No. 19-231

IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM 2019

ROBERT R. REYNOLDS,
Petitioner,

v.

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

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

BRIEF FOR RESPONDENTS

Team No. 459

Counsel for Respondents

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QUESTIONS PRESENTED

1. Whether Petitioner, a citizen of the Amantonka Nation, is Indian and therefore not subject to special domestic violence criminal jurisdiction under the Violence Against Women Act of 2013?
2. Whether (a) Petitioner's court-appointed attorney, a member in good standing of the Amantonka Nation Bar, satisfies all legal requirements for court-appointed counsel, and (b) the Nation violated equal protection by stipulating different requirements for public defenders appointed to Indian defendants and non-Indian defendants, even if these differences are not material?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case is about protecting tribal sovereignty and self-government by permitting the Amantonka Nation ("the Nation"), a federally-recognized tribe in the state of Rogers, to determine its own tribal enrollment policies and court procedures.

Since his college graduation, Petitioner has been living and working on the Nation's Reservation with his now-wife, who is a citizen of the Nation. R. at 6. Although Petitioner was not Indian when he met his wife, he applied to become a naturalized citizen of the Nation as soon as he became eligible. *Id.*

The Nation has a "longstanding custom and tradition" of allowing spouses of tribal members to become citizens of the tribe, which is reflected in the naturalization process codified in the Amantonka Nation Code ("A.N.C."). R. at 6*;* 3 A.N.C. §§ 201-203. Petitioner went through all the steps of this process, passing the Nation's citizenship test, performing 100 hours of community service within the Nation's government, and completing courses in Amantonka culture, law, and government. R. at 6*;* 3 A.N.C. § 202. Thereafter, Petitioner took an oath of citizenship and became an enrolled member of the tribe. R. at 6.

Since Petitioner became an Amantonka citizen, the Nation police have responded to several calls to his apartment. *Id.* Responding to one such call on June 15, 2017, the police learned that Petitioner had struck his wife so hard that she fell on a coffee table and cracked her rib. *Id.* Petitioner was arrested and charged with assault of a partner under 5 A.N.C. § 244(b)(2). *Id.* at 6-7.

Under 2 A.N.C. § 105, the Nation has jurisdiction to prosecute Indians for any violation of the A.N.C. that occurs within the boundaries of the Nation's Indian Country. The Nation also has jurisdiction to prosecute non-Indians for acts of dating or domestic violence against an Indian

victim if the defendant has sufficient ties to the Nation. 2 A.N.C. § 105. In the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013"), Congress expressly codified Indian tribes' inherent authority to prosecute certain non-Indian abusers under special domestic violence criminal jurisdiction ("SDVCJ"). Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54 (2013) (codified at 25 U.S.C. § 1304(b)(1) (2013)).

Upon Petitioner's arrest, the Nation appointed him indigent defense counsel. R. at 4. The A.N.C. and VAWA 2013 both outline requirements for indigent defense counsel, although the VAWA 2013 requirements only apply to defendants prosecuted under SDVCJ. 2 A.N.C. § 503; 2 A.N.C. § 607; 25 U.S.C. § 1304(d); 25 U.S.C. § 1302(c). Under the A.N.C., public defenders representing Indian defendants must (a) be "at least 21 years of age," (2) be "of high moral character and integrity," (3) not have been "dishonorably discharged from the Armed Services," (4) be "physically able to carry out the duties of the office," (5) have successfully completed the Amantonka bar exam, and (6) have "training in Amantonka law and culture." 2 A.N.C. § 503(3); § 607(a). Public defenders representing non-Indian defendants must (1) hold "a JD degree from an ABA accredited law school," (2) have successfully completed the Amantonka bar exam, and (3) have "taken the oath of office and passed a background check." 2 A.N.C. § 503(2); § 607 (b).

Under VAWA 2013, defendants prosecuted under SDVCJ must be granted (1) "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," and (2) "the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C. § 1304(d); 25 U.S.C. § 1302(c). The A.N.C. states that an attorney qualified to represent

non-Indian defendants based on the three criteria above is "sufficiently qualified" to represent any defendant charged under SDVCJ. 2 A.N.C. § 607(b).

Petitioner's public defender possessed a JD degree from an ABA accredited law school and was a member of good standing of the Amantonka Nation Bar Association. R. at 7. There is no evidence or contention that Petitioner's public defender committed any errors when representing Petitioner. *Id.*

At trial, the jury found Petitioner guilty of assault. R. at 5. The judge sentenced him to seven months of incarceration, $5,300 restitution to compensate the victim for her injuries, batterer rehabilitation and alcohol treatment programs, and a $1,500 fine. *Id.*

II. STATEMENT OF PROCEEDINGS

The Nation's Chief Prosecutor filed domestic violence charges against Petitioner on June 16, 2017. R. at 3. In response, Petitioner filed three pretrial motions, which are also the basis for his appeal. R. at 3-7. In the first, he argued that the case should be dismissed because the Nation lacked criminal jurisdiction over him as a non-Indian. R. at 3. The Nation's District Court rejected this argument because it found that Petitioner, as a citizen of the Nation, was Indian. *Id.* Second, Petitioner requested appointment of an attorney qualified to represent a defendant under VAWA 2013's SDVCJ. *Id.* The Nation's District Court again rejected this argument because, as an Indian, Petitioner is not subject to SDVCJ. *Id.* Third, and lastly, Petitioner contended that had he been tried under SDVCJ as a non-Indian, he would have been appointed an attorney who was a member of a state bar association. *Id.* at 3-4. He argues that this amounts to a violation of equal protection because the attorney appointed to him as an Indian defendant was not a member of a state bar association. *Id.* at 4. The Nation's District Court did not find that there was a violation of equal protection and denied this motion as well. *Id.*

The jury found Petitioner guilty of domestic violence, and Petitioner subsequently appealed his conviction. *Id.* at 5-6. The Nation's Supreme Court again rejected Petitioner's arguments. *Id.* at 6-7. Specifically, the Nation's Supreme Court held that Petitioner was properly classified as an Indian because tribes have a right to define their own membership. *Id.* at 7. Because Petitioner completed the process of becoming an Amantonka Nation citizen, the Court reasoned that he is an Indian. *Id.* On that basis, the Court found that he was not subject to SDVCJ under VAWA 2013, so his attorney did not need to meet VAWA 2013 standards. *Id.* at 7. The Nation's Supreme Court also held that the Nation had not violated equal protection by providing Petitioner with an attorney who was not admitted to a state bar. This difference in qualifications, they stated, was not "material or relevant." *Id.* at 7.

Following the Nation's Supreme Court decision, Petitioner filed a Writ of Habeas Corpus in the United States District Court for the District of Rogers, alleging that his conviction violates the United States Constitution's Fifth Amendment, the Indian Civil Rights Act ("ICRA"), and VAWA 2013. *Id.* at 8. The District Court held that Petitioner is not an Indian for purposes of criminal jurisdiction because he does not have any Indian blood. *Id.* The Court noted that the Nation exercised SDVCJ over Petitioner as a non-Indian, and they held that the Nation failed to provide Petitioner with sufficiently qualified defense counsel under VAWA 2013. *Id.* The United States Court of Appeals for the Thirteenth Circuit reversed the District Court on the reasoning of the Nation's Supreme Court. *Id.* at 9.

The Supreme Court of the United States granted certiorari to decide two issues: (1) whether Petitioner is a non-Indian for purposes of SDVCJ, and (2) whether Petitioner's court-appointed attorney satisfied the relevant legal requirements. *Id.* at 10.

SUMMARY OF ARGUMENT

Petitioner, as a member of a federally-recognized tribe, is Indian. The Nation properly exercised its powers of tribal government to enroll Petitioner in the tribe, and it afforded him all rights that apply to Indian defendants in court. While these rights may be different than those that a non-Indian defendant would enjoy in court, this does not amount to a violation of equal protection.

This case has important implications for tribal self-government. This Court has long recognized Indian tribes' right to self-government in internal matters, such as tribal membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *Roff v. Burney*, 168 U.S. 218, 222 (1897). Here, the Nation has appropriately exercised that right to proclaim Petitioner a citizen of the tribe and exercise jurisdiction over him based on his tribal citizenship.

Petitioner seeks to overrule the tribe's determination that he is Indian on the basis of his lack of "Indian blood." But courts review Indian status on a case-by-case basis, and Indian blood is not a required element. *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988). Rather, tribal membership is the element that courts consistently rely on. Petitioner has satisfied that prong and is accordingly classified as Indian.

Because Petitioner is Indian, it follows that he is not subject to SDVCJ under VAWA 2013. Therefore, Petitioner is not entitled to the expanded rights to counsel that VAWA 2013 provides. Because tribes are not bound by the Bill of Rights or Fourteenth Amendment of the United States Constitution, Petitioner's rights as a defendant are limited to those enumerated in the A.N.C. and ICRA. The Nation has fulfilled all of Petitioner's A.N.C. and ICRA rights in this proceeding.

While Petitioner contends that the Nation would be required to provide a non-Indian defendant with a state-licensed attorney, this does not amount to an equal protection violation under the ICRA. Rights under the ICRA are "similar, but not identical" to the rights afforded by the U.S. Constitution. *Santa Clara Pueblo,* 436 U.S. at 57. Because Petitioner has not suffered a significant injury due to the differentiation between Indians and non-Indians, and because tribal practices could be significantly impaired by eliminating this distinction, this Court should not intrude on tribal self-government by imposing a constitutional standard of equal protection on the Nation. Rather, it should defer to the Nation's interpretation that the distinction does not violate equal protection.

Even when applying a constitutional standard, there is no violation of equal protection. Tribes are political entities, so differentiation between Indians and non-Indians is not necessarily racial discrimination. *See Morton v. Mancari*, 417 U.S. 535, 554 (9th Cir. 2005); *see also United States v. Antelope*, 430 U.S. 641, 646 (1977). Because the Nation's distinction is based on political, not racial, status, the A.N.C.'s laws regarding indigent counsel for Indian and non-Indian defendants need only have a rational basis. *See Mancari*, 417 U.S. at 554. In this case, it is clear that the distinction is rationally related to tribal self-government and preservation of tribal custom, and therefore should be upheld.

Alternatively, if Petitioner is non-Indian, the Nation's judgment should be upheld because it properly asserted its SDVCJ and satisfied its obligations regarding Petitioner's right to counsel under VAWA 2013. Petitioner's arguments rest on the assumption that VAWA 2013 requires that indigent counsel appointed to SDVCJ defendants are members in good standing of a state bar. But VAWA 2013 actually requires appointed counsel to be "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and

effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C. § 1302(c)(2). Petitioner's attorney was licensed to practice law in the Amantonka Nation, a jurisdiction within the United States that administers a bar exam and ensures the competence of its licensed attorneys. Therefore, Petitioner's counsel met the relevant legal requirements, whether or not he is Indian.

ARGUMENT

I. Petitioner's conviction should be affirmed because he is an Indian subject to the Nation's criminal jurisdiction and its courts properly declined to exercise SDVCJ over him.

Petitioner's guilty conviction should stand because he is an Indian subject to the Nation's criminal jurisdiction, he has litigated this matter to finality within the Nation's courts, and the proceedings did not violate his rights under the ICRA.

This Court has repeatedly recognized Indian tribes' right to self-government in internal matters, including tribal membership. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 55; *Mazurie*, 419 U.S. at 557; *Roff*, 168 U.S. at 222. The Nation's District Court and Supreme Court determined that Petitioner is an Indian for purposes of its criminal jurisdiction because he is a naturalized citizen of the Nation. R. at 3, 6-7. Congress has not defined the term "Indian" for purposes of criminal jurisdiction. Tribal membership or citizenship is the most important factor for determining Indian status in U.S. federal courts, and it is also a matter of tribes' internal self-government. Petitioner is a naturalized citizen of the Nation, and therefore the Nation's District Court properly determined that it had criminal jurisdiction over Petitioner, and did not err in declining to exercise its Special Domestic Violence Criminal Jurisdiction ("SDVCJ") under 25 U.S.C. § 1304. Even if Petitioner is held to be non-Indian, his guilty conviction should stand because the Nation's courts would have properly had SDVCJ over him, and the proceedings did not violate his rights under SDVCJ.S

A. Petitioner's proposed definition of "Indian" should be rejected because it ignores and undermines the Nation's power to confer citizenship and create substantive law on internal matters.

This Court should reject Petitioner's contention that he is non-Indian and uphold the Nation's exercise of criminal jurisdiction over him. Petitioner's proposed "federal definition of 'Indian,'" requiring that a person possess Indian blood in addition to being a member of an Indian tribe (R. at 7), would ignore and undermine the long-recognized power of tribes to confer citizenship and create substantive law on internal matters. Given the absence of a federal statutory definition of "Indian," and this Court's recognition of Indian tribes' power to confer citizenship and self-govern internally and its adherence to the doctrine of tribal sovereignty, it should uphold the Nation's judgment.

1. There is no federal statutory definition of "Indian" for purposes of criminal jurisdiction.

As this Court recognized in *St. Cloud*, Congress has not defined the term "Indian" in its criminal statutes. *St. Cloud*, 702 F. Supp. at 1460. 25 U.S.C. § 1301(4) provides that "Indian" means "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18." 18 U.S.C. § 1153 submits Indians who commit certain major crimes against other Indians in Indian country to exclusive federal jurisdiction, but does not define the term "Indian." Indian status has been determined by courts on a case-by-case basis. See *St. Cloud*, 702 F. Supp. at 1460. Petitioner's definition of "Indian" is one that courts have inferred from this Court's *Rogers* decision, discussed below in II. *Id.*; *United States v. Rogers*, 45 U.S. 567, 572–73 (1846). As explained in II, this Court has determined that neither prong of the *Rogers* test for Indian status is dispositive. *See Antelope*, 430 U.S. at 646.

2. Indian tribes have the right to self-governance in internal matters, including tribal membership or citizenship.

On the other hand, this Court has declared Indian tribes such as the Nation to be "distinct, independent political communities, retaining their original natural rights" to govern themselves locally. *Mazurie*, 419 U.S. at 557; *Santa Clara Pueblo*, 436 U.S. at 55. Although no longer fully sovereign nations, Indian tribes have been characterized by this Court as a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381–382 (1886). Courts have continued to apply the tribal sovereignty doctrine promulgated in *Kagama* to interpret federal statutes and treaties that could pose challenges to tribes' rights to self-governance, resolving doubts in favor of Indian tribes. *See e.g.*, *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 173 (1973) (holding that Arizona exceeded its authority by attempting to tax the income of a Navajo Indian). Given the absence of a federal statutory definition, and the doctrine of tribal sovereignty, this Court should hold that Indian status is a matter of internal tribal governance over which tribes may exercise their legislative and judicial authority.

3. Tribal citizenship is a matter of internal self-governance and a marker of Indian status.

Courts have recognized that tribal citizenship is the most important indication of Indian status. In *Roff*, this Court acknowledged the Chickasaw Nation's power to withdraw the tribal citizenship it had previously conferred onto a U.S. citizen because tribal citizenship was deemed an internal matter over which tribes could create their own substantive law. *Roff*, 168 U.S. at 222. Here, the Nation has exercised its power to confer citizenship onto Petitioner according to its naturalization process. 3 A.N.C. §§ 201–203. Relying on these authorities, the Court should uphold the Nation's power to grant citizenship and exercise criminal jurisdiction over its citizens, including Petitioner.

4. Petitioner is a citizen of the Nation and is therefore subject to the Nation's laws and to the jurisdiction of its courts.

Petitioner's argument relies on the premise that a non-native, naturalized citizen cannot be an Indian for the purposes of criminal jurisdiction. The Nation's District Court rejected this premise, reasoning that it had jurisdiction over Petitioner because his decision to become a naturalized citizen was voluntary. R. at 6-7. This Court, in *Nofire*, similarly held that a U.S. citizen's voluntary decision to become a citizen of the Cherokee Nation was sufficient to create jurisdiction for the Cherokee Nation's courts over the defendant. *Nofire v. United States*, 164 U.S. 657, 662 (1897). As an adult, Petitioner decided to apply for citizenship to the Nation based on his eligibility under 3 A.N.C. § 201. Petitioner fulfilled all of the requirements for naturalization listed in 3 A.N.C. § 202, including completing courses on the Nation's culture, law, and government, and passing the Nation's citizenship test. Applying the reasoning in *Nofire* and above, this Court should uphold the Nation's jurisdiction over Petitioner based on his tribal citizenship, which he has not given up. Petitioner should not be exempted from the Nation's jurisdiction because he should not be able to enjoy the benefits of tribal citizenship without bearing its burdens.

While the Court in *Rogers* held that a white man could not be considered Indian despite his adoption into the Cherokee Nation, *Rogers* has since been distinguished by the Ninth Circuit in *Means*, which instructs that tribal jurisdiction over Indians is based on tribal enrollment, not race. *See Rogers*, 45 U.S. at 572–73; *but see Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005). The *Means* court applied this Court's decision in *Mancari*, which noted that the federal statutory recognition of Indian status in the context of the federal government's Indian employment preferences is "political rather than racial in nature." *See Means*, 432 F.3d at 932 (citing *Mancari*, 417 U.S. at 554). Here, unlike in *Mancari*, there is

no federal statutory definition of "Indian" for purposes of criminal jurisdiction in dispute. But as explained above, the doctrine of tribal sovereignty requires the Court to defer to the Nation's determination as to the Indian status of its citizens.

As an Indian, Petitioner is subject to the Nation's criminal jurisdiction in this matter because tribes have exclusive jurisdiction over non-major crimes committed by Indians against Indians in Indian country, including the non-felonious assaults listed in 18 U.S.C. § 113. Such crimes are specifically exempted from the exclusive federal jurisdiction over crimes occurring in Indian country conferred by the General Crimes Act at 18 U.S.C. § 1152 and the Major Crimes Act at 18 U.S.C. § 1153.

B. Even if the federal courts' test for Indian status controls, Petitioner is an Indian subject to the Nation's criminal jurisdiction.

Even under the federal courts' test for Indian status, Petitioner is Indian because he satisfies the test by virtue of his tribal enrollment. Courts' reliance on the tribal enrollment prong of the test suggests that the other prong, which requires some degree of Indian blood, is not necessary. Since courts have held that tribal enrollment is sufficient to show Indian status, Petitioner's Indian status should be affirmed.

1. Neither the blood requirement nor the tribal membership prong of the Rogers test for Indian status is dispositive.

The Court in *Rogers* held that a U.S. citizen could not become an Indian despite their adoption into the Cherokee Nation. *Rogers*, 45 U.S. at 572–73. While several courts read *Rogers* to imply a two-prong test for Indian status requiring that a person have Indian blood and tribal membership, the Court in *Antelope* explained that neither prong was dispositive. *Id.*; *Antelope*, 430 U.S. at 646; *see also*, *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.1979). The *Antelope* Court declared, "Indian blood alone is not enough to warrant federal criminal jurisdiction" because tribal jurisdiction over Indians in Indian country

derives from a "special status of a formerly sovereign people," not from an impermissible racial classification. *Antelope*, 430 U.S. at 646. It also noted that tribal enrollment "has not been held to be an absolute requirement for federal jurisdiction." *Id.* at 647.

2. Meeting the tribal membership prong of the test is sufficient to show Indian status, and courts have disregarded the blood requirement.

Since *Rogers*, courts have often relied on the tribal membership prong, at the exclusion of the blood requirement, to determine Indian status. For example, in *Nofire*, the Court upheld the Cherokee Nation's jurisdiction over an adopted citizen of the Cherokee Nation on the basis of his tribal citizenship, even though he did not claim to have Indian ancestry. *Nofire v. United States*, 164 U.S. at 662. Additionally, the Ninth Circuit, in *Heath*, relied on the failure of an anthropologically Klamath Indian to satisfy the tribal enrollment prong to hold him subject to state laws. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974). Courts continue to consider the tribal enrollment prong to be "the common evidentiary means of establishing Indian status" even though it is not "necessarily determinative." *United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984). While the *St. Cloud* court partly relied on evidence of Indian ancestry to hold that the defendant was subject to tribal jurisdiction, it nonetheless recognized the long history of relying exclusively on the second prong of the Rogers test: "on several occasions, courts have found tribal enrollment alone sufficient proof that a person is an Indian." *St. Cloud*, 702 F. Supp. at 1461.

3. Since Petitioner is a citizen and enrolled member of the Nation, this Court should uphold the Nation's exercise of jurisdiction over Petitioner.

It is undisputed that the Nation is a federally-recognized tribe, and that Petitioner is a naturalized citizen of the Nation. R. at 6-7. The Nation's code provides that the name of each new citizen is added to the Nation roll, which means that Petitioner is also an enrolled

member of the Nation. 3 A.N.C. § 203. In light of courts' consistent reliance on the tribal enrollment prong of the Rogers test, over the blood requirement, this Court should hold that Petitioner satisfies the federal test for Indian status and uphold the judgment of the Nation because its jurisdiction was proper in accordance with 18 U.S.C. §§ 1152, 1153, and 113.

C. Even if Petitioner is non-Indian, his conviction should stand because the Nation's courts properly had SDVCJ over him, and the proceedings did not violate his rights under SDVCJ.

Even if this Court determines that Petitioner is not an Indian, it should still affirm the judgment of the Nation's court and the Thirteenth Circuit. Petitioner's guilty conviction should be upheld even if he is a non-Indian because the Nation's courts had proper grounds for jurisdiction under SDVCJ. 25 U.S.C. § 1304. SDVCJ extends tribal criminal jurisdiction to non-Indians who commit criminal acts of domestic violence against an Indian in Indian country. 25 U.S.C. § 1304. Neither exception to SDVCJ described under 25 U.S.C. § 1304(b)(4) applies to Petitioner because the victim in this case is an Indian and Petitioner is a resident of the Nation, is employed in the Nation, and is the spouse of a member of the Nation. Further, the proceedings comported with all due protections owed to defendants under 25 U.S.C. §§ 1304 and 1302, as explained below in IV.

1. VAWA 2013 authorizes participating tribes to exercise jurisdiction over certain domestic violence offenses committed by a non-Indian against an Indian in Indian Country.

In *Bryant*, this Court recognized that Congress amended the ICRA to authorize tribal courts to "exercise special domestic violence criminal jurisdiction" over certain domestic violence offenses committed by a non-Indian against an Indian, when it enacted the VAWA 2013. *United States v. Bryant*, 136 U.S. 1954, 1960 (2016), as revised (July 7, 2016). This act of Congress modified the Court's pronouncement in *Oliphant* that tribes generally lack criminal jurisdiction over non-Indians who commit crimes in Indian country. *Oliphant v.*

Suquamish Tribe, 435 U.S. 191, 195 (1978). Pursuant to the amendment, participating Indian tribes may exercise their SDVCJ under 25 U.S.C. § 1304 "over a defendant for criminal conduct that…[amounts to]…an act of domestic violence or dating violence that occurs in the Indian country of the participating tribe." 25 U.S.C. § 1304(c)(1).

2. Petitioner's offense falls within the meaning of "domestic violence" in VAWA 2013.

25 U.S.C. § 1304(a)(2) provides that "domestic violence" may mean "violence committed by a current or former spouse or intimate partner of the victim" or "by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner." Petitioner satisfies both of these alternative definitions. Petitioner is the victim's spouse and he has cohabitated with the victim as such for a continuous period of at least two years. R. at 3-7. Petitioner struck his spouse across the face with "enough force to cause her to fall to the ground," which is an act of violence. R. at 6. Further, Petitioner's action is a non-felonious assault in a special territorial jurisdiction under 18 U.S.C. § 113. Petitioner's offense against his spouse, a member of the Nation, is therefore a criminal act of domestic violence within the meaning of 25 U.S.C. § 1304, and is subject to the Nation's jurisdiction.

3. Neither one of VAWA 2013's exceptions to tribes' authorization to exercise SDVCJ over non-Indians applies to Petitioner.

25 U.S.C. § 1304(b)(4) provides two exceptions to SDVCJ, but neither exception applies to Petitioner. The first exception prevents tribes from exercising SDVCJ over defendants when the victim and defendant are both non-Indian. 25 U.S.C. § 1304(b)(4)(A). The second exception prevents tribes from exercising SDVCJ over defendants who lack sufficient ties to the tribe. 25 U.S.C. § 1304(b)(4)(B). Petitioner does not qualify for the first exception because the victim, his spouse, is indisputably Indian, as explained above. Petitioner's ties to the Nation are too strong to exempt him from jurisdiction under the section exception.

Therefore, if the Court considers Petitioner to be non-Indian, then the Nation has a proper basis to assert SDVCJ over him because the offense qualifies and neither exception applies.

The first exception at 25 U.S.C. § 1304(b)(4)(A) does not apply here because there is no dispute that the victim in this case, Petitioner's spouse Lorinda, was a citizen and enrolled member of the Nation from the time that she met Petitioner until now. R. at 6-7. The Nation's district court found both defendant and victim to be Indians. *Id.* at 3. Whether this Court accepts Respondents' or Petitioner's proposed definition of "Indian," Petitioner does not contest his spouse's Indian status in this matter. Therefore, this Court should accept the Nation's determination of the victim's Indian status as an undisputed fact.

The second exception at 25 U.S.C. § 1304(b)(4)(B) does not apply because Petitioner has sufficient ties to the Nation to justify its exercise of SDVCJ over him. 25 U.S.C. § 1304(b)(4)(B) provides three alternative bases for finding sufficient ties to exercise SDVCJ over a defendant. While Petitioner may satisfy all three alternative bases because it seems that he still resides and works in the Nation (R. at 6), he definitely satisfies the third basis for exercising SDVCJ. The third basis at 25 U.S.C. § 1304(b)(4)(B)(iii) permits tribes to exercise SDVCJ over a defendant who "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." The record shows that Petitioner is the spouse of a member of the Nation who currently resides in the Nation. R. at 3-7. Petitioner therefore has sufficient ties to the Nation to be subject to its SDVCJ even if he is non-Indian, and he cannot avail himself of either exception to the Nation's SDVCJ.

II. Because Petitioner is an Indian defendant sentenced to less than a year in prison, his court-appointed attorney satisfies the relevant legal requirements.

Petitioner's court-appointed attorney satisfies all relevant legal requirements. The Nation is not bound under the Constitution to provide Petitioner with court-appointed counsel. Additionally, because Petitioner is Indian, as discussed above, and his prison sentence is less than one year, he is not eligible for appointed counsel of any qualification under VAWA 2013 or ICRA. The Nation has fulfilled their obligations under the A.N.C. to provide Petitioner with a sufficiently qualified public defender.

A. Petitioner has no constitutional right to counsel.

This Court has long held that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring); *see also Talton v. Mayes,* 163 U.S. 376, 382-385 (1896). Tribes are therefore not bound by the Sixth Amendment right to effective counsel, and uncounseled tribal convictions are even valid for use as predicate offenses in later sentencing. *See Bryant,* 136 U.S. at 1958-1959. Thus, under the Constitution alone, the Nation was not required to provide any counsel to Petitioner, let alone an attorney admitted to the state bar.

B. Petitioner is not eligible for expanded rights to counsel under VAWA 2013 because he is not Indian.

While VAWA 2013 extends rights to appointed counsel to certain tribal court defendants, Petitioner is not eligible for these rights. Under VAWA 2013, Indian tribes exercising SDVCJ are required, *inter alia*, to (1) "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," (2) "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," and (3) provide "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant." 25 U.S.C. § 1304(d).

As Petitioner is Indian, the SDVCJ rights do not apply to him. Pursuant to 25 U.S.C. § 1304(a)(6), "special domestic violence criminal jurisdiction" is defined as "the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise." Tribes' sovereign power has always included the ability to prosecute and punish tribal members in tribal court. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978). Congress has also recognized tribes' inherent power to prosecute nonmember Indian defendants. *United States v. Lara*, 541 U.S. 193, 199 (2004). Therefore, even if VAWA 2013 had never been enacted, the Nation would be able to exercise jurisdiction over an Indian defendant. Because Petitioner is an Indian tribal member, the Nation's jurisdiction does not derive from VAWA 2013, and he is therefore not subject to SDVCJ and not eligible for the expanded rights it affords.

C. Petitioner is not eligible for expanded rights to counsel under the ICRA because his prison sentence is less than one year.

While tribes are not bound by the United States Constitution, the ICRA established an Indian Bill of Rights that is "similar, but not identical" to the Bill of Rights in the Constitution. *Santa Clara Pueblo*, 436 U.S. at 57. Notably, the ICRA's Bill of Rights does not include a right to court-appointed counsel analogous to the Sixth Amendment. Rather, the comparable clause in ICRA states that a defendant has a right to assistance of counsel "*at his own expense*." 25 U.S.C. § 1302(a)(6) (emphasis added).

However, the ICRA does afford expanded rights to indigent defendants who are sentenced "a total term of imprisonment of more than 1 year." 25 U.S.C. § 1302(c). These rights include two of those also provided to SDVCJ defendants, namely "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," and "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*. But as long as the court imposes a sentence less than one year, the defendant is not entitled to these rights.

Petitioner is not eligible for expanded rights to appointed counsel under the ICRA. Petitioner's term of imprisonment is seven months, which is less than one year. The Nation is thus not required under federal law to provide him with an attorney, state-licensed or not.

D. Petitioner's counsel met the relevant requirements under the A.N.C.

Petitioner's counsel met the relevant requirements under the A.N.C. Although tribes are not required by the Constitution or ICRA to provide indigent Indian defendants with counsel if they are sentenced to less than a year of imprisonment, the Nation nonetheless provides appointed counsel to all indigent defendants. Under the A.N.C., indigent defense counsel appointed to Indian defendants are not required to have a JD degree from an ABA accredited law school, nor are they required to be licensed to practice before a state or federal court. 2 A.N.C. § 503(2), 607(a). Petitioner does not contend that his attorney was unqualified under Title 2 Sec. 607(a), and the Nation therefore provided him with appropriately qualified counsel.

III. Distinguishing between Indian defendants and non-Indian defendants for the purposes of appointing indigent defense counsel does not violate equal protection under the ICRA.

Petitioner's contention that the Nation denied him equal protection because a non-Indian defendant would have been appointed a state-licensed attorney is erroneous. Indian tribes are not bound by the Fifth or the Fourteenth Amendment to provide a right of equal protection. *Hicks*, 533 U.S. at 383. Under federal law, any tribal obligations of equal protection arise from the ICRA, which states that Indian tribes may not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8).

In *Santa Clara Pueblo*, this Court recognized the importance of allowing tribal courts, rather than federal courts, to interpret equal protection under the ICRA. *Santa Clara Pueblo*, 436 U.S. at 67. In this particular case, where tribal self-determination is at stake, the Court should defer to the Nation's interpretation that it has not violated equal protection. However, even under a constitutional standard, the Nation has not violated equal protection because its laws related to appointment of counsel do not discriminate based on race and serve a rational purpose.

A. Equal protection under the ICRA should be interpreted differently from the Fourteenth Amendment and in favor of the Nation.

It is a fundamental principle of federal Indian law that tribes are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo*, 436 U.S. at 56*; see also Talton,* 163 U.S. at 382-385. Thus, the Fifth and Fourteenth Amendments, requiring the federal and state governments to provide equal protection, do not apply to Indian tribes. When interpreting the Indian Bill of Rights under the ICRA, courts have recognized that ICRA rights often depart from their

constitutional counterparts. In particular, ICRA rights may be interpreted differently in order to preserve tribal practices and fulfill Congress' intent of exempting the Indian tribes from certain constitutional provisions. *Tom v. Sutton,* 533 F.2d 1101 (9th Cir. 1976). In this case, both of those interests are at stake, so the Court should defer to the Nation's interpretation of equal protection rather than applying a constitutional standard.

1. Equal protection under the ICRA should be interpreted with regard for tribal customs and self-government.

While ICRA's equal protection clause is worded similarly to the Fourteenth Amendment, lower courts have historically recognized that, in contrast to equal protection under the Fourteenth Amendment, equal protection under ICRA is interpreted with "due regard for the historical, governmental and cultural values of an Indian tribe." *Tom,* 533 F.2d at 1101 n.5; *see also Howlett v. The Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971). The Sixth Circuit has also cited tribal court decisions cautioning that tribes "have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal laws" and that "courts should not simply rely on ideas of due process rooted in the Anglo–American system and then attempt to apply these concepts to tribal governments as if they were states or the federal government." *United States v. Doherty*, 126 F.3d 769 (6th Cir. 1997).

For this reason, the Court recognized in *Santa Clara Pueblo* that federal review of tribal court interpretations of equal protection should be heavily limited. *Santa Clara Pueblo*, 436 U.S. at 71. In that case, the plaintiff argued that the Santa Clara Pueblo violated equal protection by granting tribal membership to children of men who married outside the tribe, but not to those of women. *Id.* at 51. Holding that there was no federal remedy for alleged ICRA violations beyond *habeas corpus* relief, the Court emphasized the need to protect tribal

self-government and avoid undue incursions on tribal sovereignty, even when the tribe's actions might violate equal protection if constitutional limitations applied. *Id.* at 71.

Since *Santa Clara Pueblo,* this Court has had few opportunities to clarify the meaning of equal protection under ICRA, but its guidance in that decision is still instructive. The Court reasoned in *Santa Clara Pueblo* that "resolution of statutory issues under § 1302…will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." *Id*. at 71. Further, the Court noted that ICRA served dual purposes: (1) to "[strengthen] the position of individual tribal members vis-a-vis the tribe," and (2) "to promote the well-established federal 'policy of furthering Indian self-government.'" *Id.* at 62. The Court cautioned against interpretations of ICRA that would advance the first objective while hindering Indian self-government. *Id.*

To limit incursions into tribal self-government, the Sixth, Eighth, and Ninth Circuits have all adopted a test that extends the federal constitutional standard of equal protection to a tribe only when a tribal practice mirrors a practice "commonly employed in Anglo-Saxon society." *See White Eagle v. One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973); *Randall v. Yakima Nation Tribal* Court, 841 F.2d 897 (9th Cir. 1988); *Kelsey v. Pope,* 809 F.3d 849 (6th Cir. 2016). But where a tribal practice would "significantly impair a tribal practice or alter a custom firmly embedded in Indian culture, and where the individual injury alleged by the tribal member is, by comparison, not a grievous one," then Courts have allowed tribal courts to depart from the constitutional standard of equal protection and uphold tribal laws that differentiate between protected groups. *Howlett*, 529 F.2d at 238.

The cases where lower courts found that tribal practices were sufficiently similar to those employed in the United States have typically involved tribal election procedures. For

example, the Ninth Circuit extended a constitutional standard of equal protection to the Salish and Kootenai Tribes because their election procedures "[paralelled] those commonly found in our culture." *Id.* This is consistent with previous decisions that when no traditional tribal practices are at stake, the Court is comfortable imposing a federal constitutional standard on the tribe. *One Feather*, 478 F.2d at 1314.

On its face, the present case appears similar to *Howlett*, in that the Nation has adopted procedures, like appointment of indigent defense counsel and a tribal bar examination, that mirror those commonly found in the United States. But this case can be distinguished from *Howlett* and similar lower court decisions. While the Nation has taken a page out of the states' book in appointing indigent defense counsel, it has adapted this procedure in a way that specifically preserves tribal custom. For example, the Nation has avoided requiring its public defenders to pass the state bar and requires public defenders for Indian defendants to have training in Amantonka law and culture. Through these provisions, the Nation specifically preserves Amantonka values and traditions in their courts.

Moreover, while the bar examination is common practice in the United States, tribal law does not necessarily mirror state or federal law. Rather, tribal courts "differ from traditional American courts in a number of significant respects." *Hicks,* 533 U.S. at 383 (Souter, J., concurring). Therefore, a tribal bar examination testing tribal law is not sufficiently equivalent to a state bar examination, which tests an entirely different body and tradition of law.

Moreover, unlike in *Howlett* and its brethren, imposing a requirement that the Nation appoint defendants with counsel who have passed state bar examinations would impair tribal practice. Requiring all attorneys in tribal court to pass a state bar exam would not only

"impose… a great cost on tribes," it would also put tribes under "pressure to conform their systems to match federal or state justice systems." *ICRA Reconsidered: New Interpretations of Familiar Rights*. 129 Harv. L. Rev. 1709, 1717 (2016). The Nation has a compelling interest in determining the structure of its judicial system independent of the requirements imposed in states. It can support this interest by training its lawyers and advocates in the Nation's traditional body of law, untainted by the law of other sovereigns.

And even when a tribal practice would be impaired, the *Howlett* test still requires the court to balance that harm against the injury suffered by the defendant. *Howlett*, 529 F.2d at 238. In this case, any alleged differentiation between non-Indians and Indians did not cause Petitioner to suffer injury. As the Nation's Supreme Court recognized, Petitioner has "not pointed to any errors allegedly committed by his defense counsel." R. at 7. Even though his attorney was not a member of a state bar, this Court's standard for effective assistance of counsel does not depend on bar admission. *See Strickland v. Washington,* 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like…are guides to determining what is reasonable, but they are only guides.").

Petitioner makes no argument that his attorney did not provide effective assistance of counsel. The Court employs a two-prong test to determine whether assistance of counsel was effective: The defendant must show that (1) his defense counsel's professional judgment was unreasonable; and (2) the outcome of the proceeding would have been different but for his attorney's unreasonable acts. *Id.* at 691-694. Petitioner does not contend that his attorney's judgment was unreasonable, nor that the outcome of his case would be different had he been appointed a state-licensed attorney. Therefore, he has not suffered any injury that would have been abated had the Nation appointed him a state-licensed attorney. Moreover, this Court

recently held that uncounseled tribal convictions are valid; it should not now hold that providing counsel without state credentials amounts to such a grievous injury that it warrants an incursion into tribal self-government. *Bryant*, 136 S.Ct. at 1963.

Further, the Nation's Supreme Court's determination that the difference in qualifications was not relevant for providing adequate counsel is a logical conclusion. There is no reason why knowledge of state law should be relevant when representing a client in a court that applies tribal law. Accordingly, it is not only true that Petitioner was not harmed by this differentiation, it is also unlikely that future defendants will be harmed by the Nation's distinction. Thus, given the lack of injury to Petitioner, and the strong tribal interest in determining its own judicial structure and customs, the Court should uphold the Nation's Code provisions regarding right to counsel.

2. Because Congress specifically intended for tribes to not be bound by the Sixth Amendment when enacting the ICRA, the Court should not apply a standard of equal protection that would bind tribes by the Sixth Amendment.

While goals of tribal self-government alone warrant a departure from the constitutional standard of equal protection in this case, so too does the Congressional history of ICRA's right to counsel provision. Because non-Indian defendants are entitled to "effective assistance of counsel at least equal to that guaranteed by the United States Constitution," Petitioner's request to be afforded the same rights as a non-Indian defendant amounts to a request to bind tribes by the Sixth Amendment in most cases of domestic violence. 25 U.S.C. § 1302(c)(1); § 1304(d)(2).

But the plain language and legislative history of ICRA both show that Congress did not intend to bind tribes by the Sixth Amendment. *Tom*, 533 F.2d at 1104. As discussed above, the plain language of ICRA says that a defendant is only entitled to assistance of

counsel at "his own expense." 25 U.S.C. § 1302(c)(6). The original bill introduced in Congress imposed on tribes "the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution." *Santa Clara Pueblo*, 436 U.S. at 75 (White, J., dissenting), quoting S. 961, 89th Cong., 1st Sess. (1965). But there were objections to such broad language, and it was removed. *Groundhog*, 442 F.2d at 681. The Senate Subcommittee specifically noted that the final bill carved out exceptions so that certain constitutional limitations did not apply to Indian tribes, including "certain of the procedural requirements of the 5th, 6th, and 7th amendments, and, in some respects, the equal protection requirement of the 14th amendment." *Id.* at 682.

It would be contradictory if Congress, on the one hand, intended to exempt Indian tribes from the Sixth Amendment, and on the other hand, intended to bind Indian tribes by the Sixth Amendment via ICRA's equal protection clause. The Ninth Circuit similarly refused to extend a constitutional standard of due process to tribes where such a standard would conflict with Congress' legislative intent that the tribes not be required to provide indigent counsel in tribal courts. *Tom*, 533 F.2d at 1104. The Court reasoned that Congress could not have intended due process under ICRA to be co-extensive with constitutional due process, since doing so would require tribes to appoint indigent defense counsel in contradiction of Congress' intent. *Id.* Analogously, equal protection under ICRA should not be held to be co-extensive with its constitutional counterpart where the implication would be binding tribes by the Sixth Amendment.

B. Even if equal protection under the ICRA is co-extensive with the Fourteenth Amendment, the Tribe's appointment of defense counsel does not violate equal protection because tribal identity is political and the requirement has a rational basis.

Even analyzing this case under a constitutional standard of equal protection, this Court should nonetheless come to the same conclusion that equal protection has not been violated. Where a distinction is based on racial classification, the government must show under strict scrutiny that the distinction is narrowly tailored to promote a compelling governmental interest. *See Wygant v. Jackson Bd. Of Educ.* 476 U.S. 267, 280 (1986). By contrast, distinctions based on a *political* classification are subject only to rational review. *See Mancari*, 417 U.S. at 553–54; *see also Antelope,* 430 U.S. at 646. Under this standard, the government must show that the distinction is rationally related to a legitimate governmental purpose. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993). Because the Nation's distinction is based on Indian status, which is a political classification, it is subject to rational review. Upon such review, this Court should hold that the Nation's distinction serves a rational purpose of preserving an independent tribal judicial system.

1. The Nation's distinction between Indians and non-Indians is based on a political, not racial, classification.

Indian status is a political classification that derives from the Indian tribes' unique status as "quasi-sovereign…entities." *Mancari,* 417 U.S. at 554. In *Mancari*, this Court addressed the question of whether a hiring preference that favored Indians for positions in the Bureau of Indian Affairs violated the equal protection clause of the Fifth Amendment. Holding that it did not, the unanimous majority reasoned that the preference did not apply to Indians as a racial group, but rather to members of quasi-sovereign entities who had a unique interest in their own affairs and government. *Id.* at 554.

In *Antelope*, the Court extended the holding of *Mancari* to the criminal context. *Antelope*, 430 U.S. at 646. The Indian defendants in *Antelope* were charged with first-degree murder in federal court. *Id.* at 642. Non-Indian defendants would have been prosecuted in state court, under a more favorable law that would have added a burden on the prosecution to prove premeditation and deliberation. *Id.* at 644. In another unanimous decision, the Court held that the law subjecting Indians to federal jurisdiction did not violate equal protection because "respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." *Id.* at 646. Lower courts have extended the *Antelope* holding to cases where the distinction is not between tribal members and non-tribal members, but rather between Indians and non-Indians. *Means,* 432 F.3d at 935.

In the case before the Court, the Nation's distinction between Indians and non-Indians is similarly a political classification. Perhaps the most obvious evidence that this distinction is not racial is Petitioner's case itself. Petitioner is an enrolled member of the Nation, who has no Indian blood, but was nonetheless treated as an Indian defendant. The Court need not decide whether a distinction between Indians and non-Indians based on race alone would violate equal protection because that question is not before the Court in this case. The fact that the Nation considers Petitioner to be Indian for purposes of providing defense counsel clearly shows that their distinction is not based on race.

2. The Nation's distinction between Indians and non-Indians has a rational purpose of promoting tribal self-government.

Because the Nation's distinction is based on a political classification rather than race, it must only survive rational review. The "rational tie" standard, as defined in the context of Indian law, requires that any distinctions based on Indian status in federal law must be "tied

rationally to the fulfillment of Congress' unique obligation toward the Indian." *Mancari,* 417 U.S. at 555. In *Mancari*, the BIA's hiring preference for Indians was "reasonable and rationally designed to further Indian self-government" because it allowed more tribal members to be involved in decisions that would affect their communities. *Id.*

The Court also extended this system of review to certain state laws. In *Yakima*, the Yakima tribe challenged a state statute that granted the state full jurisdiction over fee lands, but limited jurisdiction over non-fee lands. *Wash. v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 475 (1979). The Yakima contended that the State's statute violated equal protection by denying law enforcement benefits to Indians living on non-fee lands, while providing it to Indians on fee lands. *Confederated Bands & Tribes of Yakima Indian Nation v. State of Wash*., 552 F.2d 1332, 1334 (9th Cir. 1977). The Court upheld Washington's "checkerboard" jurisdiction, finding that it did not violate equal protection under the Constitution because the statute was "fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands." *Yakima,* 439 U.S. at 502. The distinction between fee lands and non-fee lands was rational because it prevented the State from intervening in places where "tribal members have the greatest interest in being free of state police power."

Similarly, the Nation's distinction between Indians and non-Indians is rationally calculated to afford the Tribe the greatest possible self-determination while still meeting any obligations to non-Indians under VAWA 2013. As discussed above, the Nation has a strong interest in preserving traditional tribal law and establishing a judicial system that is independent from state court procedures. Where the Nation is not constrained by federal law,

it has fulfilled this interest by requiring that its public defenders are trained in Amantonka law, but not in the laws of the United States.

The Nation nonetheless recognizes that, under VAWA 2013, it must provide additional protections to non-Indian citizens. This distinction is rational not only because tribes are specifically mandated by Congress under VAWA to provide certain protections to non-Indians, but also because non-Indian citizens do not have the same interest as Indians in participating in and preserving tribal traditions. *See Peyote Way Church of God, Inc. v. Thornburgh.* 922 F.2d 1210, 1216 (5th Cir. 1991). In this case, Petitioner and other members of the Nation have a unique interest in being represented by attorneys who reflect their culture and legal traditions. Non-Indians, on the other hand, do not have a similar interest in preserving tribal culture. They would suffer little harm if represented by a lawyer trained in state law, whose practice had been shaped by that training to conform to the United States legal system. Similar to Washington's distinction in *Yakima*, the Nation's distinction between Indians and non-Indians is therefore rational because Indians, as citizens of a sovereign tribe, have a greater interest than non-Indians in being free from state and federal interference and preserving traditions of tribal law.

IV. Even if Petitioner is non-Indian, his attorney nonetheless meets the SDVCJ standards.

Even if Petitioner is non-Indian, his attorney meets SDVCJ standards. First, Petitioner's attorney was admitted to practice law before the Nation's courts, meaning that his attorney is appropriately classified as counsel. *See United States v. Long*, 870 F.3d 741, 748 (8th Cir. 2017) (holding that defendant was not denied a right to counsel because his attorney was a lay advocate, rather than a state-licensed attorney). As discussed above, Petitioner's counsel provided effective assistance at least equal to that guaranteed by the

United States Constitution, as defined in *Strickland*. Second, the Nation appointed Petitioner "a defense attorney licensed to practice law by [a] jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C. § 1302(c)(2). Third, as previously discussed, the Nation has not violated equal protection under the Constitution, and Petitioner does not contend that any of his other constitutional rights have been denied.

Petitioner claims that his counsel does not meet these qualifications because his attorney was not licensed to practice in any state. Petitioner has construed "licensed to practice law in any jurisdiction in the United States" to mean "licensed to practice law in federal or state courts," but this is not apparent from the statute. While Indian tribes are quasi-sovereign nations and are not necessarily jurisdictions *of* the United States, their borders fall within the United States. In fact, the Congressional definition of "Indian Country" includes "all dependent Indian communities *within* the borders of the United States." 18 U.S.C. § 1151 (emphasis added). Elsewhere in the statute, Congress refers to "Federal or State criminal jurisdiction" or otherwise refers to the "the authority of the United States or any State government. *See* 25 U.S.C. § 1304(b)(3). The fact that Congress did not specify that Petitioner's court-appointed attorney needed to be licensed in a federal or state jurisdiction implies that an attorney licensed in a tribal jurisdiction in the United States satisfies the VAWA requirements.

Further, by administering a tribal bar exam, the Nation "applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C. § 1302(c)(2). Petitioner has not specified any flaws in the tribal bar exam that prove otherwise. Beyond the bar exam, the Nation

ensures the continued competence and professional responsibility of its attorneys by establishing a Code of Ethics and providing for disbarment upon violation of that Code. *See* 2 A.N.C. § 504(a); 2 A.N.C. ch. 7.

Lastly, Petitioner's attorney meets the requirements to represent a non-Indian defendant under 2 A.N.C. § 607(b). Petitioner's attorney possessed a Juris Doctor degree from an ABA-accredited law school and had successfully completed the Nation's bar exam. R. at 7. Petitioner has not asserted that his counsel did not take an oath of office or pass a background check. Therefore, Petitioner's lawyer satisfied the relevant requirements whether or not Petitioner is Indian.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that (1) Petitioner is Indian, (2) the Nation accordingly had criminal, but not special domestic violence criminal, jurisdiction over him, and (3) the Nation provided Petitioner with a properly qualified attorney under all relevant laws and did not violate equal protection in doing so.

Respectfully Submitted,

January 2019 *Counsel for Respondents*