**NO. 19-231**

IN THE

# Supreme Court of the United States

ROBERT R. REYNOLDS,
*Petitioner,*

v.

WILLIAM SMITH, Chief Probation Officer, Amantonka Nation Probation Service
JOHN MITCHELL, President, Amantonka Nation,
ELIZABETH NELSON, Chief Judge, Amantonka Nation District Court,
*Respondents.*

ON WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

## BRIEF FOR THE PETITIONER

TEAM 391
*Counsel for the Petitioners*

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## QUESTIONS PRESENTED

1. Is Mr. Reynolds' status as a naturalized citizen of the Amantonka Nation sufficient for him to be classified as an Indian for the purpose of Special Domestic Violence Criminal Jurisdiction despite his lack of Indian ancestry?
2. Did the attorney provided to Mr. Reynolds satisfy the relevant legal requirements?
    a. If Mr. Reynolds is considered a non-Indian in this context, did his attorney's qualifications as a public defender in the Amantonka Nation satisfy the various licensing and other constitutional legal requirements?
    b. If Mr. Reynolds is considered an Indian, did the differences between the protections he was afforded and those a non-Indian defendant would have received constitute a violation of his constitutional or tribal right to equal protection under the law?

## STATEMENT OF THE CASE

### 1. STATEMENT OF FACTS

This case is about preserving the right of indigent defendants to have access to appropriate representation of counsel in Amantonka Nation courts. The Petitioner, Mr. Reynolds, is a non-Indian by birth, who married a citizen of the Amantonka Nation (a federally recognized tribe). R. at 6.[1] Two years into the marriage, Mr. Reynolds applied to become a naturalized citizen of the Amantonka Nation, completed the naturalization process, took an oath of citizenship, and received an Amantonka Nation ID card. *Id*. He obtained a job on the Amantonka Nation Reservation as a manager at the Amantonka shoe factory and moved into the tribal housing complex with his wife. *Id*. Mr. Reynolds lost his job a year after becoming a citizen of the Amantonka Nation when his employer went out of business. *Id*. During the ensuing ten-month unemployment period, the Reynolds' marriage became troubled. *Id*.

The police were called to the Reynolds' apartment on June 15, 2017. *Id*. While the police had responded to previous calls at the apartment, this was the only occasion on which there was any evidence of a physical altercation. *Id*. According to the evidence, Mr. Reynolds had slapped his wife, causing her to fall to the floor. *Id*. The responding officer arrested Mr. Reynolds and transported him to jail. *Id*. Since the incident, Mr. Reynolds has found employment as a manager at a warehouse distribution center. *Id.* He has also faithfully complied with all conditions of his bond, and has attended counseling with his wife, who requested that the court drop the protection order against him. R. at 5.

[1] Numbers preceded by "R." refer to pages in the provided record.

Given that the questions this case presents rest on Mr. Reynolds' disputed Indian status, a brief discussion of tribal jurisdiction over non-Indians is warranted. If Mr. Reynolds is a non-Indian, the Amantonka Nation can only exercise criminal jurisdiction over him through Special Domestic Violence Criminal Jurisdiction (SDVC Jurisdiction), as tribal criminal jurisdiction over non-Indians is otherwise barred by the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). SDVC Jurisdiction was authorized by Congress in the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) and granted tribal courts criminal jurisdiction over non-Indians in limited circumstances.[2] 25 U.S.C. § 1304 (2018). To exercise this jurisdiction in imposing a prison sentence, tribes must grant additional protections to defendants, which include the right to effective assistance of counsel, *Id.* § 1302(c)(1), the right to 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," *Id.* § 1302(c)(2), and all other constitutional rights necessary to exercise jurisdiction, *Id.* § 1304(d)(4).

The following provisions of the Amantonka Nation Code (A.N.C.) provide much of the direct legal backdrop for the present case. Title 2 discusses the functioning of the courts. Within Title 2, Chapter 1 permits the Nation's courts to exercise criminal jurisdiction over Indians generally and over non-Indians within the bounds of SDVC Jurisdiction. 2 A.N.C. ch. 1 §105.[3] Chapter 5 discusses the requirements of the Amantonka Nation Bar and grants a right to counsel for indigent defendants. 2 A.N.C. ch. 5 §§ 501, 503. Chapter 6 describes the

[2] Those circumstances include instances of domestic or dating violence where the victim is an Indian and the defendant has ties to the prosecuting Indian tribe. *Id.* § 1304.

[3] A.N.C. is representative of the Amantonka Nation Code. Because formatting guidelines are not available for the Amantonka Nation Code the citation follows the format of the United States Code.

different requirements for public defenders; while lay counselors are ordinarily permitted, defendants charged under SDVC Jurisdiction are entitled to a defender with a "JD degree from an ABA accredited law school" who is "sufficiently qualified" to represent the defendant. 2 A.N.C. ch. 6 § 607. Title 3 allows non-Indians who are married to a citizen of the Amantonka Nation and have lived on the reservation for a minimum of two years to become citizens through naturalization, discusses the naturalization process, and addresses citizenship status, stating that "upon successful completion of the Naturalization process, the applicant shall be… entitled to all the privileges afforded all [Amantonka] citizens." 3 A.N.C. ch. 2 §§ 201-203. Finally, Title 5 defines partner or family member assault and describes the consequences and penalties for violating this section of the criminal code. 5 A.N.C. § 244.

## 2. STATEMENT OF PROCEEDINGS

On June 16, 2017, the Amantonka Nation Chief Prosecutor filed criminal charges in the District Court for the Amantonka Nation against Robert Reynolds for violating Title 5, Section 244 of the Amantonka Nation Code in an action titled *Amantonka Nation v. Reynolds*. R. 2. Mr. Reynolds made three pretrial motions challenging the court's jurisdiction over him and their provision of suitable counsel. *Id.* at 3. First, that the court lacks jurisdiction over him because he is an non-Indian for the purpose of criminal jurisdiction. *Id.* Second, that an attorney be appointed to him as required by VAWA 2013 because he is a non-Indian and thus falls within the Nation's exercise of SDVC Jurisdiction. *Id.* Third, that the assignment of his attorney violated his right to equal protection under the law as the attorney he received as an Indian was less qualified than an attorney a non-Indian would be entitled to. *Id.* at 3-4. The first two motions were denied because the court found that Mr.

Reynolds is an Indian. *Id*. at 3. The third motion was also denied; the court found that there was no difference in qualifications. *Id.* at 4. After a criminal trial, the jury returned a guilty verdict and the judge sentenced Mr. Reynolds to seven months of incarceration, a $1,500 fine, additional restitution, and treatment programs. *Id.* at 5. On appeal before the Supreme Court of the Amantonka Nation, Mr. Reynolds unsuccessfully raised the same arguments as in his pre-trial motions and the court affirmed the conviction. *Id.* at 6-7.

Mr. Reynolds filed a petition for a writ of habeas corpus under 25 U.S.C. § 1303 in the U.S. District Court for the District of Rogers, alleging a violation of his civil rights. *Id.* at 8. The petition was granted; the court held that Mr. Reynolds is a non-Indian and his court-appointed attorney failed to satisfy the requirements imposed by VAWA 2013. *Id.* On appeal, the U.S. Court of Appeals for the Thirteenth Circuit reversed the decision of the District Court and remanded with instructions to deny the petition for the writ of habeas corpus. *Id.* at 9. Mr. Reynolds filed a writ of certiorari to the United States Supreme Court. *Id.* at 10. On October 15, 2018, this Court granted the petition for writ of certiorari. *Id.*

## SUMMARY OF ARGUMENT

Mr. Reynold's petition for a writ of habeas corpus should be granted because his conviction is in violation of his civil rights as guaranteed by the US Constitution's Fifth Amendment, the Indian Civil Rights Act of 1968 (ICRA), and VAWA 2013.

First, Mr. Reynolds should be classified as a non-Indian for the purpose of criminal jurisdiction. Mr. Reynolds' classification must be established under the federal definition because of the Court's previous divestment of tribal criminal jurisdiction over non-Indians and the restoration of some of that jurisdiction under a federal act, VAWA 2013. As a non-Indian naturalized into the Amantonka Nation, Mr. Reynolds does not meet the requirements to be classified as an Indian under the federal definition. The courts have determined that some degree of Indian ancestry is required to be considered an Indian for federal purposes; Mr. Reynold's has none. Because Mr. Reynolds does not meet the requirements for Indian classification under the federal definition, he must be classified as a non-Indian for the purposes of criminal jurisdiction.

Second, as Mr. Reynolds is a non-Indian for the purposes of criminal jurisdiction, the representation he was provided was insufficiently qualified under VAWA 2013. Because Mr. Reynolds is a non-Indian, in order to exercise jurisdiction over him, the Amantonka Nation must use SDVC Jurisdiction. To exercise this jurisdiction, Respondents were required to provide Mr. Reynolds with an attorney who was licensed by an appropriate jurisdiction. The Amantonka Nation is not an appropriate jurisdiction given its relaxed licensing standards. The Nation was also required to provide him with effective assistance of counsel and other constitutional rights, including the same protections that he would be provided in federal court.

Lastly, even if the Court holds that Mr. Reynolds is an Indian for the purposes of criminal jurisdiction, the discrepancies between representation required for Indians and non-Indians violates Mr. Reynolds' right to equal protection under the Fifth Amendment. His constitutional rights apply in this case because SDVC Jurisdiction is a delegated federal power, not an inherent tribal power. Under either the strict scrutiny or *Mancari* standards, the differences in protection are not justified and represent a violation of equal protection. Even if the Court holds the Fifth Amendment does not apply to Mr. Reynolds as an Indian, the discrepancies still violate the equal protection rights afforded to Mr. Reynolds under the Indian Civil Rights Act (ICRA).

## ARGUMENT

### 1. Mr. Reynolds is a non-Indian for the purpose of criminal jurisdiction as the applicable federal definition requires Indian descent/blood quantum

One definition of the term "Indian" does not control or predominate in all contexts, nor has one been statutorily defined; rather a definition has been "judicially explicated over the years." *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979). However, since the Supreme Court divested tribal courts of criminal jurisdiction over non-Indians in *Oliphant*, the bounds of Indian classification are important in determining the existence and nature of tribal criminal jurisdiction over Mr. Reynolds. The Supreme Court has generally permitted tribes to maintain the right to define and control their own membership for certain legal contexts. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). Mr. Reynolds does not dispute that he is a member of the Amantonka Nation according to their own qualifications. However, *Santa Clara Pueblo* does not compel the Court to classify him as an Indian for the specific purpose of criminal jurisdiction. To the contrary, in *United States v. Rogers*, the Court held that membership in a tribe is not a dispositive factor in determining whether an individual is classified as an Indian for purposes of federal legislation and criminal jurisdiction. *United States v. Rogers*, 45 U.S. 567 (1846). Due to his lack of Indian descent, Mr. Reynolds should be classified as a non-Indian for the purpose of criminal jurisdiction, and specifically the Amantonka Nation's exercise of SDVC Jurisdiction granted by Congress in VAWA 2013.

#### a. The Amantonka Nation does have criminal jurisdiction over Mr. Reynolds, but his Indian/non-Indian status determines the rights he is afforded

Mr. Reynolds does not dispute that the Respondents hold jurisdiction over him in this case. However, it does not follow from that concession that the Respondents have the authority to prosecute him as an Indian within their own courts as they allege. *See United States v. Wheeler*, 435 U.S. 313, 326 (1978) ("Indian tribes have power to enforce their criminal laws against tribe members"). Instead, Mr. Reynolds' status (as an Indian or non-Indian) must be ascertained in the context of the federal VAWA 2013 legislation; If Mr. Reynolds is held to be an Indian, then he will be subject to exclusive tribal jurisdiction because his alleged crime will have been "Indian-against-Indian." On the other hand, if Mr. Reynolds is correctly held to be a non-Indian, then the only source of the tribe's jurisdiction is SDVC Jurisdiction delegated to the tribe in VAWA 2013. This statute grants the Amantonka Nation jurisdiction over "non-Indians" like Mr. Reynolds who have strong ties to the tribe (Mr. Reynolds married a tribe member and works on the Reservation). Defendants under SDVC Jurisdiction are granted additional rights unavailable to similarly positioned Indian defendants. Thus, while the Amantonka Nation has jurisdiction over Mr. Reynolds whether or not he is classified as an Indian, his classification determines the rights and protections he is owed as a United States citizen.

**b. The *Rogers* test states that tribal affiliation/enrollment is not dispositive in determining an individual's Indian status for federal purposes**

The present case deals solely with the issue of criminal jurisdiction that is authorized by Congress, so the federal definition of Indian is applicable. Most federal statutes do not define the term "Indian," but a commonly accepted determinative measure, with respect to federal statutes, is a test derived from *United States v. Rogers*. *Rogers*, 45 U.S. at 572. In *Rogers*, the Court held that adoption into a tribe does not by itself confer Indian status for

criminal jurisdictional purposes. *Rogers* involved a non-Indian man, William Rogers, who was indicted for the murder of Jacob Nicholson, another non-Indian man. *Id*. at 571. Rogers claimed that because he and Nicholson had both been adopted into the Cherokee tribe by marrying Cherokee members, this was an Indian-on-Indian crime that only fell within the jurisdiction of the tribe. *Id*. This argument was rejected by the Supreme Court, which held that in the federal context, some degree of Indian descent or blood quantum is required in addition to membership of a tribe to meet the definition of Indian. *Id.*

The facts of *United States v. Rogers* are directly analogous to the present case. In both cases, the defendants married into their respective tribes and were then adopted or naturalized into the tribe. Like Mr. Rogers, Mr. Reynolds is not of Indian descent although his spouse is an Indian woman. The Court in *Rogers* wrote that "a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian." *Rogers*, 45 U.S at 572-73. It is undisputed that Mr. Reynolds, like Mr. Rogers, does not meet any degree of blood quantum nor any measure of Indian descent. The Court held that even though Mr. Rogers was adopted into the Cherokee Nation, he is still a non-Indian for the purpose of criminal jurisdiction. *Id.* at 573. The same logic used by the Supreme Court in *Rogers* should be applied to Mr. Reynolds' case – in cases of criminal jurisdiction, some degree of blood quantum or Indian descent is required to establish "Indian" status and exclusive tribal jurisdiction. Otherwise, jurisdiction in this case can only be established through SDVC Jurisdiction authorized by VAWA 2013.

Subsequent cases have applied *Rogers* in developing a test to determine Indian classification. In *United States v. Broncheau*, the Ninth Circuit Court of Appeals held that tribal enrollment is not the only criteria that should be considered when determining Indian

status. *Broncheau,* 597 F.2d at 1263. The test instead requires that "for purposes of federal criminal jurisdiction, an Indian is a person who (1) has some Indian blood; and (2) is 'recognized' as an Indian by a tribe or by the federal government." *Id.* Enrollment in a federally recognized tribe is considered the "common evidentiary means of establishing Indian status," but it is "not the only means nor is it necessarily determinative." *Id.*

Additionally, more recent cases have applied the same logic. In *United States v. Keys*, the Ninth Circuit Court of Appeals held that though tribal enrollment is a factor of determining "Indian" status, it is not "the sole means of proving such status." *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996) (holding that defendant's daughter, who was one-fourth Indian, was considered an Indian under the act in question and that her lack of enrollment in the tribe did not control the determination of her Indian status). The Eighth Circuit Court of Appeals, applying the logic of *United States v. Antelope,* held in *United States v. Stymeist* that the *Rogers* test is determinative of Indian status. *United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009). The tribal membership of Mr. Reynolds is thus not dispositive as the *Rogers* test considers both Indian descent and tribal relationship in determining Indian status.

**c. Indian blood quantum or descent is a necessary factor for an individual to be classified as an Indian for the purpose of criminal jurisdiction**

As previously discussed, the *Rogers* classification test rests on not one, but two factors: Indian descent/blood quantum and tribal affiliation. *Rogers*, 45 U.S. at 572; *Broncheau,* 597 F.2d at 1263. Just as tribal enrollment is not determinative by itself, blood quantum or descent is also not dispositive. However, Congress and the courts have held that blood quantum or descent is a necessary requirement for Indian classification; there is no

"sliding scale" where a closer connection between the defendant and the tribe allows for the blood quantum/descent requirement to be relaxed.

Federal courts throughout the country have generally taken a uniform approach in holding that descent or blood quantum is necessary. The Tenth Circuit Court of Appeals held that there must be some showing of Indian blood for the defendant to hold "Indian" status, and supported this decision with "our precedent applying the two-part test, the numerous decisions continuing to apply that test, and the view of scholars that 'some demonstrable biological identification as an Indian' is an important component of determining Indian status in this context." *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001). The Seventh Circuit Court of Appeals held in *Ex Parte Pero* that actual tribal membership is not a prerequisite for "Indian" classification and Indian descent is an essential factor in determination of status. *Ex Parte Pero*, 99 F.2d 28 (7th Cir. 1938) (reasoning that because the habeas corpus petitioner was "a child of an Indian mother and half-blood father, where both parents are recognized as Indians and maintain tribal relations" he should be recognized as an Indian himself). The Supreme Court, in *Adoptive Couple v. Baby Girl*, held that the baby girl in question could be classified as an Indian because of her ancestry and blood quantum even though she was not an enrolled member of any tribe. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). This case demonstrates that descent is even more important than tribal enrollment; while descent or blood quantum is necessary to be classified as an Indian under the federal definition, enrollment is not. It is undisputed that Mr. Reynolds is not descended from Native Americans nor does he contain any degree of Indian blood. The absence of Indian blood or descent means that, for purposes of criminal jurisdiction, Mr.

Reynolds cannot be classified as an "Indian" even though he fulfills the tribal enrollment factor of the *Rogers* test.

Furthermore, the relative unimportance of tribal membership as compared with blood quantum or Indian descent can be seen within the statutory inclusion of nonmember Indians within tribal criminal jurisdiction. In response to *Duro v. Reina*, a Supreme Court case which constrained tribes from prosecuting Indians who were not members of the prosecuting tribe, Congress amended the ICRA to allow Indian tribes to exercise criminal jurisdiction over all Indians, even those who were not members of the prosecuting tribe. 25 U.S.C. § 1301(2). While this still invoked the concept of tribal membership in general, it recognized a key difference between nonmember Indians and non-Indians. Additionally, a person with Indian ancestry who is not a member of the prosecuting tribe may be included in the tribe's criminal jurisdiction if he or she identifies with Indian culture or receives benefits from the government on the fact of Indian identification. *Ex Parte Pero*, 99 F.2d 28 at 32. This demonstrates that if a person has Indian ancestry and "claims" that ancestry by self-identifying as an Indian (through participation in Indian-related government programs or tribal cultural practices), then they will be classified as an Indian, even lacking official tribal enrollment.

Thus, both precedent and legislation points to the idea that descent/blood quantum is of paramount importance in determining Indian status. Tribal affiliation, while a key factor, is not sufficient in making that determination. If tribal membership was sufficient for the purpose of criminal jurisdiction, tribes should not have jurisdiction over Indians of other tribes. In fact, jurisdiction exists over nonmember Indians because they are in some way affiliated with Indian benefits or culture and have some degree of Indian descent or blood.

**d. Mr. Reynolds has no Indian descent or blood quantum so he should not be considered an Indian for the purpose of criminal jurisdiction even though he has tribal membership**

As applied to the present case before the Court, the weight of the cited authorities indicates that Mr. Reynolds' membership in the Amantonka Nation is not wholly determinative of his status as either an Indian or non-Indian. Thus, while the Respondents will argue that Mr. Reynolds is subject to inherent Amantonka Nation criminal jurisdiction based exclusively on his membership in the tribe, criminal jurisdiction does not rest solely in tribal membership, especially in the absence of any Indian descent. Mr. Reynolds' treatment as an Indian by the Respondents was fallacious and requires correction.

A person can be an "Indian" in one context and not in another. For instance, "a person of little Indian ancestry might become a tribal member by adoption for some purposes, such as voting and participation in tribal government, but not be an Indian for purposes of federal criminal jurisdiction." Cohen's Handbook of Federal Indian Law § 3.03[2] (2017). It should be clear that although the Court has held that tribes can enroll or naturalize non-Indians, and maintain power over their membership processes, tribes still "lack the specific power to bring non-Indians under the exception to criminal jurisdiction." Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 Am. Indian L. J. 323, 327 (2014).

Thus, although Mr. Reynolds joined the Amantonka Nation voluntarily and carried an ID card identifying himself as a member of the tribe, he should not be considered an "Indian" in this context because he lacks Indian descent. Instead, Mr. Reynolds should be classified as a non-Indian for the purpose of SDVC Jurisdiction.

Lastly, this decision is the only logical conclusion from a policy perspective. Because he has no historical or genealogical tie to the Amantonka Nation besides his fairly recent membership and employment, it would be fundamentally unfair to prosecute him as if he were an Indian. To hold otherwise would unfairly strip him of many of his rights as a citizen of the United States. Furthermore, granting tribes the complete, unqualified power to define their membership in the context of criminal jurisdiction could result in tribes implementing overly-expansive membership rules to expand the limits of their jurisdiction. For instance, a tribe could decide that all persons living on tribal land were members and thus, exercise inherent tribal criminal jurisdiction over non-consenting United States citizens without granting them any additional safeguards.

**2. The attorney provided by the Respondents was insufficiently qualified as a matter of law under VAWA 2013 to represent non-Indian defendants**

Given that Mr. Reynolds is both a non-Indian for the purposes of criminal jurisdiction and an indigent defendant, the Respondents were required to satisfy all legal requirements imposed by VAWA 2013 in exercising SDVC Jurisdiction. The Respondents failed to provide Mr. Reynolds with an attorney that satisfied the requirements mandated by VAWA 2013.

There are two main requirements relevant to the provision of an attorney to an indigent, non-Indian defendant facing imprisonment when a tribe is exercising SDVC Jurisdiction. The first is that the tribe provide the defendant with all the rights ordinarily granted with the imposition of a prison term in excess of one year; namely, the right to "effective assistance of counsel at least equal to that guaranteed by the United States Constitution," and the right to assistance of counsel "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" at the expense of the tribe. 25 U.S.C. § 1302(c). The second is a catch-all provision – that the tribe provide all other necessary rights under the Constitution to exercise jurisdiction. *Id.* § 1304(d)(4) (2018).

**a. The attorney was not licensed by a jurisdiction that applies appropriate professional licensing standards and effectively ensures competence and professional responsibility.**

The attorney Mr. Reynolds received did not meet the stringent requirements imposed by VAWA 2013. The terms contained within the statute requiring the provision of counsel for indigent defendants ("attorney," "appropriate professional licensing standards," "effectively ensures the competence") are not defined by the statute or by precedent. However, given the plain meaning and common understanding of the word "attorney," at a minimum, these requirements would exclude lay advocates (advocates who have not undergone formal legal training and education). *See* David Patton, *Tribal Law and Order Act of 2010: Breathing Life Into the Miner's Canary*, 47 Gonz. L. Rev. 767, 786 (2012) ("The statute specifically refers to 'attorney,' ruling out the possibility that lay advocates can counsel indigent defendants"). *See also* Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. Rev. Disc. 88, 100 (2013) ("the TLOA likely bans lay advocates in criminal cases").

At a minimum, Mr. Reynolds did happen to be provided with an attorney with a Juris Doctor degree from an American Bar Association accredited law school. The Respondents have further noted that all of their current public defenders have these qualifications.

However, although the attorney in question was licensed to practice law in the Amantonka Nation, an attorney licensed by the Amantonka Nation Bar alone (and no other jurisdictions) is statutorily insufficient because the Amantonka Nation Bar does not apply appropriate standards. The A.N.C. permits lay counselors to practice and explicitly refers to lay counselors as "attorneys." *See* 2 A.N.C. ch. 7 Canon 1 ("as employed in this Code, the term 'attorney' includes lay counselors"). Furthermore, there is not even a requirement that a candidate for admission to the Amantonka Nation Bar graduate high school, let alone law school. Additionally, the Nation does not require that candidates pass the Multistate Professional Responsibility Examination (MPRE) and there is no evidence that the Amantonka Nation's bar exam incorporates any professional responsibility component that mimics the role of the MPRE.

These minimum requirements imposed by the Amantonka Nation Bar are extremely lax in comparison to those imposed in other jurisdictions that typically prosecute non-Indian US citizens. As a point of comparison, all fifty-six United States jurisdictions require candidates to have graduated from law school or study under a judge or practicing attorney for an extended period, and fifty-three of the fifty-six jurisdictions use the MPRE.[4] National Conference of Bar Examiners & Section of Legal Education and Admission to the Bar, American Bar Association, Comprehensive Guide to Bar Admissions Requirements 2018 8-11, 28-32 (Judith A. Gundersen & Claire J. Guback eds., 2018). The difference between these requirements (as well as any substantial differences in the content of the bar examination itself) illustrates the fact that the Amantonka Nation lacks the appropriate professional licensing standards and oversight that is required by VAWA 2013 to prosecute a

[4] The other three (Wisconsin, Maryland, and Puerto Rico) incorporate ethics rules into their bar exams.

non-Indian defendant. Given that SDVC Jurisdiction allows tribal bodies to exercise control over United States citizens who have never consented to be governed by those bodies, it is of utmost importance that the licensing and professional standards of attorneys meet the standards imposed in state and federal jurisdictions. In this case, the Amantonka Nation Bar requirements fall far below those standards.

**b. All other applicable constitutional rights should have been provided to Mr. Reynolds as the Respondents were exercising a delegated federal power**

Furthermore, SDVC Jurisdiction is a delegated federal power, not an inherent tribal power.[5] Therefore, the Nation's exercise of this jurisdictional power is subject to the constitutional procedural constraints imposed on the federal government. These constraints are recognized in the catch-all provision that required the Respondents to provide all other necessary rights under the Constitution to Mr. Reynolds. 25 U.S.C. § 1304(d)(4). One particularly relevant constraint requires that the attorney representing Mr. Reynolds meet the same qualifications an indigent defendant would receive in federal court. However, the attorney appointed to Mr. Reynolds did not meet these qualifications. While admission practices for United States District Courts vary, they uniformly require that the attorney be licensed to practice in a state or within the federal system. John Okray, *Attorney Admission Practices in the U.S. Federal Courts*, The Federal Lawyer, Sep. 2016, at 41, 42.

It is also worth noting that although Mr. Reynolds was provided with an attorney, he was not guaranteed the effective assistance of counsel or other constitutional rights that would be available in federal court, such as the right to be heard by a judge appointed through the proper procedure. As SDVC Jurisdiction is a delegated federal power, the tribe

[5] This distinction is discussed in depth later in the brief in the section on equal protections violations that are present if Mr. Reynolds is determined to be an Indian for the purpose of criminal jurisdiction.

exercising that power must provide a full array of constitutional rights to non-Indians. Neither of these differences in treatment are challenged in the case currently before the Court. However, it is important that the Court consider the broader impact of its holding in this case on these important issues.

In summary, Mr. Reynolds was entitled to a more qualified attorney than the one he was given for two alternative reasons: First, because the attorney was only licensed by the Amantonka Nation, which is not a jurisdiction that applies appropriate licensing and oversight standards. Second, because the rights he was provided fell below the constitutional rights to which defendants in federal court are entitled.

**3. If Mr. Reynolds is classified as an Indian for the purpose of criminal jurisdiction, the fact that he was entitled to a lower standard than non-Indian defendants is a violation of his right to equal protection under the law.**

If the court holds that Mr. Reynolds is an Indian and thus not protected under the requirements of SDVC Jurisdiction, then the difference mentioned previously between the attorney he is entitled to as an Indian and the attorney to which a non-Indian would be entitled constitutes discrimination against Indians and is itself a violation of equal protection. One key issue involved in a discussion of equal protection is the source of that right. The requirement of equal protection applies both to the federal government through the Fifth Amendment of the Constitution and to tribal governments statutorily, through the ICRA.

SDVC Jurisdiction is a delegation of federal power, not an exercise of inherent tribal power, so Fifth Amendment equal protection is applicable to the actions of the tribe in this case. If the Court determines this to be the case, there is also the question of which standard of scrutiny to apply to the discrimination faced by Mr. Reynolds. There may be good reason

to use the strict scrutiny standard in assessing the constitutionality of the discrimination that Mr. Reynolds' faced, but even if one applies the more relaxed standard the Supreme Court used in *Morton v. Mancari*, the special treatment for non-Indians does not pass constitutional muster.

However, assuming in the alternative that the jurisdiction is an inherent tribal power, the special treatment is similarly disallowed by the equal protection requirement of the ICRA. While tribes typically have leeway to interpret the meaning of equal protection in the ICRA, there are no tribal practices or values that would act as a barrier in this context to the Amantonka Nation applying a traditional American conception of equal protection.

**a. Mr. Reynold's Fifth Amendment right to equal protection was violated**

The federal government is constrained by the individual protections granted in the Bill of Rights, including the right to equal protection. While the Equal Protection Clause of the Fourteenth Amendment only applies to states (and not the federal government), the Supreme Court has held that the concept of equal protection is applied to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Indeed, the Court has interpreted the concept of equal protection identically regardless of which amendment is its vehicle, so an equal protection inquiry is unchanged whether or not it is being applied to state or federal power. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment").

On the other hand, tribal governments are typically not bound by the Constitution and Bill of Rights. This is because their unique status "as separate sovereigns pre-existing the

Constitution" vests them with inherent powers that are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo*, 436 U.S. at 56. In particular, the Supreme Court has consistently held that the Fifth Amendment, including the right to equal protection, does not operate on the exercise of inherent tribal authority. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896) ("as the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment"). *See also Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971) (holding that the due process and equal protection clauses of the Fifth and Fourteenth Amendments are not applicable to the exercise of tribal power).

While tribes are not bound by the constitutional equal protection requirements in exercising their inherent powers, they are still bound by federal statutes that shape these powers. Congress maintains the "plenary authority to limit, modify, or eliminate the power of local self-government which the tribes otherwise possess." *Santa Clara Pueblo*, 436 U.S. at 56 (1978). Congress notably exercised this power in 1968 by passing the ICRA which provides certain individual protections to people under tribal jurisdiction that echo those contained within the Bill of Rights, including an equal protection requirement that "No Indian tribe in exercising powers of self-government shall – … deny to any person within its jurisdiction the equal protection of its laws." 25 U.S.C. § 1302(a)(8).

**i. The Fifth Amendment equal protection requirement is applicable because SDVC Jurisdiction is a delegated federal power, not an inherent tribal power**

Thus, one issue the Court faces is determining which equal protection standard is relevant: The federal standard (Fifth Amendment) or tribal standard (ICRA)? This difference

is important because the two standards are not necessarily interpreted in the same way. Because SDVC Jurisdiction is best understood as a delegation of federal power and not as a recognition of inherent tribal power, constitutional equal protection is applicable.

In the present case, the source of the tribe's SDVC Jurisdiction is a delegated federal power and not an inherent tribal power. In general, Congress faces restriction over when and how it can delegate its power to other bodies, especially those that are non-governmental in nature. However, the Supreme Court has permitted Congress to delegate power to tribes because they are not merely private organizations but instead "possess independent authority over the subject matter" through their historical claims to sovereignty. *United States v. Mazurie*, 419 U.S. 544, 556 (1975). The effect of such a delegation has important implications for individual rights. While a tribe exercising inherent authority is bound only by the protections contained in the ICRA, a tribe exercising delegated power is subject to the individual rights that apply to the federal government. *See* Cohen's Handbook of Federal Indian Law § 4.03[2] ("If a delegation of federal power makes a tribe an arm of the federal government, the tribe will likely assume an obligation to comply with requirements of the Bill of Rights, which binds the federal government"). These rights included the aforementioned right to equal protection contained within the Due Process Clause of the Fifth Amendment.

Exercising SDVC Jurisdiction is best described as a delegation of federal authority and precedent that suggests otherwise is easily distinguishable from the present case. In *United States v. Lara*, the Supreme Court held that the Constitution authorizes Congress to legislatively "recognize and affirm" inherent tribal jurisdiction over nonmember Indians despite the facts that the Court had previously denied this inherent jurisdiction in *Duro v.*

*Reina*. *United States v. Lara*, 541 U.S. 193 (2004). Without truly understanding the rationale of the two cases, one may be inclined to believe that a similar process occurred here: First, the Court denied inherent tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*. *Oliphant*, 435 U.S. at 208. In response, Congress passed the "Duro-fix" legislation that "recognized and affirmed" the inherent authority of tribes in exercising SDVC Jurisdiction. 25 U.S.C. § 1304(d)(4). The Respondents will urge the Court to therefore conclude that given the *Lara* precedent, the only proper course of action is to accept Congress' recognition of inherent jurisdiction in this case.

However, despite the facial similarity between the two sets of circumstances, this approach is incorrect due to the overwhelming reasons to distinguish this case from *Lara*. First, it is important to recognize that the Court in *Duro v. Reina* viewed that situation as a jurisdictional edge case, not a completely settled question. The issue in that case (whether tribes have inherent criminal jurisdiction over other Indians who were not members of the prosecuting tribes) fell somewhere in the murky middle ground between two jurisdictional pole cases. *Duro v. Reina*, 495 U.S. 676, 684 (1990), *superseded by statute*, Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2)), *as recognized in United States v. Lara*, 541 U.S. 193 (2004). On one side was *Oliphant*, which held that there was no tribal criminal jurisdiction over non-Indians. On the other side was *United States v. Wheeler*, which held that there was tribal criminal jurisdiction over Indians who were members of the prosecuting tribe. *Wheeler*, 435 U.S. at 323. The Court was thus forced to wade into the substantial ambiguity concerning whether there is inherent jurisdiction over individuals who are Indians but are not members of the prosecuting tribe. Unlike in *Lara*, the question before the Court in this case

rests strictly on the solid foundation of *Oliphant*, as it concerns jurisdiction over Mr. Reynolds, a non-Indian.

Furthermore, the holding in *Oliphant*, the precedent for this case, is based on the notion that criminal jurisdiction over non-Indians is inconsistent with tribes' fundamental status as dependent nations. *Oliphant*, 435 U.S. at 206-211. This contrasts with *Duro*, where criminal jurisdiction over nonmember Indians can be easily reconciled "with our traditional understanding of the tribes' status as 'domestic dependent nations.'" *Lara*, 541 U.S. at 204. Thus, Congress' affirmation of jurisdiction over nonmember Indians in the "Duro-fix" legislation merely required a "limited" clarification that nonmember Indians were more similarly situated to tribal members (in *Wheeler*) than non-Indians (in *Oliphant*). *Id.* at 204. By comparison, permitting Congress to "recognize and affirm" inherent jurisdiction over non-Indians in this case would require a re-evaluation of the basic nature of tribes as domestic dependent nations and would represent dealing with a "far more radical change in tribal status." *Id.* at 205.

Additionally, the historical records are vastly different with respect to the two cases. One of the reasons why it was so unclear whether tribes had inherent power over Indian nonmembers (and one reason why the "Duro-fix" clarification was invited by the court) was because "the historical record… [with respect to whether tribes had jurisdiction was] somewhat less illuminating than in *Oliphant*." *Duro*, 495 U.S. at 688. Note that the Court even points out that in this case, there is a conclusive record that does not need clarification. The record in this case is conclusive in showing that tribes do not have the inherent power to exercise criminal jurisdiction over non-Indians. *Oliphant*, 435 U.S. at 197.

Aside from these important distinctions between the present case and *United States v. Lara*, there are also policy-based reasons for classifying SDVC Jurisdiction as a delegation of federal authority. If SDVC jurisdiction falls within the inherent power of the tribe, Justice Kennedy's concerns over ensuring the consent of the governed in his concurrence in *Lara* become increasingly relevant; as a matter of principle, defendants should not be subject to authorities by which they are not represented. *See Lara*, 541 U.S. at 211-214 (Kennedy, A., concurring). Furthermore, a tribe exercising jurisdiction over a non-Indian may run into additional constitutional challenges unless defendants are granted all constitutional protections. Finally, the language around recognizing and affirming inherent power that is contained in VAWA 2013 cannot possibly be sufficient by itself to make this power inherent. The implication of holding otherwise would be to suggest that Congress could expand or contract the inherent power of tribes as far as it wished by simply using phrases like "recognize and affirm" in legislation. In addition to being incorrect, this line of reasoning is potentially damaging to the concept of tribal sovereignty and could ultimately be used to curtail, rather than expand, the power of tribes. Thus, although SDVC Jurisdiction appears to be relatively limited (in that it extends jurisdiction only to a small set of cases involving non-Indian defendants), holding in favor of inherent tribal jurisdiction in this case would have far-reaching effects.

**ii. The differences in protections accorded to Indians as opposed to non-Indians establish a violation of equal protection under either the strict scrutiny standard or *Mancari* standard.**

Having established that the constitutional requirement does apply in this case, the Court faces a second question: did the discrimination that Mr. Reynolds faced violate the

relevant Fifth Amendment standard? The difference between the protections Mr. Reynolds received and those a non-Indian would be entitled to are substantial and intolerable. These differences establish the grounds for an equal protection violation regardless of whether the strict scrutiny standard or *Mancari* standard is applied.

Ordinarily, under a constitutional equal protection analysis, federal statutes with classifications based on race and ancestry are subject to strict scrutiny by courts. They are only constitutional if they are "narrowly tailored to further compelling government interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). This is an extremely high standard that derives from the "basic principle" that equal protection requirements protect individuals, not groups. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Given this principle, the Supreme Court held in *Adarand Constructors v. Pena* that any government action based on race is subject to strict scrutiny because race is typically an irrelevant and prohibited group classification. *Id.* at 227.

The unequal treatment of Indians as compared to non-Indians is clearly unconstitutional if strict scrutiny is applied – there is clear intent to differentiate between Indians and non-Indians, there is no sufficiently compelling government interest to justify the discrimination, and the law is not the "least restrictive means" for achieving the government interest in question. *See e.g. Plyler v. Doe*, 457 U.S. 202, 216-218 (1982) (reasoning that classifications that disadvantage a suspect class require the state to demonstrate a compelling government interest and precise tailoring). For instance, the law could have easily granted all defendants the same protections, or reinforced federal (as opposed to tribal) jurisdiction over these types of offenses committed by non-Indians.

Despite the general "strict scrutiny" standard for classifications based on race and ancestry, the Court carved out an exception in *Morton v. Mancari* for laws that single out Indians in particular. In a case like *Mancari*, the applicable standard is whether special treatment "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). The Court justified this lower standard by pointing to classifications singling out Indian tribes that are enshrined in the Constitution itself and argued that the plenary power of Congress and unique relationship between the United States and Indian tribes gave Congress more leeway in legislating on Indian issues. *Id.* at 551.

However, the *Mancari* standard is not universally applicable to any Indian-related case. The court itself notes that its decision in *Mancari* is confined to the unique context of the Bureau of Indian Affairs and rejected an attempt to "extend the limited exception of *Mancari* to a new and larger dimension." *Id.* at 554; *See Rice v. Cayetano*, 528 U.S. 495, 520 (2000) (refusing to apply the *Mancari* standard in the Fifteenth Amendment voting rights context). Furthermore, some lower courts have even understood *Mancari* as being limited to statutes that affect uniquely Indian interests. *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997). The context of the current case – a challenge to unfair protections favoring non-Indians in the course of a criminal proceeding – should logically bring this case outside the narrow bounds of *Mancari* or at least require a fundamental reconsideration of the applicability of that standard.

Even if the Mancari standard is applied, the difference in protections between Indians and non-Indians do not meet the standard's requirements and thus do not pass constitutional muster. While the *Mancari* standard is certainly more lenient than "strict scrutiny," it is

important to note that the language is not synonymous with "no scrutiny" or even a more relaxed rational basis review. Unlike in *Mancari*, where the statute being challenged gave a preference to Indians (for hiring and promotion at the Bureau of Indian Affairs), the preference in Mr. Reynolds' case is reserved for non-Indians. This distinction is not inherently fatal; in *Fisher v. District Court of Sixteenth Judicial Dist.*, the Indian defendants argued that they faced racial discrimination by not being able to access a forum that non-Indian defendants had access to. *Fisher v. District Court of Sixteenth Judicial Dist.*, 424 U.S. 382 (1976). However, the Court held that this disparate treatment favoring the non-Indian was permitted as it "furthered the congressional policy of Indian self-government." *Id.* at 390. To allow Indian defendants access to other forums in *Fisher* would clearly undermine Indian self-government. On the other hand, in this instance, the special treatment does not similarly further Congress' obligation. Granting extra rights to non-Indian defendants hinders, rather than promotes, the exercise of tribal jurisdiction over non-Indian defendants. Furthermore, while the Respondents may argue that those protections are needed to meet constitutional requirements, there is no reason why the same protections should not be required for Indian defendants if they can be granted to non-Indians. Ultimately, this differential treatment is a symptom of the damaging belief that tribal courts cannot be trusted to administer justice fairly.[6]

The attorney Mr. Reynolds was entitled to as an Indian defendant did not meet the requirements for an attorney representing a non-Indian defendant. The concrete differences in

[6] Note that this belief is reflected in the statements of congressional legislators during the passage of VAWA 2013. *See* S. REP. NO. 112-153, at 48-49 (Minority Views from Sens. Kyl, Hatch, Sessions, and Coburn) (arguing against tribal jurisdiction over non-Indians). *See also* Jennifer Bendery, Chuck Grassley on VAWA: Tribal Provision Means 'The Non-Indian Doesn't Get a Fair Trial,' HUFFINGTON POST (Feb. 21, 2013, 5:33 PM), https://www.huffingtonpost.com/2013/02/21/chuck-grassley-vawa_n_2735080.html (noting Senator Chuck Grassley's concerns over non-Indian defendants receiving fair trials in tribal courts).

qualification in this specific case have been previously outlined but additionally, there are substantial broad inequities that the Court should consider. First, because the prison term Mr. Reynolds faces is less than a year, the ICRA does not require an attorney be provided to him at all, whereas a non-Indian would be entitled to an attorney under VAWA 2013. 25 U.S.C. §§ 1302, 1304(d)(2). Second, Mr. Reynolds is not guaranteed the effective assistance of counsel while a non-Indian is granted that protection. §§ 1302, 1304(d)(2). Third, Mr. Reynolds does not have access to an array of additional constitutional protections that would be available to a non-Indian defendant if SDVC Jurisdiction is a delegated power. The Court must consider these broader implications of its holding in this case and the effect the holding would have on the fundamental fairness of the judicial system for these types of cases.

**b. If the Court holds that the Fifth Amendment equal protection requirements are not applicable, the differences in representation were still a violation of equal protection within the ICRA**

Even if the power to prosecute non-Indians through tribes' SDVC Jurisdiction stems from inherent tribal power rather than a delegation of federal power, the Amantonka Nation still violated the equal protection requirement of the ICRA. While the language of the equal protection requirement is practically identical to the Equal Protection Clause of the Fourteenth Amendment, equal protection under the ICRA does not necessarily mean the same thing as equal protection under the Constitution. The Supreme Court itself has stated a number of times that the restrictions and provisions of the ICRA are merely "similar, but not identical" to the constitutional requirements. *Santa Clara Pueblo*, 436 U.S. at 57. *See also Oliphant*, 435 U.S. at 194 ("the [due process] guarantees are not identical").

Unhelpfully, the Supreme Court has not directly addressed the meaning of equal protection as contained within the ICRA. However, "there is a 'definite trend by tribal courts' toward the view that they have 'leeway in interpreting' the ICRA's due process and equal protection clauses" that is cited approvingly by the Court in *Nevada v. Hicks*. *Nev. v. Hicks*, 533 U.S. 353, 384 (2001) (quoting Neil Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. L. Rev. 285, 344 (1998)). In *Santa Clara Pueblo*, the court noted that the "equal protection guarantee of the ICRA should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved." *Santa Clara Pueblo*, 436 U.S. at 54. Clearly there is a balancing act at play in tribal law that does not have an analog in the state or federal judicial system, between the individual injury that results from a lenient application of traditional equal protection and tribal practice and custom. *See e.g. Howlett v. Salish & Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 238 (9th Cir. 1976) (stating that where a traditional application of equal protection would "significantly impair" a tribal practice and where the resulting individual is not "grievous," then equal protection can be implemented differently). However, this balance may often weigh in favor of a stricter application of equal protection.

In this case, the countervailing weight of tribal practice and traditional values is nonexistent. The Amantonka Nation has already implemented a judicial system that attempts to mirror state and federal jurisdictions in the relevant respects. They have an adversarial legal system which grants a right to counsel to indigent defendants. 2 A.N.C. ch. 5 § 503. They have a legal bar with minimum admission requirements. 2 A.N.C. ch. 5 § 501. Finally, they exercise SDVC Jurisdiction, which, as discussed earlier, requires many of the same

individual protections granted in state and federal courts. While the protections offered to Indians are quite clearly lacking in comparison to those required for non-Indians, increasing these protections to the degree required to avoid the inequitable treatment would not "[force] an alien culture, with strange procedures" on the tribe and is thus permissible. *See White Eagle v. One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973) (holding that the one-person, one-vote principle could be applied to the tribe in question given their adoption of American voting procedures). To the extent that alien procedures were forced on the Amantonka Nation, that injustice occurred in the past; those procedures are now deeply embedded in the current legal culture of the Nation. Because there is no current further threat to tribal values or cultural integrity, there is no rationale for granting leeway in interpreting the requirements of equal protection.

## CONCLUSION

For the foregoing reasons, this Court should reverse the U.S Court of Appeals for the Thirteenth Circuit, grant the petition for habeas corpus, and hold that the conviction of Mr. Reynolds by the Amantonka Nation tribal court is in violation of his civil rights. Mr. Reynolds' status as a non-Indian US citizen necessitates that the Respondents exercise their SDVC Jurisdiction in order to prosecute him. However, the Nation did not grant him an attorney that met the strict requirements imposed by VAWA 2013 and the Constitution in order to exercise this type of jurisdiction. Furthermore, even if Mr. Reynolds were an Indian, the discrimination that resulted from the Nation's provision of a less-qualified attorney violated his right to equal protection under the law.