No. 19-231

In the

Supreme Court of the United States

ROBERT R. REYNOLDS,

Petitioner,

v.

WILLIAM SMITH, Chief Probation Officer, Amantonka Nation Probation Services; JOHN MITCHELL, President, Amantonka Nation,

ELIZABETH NELSON, Chief Judge, Amantonka Nation District Court,

Respondents.

On Writ of Certiorari

to the United States Court of Appeals for the Thirteenth Circuit

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BRIEF FOR THE RESPONDENTS

Team No. 414

Counsel for Respondents

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QUESTIONS PRESENTED

1. Given that Congress reaffirmed Indian tribes' "powers of self-government" to have criminal jurisdiction over "all Indians," 25 U.S.C.A. § 1301(d) (West 2018) and petitioner is an enrolled member of the Amantonka Nation, should this Court hold petitioner is a non-Indian for purposes of special domestic violence criminal jurisdiction, when doing so would usurp Indian tribes' inherent sovereign authority to "define its own membership for tribal purposes," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978)?
2. Provided that Congress intended to leave special domestic violence criminal jurisdiction defense attorney licensing requirements for tribes to determine, *see* S. Rep. 111-93, at 17 n. 57, Tribal Law and Order Act of 2009 (October 29, 2009), and tribes determine the standards for public defenders for indigent Indian defendants under 25 U.S.C.A. § 1302 et seq. (West 2018), did the Amantonka Nation District Court provide equal protection under tribal law to Petitioner by providing him with a court-appointed tribal public defender who held a J.D. and was licensed to practice law in the Amantonka Nation Bar Association?

STATEMENT OF THE CASE

Despite being an enrolled tribal member of the Amantonka Nation, petitioner, Robert R. Reynolds, seeks to be classified as a non-Indian for purposes of special domestic violence criminal jurisdiction (SDVCJ) under § 1304(a)(6) since he does not possess any degree of Indian blood. Accordingly, petitioner seeks habeas corpus relief from this Court because he alleges the Amantonka Nation failed to appoint petitioner with an adequate indigent defense counsel required under the § 1304 as a result of petitioner's non-Indian status.

1. Statement of Facts

Prior to becoming a naturalized citizen of the Amantonka Nation, petitioner married his wife Lorinda Reynolds, an Amantonka citizen. For two years after getting married, petitioner and his wife lived and worked on the Amantonka Indian Reservation. Petitioner then voluntarily started and completed the process to become a naturalized citizen under the Amantonka Tribal Code, Title 3, ch. 2, § 201 et seq.

Over one year after becoming a naturalized citizen, the Amantonka tribal police responded to a call of domestic violence at petitioner's home on the Reservation. It is undisputed that petitioner struck his wife with an open palm, causing her to fall onto a coffee table and break her rib. Petitioner was arrested, charged, and later found guilty by a jury for violating Title 5, § 244 (partner or family member assault) of the Amantonka Tribal Code. The District Court for the Amantonka Nation sentenced petitioner, in part, to seven (7) months of incarceration with a $1,500 fine.

2. Statement of the Proceedings

Petitioner appealed his criminal conviction to the Supreme Court of the Amantonka Nation on the same bases as petitioner's pre-trial motions, which the district court denied.

The supreme court affirmed the district court's holding and petitioner sought habeas relief in the United States District Court for the District of Rogers. The United States District Court relied on, without citing to any authority, the proposition that "[f]ederal law clearly limits criminal jurisdiction over 'Indians' and provides a definition of 'Indian' that requires some degree of Indian blood." Through this reasoning, the United States District Court held that petitioner's civil rights guaranteed by the Fifth Amendment, Indian Civil Rights Act, and the Violence Against Women Act of 2013 were violated because the Amantonka Nation failed to provide petitioner with adequate indigent defense counsel. The United States Court of Appeals for the Thirteenth Circuit reversed the United States District Court's opinion on the basis that tribes have the right to define and control their own memberships. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Thirteenth Circuit thus held that petitioner was an Indian for purposes of the respondent's criminal jurisdiction because petitioner is an enrolled tribal member, and that because of petitioner's Indian status, the Amantonka Nation appointed him with adequate indigent defense counsel. Petitioner appealed to the United States Supreme Court, and this Court granted certiorari on October 15, 2018.

ARGUMENT

I. Courts should look to the Amantonka Nation Code for the definition of "Indian" because the *Rogers* Test undermines Congress' exercise of plenary power and usurps Indian tribes' inherent sovereign authority.

Whether petitioner is an "non-Indian" for purposes of SDVCJ directly concerns a tribe's inherent sovereign authority to "define its own membership for tribal purposes." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Congress, through its plenary power, restored tribal governments inherent "'powers of self-government' . . . to exercise criminal

jurisdiction over all Indians." 25 U.S.C.A. § 1301(2) (West 2018) (referring to what is commonly known as the *Duro* Amendment). Here, Congress expressly defines "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under [the Indian Major Crimes Act, 18 U.S.C.A. § 1153 (West 2018)], if that person were to commit an offense listed in that section in Indian country." § 1301(1)(4).

The Indian Major Crimes Act "does not define 'Indian,' but 'courts have judicially explicated its meaning.'" *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (internal quotations omitted). The primary source of such judicial explication dates back to 1846; before the United States ratified the Fourteenth Amendment of the Constitution and before Congress created either the Indian Civil Rights Act or the Indian Major Crimes Act. *See United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) (referring to the *Rogers* Test). The Indian blood quantum requirement created by the first prong of the *Rogers* Test has distorted Congress' intention of the *Duro* Amendment and usurped tribes' inherent "powers of self-government . . . to exercise criminal jurisdiction over all Indians," § 1301(2). As such, applying the *Rogers* Test to the definition of "Indian" here is inconsistent with Congress' "clear expression of intention," *Ex Parte Kan-gi-shun-ca (Otherwise known as Crow Dog)*, 109 U.S. 556, 572 (1883) (referring to the congressional power that developed into the plenary power doctrine), to restore tribal governments inherent sovereign authority, which fundamentally includes the ability to "define its own membership for tribal purposes," *Santa Clara Pueblo*, 436 U.S. at 72 n.32, including tribal criminal jurisdiction.

A. The spirit of the *Duro* Amendment is consistent with reaffirming Indian tribes' ability to define "Indian" for purposes of criminal jurisdiction.

The *Duro* Amendment revolutionized the congressional plenary power doctrine because it demonstrated that Congress has the ability to not only restrict tribal affairs, but also to reaffirm Indian tribes' already-existing powers of self-government. *See United States v. Lara*, 541 U.S. 193 (2004); *see* AM. INDIAN L. DESKBOOK § 4:12 247 (2018 ed.). The *Duro* Amendment "changed the language of § 1301 to state 'the powers of self-government means . . . the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians*.'" April L. Seibert, *Who Defines Tribal Sovereignty? An Analysis of United States v. Lara*, 28 AM. INDIAN L. REV. 393, 397 (2004) (quoting 25 USC § 1301(2)) (internal quotations omitted) (emphasis added). Congress' intention with the *Duro* Amendment cannot be misinterpreted. *Id.* The Congressional Record states that "'this bill recognizes an inherent tribal right which always existed. It is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away.'" *Id*. (citing 137 CONG. REC. H2988 (daily ed. May 14, 1991)) (internal alterations omitted). As such, the spirit of the *Duro* Amendment is to broaden the congressional plenary power doctrine and reaffirm the inherent sovereign authority Indian tribes possess to have criminal jurisdiction over its members.

To fully appreciate and understand the spirit of the *Duro* Amendment, however, a brief examination of its rich, contextual legal history is warranted. Prior to the creation of the congressional plenary power doctrine, Congress exerted constitutional authority over tribal affairs primarily through the Indian Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3. The Indian Commerce Clause provides that "[t]he Congress shall

have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* Neither Congress nor the Court interpreted the Commerce Clause as giving Congress the power to regulate internal tribal affairs until 1883. *See* AM. INDIAN L. DESKBOOK § 4:10 240 (2018 ed.) In *Ex Parte Crow Dog*, 109 U.S. at 572, the Supreme Court held that only through a "clear expression of the intention of [C]ongress" may the federal government exercise federal jurisdiction over internal Indian affairs. *Id*. Thus, *Crow Dog* cemented its place in legal history for "planting the seeds" for the congressional plenary power doctrine to flourish. *See generally* AM. INDIAN L. DESKBOOK § 4:10 240 (2018 ed.)

And so, it did; but as congressional plenary power strengthened, tribal sovereign authority suffered. In 1885, Congress passed the Major Crimes Act of 1885 "to give federal courts jurisdiction over crimes 'that might go unpunished under tribal criminal justice systems.'" AM. INDIAN L. DESKBOOK § 4:10 241 (2018 ed.) (citing *United States v. Other Medicine*, 596 F.3d 677, 680 (9th Cir. 2010)). When challenged, the constitutionality of the Major Crimes Act of 1885 was upheld as a necessary power of the federal government to protect Indians as "'wards of the nation'" and provide "safety [for] those among whom they dwell." *United States v. Kagama*, 118 U.S. 375, 382, 385 (1886). Resultantly, the Major Crimes Act of 1885 provided the necessary "clear expression," *Ex Parte Crow Dog*, 109 U.S. at 572, of Congress' intention to assume federal jurisdiction over certain enumerated offenses carried out by Indians in Indian country.

Despite the enactment of the Major Crimes Act, this Court reaffirmed the inherent sovereign authority Indian nations had left to exercise criminal jurisdiction over Indians who violated tribal law. *United States v. Wheeler*, 435 U.S. 313 (1978); AM. INDIAN L. DESKBOOK

§ 4:12 246 (2018 ed.). In *Wheeler*, this Court went so far as to acknowledge that this inherent power was never extinguished, as tribes were self-governing sovereigns prior to the creation of the United States. *Id*. at 322.

Tribes' powers of self-government, however, were further limited in two significant ways. *See* AM. INDIAN L. DESKBOOK § 4:12 246 (2018 ed.). First, Congress limited tribes' criminal jurisdiction to prosecute and sentence Indians through the creation of the Indian Civil Rights Act of 1968, which prevents tribal courts from ordering sentences "greater than imprisonment for a term of 1 year or a fine of $5,000, or both." § 1302(7)(B). And second, the Supreme Court provided that tribes' criminal jurisdiction over Indians did not extend to non-Indians whether or not they violate tribal law on tribal land. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

The latter limitation was exacerbated in *Duro v. Reina*, 495 U.S. 676 (1990), when this Court held an Indian tribe lacked criminal jurisdiction over a non-member Indian. *Id*. As a result of *Duro*, nonmember Indians were equated to non-Indians for purposes of criminal jurisdiction. AM. INDIAN L. DESKBOOK § 4:12 246 (2018 ed.). In 1990, Congress responded swiftly to restore tribal sovereign authority with the *Duro* Amendment, which "modified the definition of 'powers of self-government' to include 'the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians*.'" *Id*. at 247 (emphasis added). Despite constitutional challenges, *see e.g.*, *United States v. Lara*, 541 U.S. 193 (2004), this Court has upheld the *Duro* amendment as an appropriate exercise of congressional plenary power.

To hold petitioner is not an Indian for purposes of tribal criminal jurisdiction would frustrate the spirit of the *Duro* Amendment. The spirit of the *Duro* Amendment is undeniably

to strengthen Indian sovereign authority, which had been constitutionally diminished for decades prior, by broadening the definition of "powers of self-government" to encompass "all Indians" within tribal criminal jurisdiction. The legislative history of the *Duro* amendment demonstrates that, at a minimum, "all Indians" means Indians who are either members of that tribe or members of another tribe. *See Duro v. Reina*, 495 U.S. at 679 (noting the petitioner in *Duro* was an enrolled member of another Indian Tribe). Regardless of which tribe, however, what determined whether someone in *Duro* was Indian was the mere fact of their tribal membership. Accordingly, the *Duro* amendment's change to "all Indians" implies any Indian, regardless of which tribe he or she is an enrolled member. Therefore, the *Duro* Amendment inclines this Court to hold that tribes possess the inherent sovereign authority to define "Indian" through the applicable membership enrollment requirements for purposes of criminal jurisdiction.

B. Under the Amantonka Tribal Code, petitioner satisfies all three elements of "Indian" for purposes of tribal criminal jurisdiction.

Classifying petitioner as an "Indian" for purposes of tribal criminal jurisdiction, instead of a "non-Indian" for purposes of SDVCJ, is consistent with Congress' exercise of their expansive plenary power and Indian tribes' inherent sovereign authority. Accordingly, petitioner is an Indian for purposes of tribal criminal jurisdiction because petitioner is an enrolled tribal member of the federally-recognized Amantonka Indian Tribe, petitioner committed the crime of domestic violence which is an enumerated offense under 18 U.S.C.A. § 1153 (West 2018), and petitioner committed an offense within the boundaries of Indian country as defined by § 2266(4). As such, this Court should honor Congress' clear intention to restore this specific aspect of inherent tribal sovereignty, recognize respondent's power of

self-government to carryout petitioner's criminal penalty, and affirm the Thirteenth Circuit's holding.

Petitioner satisfied the eligibility and procedural requirements to voluntarily become a naturalized member of the Amantonka Nation. Title 3, Chapter 2 of the Amantonka Nation Code governs the requirements for naturalization. To be eligible to apply for naturalization, a person must marry "a citizen of the Amantonka Nation" and have "lived on the Amantonka reservation for a minimum of two years." Title 3, Ch. 2, § 201. Additionally, the person must "complete a course in Amantonka culture" and "Amantonka law and government," "pass the Amantonka citizenship test," and "perform 100 hours of community service with a unit of the Amantonka Nation government." Title 3. Ch. 2, § 202. "Upon successful completion of the Naturalization process, the applicant [is] sworn in as a citizen of the Amantonka Nation . . . [and] is thereafter entitled to all the privileges afforded [to] all Amantonka citizens." Title 3, Ch. 2, § 203.[1]

The following facts are undisputed and reflected in the Record. After both graduated from the University of Rogers, Petitioner married Lorinda Reynolds who was and still is a citizen of the Amantonka Nation. *Reynolds v. Amantonka Nation*, No. 17-198 at I. After getting married, the two became employed on the Amantonka Nation Reservation and "moved into an apartment in the tribal housing complex." *Id.* "Two years after the couple got married, [petitioner] applied to become a naturalized citizen of the Amantonka Nation. [Petitioner] successfully completed the process, took the oath of citizenship, and received his Amantonka Nation ID card." *Id.* At trial, petitioner was found guilty by a jury of his peers for

[1] While the exact privileges afforded to members of the Amantonka Nation are not stated within the record, typical privileges afforded to members of Indian tribal nations in general include tribal housing and medical care, *see* Zepeda, 792 F.3d at 1108.

violating Title 5, Section 244 of the Amantonka Nation Code.[2] Although being an "Indian" is not an element of the crime for purposes of SDVCJ[3], petitioner was tried as an Indian within the power of the Tribe's criminal jurisdiction because he was a naturalized Amantonka Nation citizen at the time the offense occurred. *Reynolds v. Amantonka Nation*, No. 17-198 at II. Given this, being an Indian is both a jurisdictional and substantive element of the crime to which petitioner was charged and ultimately satisfied due to his enrollment status. Therefore, petitioner satisfies every requirement to be considered an enrolled member of the Amantonka Nation, and thus an "Indian" for purposes of tribal criminal jurisdiction.

C. The Rogers Test is at odds with Congress' plenary power and Indian tribes' inherent sovereign authority.

Applying the *Rogers* Test, as well as its corollaries like the *Bruce* Test, and the *Duro* Amendment together is inconsistent and at odds with the congressional plenary power doctrine and tribes' inherent sovereign authority.

The first prong of the *Rogers*/*Bruce* Tests refers to requirement that a person possess some degree of Indian blood to achieve Indian status. *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). No serious legal scholar today would deny that *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), is a racist, "nearly 170-year-old-case," *Zepeda*, 792 F.3d at 1118 (J. Kozinski concurring), that was decided by this Court during the Termination Era. The Court in *Rogers* held that defendant, a white man who had been adopted into the

[2] "A person commits the offense of partner or family member assault if the person: (1) intentionally causes bodily injury to a partner or family member." Amantonka Nation Code Title 5, § 244(a)(1).
[3] "The Amantonka Nation District Court is vested with jurisdiction to enforce all provisions of this Code against a non-Indian who has committed an act of . . . domestic violence against an Indian victim within the Amantonka Nation's Indian country provided the non-Indian has sufficient ties to the Amantonka Nation." Title 2, § 105(b). Sufficient ties include non-Indians who "[a]re a spouse . . . of . . . [a] member of the Amantonka Nation." Amantonka Nation Code Title 2, § 105(b)(1).

Cherokee Indian tribe and was evading prosecution by the United States government, was not an "Indian" for purposes of the Indian Trade and Intercourse Act of 1834 because defendant was not a member of the "unfortunate [Indian] *race*." *Rogers*, 45 U.S. at 572 (referring to an Indian blood quantum) (emphasis added); *Zepeda*, 792 F.3d at 1118.

In *Bruce*, 394 F.3d at 1215, the Ninth Circuit reluctantly applied *Rogers* in the context of the Indian Major Crimes Act because it felt bound by the jurisprudence of Indian enrollment standards. *Id.* at 1225. In the same paragraph, the Ninth Circuit even admitted that "[f]rom a purely conceptual standpoint, we agree that eligibility for enrollment provides a simpler framework within which we might judge Indian status."[4] *Id.* This is likely because, as the concurrence in *Bruce* pointed out, "[r]eliance on pre-civil war precedent laden with dubious racial undertones seems an odd course" for any court to follow. *Zepeda*, 792 F.3d at 1118.

Assuming, however, that the racially discriminatory undertones of the *Rogers*/*Bruce* Tests were not enough to warrant its departure from courts, the first prong of the *Rogers*/*Bruce* Tests is arbitrarily applied because there is no uniform standard for how much blood quanta is required to achieve Indian status, *Bruce*, 394 F.3d at 1223[5]; proving blood quanta beyond a reasonable doubt presents significant evidentiary difficulties, *e.g. Zepeda*,

[4] Ironically, the second prong of the Bruce Test places the greatest weight on whether someone is an enrolled tribal member to determine if he or she is an "Indian." Bruce, 394 F.3d at 1124.

[5] The court in *Bruce* recognized that defendants in the following cases possessed sufficient blood quanta to achieve Indian status: "*Vezina v. United States*, 245 F. 411 (8th Cir.1917) ([woman was 1/4 to 3/8 Chippewa Indian held to be Indian]); *Sully v. United States*, 195 F. 113 (8th Cir.1912) ([1/8 Indian blood not traceable to a tribe held sufficient to be Indian]); *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D.1988) ([15/32 of Yankton Sioux blood held to be Indian]); *Goforth v. State*, 644 P.2d 114, 116 (Okla. Crim. App. 1982) (requirement of Indian blood satisfied by testimony that person was slightly less than one-quarter Cherokee Indian); *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 440 P.2d 442 (1968) (1/4 Makah blood sufficient to satisfy Indian blood requirement)." Bruce, 394 F.3d at 1223-24.

792 F.3d at 1108; and blood quanta could inevitably become diluted over time to the point where, one day, no one will be able to satisfy this requirement.

It's also worth noting the jurisdictional void[6] created by the *Rogers*/*Bruce* Tests that courts have continuously attempted and failed to gap-fill. *See, e.g.*, *United States v. Antelope*, 430 U.S. 641 (1977); *United States v. Loera*, 952 F. Supp. 2d 862 (D. Ariz. 2013); *Reina*, 495 U.S. at 676. Even if defining "Indian" under a tribal code does not solve the jurisdictional void, at least its existence would be consistent with Congress' exercise of its plenary power to give tribes the inherent sovereign authority over such affairs.

For these reasons, the *Rogers*/*Bruce* Tests is not an administrable standard standing alone. More importantly, however, unless this Court departs from applying the *Rogers*/*Bruce* Tests, this area of law will continue to be at odds with Congress' exercise of plenary power through the *Duro* amendment to reaffirm tribal sovereignty, specifically in the area of defining who is an "Indian" for tribal purposes such as criminal jurisdiction.

II. Regardless of whether petitioner is an "Indian," petitioner's equal protection rights were not violated with the appointment of a tribal public defender.

A. The Court should hold petitioner is an Indian for purposes of tribal criminal jurisdiction and petitioner's equal protection challenge fails under scrutiny.

Since petitioner is an Indian under Amantonka Nation criminal jurisdiction, he was afforded the equal protection under tribal law that is required by the Indian Civil Rights Act, 25 U.S.C.A. § 1302(a)(8) (West 2018). Petitioner loses his equal protection claim under *Morton v. Mancari*, 417 U.S. 535 (1974), because the Tribe's indigent right to counsel

[6] The jurisdictional void refers to gaps in the statutory scheme where a defendant may commit a crime in Indian country but no sovereign has criminal jurisdiction to prosecute it. Bruce, 394 F.3d at 1221-22.

requirements are "rationally tied" to promoting tribal self-governance and he was in fact provided equal protection under the law.

The Indian Civil Rights Act prohibits a tribe from denying any person under its jurisdiction the equal protection of law or deprivation of liberty without due process. § 1302(a)(8). Even though this Court has not yet interpreted the meaning of § 1302(a)(8), COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 963 (2012) (hereinafter COHEN), there is case law on equal protection in Indian country.

The governing law of equal protection in Indian country comes from the first equal protection challenge to federal Indian law: *Morton v. Mancari*, 417 U.S. at 535. *See* COHEN at 951. In *Morton*, this Court would not apply strict scrutiny because "Indian" was not a racial classification but a political classification, so the law's "Indian" classification must be "rationally tied to Congress' unique obligation" to promote tribal self-government. *Morton*, 417 U.S. at 554, 555 (stating "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians [to promote tribal self-government], such legislative judgments should not be disturbed."). Additionally, "Indian" classifications in federal law are a constitutional and common practice. *See, e.g.*, U.S. CONST. art. 1, § 8, cl. 3; *see* § 1301(4); *see United States v. Antelope*, 430 U.S. 641, 645 (1977) (singling out "Indians" in legislation is permitted and supported by the text of the U.S. Constitution and by the U.S. government's historical and current federal Indian policy). Further, traditional strict scrutiny equal protection analysis, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Weinberger v. Weinberger*, 420 U.S. 636, 638 n.2 (1975) (mirroring the Fourteenth Amendment's equal protection approach in the Fifth Amendment's equal protection approach); *Bollinger v. Sharpe*, 247 U.S. 497, 499 (1954), is impracticable

with the corpus of federal Indian law because it would disrupt the "federal-Indian relationship." COHEN at 952 (inferring that "Indian" classifications in the law would struggle to pass muster under such a stringent test).

In relying on *Morton*'s rational ties test, the inquiry here is whether the Amantonka Nation Code's right to counsel statutes are reasonably and rationally designed to further Indian self-government and not a product of invidious racial discrimination? *See Morton*, 417 U.S at 555.

As the Tribal Code was applied when petitioner was appointed a tribal public defender, there was no equal protection violation in this case. Indigent Indian and non-Indian defendants under Amantonka Nation criminal jurisdiction will receive the same level of criminal defense representation. Thus, regardless of Indian status, indigent defendants are indigent defendants under Amantonka Nation criminal jurisdiction and they are treated alike.

The Tribe's public defender qualifications go above and beyond what Indian Civil Rights Act requires for Indian defendants. As an Indian, petitioner did in fact receive a belt-and-suspender criminal defense that goes beyond the Indian Civil Rights Act's legal requirements.

So, petitioner was not denied equal protection of law because Indigent Indian and non-Indian defendants receive the same right to counsel in Amantonka Nation District Court. Under the Amantonka Nation Code, Indian and non-Indian indigent defendants are entitled to court-appointed counsel, *see* Title 2 § 503(2)–(3) Amantonka Nation Code (declaring Indian and non-Indian defendants alike are entitled to the appointment of a tribal public defender). While as a matter of law Indian defendants are only entitled to lay counselors, *see* Title 2 § 503(3) Amantonka Nation Code, regardless of Indian status every indigent defendant under

the Tribe's criminal jurisdiction in fact receives a legally trained tribal public defender. This is because all the Amantonka Nation tribal public defenders have juris doctorates from ABA accredited law schools and are admitted to practice law in a United States jurisdiction. Thus, the distinction between Indian status makes no difference in this context, and petitioner was afforded equal protection under the law.

B. Alternatively, if the Court deems petitioner is a non-Indian for purposes of SDVCJ, petitioner's rights to representation under the Violence Against Women Act of 2013 were satisfied by petitioner's indigent defense counsel.

Originally, the Indian Civil Rights Act did not provide for any right to defense counsel for indigent defendants, but this was later fixed with the Tribal Law and Order Act in 2010 for defendants who could face imprisonment for longer than one year. COHEN at 980–82. Now, the 2013 reauthorization of the Violence Against Women Act "affirms the inherent sovereign authority of tribes to exercise special domestic violence criminal jurisdiction over non-Indians who commit acts of domestic violence or dating violence that occur in the Indian country of the participating tribe, as long as the perpetrator has sufficient ties to the prosecuting tribe." Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. Rev. 1564, 1591 (2016). That said, "[p]rotection of the people from crime is one of the core functions of government. Without safety, individuals cannot flourish, seek education or pursue other life goals. The tribes implementing both [Tribal Law and Order Act] and [Violence Against Women Act of 2013], respectively--during the pilot project and since--have continuously emphasized the importance of criminal authority to tribal sovereignty, which includes the legal and moral obligation to protect tribal citizens." *Id.* at 1598.

There are signs that tribes are exercising this authority in a way that protects indigent defendants' civil rights. Until at least 2016, there has not been one tribal court defendant prosecuted under the Violence Against Women Act of 2013 who has filed a writ of habeas corpus seeking relief in federal court, which could imply that tribal courts support and protect defendant's civil rights. *See id.* at 1611 n. 250. For example, the Pascua Yaqui Tribe exercised its SDVCJ giving us "[t]he one and only non-Indian defendant in the past forty years to be prosecuted by an Indian tribe and tried by a reservation-based jury [that] resulted in an acquittal . . . At the same time, in Indian country, the case has come to stand for the proposition that non-Indians unquestionably can get a fair trial in tribal court." *Id.* at 1615 (discussing *Pascua Yaqui Tribe v. Montae Lamont Garris,* CR-14-432 (Nov. 14, 2014)).

Given Congress' aim with the Violence Against Women Act of 2013 to promote tribal sovereignty and the rule of law, the Amantonka Nation can exercise SDVCJ over petitioner under § 1304. Section 1304(b)(4)(B) requires the defendant have sufficient ties to the tribe for the tribe to exercise SDVCJ over a non-Indian. Sufficient ties to the tribe are established by the defendant meeting one of three factors: "(i) resides in the Indian country of the participating tribe; (ii) is employed in the Indian country of the participating tribe; or (iii) is a spouse, intimate partner, or dating partner of-- (I) a member of the participating tribe; or (II) an Indian who resides in the Indian country of the participating tribe" § 1304(b)(4)(B).

Here, petitioner meets all three factors and more. Petitioner resides in Indian country in tribal housing, he is employed as a manager at a distribution center on the Amantonka Reservation, and he is the spouse of Mrs. Lorinda Reynolds, who is a citizen of the Amantonka Nation. Further, petitioner is himself a naturalized tribal member of the Amantonka Nation because he voluntarily underwent the naturalization process in Title 3,

Chapter 2 of the Amantonka Nation Code. He also committed the relevant criminal conduct for § 1304(c) by committing domestic violence against his wife in Indian country. Thus, the Tribe can safely exercise its SDVCJ over petitioner.

Even if the SDVCJ representation requirements are triggered, the Tribe provided adequate representation to petitioner. Factually, the Tribe provided petitioner adequate representation with his court-appointed tribal public defender for three reasons. First, petitioner' attorney held a J.D. from an American Bar Association (ABA) accredited law school and was a member in good standing of the Amantonka Nation Bar Association, *see Reynolds v. Amantonka Nation*, No. 17-198 at II (explaining that the tribal code does not require tribal public defenders representing Indians possess a J.D. as a matter of law, but all Amantonka tribal public defenders do in fact possess a J.D. from an ABA accredited law school). Second, there are no facts in the record that the state and tribal bar exams are different. Lastly, petitioner did not allege his counsel committed any errors representing him.

Even if SDVCJ standards apply, the petitioner's appointed attorney's representation was legally adequate. Under § 1304, a defendant's rights under § 1302(c) kick in if the Indian tribe imposes a "term of imprisonment of any length." Here, petitioner was given a seven-month sentence. So, his SDVCJ representation rights are triggered.

If the Court holds petitioner's SDVCJ rights are triggered, § 1302(c) requires two things. First, the court-appointed counsel is at least equal to the effective assistance of counsel required by the U.S. Constitution. § 1302(c). Second, "at the expense of the tribal government, provide 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 [emphasis added]." *Id.*

First, the U.S. Constitution's Sixth Amendment ("In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense") standard for effective assistance of counsel is determined under the two-pronged test in *Strickland v. Washington*, 466 U.S. 668 (1984). To prove ineffective assistance of counsel, the defendant must prove two things: 1) ineffective or deficient assistance of counsel, and 2) the defendant was prejudiced by the deficient assistance of counsel, such that but for the deficient representation the outcome of the proceeding would have been different. *Id.* at 687. Here, petitioner's defense counsel met the U.S. Constitution's standards set forth in *Strickland*. Since petitioner didn't allege any errors committed by his court-appointed attorney, the *Strickland* test cannot be applied. Therefore, any constitutional challenge based on ineffective assistance of counsel has no merit.

Second, there is no injurious difference between standards set for attorneys in the Amantonka Nation Code and other comparable, relevant bodies of law. And, Congress intended to leave determining defense attorney licensing standards to the tribe by allowing defense attorneys to be licensed in "any jurisdiction in the United States" as a way to promote tribal self-government. *See* S. Rep. 111-93, at 17 n. 57, Tribal Law and Order Act of 2009 (October 29, 2009) ("The intent of the section 304 licensing requirements for public defenders and tribal court judges respects the dual purposes of the Indian Civil Rights Act to protect the rights of individuals before tribal courts, and to acknowledge and strengthen tribal self-government . . . Whether the standard employed is a state, federal, or tribal standard will

be a decision for the tribal government. Several tribal governments have developed their own tribal law standards and others have adopted state licensing standards.").

Since Congress clearly and unambiguously left licensing standards to individual tribes under § 1302(c), the Amantonka Nation only requires tribal licensure in the Amantonka Nation Bar Association for its tribal public defenders. This licensing standard satisfies the "any jurisdiction in the United States" language in § 1302(c) because the Amantonka Nation is a jurisdiction in the United States.

Further, if ambiguities in § 1302(c) persist after examining Congress' intent, reading § 1302(c)'s legislative history with the Indian law canons of construction further supports the Amantonka Nation providing effective assistance of counsel by only requiring tribal licensure. Generally, the Indian law canons of construction require reading statutes in the light most favorable to the tribe and resolving all ambiguities in favor of the tribe. COHEN at 113–14 (outlining the four basic tenets of the Indian law canons: 1) liberal construal of legal language in favor of Indians; 2) all legal ambiguities in the language are resolved in favor of Indians; 3) "treaties and agreements are to be construed as the Indians would have understood them;" and, 4) "tribal property rights and sovereignty are preserved unless Congress' intent to the contrary is clear and unambiguous"). Here, the most beneficial reading of the statute allows the Amantonka Nation to require only tribal licensure for tribal attorneys for SDVCJ purposes. Furthermore, reading § 1302(c) in this way supports the Tribe's interest in furthering its sovereignty, and it supports Congress' "unique" *Morton* obligation to further tribal self-government by leaving the licensing standards to tribes.

Moreover, Amantonka tribal public defenders' competence and professional responsibility are effectively ensured because they must pass the Amantonka Nation's Bar

Exam to practice law in tribal court. *See* Title 2 § 607 Amantonka Nation Code, *and see generally* Title 2, Chapter 7 Code of Ethics for Attorneys and Lay Counselors (outlining the professional responsibilities of Amantonka Nation barred attorneys). The requirements found in Title 2 § 607 Amantonka Nation Code are nearly identical to that of other U.S. jurisdictions' Bar admission requirements. *See, e.g.*, Rules for Admission of Applicants to the Practice of Law in Arizona, Rule 34(b) Applicant Requirements and Qualifications, Arizona Supreme Court Rules (https://www.azcourts.gov/Portals/26/admis/2017/RulesOfAdmission_2017.pdf) (requiring, *inter alia*, graduation from an ABA accredited law school and passage of a bar exam), *and* Rules for Admission of Attorneys in Oregon, Rule 3.05 Qualifications of Applicants, Oregon Supreme Court Rules (January 2019) (https://www.osbar.org/_docs/rulesregs/admissions.pdf) (requiring, *inter alia*, graduation from an ABA accredited law school and passage of a bar exam).

Further, the requirements found in Title 2, Chapter 7 Code of Ethics for Attorneys and Lay Counselors are similar to the requirements found in the ABA Code of Professional Responsibility. *Compare* Amantonka Canon 1 Competence, *with* ABA Model Rules of Professional Conduct Rule 1.1 Competence (these two rules have nearly identical phrasing). Amantonka Nation's Canon 3 the ABA's Diligence and Rule 1.3 Diligence are also nearly identical. *Compare* Amantonka Canon 3, *with* ABA Model Rules of Professional Conduct Rule 1.3 (these two rules have nearly identical phrasing). Given the near mirrored letter of the law concerning attorney qualifications and professional responsibility of the Amantonka Nation Code, the ABA's Model Rules of Professional Conduct, and other jurisdictions statutes, no cognizable injury to the petitioner occurred from lower legal standards for

attorneys by arguing facial discrepancies in the Tribal Code. Furthermore, as applied, petitioner' defense attorney had more qualifications than the Tribal Code demanded.

Thus, petitioner was afforded legally sufficient legal counsel under § 1304 and his constitutional rights were not violated in any way.

CONCLUSION

For the reasons stated above, this Court should honor Congress' exercise of plenary power and reaffirm Indian tribes' inherent authority to define "Indian" for purposes of criminal jurisdiction by affirming the holding of the United States Court of Appeals for the Thirteenth Circuit. Additionally, this Court should hold that, as a person with Indian status, petitioner was afforded equal protection of the law through the defense counsel appointed by the Amantonka Nation. Even if, however, this Court decides petitioner is a non-Indian for purposes of special domestic violence jurisdiction, this Court should nonetheless find that petitioner's defense counsel satisfied his rights under the Violence Against Women Act of 2013.