*