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 PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

Team No. 381
Counsel for Respondents

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QUESTIONS PRESENTED

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

STATEMENT OF THE CASE

I. STATEMENT OF PROCEEDINGS

The Chief Prosecutor for the Amantonka Nation District Court filed criminal charges against Petitioner in the Amantonka Nation District Court. After arraignment, the Petitioner filed three (3) pretrial motions where he contested the Court's criminal jurisdiction over him because he claimed he was not an Indian; asked to have an attorney appointed to him pursuant to the tribe's special domestic violence criminal jurisdiction ("SDVCJ") authorized by 25 U.S.C. Sec. 1302 et. seq., the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013"); and, challenged the qualifications of the counsel appointed to him by the tribe in violation of his rights under the Equal Protection Clause. The Amantonka Nation District Court denied all of the Petitioner's motions finding that Petitioner is a naturalized citizen of the Amantonka Nation and as a result, his court-appointed attorney possessed the qualifications required under the Amantonka Nation's Code.

After a jury found Petitioner guilty as charged, Petitioner motioned to set aside the verdict by raising the same arguments from his pretrial motions. The Amantonka Nation District Court denied the motion by reiterating its previous ruling and sentenced Petitioner to seven (7) months of incarceration and a $1,500.00 fine. Petitioner was required to complete batterer rehabilitation and alcohol treatment programs through Amantonka Nation Social Services Division and pay $5,300.00 in restitution to Lorinda Reynolds.

The Petitioner appealed the Amantonka Nation District Court's decision to the Supreme Court of the Amantonka Nation by raising the same arguments from his pretrial motions. The Supreme Court of the Amantonka Nation affirmed the District Court's ruling. The Court rejected

Petitioner's argument that he is a non-Indian finding that because Petitioner voluntarily undertook the naturalization process to become a member of the Amantonka Nation, he is an Indian. As a result, the Amantonka Nation's exercise of criminal jurisdiction over him was proper. Since the Court concluded Petitioner is an Indian, it also denied Petitioner's arguments that his court-appointed counsel was insufficient under the qualifications required by VAWA 2013 was inapplicable. The Court rejected his alternative argument, where he alleged that as an Indian, his court-appointed attorney possessed fewer qualifications than the attorney he would have been afforded were he prosecuted as a non-Indian. The Court found the argument without merit since Petitioner relied heavily on alleged differences between the State of Rogers' and Amantonka Nation's bar exams yet failed to produce evidence supporting his claim.

Then the Petitioner filed a Writ of Habeas Corpus under 25 U.S.C. §1303 in the United States ("U.S.") District Court for the District of Rogers, alleging that his conviction by the Amantonka Nation District Court violated his federal civil rights guaranteed in the U.S. Constitution's Fifth Amendment, the Indian Civil Rights Act ("ICRA"), and VAWA 2013. The U.S. District Court granted his motion. The Court stated Petitioner cannot be an Indian for purposes of criminal jurisdiction because the federal definition requires a degree of Indian blood, and the Petitioner has none. Since the Court found that Petitioner was a non-Indian, the Amantonka Nation's exercise of criminal jurisdiction over him stemmed from the Nation's SDVCJ under VAWA 2013; under those requirements, the Nation failed to provide Petitioner with sufficient defense counsel.

The Thirteenth Circuit reversed the U.S. District Court's decision for the same reasons as the Amantonka Nation's Supreme Court and remanded the decision back to the lower court to

deny the writ of habeas corpus. The Petitioner filed a petition for Writ of Certiorari to the Supreme Court of the United States, which the Court granted.

II. STATEMENT OF FACTS

Based on the evidence produced at trial, the following facts are not in dispute. The Petitioner met his wife Lorinda while both were students at the University of Rogers. Record ("R.") at 6. Lorinda was, and to this day remains, a member of the Amantonka Nation, which is a federally-recognized tribe located in the State of Rogers. *Id.* At the time, Petitioner was a non-Indian. *Id.* After their graduation, the Petitioner and Lorinda decided to marry. *Id.* They both found jobs on the Amantonka Nation Reservation and moved into an apartment in the tribal housing complex. *Id.* The Petitioner worked as a manager at the Amantonka shoe factory. *Id.*

Two years after marrying Lorinda, having worked and lived on the reservation during that time, Petitioner voluntarily made the decision to apply to become a naturalized member of the Amantonka Nation. *Id.* The Petitioner applied and completed the naturalization process, which includes completing a course in Amantonka culture, completing a course in Amantonka law and government, passing the Amantonka citizenship test, and performing one hundred (100) hours of community service within a unit of the Amantonka Nation government. R. at 12-13. Upon successfully completing this process and taking his oath of citizenship to the Amantonka Nation, the Amantonka Nation issued Petitioner a tribal identification card, and became a member of the Amantonka Nation. R. at 6. Petitioner's status as a naturalized tribal member afforded him all the benefits and privileges available to all other members of the Amantonka Nation. R. at 13.

One year after the Petitioner chose to become a citizen of the Amantonka Nation, the Amantonka Shoe Factory went out of business, and the Petitioner lost his job. R. at 6. For ten

(10) months subsequent, Petitioner remained out of work. *Id.* During that ten (10) month period, the couple's marriage became increasingly tumultuous. *Id.* The Petitioner began to drink heavily and was verbally abusive toward Lorinda. *Id.*

On June 15, 2017, the Amantonka Nation police responded to a call at the couple's apartment. *Id.* According to the record, this was not the first time the Amantonka Nation police were called to the couple's apartment. *Id.* However, June 15, 2017, was the first time that responding officers saw evidence of physical abuse. *Id.* Based on the evidence presented at trial, Petitioner struck his wife in the face with an open fist, using enough force to knock her to the ground. *Id.* As Lorinda fell to the floor, her torso hit a coffee table. *Id.* The Petitioner's blow and resulting fall caused Lorinda to suffer cracked ribs. *Id.*

After the incident, Petitioner was transported to the Amantonka Nation Jail. R. at 6. The following day, the Amantonka Nation Chief Prosecutor, Amanda Flores, filed a criminal complaint against the Petitioner alleging domestic violence in violation of Title 5 Section 244 of the Amantonka Nation Code. R. at 7. There is no record Petitioner objected to the jurisdiction of the Amantonka District Court during his arraignment, though he did request court-appointed indigent counsel. R. at 4.

Per his request for indigent counsel, the Amantonka Nation District Court appointed defense counsel to the Petitioner in accordance with Title 2, Section 503(3) of the Amantonka Nation Code. R. at 6. The counsel appointed to represent the Petitioner was qualified to do so under Title 2, Chapter 6 of the Amantonka Nation Code. R. at 8. As the record further illustrates, Petitioner's defense counsel possessed a Juris Doctorate ("J.D.") from an American Bar Association ("ABA")-accredited law school and was a member in good standing with the Amantonka Nation Bar Association. R. at 7.

SUMMARY OF ARGUMENT

The Amantonka Nation's District Court exercised its inherent criminal jurisdiction over Petitioner as an Indian because Petitioner voluntarily undertook the naturalization process to become a naturalized member of the Nation. Therefore, the due process procedures required by the Violence Against Women Act's ("VAWA") Special Domestic Violence Criminal Jurisdiction did not apply to Petitioner's conviction in tribal court.

The definition for who is an Indian for purposes of federal jurisdiction is neither defined in 25 USC § 1301 or § 1302, though each provision is referenced by VAWA. 25 USC § 1304. Rather, the definition of Indian is "judicially explicated," defined instead by federal common law. *United States v. Bruce*, 597 F.2d 1260, 1263 (9th Cir. 1979). Under federal common law, the court has the authority to determine who is an Indian by applying a two-pronged analysis called the Rogers Test. *See E.g. U.S. v. Stymiest*, 581 F.3d 759, (8th Cir. 2009); *U.S. v. Bruce*, 394 F.3d 1215 (9th Cir. 2005); *U.S. v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001). Under *Rogers*, federal courts consider two prongs to define who is an Indian: (1) Native American ancestry to a federally-recognized Indian tribe; and (2) tribal or federal government recognition as an Indian. *Bruce*, 394 F.3d at 1223–24. Federal courts have held that both prongs must be met. *U.S. v. Maggi*, 598 F.3d 1073, 1075 (9th Cir. 2010).

While the Rogers Test remains the agreed upon test for determining whether a defendant can be prosecuted under a federal rather than state statute, tribes still possess the inherent sovereignty to define the basis for membership within their tribes. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); s*ee e.g. Williams v. Lee*, 358 U.S. 217 (1959). Under this inherent authority, this Court should abrogate the first prong under the Rogers Test in the narrow circumstance, as is the case here where the tribal court is exercising concurrent criminal

jurisdiction over a naturalized tribal member who has committed domestic violence within their reservation.

If Petitioner is Indian for purposes of the tribal court's inherent authority to exercise its criminal jurisdiction over him, then the qualifications applicable to the type of counsel Petitioner is afforded as an indigent stems from the Amantonka Nation's Code. Pursuant to Section 607(a), a public defender must "be at least 21," be of "high moral character and integrity," not have been "dishonorably discharged by the Armed Services," be "physically able to discharge her duties," successfully complete an Amantonka Nation bar exam, and be trained in Amantonka law and culture. 607(a)(1-6). The court-appointed counsel Petitioner was given by the Nation complied with all of these qualifications. In addition, she also possessed a JD from an ABA-accredited institution.

Though the counsel indigent defendants who are Indians are afforded pursuant to the Nation's Code may possess different qualifications than indigent, non-Indian defendants, this difference does not violate Petitioner's due process rights under an equal protection analysis. To apply an equal protection analysis to legislation and regulations as related to federally-recognized tribes, Courts must conduct their analyses under a rational basis level of scrutiny. See Morton v. Mancari, 417 U.S. 535, 554–55 (1974), where this Court held that "Indian is not a racial classification, but a political one." Under this standard of review, federal regulations which acknowledge tribal sovereignty by affirming a tribes' rights to self-govern and regulations that close jurisdictional voids on reservations where native women are being subjected to higher rates of domestic violence perpetrated by non-members with impunity, serve a rational government interest. *Means v. Navajo Nation*, 432 F.3d 924, 933-35 (9th Cir. 2005).

However, even if this Court finds that Petitioner is a non-Indian and the Nation exercised its SDVCJ over him rather than its inherent criminal jurisdiction, the counsel appointed by the tribe to Petitioner still satisfied the qualifications required by 25 USC 1304. Petitioner's court-appointed attorney was licensed to practice law by the tribe, a jurisdiction within the U.S.; the tribe applies appropriate professional licensing standards to those it has licensed; and, the tribe's Code ensures the competence and professional responsibility of those practicing within its courts. Amantonka Code Title 2, Section 607.

ARGUMENT

I. THE AMANTONKA NATION EXERCISED ITS INHERENT CRIMINAL JURISDICTION OVER PETITIONER AS A NATURALIZED MEMBER OF THE NATION.

The Petitioner files this petition as a final effort to circumvent the jurisdiction of the Amantonka Nation of which he knowingly, voluntarily, and intelligibly chose to avail himself. In doing so, he is also attempting to undermine the criminal jurisdiction of all Tribal Nations within the United States. A favorable ruling for the Petitioner will create new jurisdictional gaps that Congress sought to fill with the passage of the Violence Against Women Act ("VAWA") and set a dangerous precedent for Indian Country.[1]

It is undisputed that on June 15, 2017, the Petitioner physically abused his wife, Lorinda Reynolds, by hitting her in the face causing her to fall to the ground, hit a coffee table, and crack her ribs. It is also undisputed that this incident was not the first time that Amantonka Nation police officers were called to the couple's residence. What is in dispute is whether the Petitioner, as a naturalized citizen of the Amantonka Nation, should be designated as a non-Indian for the purposes of federal criminal jurisdiction and subject only to the Amantonka Nation's Special Domestic Violence Criminal Jurisdiction ("SDVCJ") under VAWA, or whether he is an Indian for the purposes of tribal criminal jurisdiction and should be required to serve out his sentence as ordered after a jury found him guilty of domestic violence. The Respondents respectfully argue the latter.

[1] Respondents follow the statutory definition of Indian Country set forth in 18 U.S.C. § 1151: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

A. The Petitioner is Indian for purposes of tribal criminal jurisdiction.

Federal courts have long grappled with the issue of defining who is an Indian for purposes of jurisdiction. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 513 (1976) (stating that the "question of Indian status for purposes of criminal jurisdiction is perplexing," and that "[n]o statutory definition currently exists to guide courts and practitioners in determining Indian status under the federal criminal jurisdiction statutes"). Congress granted the federal courts criminal jurisdiction in Indian Country under the General Crimes Act, or 18 U.S.C. § 1152, and the Major Crimes Act, or 18 U.S.C. § 1153. The General Crimes Act ("GCA") provides the federal courts with jurisdiction over interracial crimes committed in Indian Country. *See* 18 U.S.C. § 1152. The Major Crimes Act ("MCA") provides federal criminal jurisdiction over sixteen criminal offenses when committed by Indians in Indian Country. *See* 18 U.S.C. § 1153. However, there is no definition of the term "Indian" provided in the GCA or MCA.

In the absence of a statutory definition, federal courts have applied a two-prong test to determine whether a party is Indian for the purposes of establishing federal jurisdiction over a crime committed in Indian Country. This test has widely become known as the "Rogers Test" as it was first used in *United States v. Rogers*, 45 U.S. 567 (1846). The Court in *Rogers* interpreted the meaning of Indian under the Trade and Intercourse Act of 1834, the precursor to the MCA, to determine that it did not apply to a white man who had been adopted into the Cherokee Nation. *Rogers,* 45 U.S. at 573.

In *Rogers*, a grand jury in the U.S. District Court for the District of Arkansas indicted William S. Rogers for the murder of Jacob Nicholson, both of whom were described as "white

men and not Indians," by the court. *Rogers,* 45 U.S. at 567. Both men fully incorporated themselves into the Cherokee Nation. *Rogers,* 45 U.S. at 567-68. Rogers made his home in the Cherokee Nation territory, married a Cherokee woman, and had several children by her. *Id*. Nicholson settled in the territory of the Cherokee Nation, married a Cherokee woman, and was adopted by the Cherokee Nation, at which time he was afforded all the rights and privileges of any Cherokee Indian. *Id*. Rogers filed a plea stating the federal court "ought not take further cognizance of the said prosecution," because, although racially white, he and Nicholson were citizens of the Cherokee Nation for purposes of criminal jurisdiction. *Rogers,* 45 U.S. at 567. The Court held it would be inconsistent with history, statutory, and case law to allow Tribal Nations the ability to subsume United States citizens into their membership for the purposes of an exemption to a federal jurisdiction provision. *Rogers,* 45 U.S. at 573. According to the Court, granting Rogers' plea would undermine United States' sovereignty to define its citizens. *See Id*.

The Rogers Test is significant as it has been widely adopted across the circuits. *See E.g. U.S. v. Stymiest*, 581 F.3d 759 (8th Cir. 2009); *U.S. v. Bruce*, 394 F.3d 1215 (9th Cir. 2005); *U.S. v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001). Under *Rogers*, federal courts consider two prongs to define who is an Indian: (1) Native American ancestry to a federally-recognized Indian tribe; and (2) tribal or federal government recognition as an Indian. *Bruce*, 394 F.3d at 1223–24. Federal courts have held that both prongs must be met. *U.S. v. Maggi*, 598 F.3d 1073, 1075 (9th Cir. 2010). Though there is not consensus regarding how much Indian blood the test requires, federal courts have adopted factors for proving tribal recognition. *See U.S. v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010). Among factors that courts consider to analyze whether an individual's status meets the "tribal or government recognition" prong of the Rogers test are (in declining

order of importance): (1) tribal enrollment; (2) receipt of assistance reserved only to Indians; (3) enjoyment of benefits of tribal affiliation; and (4) social recognition as Indian through residence on reservation and participation in Indian social life. *Bruce*, 394 F.3d at 1224.

However, it is important to note that the Rogers Test only applies to a party seeking an exemption from *federal* criminal jurisdiction. This is consistent with federal Indian law as a whole and principles of federal common law. Tribal Nations are distinct political entities and maintain the inherent right of self-governance. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Although, they are considered to be "domestic dependent nations," their power to regulate their own internal and social relations is still intact. *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17 (1831); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); see *United States v. Wheeler*, 435 U.S. 313 (1978). This inherent sovereign authority extends to membership and the ability to enforce their own laws in their own forums. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); s*ee e.g. Williams v. Lee*, 358 U.S. 217 (1959).

The Rogers Test is "judicially explicated," not statutorily mandated. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979). As such, it is federal common law and can be changed due to the passage of time and changing of social norms. *Milwaukee v. Illinoi*s, 451 U.S. 304, 313 (1981) ("[F]ederal common law is 'subject to the paramount authority of Congress'" (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931))). Additionally, under their inherent sovereign authority, the Rogers Test may be followed or distinguished by tribal governments.

In this case, the Petitioner is seeking an exemption from *tribal* criminal jurisdiction, not *federal* criminal jurisdiction as in *Rogers*. Thus, the tribe may set forth its own standards for determining who is an Indian and subject to their criminal jurisdiction.

The Amantonka Nation has a longstanding custom and tradition of accepting individuals into the tribe who have married tribal members, as evidenced by the naturalization process codified in Title 3 Chapter 2. Under this process, Petitioner voluntarily applied for citizenship within the Amantonka Nation after two years of marriage to his wife. He was eligible for naturalization as he was married to a citizen of the Amantonka Nation and lived on the Amantonka reservation for at least two years. *See* Amantonka Nation Code Title 3 Section 201. He became a member of the Amantonka Nation by completing a course in Amantonka culture, completing a course in Amantonka law and government, passing a citizenship test, and performing one hundred (100) hours of community service within a unit of the Amantonka Nation government. *See* Amantonka Nation Code Title 3 Section 202. Upon completion of all of these requirements, Petitioner received a tribal identification card and all the rights and privileges of an Amantonka Nation citizen. *See* Amantonka Nation Code Title 3 Section 203.

At no point prior to being prosecuted and convicted for domestic violence did the Petitioner question the Amantonka Nation's jurisdiction over him. There is also no record of the Petitioner questioning the Amantonka Nation's jurisdiction over him at his arraignment. Indeed, the Petitioner requested counsel be appointed to him, at the Nation's expense pursuant to his rights as a member under the Nation's Code. There is also no record that Petitioner has ever sought or attempted to revoke or rescind his membership within the Amantonka Nation. He still maintains all the rights and privileges afforded to Amantonka Nation tribal members, and as such, he should be subject to the Amantonka Nation's jurisdiction as an Indian.

The precedent for applying the judicially-explicated definition of Indian is generally invoked where parties seek to be exempted from federal jurisdiction. The Amantonka Nation maintains the inherent sovereignty to define its members. The Petitioner was a member of the Amantonka Nation when he committed the offense and remains a tribal member to this day. Thus, the Amantonka Nation has the authority to exert its inherent criminal jurisdiction over him. The Petitioner is an Indian for the purposes of tribal criminal jurisdiction.

B. The Special Domestic Violence Criminal Jurisdiction Requirements under the Violence Against Women Act 2013 do not apply as the Petitioner is Indian.

The Petitioner argues that the Amantonka Nation does not have criminal jurisdiction over him due to the Supreme Court of the United States' decision in *Oliphant v. Suquanish Indian Tribe*, 435 U.S. 191 (1978). However, as discussed earlier, the Petitioner is Indian for the purposes of tribal jurisdiction and may not pick and choose when he wants to be a citizen of the Amantonka Nation just to circumvent their criminal jurisdiction.

In *Oliphant*, the Court severely limited tribal criminal jurisdiction finding that a non-Indian could not be prosecuted by a tribal court because he was not a member of the tribe and could not be expected to know their laws. *Oliphant*, 435 U.S. at 211-12. The Court further held that tribes could not maintain criminal jurisdiction over non-Indians because the Indian Civil Rights Act ("ICRA") did not include the same constitutional guarantees afforded to criminal defendants under the United States Constitution. *Oliphant*, 435 U.S. at 194. In particular, the Court was concerned with the lack of guarantee to indigent defense counsel. *Oliphant*, 435 U.S. at 211-12. *Oliphant* effectively decided that only the federal courts have criminal jurisdiction over non-Indian defendants.

The practical implications of *Oliphant* were harshly felt throughout Indian Country. In particular, rates of sexual violence against Native women skyrocketed. *See* Amnesty International, *Maze of Injustice* (2007) (stating 34% of Native women will be raped in their lifetimes and 39% will be victims of domestic violence). Tribes were left unable to protect their communities from non-Indian offenders. In some instances, the only response that tribal police could have toward a violent, but non-Indian offender was to transport them off reservation. Alfred Urbina; Melissa Tatum, *On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe*, 55 Judges J. 8, 9 (2016) (stating in the case of Pascua Yaqui, tribal police simply transported an offender to a convenience store off the reservation). In part of a response to this epidemic, Congress enacted the Violence Against Women Act ("VAWA") in 1994. 42 U.S.C. § 13701 et. seq. Since its passage, VAWA has been reauthorized four times, most recently in March of 2013. 25 U.S.C. §1302. VAWA 2013 sought to fill the jurisdictional holes created by this Court's holding in *Oliphant.*

Under VAWA 2013, ICRA was amended to provide tribes with Special Domestic Violence Criminal Jurisdiction ("SDVCJ") provisions, which granted Congressional authority to tribes to prosecute non-Indians for domestic and sexual violence cases. 25 U.S.C. §1304. In order to exercise SDVCJ, tribes would have to meet certain requirements for their criminal justice systems to be deemed adequate. VAWA 2013 requires tribes must provide criminal defendants with all the rights defined in ICRA in addition to two new rights, namely the right to indigent defense counsel and the right to an impartial jury drawn from a fair cross section of the community. 25 U.S.C. §1304(f)(2-3).

The Amantonka Nation is one of few tribes who have opted in to exercising SDVCJ and have done so successfully. However, under SDVCJ, the criminal offender or victim must be

non-Indian. As stated above, the Petitioner is Indian. He chose to avail himself of the Amantonka Nation's criminal jurisdiction by becoming a citizen with all the rights and privileges thereof. For this Court to allow the Petitioner to now circumvent the criminal jurisdiction of the Amantonka Nation would undermine the very purpose of VAWA and uncover the jurisdictional holes that this Congressional delegation of authority sought to close.

Respondents respectfully request that this Court refer to tribal decisions such as *Navajo Nation v. Hunter*, 7 Navajo Reporter 194 (Navajo 1996)(stating under the Navajo Criminal Code, "person" is defined as "any natural Indian individual," and the code does not require affirmative proof of the terms "person" or "Indian" as an element of the crime), and *Nofire v. U.S.*, 164 U.S. 657 (1897) (stating the victim, who was a white man, was Indian for purposes of criminal jurisdiction based on his adoption into the Cherokee Nation by marriage to a Cherokee woman and his exercise of the right to vote as a Cherokee citizen). These courts have successfully maintained tribal criminal jurisdiction due to a voluntary and consensual relationship with their tribal members rather than referring such an integral decision to the archaic definition of Indian that relies on blood quantum. As held by this Court in *Mancari* and affirmed many times over, Indian status is more than a racial classification, it is a political relationship. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). Pursuant to this political relationship, the decision of whom is a tribal member, and Indian for purposes of criminal jurisdiction, is best left to tribes to decide.

II. PETITIONER IS AN INDIAN THEREFORE THE TRIBAL COURT-APPOINTED ATTORNEY HE WAS PROVIDED SATISFIED THE QUALIFICATIONS REQUIRED BY TITLE 2, SECTION 607(A) OF THE AMANTONKA NATION'S CODE

A. Since Petitioner was sentenced to less than a year imprisonment, the Amantonka Nation's Code defined the legal qualifications court-appointed indigent defense counsel must possess.

The Amantonka Nations' exercise of criminal jurisdiction over the petitioner in tribal court stems from its inherent criminal jurisdiction over Indians. As a result, since the petitioner is a member of the Amantonka Nation, it is within the auspices of the Nation's government to set the qualifications required by the attorneys who practice in their courts. *See Tom v. Sutton*, 533 F.2d 1101, 1103 (9th Cir. 1976), where the court held that, "Under their sovereign status, Indian tribes are vested with the inherent power to create and administer a criminal justice system…and the power to adopt their own constitution and enact laws."

Tribal sovereignty predates the Constitution; therefore, the Constitution does not bind tribal governments with respect to their members. *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F.Supp.3d 1221, 1228 (D. Nevada, 2014). ICRA, which governs tribal-court proceedings, "accords a range of procedural safeguards to tribal-court defendants 'similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.'" *U.S. v. Bryant*, 136 S.Ct. 1954, 1956 (2016), *quoting Santa Clara*, 436 U.S. at 57. When Congress amended ICRA in 1994, it affirmed the rights of tribes to exercise criminal jurisdiction over all Indians in Indian country as a power of self-government that has always existed and has never been "taken away" by Congress. *U.S. v Archambault*, 174 F.Supp.2d 1009, 1012 (D.S.D. 2001).

Pursuant to ICRA, whenever a sentence of more than a year is being imposed, a defendant is entitled to "effective assistance of counsel at least equal to that guaranteed by the United States Constitution." §1302(c)(1), (2). However, where the sentence imposed does not

exceed one year, the tribal code's requirements govern. *U.S. v Long*, 870 F.3d 741, 747 (8th Cir. 2017).

Since the defendant is a member of the Amantonka Nation, the tribal court's exercise of jurisdiction over him is pursuant to Title 2, Section 105(a). This section vests the Amantonka Nation with jurisdiction to "enforce all provisions of [its Criminal Code]…against any person [who violates it] within the boundaries of the Amantonka Nation's Indian country." Amantonka Crim. Code 105(a).

Pursuant to Title 2, Section 503 of the Amantonka Code, any Indian defendant accused of a crime under the Nation's criminal jurisdiction, whom the court finds is indigent, is entitled to appointment of a public defendant whose qualifications are listed under Title 2, Section 607(a). Pursuant to Section 607(a), a public defendant must be at least 21, be of high moral character and integrity, not have been dishonorably discharged by the Armed Services, be physically able to discharge her duties, successfully complete an Amantonka Nation bar exam, and be trained in Amantonka law and culture. 607(a)(1-6).

In *U.S. v. Long*, because the defendant was sentenced to a one-year suspended prison sentence, the court concluded the defendant's right to appointed counsel had to derive from the tribal court's code. *U.S. v. Long*, 870 F.3d at 747 (8th Cir. 2017). In *Long,* Rosebud Sioux's Code allows for both lay and professional attorneys to practice in its court, so long as the advocates obtain permission from the Rosebud Sioux tribal court first. *Id*. The court held that because the defendant failed to present evidence that his counsel at the tribal court proceeding was not admitted into the court, then the counsel defendant was appointed by the tribal court was sufficient. *Id*.

In this case, since the defendant was sentenced to a prison term of less than one year, the qualifications of his court-appointed attorney satisfied the due process considerations under ICRA. The Court in *Long* held that a tribal code permitting both lay and professional attorneys to practice in tribal courts with the court's permission is statutorily sufficient. Similarly, the Amantonka Code permits both attorneys and lay counselors to serve as public defenders for indigent, Indian defendants so long as the counselors are admitted to practice within the court. This admission is based on several requirements, including passing the bar examination administered by the tribe, possessing high moral character and integrity, and having training in Amantonka law and culture. Thus, not only does the Amantonka Code meet the minimum standards deemed sufficient in *Long,* but it provides for more by requiring advocates to successfully complete the Amantonka bar exam.

Additionally, though ICRA does not require tribes to provide indigent defendants with counsel, the Amantonka Nation does. Pursuant to Title 2, Section 503, Indian defendants who satisfy the Nation's standard for indigence are entitled to the appointment of a public defender.

Furthermore, though the Amantonka Nation is perfectly capable of defining and protecting its citizens' due process rights in its own tribal courts, as noted in *Bryant*, ICRA fills in the gaps by according to defendants being tried in tribal courts specific procedural safeguards resembling those in the Bill of Rights and Fourteenth Amendments. *Bryant*, 136 S.Ct. at 1956. Thus, where as here, certain procedural rights may not apply because the defendant is sentenced to less than a year imprisonment, the "prisoner may challenge the fundamental fairness of the proceedings in tribal court" by extending the availability of habeas corpus review in federal court. *Id.*

Finally, as a Tenth Circuit court warns,

> "…'the practice of failing to fully recognize convictions from individual tribal courts also risks imposing inappropriately sweeping standards upon diverse tribal governments, institutions and cultures,' which undermines ICRA's objective of allowing tribes to adopt 'their own tribal court[s] and criminal justice system[s].'" *U.S. v. Shavanaux*, 647 F.3d 993, 1000 (10th Cir. 2011) (*quoting* State v. Spotted Eagle, 71 P.3d 1239, 1245 (Mont. 2003)).

B. Applying an equal protection analysis, Petitioner's due process rights were not violated because regulations related to tribes are subject to rational basis review and deferring to the Amantonka Nation's expertise in establishing its own processes of self-government is a rational government interest.

Since the petitioner raised an equal protection argument, this brief will also address its merits as it pertains to the sufficiency of counsel petitioner was afforded by the tribal court due to his status as an Indian member of the Amantonka Nation. Applying an equal protection analysis to the qualifications possessed by the petitioner's court-appointed attorney against the qualifications required by attorneys appointed to non-Indian defendants in the Amantonka Nation's tribal court shows that ICRA, which affirms the Amantonka Nation's inherent authority to codify the qualifications for attorneys who practice within their tribal courts, does not result in an equal protection violation of the petitioner's due process rights.

VAWA (25 U.S.C. §1304) enumerates the requirements tribes must comply with in order to prosecute non-Indian offenders in tribal court under their SDVCJ. According to §1304(d)(2), if a non-Indian defendant is facing a term of imprisonment for any amount of time, the enumerated rights found in ICRA §1302(c) apply. 25 U.S.C.A. §1304 (West). Pursuant to 1302(c), those rights include: (1) "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;" and, (2) at the tribal government's expense, "an

indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C. §1302(c)(1-2). Thus, while a non-Indian prosecuted pursuant to a tribe's SDVCJ is appointed an attorney qualified under Title 2, Section 607(b) of the Amantonka Nation's Code, an Indian over whom the tribe is exercising its inherent jurisdiction must be qualified under Title 2, Section 607(a). The fundamental difference between the two sections being that Section 607(b) requires the attorney to possess a J.D. from an ABA-accredited institution whereas public defenders qualified under 607(a) are not. Amantonka Nation Code Title 2, Section 607. However, the petitioner's attorney, like all the public defenders employed by the tribe at the time of this writ, does possess a J.D. from an ABA-accredited institution.

To apply an equal protection analysis to legislation and regulations as related to federally-recognized tribes, Courts must conduct their analyses under a rational basis level of scrutiny. This is due to *Morton v. Mancari*, where this Court held that "'Indian' is not a racial classification, but a political one." *Mancari*, 647 F.3d at 1001 (*quoting* Morton v. Mancari, 417 U.S. 535, 554–55 (1974)); *see also U.S. v Antelope*, 630 U.S. 641, 645-56 (1977) (where the Court held that federal legislation with respect to Indians treats tribes as "unique aggregations," or "quasi sovereign tribal entities" and is rooted in tribal status "as a separate people with their own political institutions," and not upon "invidious racial classifications.") Therefore, the permissible political relationship between tribes and the federal government invokes the rational basis standard of scrutiny. Pursuant to a rational basis analysis, so long as the "special treatment [of tribes within federal regulation] can be tied rationally to the fulfillment of Congress' unique

obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 647 F.3d at 1002 (*quoting Mancari*, 417 U.S. at 555).

In *Shavanaux*, the court held that to the extent a federal regulation subjects Indian defendants to disparate treatment, Congress has a rational basis for doing so where the government's interest is to protect Native women, who are subject to higher levels of domestic violence, including physical and sexual abuse, than any other groups in the U.S., from domestic violence. *Shavanaux*, 647 F.3d at1002 (10th Cir. 2011). The defendant in *Shavanaux* argued that the counsel appointed to him by the tribal court for his misdemeanor domestic violence conviction violated equal protection. *Id.* at 1001. The defendant claimed that 18 USCA §117, which extends federal criminal jurisdiction over him because of a prior domestic violence conviction in a tribal court, singles out Indians based on impermissible racial lines. *Id.* Pursuant to *Mancari*, the Court analogized the defendant's status to the defendant in *U.S. v. Antelope*[2], concluding that he,

> was not subjected to differential treatment in federal court because of his ancestry, but because of his voluntary association with an Indian tribe. Through his tribal membership and residence in Indian country, Shavanaux [the defendant] chose to submit himself to tribal jurisdiction and the criminal procedures of the Ute tribe.

Id. at 1002; *see also Morris v. Tanner,* 288 F. Supp.2d 1133, 1138 (D. Mont. 2003) (where the court held that because tribal jurisdiction extends to enrolled tribal members and because

[2] In *U.S. v. Antelope*, the court held that defendants are not subject to the federal criminal jurisdiction of the Major Crimes Act because of their Indian race but rather because they are enrolled members of the Coeur D'Alene Tribe. 630 U.S. at 649.

enrollment in a tribe is voluntary, the exercise of tribal criminal jurisdiction over them does not violate their Fifth Amendment equal protection rights).

Likewise in *Means*, the Court held that a law which subjects "nonmember Indians to tribal criminal jurisdiction in 'Indian country' passes the 'rational tie' standard" because the recognition: (1) furthers Indian self-government, especially on the Navajo Nation where there are non-member Indians permitted to live on the reservation because of their marriages to Navajo women and by granting the tribe's misdemeanor jurisdiction over them, Congress ensures "rapid and effective tribal responses," when domestic violence occurs; and, (2) reaffirms *Mancari*'s holding, "that Indian tribal identity is political rather than racial, and the only Indians subject to tribal court jurisdiction are enrolled or de facto members of tribes, not all ethnic Indians." *Means v. Navajo Nation*, 432 F.3d 924, 933-35 (9th Cir. 2005).

An equal protection analysis as applied to the circumstances of this case must begin with ICRA, since it is the source of the alleged disparity as it limits the due process requirements tribal courts must comply with in order to exercise its inherent criminal jurisdiction. As explicated by the courts in the cases referenced above, an equal protection analysis of ICRA is subject to a rational basis review, meaning so long as there is a rational basis for the passage of the legislation, it withstands the analysis.

By passing ICRA and recognizing tribal authority to govern its own institutions by setting its own requirements for those authorized to practice within its courts, Congress sought to further Indian self-government. This is especially true where here, as was also the case in *Means*, the exercise of self-government involves tribes being able to exercise criminal jurisdiction over men who live on the reservation, who live in tribal housing, who work for tribal businesses, and

who are married to members of the tribe, and commit acts of domestic violence against the tribal members.

Additionally, the mitigation of harm to the defendant applicable to the analysis in *Shavanaux*, where the defendant benefited from his voluntary association with the tribe, is applicable to the circumstances of this case as well. Petitioner not only lives and works on the reservation and is married to a tribal member, he also voluntarily became a tribal member by going through the naturalization process as outlined in the Amantonka Code, which affords to naturalized tribal members all the same benefits and privileges as any other Amantonka tribal member.[3]

Therefore, not only is there a strong government interest furthered by the Act itself, there is virtually no harm to Petitioner because he voluntarily availed himself of the tribe's jurisdiction by living on the reservation, working on the reservation, marrying a tribal member, and becoming a tribal citizen through the Nation's naturalization process.

C. Even if Petitioner were a non-Indian under VAWA's SDVCJ, Petitioner's court-appointed indigent counsel would still satisfy the qualifications required under 25 U.S.C. 1304.

Alternatively, if the Court finds that defendant is a non-Indian and the tribe exercised its SDVCJ over him, Petitioner's court-appointed attorney still satisfied the relevant legal requirements: she was licensed to practice law by the tribe; the tribe applies appropriate

[3] *See:* Amantonka Tribal Code Title 3, Sec. 203: "Upon successful completion of the Naturalization process, the applicant shall be sworn in as a citizen of the Amantonka Nation. The name of each new citizen shall be added to the Amantonka Nation roll, and the new citizen shall be issued an Amantonka Nation ID card. Each new citizen is thereafter entitled to all the privileges afforded all Amantonka citizens."

professional licensing standards to those it has licensed; and, the tribe's Code ensures the competence and professional responsibility of those practicing within its courts.

Since it is an undisputed fact that Petitioner's court-appointed counsel was qualified as a public defender under the Amantonka Nation's Code and possessed a JD from an ABA-accredited institution, her qualifications satisfied the legal requirements enumerated in VAWA 2013. This is evidenced by a direct comparison of the qualifications afforded to non-Indian offenders pursuant to VAWA with the qualifications afforded by the Amantonka Tribal Court.

In accordance with the requirements enumerated in VAWA, Section 503 of the Amantonka Nation's Code provides:

> Any non-Indian defendant accused of a crime pursuant to the Nation's criminal jurisdiction under Title 2 Section 105(b) [the tribe's exercise of SDVCJ], who satisfies the Nation's standard for indigence, is entitled to appointment of a public defender qualified under Title 2 Section 607(b).

Title 2 Sec. 503(2). Pursuant to Sec. 607(b), a public defender charged with representing an indigent, non-Indian offender in tribal court under the auspices of the court's SDVCJ must: (1) hold "a JD degree from an ABA accredited law school," (2) have "taken and passed the Amantonka Nation Bar Exam," (3) have "taken the oath of office," and (4) have "passed a background check." Title 2, Sec. 607(b). These qualifications are in addition to those required to be a public defender practicing in the tribal court, including an age requirement of 21, a high moral character and integrity requirement, and a familiarity with the Amantonka tribe and culture requirement. Title 2, Sec. 607(a)(1-6).

First, under ICRA, court-appointed counsel must be "licensed to practice law by any jurisdiction within the United States that applies appropriate professional licensing standard..." §1302(c)(2). Likewise, for an attorney to practice within the Amantonka Tribal Court, she must first be "admitted to practice and enrolled as an attorney of the [Amantonka] District Court upon written application." Title 2, Section 501(a). The Chief Judge approves applications based on whether the attorney is already barred by "any tribal, state or federal" court, and whether the attorney successfully completed the Amantonka's bar exam. *Id.* The attorney appointed by the tribal court to counsel the petitioner possessed the required qualifications because she held "a JD from an ABA accredited law school and was a member in good standing of the Amantonka Nation Bar Association," both of which are required in order to be a "licensed" attorney for purposes of practicing in the Amantonka Nation District Court.

While the petitioner argues that to be "licensed" as required under the Act means the attorney must be a member of a state bar association, that specification is neither qualified by the Act itself nor is there any case law suggesting the same. To the contrary, there are several sources of authority suggesting that "licensed by any jurisdiction" means "by any jurisdiction." §1302(c)(2). Pursuant to Black's Law Dictionary's definition of lawyer, "counsel" simply means "one or more lawyers who represent a client," and "lawyer" means "one who is licensed to practice law." Black's Law Dictionary 352, 895 (7th ed. 1999). Under this definition's plain meaning, so long as the court-appointed attorney is licensed, she is authorized to offer counsel regardless of whether the license was issued by a tribe, state or federal court.

More importantly, as stated in VAWA, a tribal court's jurisdiction over a non-Indian defendant is in recognition of the tribe's inherent sovereignty. *See* §1304(b)(1), which states, "the powers of self-government of a participating tribe include the inherent power of that tribe,

which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons." Since the tribe's exercise of SDVCJ is "concurrent" with the federal government's jurisdiction over the same perpetrators, §1304(b)(2), the jurisdiction cannot be a federal delegation.[4] Therefore, as a separate sovereign exercising inherent jurisdiction, the tribe should be able to define the qualifications for attorneys seeking to practice in its tribal court in a way that affirms the tribe's authority for self-governance. *See Tom v. Sutton*, 533 F.2d 1101, 1103 (9th Cir. 1976). This means recognizing a tribal court's authority to administer its own bar exam and establish its own licensing mechanisms. By interpreting the qualification otherwise, that being licensed requires counselors being barred in state court, tribes are denied legitimacy counter to Congressional intent. Furthermore, tribes unable to attract and employ state-barred attorneys will remain lawless jurisdictional voids where non-Indians are permitted to commit acts of violence against Indian women with impunity.

The Act also requires that the licensing jurisdiction, "effectively ensures the competence and professional responsibility of its licensed attorneys." §1302(c)(2). In addition to the licensing requirements listed above, which detail the ways in which the tribal court ensures its attorneys' competence, Title 2, Section 7 contains the Amantonka Nation's Code of Ethics for Attorneys and Lay Counselors. The duties of professional responsibility listed in Section 7 are similar to the duties proposed by the Model Rules of Professional Conduct. For example, the Code's first canon is "competence," followed by a canon defining the scope of representation, then one for diligence, etc. Likewise, Rule 1.1 of the Model Rules is "competence," 1.2 is "scope of representation," etc. American Bar Association, Model Rules of Professional Conduct (2016),

[4] *See U.S. v. Lara*, where the Court held that double jeopardy does not apply to concurrent tribal and federal convictions for the same offense because the sources of jurisdiction stem from two separate sovereigns. 541 U.S. 193, 199 (2004).

accessed at:

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

Furthermore, the Amantonka Code also contains a section detailing the process by which attorneys licensed to practice within its tribal courts may be disbarred. Title 2, Sec. 504. An attorney may be disbarred or suspended from practicing within the Amantonka Tribal Court pursuant to rules listed within the Code. Sec. 504(a). These rules include, "significant violations of the Code of Ethics of the Amantonka Nation." *Id.* By listing the qualifications required for attorneys to practice within its courts, detailing the standards by which attorneys may be licensed, and enumerating rules describing the duties the licensed attorneys are expected to follow as well as the mechanisms by which their licenses may be suspended or revoked, the Nation is able to "effectively" ensure its licensed attorneys' competence and professional responsibility. §1302(c)(2).

Petitioner has offered no evidence showing how the Amantonka Nation has failed to meet the due process procedures afforded to Petitioner as a member of its tribe, regardless of whether this Court chooses to classify him as an Indian or not. Under the requirements afforded to him under his status as an Indian or not, Petitioner's court-appointed counsel possesses a J.D. from an ABA accredited law school and is licensed to practice within the jurisdiction of the US.

CONCLUSION

For the foregoing reasons, the Respondents respectfully ask this Court to affirm the U.S. Court of Appeals for the Thirteenth Circuit's Opinion No. 18-344 reversing and remanding the District Court's opinion with instructions to deny the petition for writ of habeas corpus.

Respectfully submitted,

Team No. 381

Counsel for Respondents