NO. 19-231

IN THE

Supreme Court of the United States

ROBERT R. REYNOLDS

Petitioners,

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 U.S. Court of Appeals for the Thirteenth Circuit

BRIEF OF RESPONDENTS

Team # 577

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QUESTIONS PRESENTED

1. Is Petitioner a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction?

2. Did Petitioner's court-appointed attorney satisfy the relevant legal requirements?

STATEMENT OF THE PROCEEDINGS

On June 16, 2017 Petitioner, Robert Reynolds, was indicted in the District Court for the Amantonka Nation for violation of Title 5 section 244. After several unsuccessful pre-trial motions, Petitioner was convicted by the District Court on August 23, 2017. Petitioner appealed his conviction to the Amantonka Supreme Court, which affirmed the conviction on November 27, 2017. Petitioner then filed a petition for a Writ of Habeas Corpus in the District Court for the District of Rogers pursuant to 25 U.S.C. section 1303, which was granted on March 7, 2018. The U.S. Court of Appeals for the Thirteenth Circuit reversed *per curiam* on August 20, 2018. On October 15, 2018, this Court granted Petitioner's petition for a Writ of Certiorari.

STATEMENT OF THE FACTS

On June 15, 2017, Petitioner Robert Reynolds violently attacked his wife, Lorinda, at their apartment in the Amantonka Nation tribal housing complex, breaking her ribs. *Reynolds v. Amantonka Nation,* Op. No. 17-198 (S. Ct. Amantonka Nat., 2017). This was not the first time Mr. Reynolds had abused his wife. Over the past 10 months, the Amantonka police have responded to repeated reports of violence at the Reynolds' home. *Id.* Reynolds, who began drinking heavily after losing his job at the Amantonka Nation's casino, grew increasingly belligerent over this period. *Id.* And, on June 15, his violence finally resulted in a serious injury.

The Reynolds' are members of the Amantonka Tribe. Lorinda was born into the tribe, while Petitioner became a tribal member as an adult. *Id.* After marrying, they lived together within the sovereign territory of the Amantonka, in the tribal housing complex. *Id.* Both Lorinda and Mr. Reynolds worked at the tribal casino. *Id.* After two years residing

within the Amantonka reservation, Mr. Reynolds became eligible to apply for Amantonka citizenship. A.N.C. § 201. He immediately chose to begin the formal process of becoming a naturalized citizen of the Amantonka Nation. *Reynolds*, Op. No. 17-198. Like a foreign national naturalizing as a U.S. citizen, this process involved completing a course in Amantonka culture, a course in Amantonka law and government, and passing a citizenship test. A.N.C. § 202. And, as through the naturalization process for any sovereign nation, becoming a member of the Amantonka Nation means that Petitioner receives "all the benefits of citizenship afforded all Amantonka citizens," whether born into the tribe or not. A.N.C. § 203. Along with the privileges of citizenship, Petitioner has agreed to uphold corresponding duties—including the duty to abide by tribal law. And, just like any other citizen, Petitioner is subject to the Amantonka Nation's criminal jurisdiction in the event that he violates the law. Through his course in Amantonka law and government, Petitioner was well aware of both his privileges and responsibilities.

Unfortunately, Petitioner did not uphold his civic responsibility to obey the law. Instead, Petitioner violently beat his wife, in violation of an Amantonka statute prohibiting family member and partner assault. A.N.C. § 244. The Amantonka Nation prosecuted him under Amantonka law; just like any other Amantonka citizen. *Reynolds*, Op. No. 17-198.

Because Mr. Reynolds could not afford an attorney, the Amantonka court provided him with one. *Id.* Petitioners' court-appointed attorney, like all currently serving public defenders in the Amantonka Nation, possessed a J.D. from an A.B.A. accredited law school and was admitted to the Amantonka Nation's Bar. *Id.* There is no evidence to suggest that the Amantonka bar is in anyway less rigorous than the bar of Rogers or any other American jurisdiction. In fact, the Amantonka Nation Supreme Court observed Petitioner presented no

evidence at trial as to any meaningful difference between a tribal and state bar exam. *Id.* Mr. Reynolds' attorney is also a member of good standing of the Amantonka Bar Association, which includes adherence to the Nation's stringent canons of professional ethics. *Id.* In particular, Petitioner's attorney was held to the same standard of competence and diligence as any other lawyer barred in an American jurisdiction. As a J.D.-holding, fully licensed attorney, Petitioner's public defender fulfilled all of the requirements for indigent counsel under the Indian Civil Rights Act for charges carrying a sentence of greater than one year imprisonment; and under the VAWA 2013 special domestic violence jurisdiction provisions.

Pursuant to Amantonka law, Reynolds was provided due process throughout his prosecution. He was given a trial, right to appeal, and an opportunity to present oral argument before the Amantonka Supreme Court. A.N.C. §§ 205-06. This is the same procedure afforded all criminal defendants under Amantonka law. Ultimately—and unsurprisingly given the undisputed facts in the case—a jury of his peers found Mr. Reynolds guilty of partner assault. *Reynolds*, Op. No. 17-198. Amantonka Nation Chief Judge Elizabeth Nelson then sentenced him to 7 months imprisonment, restitution to Lorinda for the medical bills stemming from his abuse, a $1500 fine, and batterer rehabilitation and alcohol treatment programs through the Amantonka Nation Social Services Division. *Id.* This sentence is a minimal consequence for Mr. Reynolds' act of violence. Under many state penal codes, for example, the same offenses can result in sentences of multiple years. Moreover, the sentence seeks to provide restorative justice—not only making Lorinda whole but providing Mr. Reynolds with treatment to help him manage his violent tendencies and relinquish his dependency on alcohol. Order Entering Judgment and Sentence.

Reynolds' abuse is paradigmatic of the widespread domestic violence plaguing Indian country. Compared to all other groups in the United States, Native women experience the highest rates of physical abuse. More than 4 in 5 American Indian and Alaska Native women have experienced domestic violence, and more than 1 in 2 have experienced sexual violence. NATIONAL CONGRESS OF AMERICAN INDIANS, POLICY RESEARCH CENTER DATA BRIEF: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 1 (Feb. 2018). As many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner. *Id.* These rates are up to 10 times higher than those experienced by other groups in the United States. *Id.* Moreover, Petitioner's abusive behavior follows a typical, and disturbing, pattern. Most domestic violence is perpetrated by intimate partners. *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016). And domestic abusers exhibit high rates of recidivism, with their violence escalating in severity over time. *Id.* Reynolds has already demonstrated a pattern of increasingly aggravated attacks, with his most recent abuse causing serious injury to Lorinda.

In large part, the pervasiveness of domestic violence within Indian country can be attributed to the "patchwork" of federal, state, and tribal authority governing in Indian country. *Id.* While tribes have definitive criminal jurisdiction over their own members, like Mr. Reynolds, they must rely on the assistance of the federal (and in some instances) state governments for protection from outsiders and trespassers. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 201, 206 (1978). And state and federal governments have demonstrated a distinct unwillingness to devote their time and resources to prosecuting individual instances of domestic violence in Indian country. Bryant, 136 S. Ct. at 1960. As a result, where tribes lack enforcement power, acts of violence within Indian country go largely unpunished. *Id.*

Congress included in the 2013 reauthorization of the Violence Against Women Act, a provision affording tribes "special domestic violence" criminal jurisdiction over non-members. U.S.C. 25 § 1304. Through this statute and the 2010 Tribal Law and Order Act, Congress has also increased tribal authority to mete out punishment for crimes of violence committed in Indian country. P.L. No. 11-211, 124 Stat. 2258 (2010). For example, Congress has expanded tribal courts' sentencing authority, allowing them to impose up to three years' imprisonment, contingent on adoption of additional procedural safeguards. *Id.* Through such acts, Congress has demonstrated a commitment to promoting, protecting, and even enlarging tribal sovereignty.

SUMMARY OF ARGUMENT

At the core of this case is the intersection of domestic violence in Indian country and tribal sovereignty. For tribes to effectively confront the former—a true epidemic amongst Native populations—the latter must be safeguarded. Despite his minimal sentence, Petitioner attempts to circumvent responsibility for his crime by arguing that the tribe lacks criminal jurisdiction over him because he is not racially Indian. This argument contradicts centuries-old federal policy of promoting tribal sovereignty. As independent nations whose sovereignty pre-dates the coming of European colonists or the penning of the U.S. Constitution, Indian tribes maintain a unique status in the United States. Though the history of violence, conquest, and settler colonialism in the United States has diminished some aspects of tribal sovereignty, tribes retain their inherent power of self-government.

Central to the power of self-government is the ability of a sovereign to maintain internal law and order, including the power to protect its own citizens from abuse. This Court's jurisprudence has made it abundantly clear that tribes retain the authority to enforce

their own laws against their own members, like Petitioner. And even assuming Petitioner is a non-Indian he is still subject to tribal jurisdiction pursuant to the 25 U.S.C. section 1304. Moreover, Petitioner's court-appointed attorney more than satisfied all relevant legal requirements, regardless of Petitioner's Indian status. Under the relevant standard, the Indian Civil Rights Act, Petitioner's equal protection and due process rights were upheld.

ARGUMENT

Petitioner has raised meritless arguments in his attempt to evade justice for his act of domestic violence. First, as a freely enrolled member of the Amantonka Nation, petitioner is an Indian for the purposes of tribal criminal jurisdiction. Petitioner's argument to the contrary flies in the face of the well-settled principle that tribes, as quasi-sovereign entities, have authority over their own members – regardless of blood status. Moreover, even under the counterfactual that Petitioner is a non-Indian, the Amantonka Nation would maintain criminal jurisdiction by virtue of the special domestic violence criminal jurisdiction (SDVCJ) provisions of the Violence Against Women Act (VAWA). Next, Petitioner's court appointed attorney more than satisfied the relevant legal requirements – namely those codified in the Indian Civil Rights Act (ICRA) and VAWA. And Petitioner's contention that the differential requirements applied to Indians and non-Indians violates equal protection, like his contention that the Amantonka Nation lacks criminal jurisdiction, flies in the face of the well-settled jurisprudence of this court. In recognition of inherent tribal sovereignty, this Court has determined that the Bill of Rights does not apply to tribes and tribal proceedings are instead governed by ICRA. This Court has found that under ICRA, Indian is a political, not racial, class. Thus, different standards predicated on Indian status are not considered discriminatory unless they lack any rational basis – a contention petitioner has not made. In Petitioner's

meritless attempt to evade a sentence of 7 months imprisonment and a small fine, he asks this court to allow a bizarre abrogation of tribal sovereignty that runs contrary to Congressional intent and this Court's caselaw. As such, Petitioner's frivolous claims should be dismissed.

I. The Amantonka Tribe has Criminal Jurisdiction Over Petitioner

The Amantonka Tribe has authority to criminally prosecute Petitioner for his act of domestic violence. First, as a freely enrolled tribal member, petitioner is "Indian" for the purposes of tribal criminal jurisdiction. By virtue of their inherent sovereignty, tribes have unencumbered autonomy to define their own membership and prosecute members for violations of tribal law. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *U.S. v. Wheeler*, 435 U.S. 313, 322 (1978); *Roff v. Burney*, 168 U.S. 218, 223 (1897). As defined by the Amantonka law, Petitioner is a tribal member, who – by beating his wife – violated Amantonka law. Amantonka Code Sec. §§ 201-203, 244. Petitioner is thus subject to the criminal jurisdiction of the tribe. And by freely electing to enroll as a tribal member, Petitioner consented to the tribe's jurisdiction. *Duro v. Reina*, 495 U.S. 676, 693-94 (1990). Contrary to Petitioner's belief, blood quantum does not factor in assessing *tribal* criminal jurisdiction. Moreover, even if Petitioner was not an Indian, the tribe maintains SDVCJ under the Violence Against Women Act. 25 U.S.C. § 1304 (2013).

A. The Amantonka Nation has General Criminal Jurisdiction Over Petitioner

1. As an Amantonka Nation Member, Petitioner is an Indian Subject to Amantonka Criminal Jurisdiction

The Amantonka Nation has criminal jurisdiction over Petitioner because he is an enrolled member of the tribe. Indian tribes are autonomous sovereign entities. *E.g., U.S. v. Kagama*, 118 U.S. 375, 381-82 (1886); *U.S. v. Enas*, 255 F.3d 662, 666 (9th Cir. 2001) (en banc). As such, tribes retain all sovereign power not explicitly extinguished by Congress and

not inconsistent with their status as "domestic dependent nations." *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 196 (1978) (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831)). At the core of retained tribal sovereignty is the exercise of self-government. *See, e.g.*, *New Mexico v. Mescalero Apache*, 462 U.S. 324, 433 (1983) (explaining that tribes have unmitigated authority to "make their own laws and be governed by them."). And tribal self-government encompasses "unconstrained" tribal authority to both define their own membership and to exert jurisdiction over their members. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) ("Indian tribes remain a separate people, with the power of regulating their internal and social relations. They have the power to make their own law in internal matters, and to enforce that law in their own forums."). Promoting tribal self-government is a "well-established Congressional policy" and "unless and until Congress makes clear its intention to permit [] additional intrusion[s] on tribal sovereignty," courts should not impose them. *Santa Clara*, 436 U.S. at 72.

Applying these principles here, it is indisputable that Petitioner is a tribal member subject to Amantonka criminal jurisdiction. On the question of tribal membership, the tribe's own definition is controlling. And because Indian status is "political rather than racial in nature," the scope of tribal membership – and therefore criminal jurisdiction – need not include a blood quantum requirement. *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005) (applying *Morton v. Mancari*, 417 U.S. 535 (1974)) in the context of tribal criminal jurisdiction over non-member Indians). This principle was established in *Roff v. Burney*, where the Supreme Court held that tribes have absolute authority to both extend and deny full tribal membership to individuals who were not born into the tribe by blood. 168 U.S. 218, 223 (1897).

Moreover, a tribe's membership criteria are generally not subject to review or alteration by any other authority, including the federal government. *Id.* The Supreme Court underscored this point in *Santa Clara Pueblo v. Martinez.* 436 U.S. 59 (1978). At issue in *Santa Clara* was a tribal ordinance that afforded tribal membership to the children of male tribal members who married outside the tribe, while denying membership to children of female members who did the same. *Id.* at 51. Plaintiffs argued that the ordinance constituted invidious sex discrimination under the Indian Civil Rights Act. *Id.* While acknowledging the serious individual liberties concerns implicated by the ordinance, this Court dismissed the case. It held allowing federal judicial review of the tribe's own membership criteria would impermissibly "undermine" tribal sovereignty and "interfere with the tribe's ability to maintain itself as a culturally and politically distinct entity." *Id.* at 72-73. Here, the Amantonka Tribe's membership criteria recognize naturalized citizens – like Petitioner – as full tribal members. A.N.C., § 203 (providing that naturalized citizens are listed on the tribal roll and "entitled to all the privileges afforded all Amantonka citizens"). Thus, Petitioner is a tribal member.

Because Petitioner is a tribal member, he is subject to the general criminal jurisdiction of the tribe. The Supreme Court has repeatedly reaffirmed that retained tribal self-government categorically includes criminal jurisdiction over tribal members. *E.g.*, *U.S. v. Antelope*, 430 U.S. 641, 643 n.2 (2005) ("Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions."); *U.S. v. Wheeler*, 435 U.S. 313, 322 (1978) ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribal members."); *Duro v. Reina*, 495 U.S. 676, 686 (1990) ("The power of a tribe to prescribe and enforce rules of conduct for its own

members 'does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status.'"); *Greywater v. Joshua*, 846 F.2d 486, 492 (8th Cir. 1988) (Explaining that "nothing" has deprived tribes of their "own jurisdiction to charge, try, and punish members of the Tribe for violations of tribal law. On the contrary, we have said that "[i]mplicit in these treaty terms ... was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.") (quoting *Williams v. Lee*, 358 U.S. 217, 221-222 (1959); *see also U.S. v. Lara*, 541 U.S. 193, 199 (2005) (explaining that the source of tribal criminal jurisdiction over members is inherent tribal sovereignty).

The counterpoint to tribes' criminal jurisdiction over members – their lack of criminal jurisdiction over non-members – further demonstrates that Amantonka prosecution of Petitioner is proper. In *Oliphant v. Suquamish*, the Court explained that the power to criminally prosecute nonmembers constituted an exercise of authority over "external" or "outside" actors inconsistent with tribes' status as "domestic dependent nations." 435 U.S. 191, 209-10 (1978). As such, criminal jurisdiction over non-members had been implicitly divested by Congress. *Oliphant*, 435 U.S. at 210. In so holding, the Court explicitly distinguished the "sovereign power of a tribe to prosecute its members" as consistent with tribes' dependent status and thus retained by tribes. *Id.*; *see also Wheeler*, 435 U.S. at 325. Indeed, "the power to punish offenses against tribal law committed by Tribe members, which was part of the [tribe's] primeval sovereignty, has never been taken away from them, either explicitly or implicitly." *Wheeler*, 435 U.S. at 328. Thus, because petitioner is an Amantonka member, he is subject to tribal criminal prosecution for violently beating his wife in contravention of Amantonka law. *See* A.N.C. § 244, Partner or Family Member Assault.

Moreover, in keeping with the Congressional policy to promote tribal self-government, tribes' complete criminal jurisdiction over their members should not be disturbed except by explicit Congressional action. *Greywater*, 846 F.2d at 492. And "far from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of a tribe, Congress has repeatedly recognized that power and declined to disturb it." *Wheeler*, 435 U.S. at 325.

To the contrary, Congress has instead demonstrated a commitment to enlarging tribal criminal jurisdiction. In *Duro v. Reina*, the Supreme Court applied the member/non-member dichotomy established in *Oliphant* and *Wheeler* to conclude that tribes' lack authority to criminally prosecute non-member Indians. 495 U.S. 676, 682 (1990). Congress overturned the holding in *Duro* by statute, thereby restoring tribes' inherent sovereign authority to criminally prosecute non-member Indians. Act of Oct. 28, 1991, 105 Stat. 646; *Lara*, 541 U.S. at 200 (recognizing that the legislation "enlarges the tribes' own powers of self-government to include . . . criminal jurisdiction over all Indians, including nonmembers"). This legislation was based on the Congressional objective of promoting tribal self-governance and well-being. Act of Oct. 28, 1991, 105 Stat. 646. Without tribal jurisdiction over non-member Indians, no sovereign would be able to prosecute such perpetrators for many crimes committed within Indian country, thereby compromising the ability of tribes to maintain law and order within their boundaries. *Means v. Navajo Nation*, 432 F.3d 924, 933 (9th Cir. 2005) (en banc).

This expansion of tribal jurisdiction to effectuate tribal sovereignty further elucidates the propriety of Amantonka jurisdiction over Petitioner. As much as tribal sovereignty would be compromised by the jurisdictional gap resulting from *Duro*, it would be utterly

gutted if a tribe like the Amantonka was unable to assert criminal jurisdiction over its own members, like petitioner. Fidelity to this Court's precedent requires adherence to the rule that "unless and until" Congress acts, tribal sovereignty should be undisturbed.

2. Petitioner Consented to Tribal Criminal Jurisdiction by Choosing to Naturalize as an Amantonka Citizen

By electing to enroll as a tribal member, Petitioner consented to Amantonka criminal jurisdiction. The holding in *Oliphant* that tribes lack criminal jurisdiction over non-Indians was largely based on concerns about consent. 435 U.S. at 210. Because U.S. citizens have not submitted to the sovereignty of tribes, subjecting them to tribal criminal jurisdiction – and therefore prosecution according to unfamiliar tribal "custom and procedure" – would constitute "unwarranted intrusions on their personal liberty." *Id.* The same concerns about consent were echoed in *Duro v. Reina*, regarding a tribes' authority to prosecute Indians from other tribes. Out of these concerns, the court crafted a criminal jurisdiction rule based on consent through membership: "A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority." 495 U.S. 676, 693 ("criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.")[1]

This rule was applied in *Greywater v. Joshua*, 846 F.2d 486, 493 (8th Cir. 1988). There, the court explained that because the defendant did not consent to tribal jurisdiction by enrolling as a tribal member, the tribe lacked authority to criminally prosecute him. *Id.* ("in this Nation each sovereign governs only with the consent of the governed.") The court

[1] To a lesser degree, the same concerns operate in the background of tribal civil jurisdiction. *See generally, Montana v. U.S.*, 450 U.S. 544 (1981) (requiring that non-Indians enter a consensual relationship with tribe or commit acts that threaten the welfare of tribe in order for a tribe to assert jurisdiction).

further elucidated the nature of the membership-based consensual relationship. Because the non-member defendant did not enjoy the same privileges as tribal members – including the right to vote in tribal elections, sit on tribal juries, or run for tribal office – the tribe's power over him "appropriately limited" and excluded criminal jurisdiction. *Id.* at 494.

Tribal jurisdiction has, of course, been subsequently widened to encompass non-member Indians within a tribe's territory. As discussed above, Congress relaxed the consent requirement and expanded tribal jurisdiction because doing so was necessary to protect the internal integrity and self-government of tribes. *U.S. v. Lara*, 541 U.S. 193, 205-06. Although non-member Indians have not "consented" to the jurisdiction of other tribes to the same degree as members, without tribal jurisdiction over non-member Indians within their territory, no sovereign would be capable of enforcing the law against perpetrators in this class. *Means v. Navajo Nation*, 432 F.3d 924, 933 (9th Cir. 2005) (en banc). It is also worth noting that, in general, by entering into a sovereign territory, one is generally viewed as consenting to that sovereign's jurisdiction. *See, e.g.*, Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 Hastings L.J. 1155 (1971) (explaining that, from the beginning of the common law tradition, sovereigns have had criminal jurisdiction over crimes committed in their territories).

Here, however, even the staunchest adherents to the "consent" requirement are easily satisfied. Petitioner unequivocally consented to the criminal jurisdiction of the Amantonka Nation by freely enrolling as a tribal member. He not only went through a lengthy and involved naturalization process – including living on the Amantonka reservation for at least two years, completing courses on Amantonka law and culture, and completing 100 hours of community service with the Amantonka government. A.N.C. §§ 201-02. In so doing,

Petitioner not only expressly consent to be a tribal member, but also became well-versed in Amantonka "custom and procedure." And as a tribal member, unlike the defendant in *Greywater*, Petitioner is "entitled to all the privileges afforded all Amantonka citizens." *Id.* at § 203. Thus, concerns about infringing on personal liberties by subjecting nonconsenting defendants to unfamiliar criminal prosecutions simply do not apply here.

3. The Blood Quantum of the Defendant is Not Relevant for Tribal Criminal Jurisdiction

Petitioner has argued that the definition of "Indian" for the purposes of federal criminal jurisdiction in Indian country should apply here. That argument is inapt. Under the Indian Country Crimes Act and the Major Crimes Act, the federal government may assert jurisdiction over crimes in Indian country only if the perpetrator is an "Indian" defined as (1) possessing some quantum of Indian blood; and (2) affiliated with a federally recognized tribe. 18 U.S.C. §§ 1152-53. Thus, for purposes of federal criminal jurisdiction, Petitioner is not an Indian because he lacks Indian blood. The federal standard is irrelevant here, however, because this matter does not—in any way—concern federal criminal jurisdiction. Instead, this is a matter of tribal criminal jurisdiction. And as explained above, tribes unequivocally maintain criminal jurisdiction over their own members.

The difference between the standard for federal jurisdiction in Indian country and tribal jurisdiction has been well-established for almost 200 years. In *United States v. Rogers*, this Court held that a white man adopted as an adult by a tribe did not come within the federal definition of "Indian" because he lacked Indian blood. 45 U.S. 567, 572 (1846). But, because the tribe had not chosen to restrict tribal membership based on blood status, by becoming a tribal member, the same man had "made himself amenable to [the tribes'] laws and usages." *Id.* at 573; *see also Duro*, 495 U.S. at 694 (interpreting *Rogers* to mean that

tribal jurisdiction is based on membership). The defendant in *Rogers* held the same status as Petitioner here—an ethnically non-Indian adopted by a tribe. And like the defendant in *Rogers*, while Petitioner may not fall under the purview of federal jurisdiction for crimes committed in Indian country, as a tribal member, he is certainly subject to Amantonka criminal law. And indeed, in enacting the General Crimes Act, Congress explicitly stated that "the tribes have exclusive jurisdiction" over offenses committed by Indians against other Indians. *Wheeler*, 435 U.S. at 325.

From 1846 onwards, courts have consistently recognized that political membership is enough to confer tribal criminal jurisdiction. Indeed, for the purpose of criminal jurisdiction, Indian status is "political rather than racial in nature." *Means v. Navajo Nation*, 432 F.3d 924, 932 (9th Cir. 2005) (applying *Morton v. Mancari*, 417 U.S. 535 (1974) in the context of tribal criminal jurisdiction over non-member Indians). And as discussed above, Supreme Court caselaw has consistently delineated criminal jurisdiction on the basis of membership; not on the basis of blood, ethnicity, or race. *Wheeler*, 435 U.S. at 326.

Lower courts have also analyzed this distinction in more detail. For example, in upholding the scope of tribal criminal jurisdiction against a non-member Indian, the court in *Morris v. Tanner* held that for the purpose of tribal criminal jurisdiction, "Indian" is political and not racial. 288 F. Supp. 2d 1133, 1141 (D. Mo. 2003). The court recognized that although, "blood quantum is usually an element of [tribally-defined] membership," in this case, tribal law specified that "Indian" means "federally enrolled Indians." *Id.* Thus, the tribe had criminal jurisdiction over the "many [] members" who, like Petitioner, "do not appear racially Indian but who are enrolled members of the tribe." *Id.* In so holding, the court also distinguished the voluntary action that provided the basis for criminal jurisdiction,

as opposed to the immutable character of blood quantum: "the voluntary nature of tribal membership, like citizenship, is crucial to keep in mind. While one might be unhappy to relinquish one's tribal membership in order to avoid future prosecution by a tribal court, one could still do so. One could never give up one's race in the same way." *Id.*

Likewise, in *Means v. Navajo Nation*, the Ninth Circuit explained that, under *Lara*, a tribe only has authority to prosecute non-member Indians that are "enrolled or de facto members of [other tribes], not all ethnic Indians." 432 F.3d 924, 934-35 (9th Cir.2005). In *Means*, the defendant, a non-member Indian, was subject to criminal prosecution in tribal court because he had "chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe." *Id.* at 935.

In short, the scope of tribal jurisdiction comes down to political affiliation. Although blood quantum may be an element of federal criminal jurisdiction, it only factors into tribal jurisdiction when blood quantum is a criterion for tribal membership. Importantly, as recognized in *Morris*, it is the language of the tribal code that delineates that tribe's criterion for membership and political affiliation. Here, as in *Morris*, the tribe does not condition membership on blood quantum and thus it is not a condition for tribal criminal jurisdiction. Here, the propriety of tribal criminal jurisdiction is ironclad. Not only did petitioner choose to affiliate politically as an "Indian," as the defendant in *Means*, but specifically to affiliate as an Amantonka Indian. This consensual affiliation with the Nation places Petitioner within the core group over which the tribe retains jurisdiction—its own members.

Finally, undergirding the divergent standards for federal and tribal jurisdiction is the "well-settled" federal policy of promoting tribal sovereignty. Against the "backdrop" of the tribal sovereignty doctrine, it is clear that applying the federal standard to define the scope of

tribal criminal jurisdiction is erroneous. *McClanahan v. State Tax Commission*, 411 U.S. 164, 172 (1973). Federal criminal jurisdiction in Indian reservations arose out of the federal trust responsibility to Indian tribes. Through conquest and treaties, tribes were induced to cede land and power—including the power to mete out stringent criminal punishments—to the United States. *U.S. v. Kagama*, 118 U.S. 375, 382 (1886). In return, the United States obligated itself to provide protection for Indian tribes. *Id.* at 384. In the criminal jurisdiction context, this means offering the weight of federal prosecution for major crimes committed in Indian country.[2] *Id.*; *see also, e.g.*, Treaty of Fort Laramie of 1868. Moreover, Congress established federal jurisdiction in Indian country because tribal powers were presumed inadequate[3], but with the goal of eventually strengthening tribal institutions to assume larger responsibility for crimes committed in their territory. *See* Tribal Law & Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2281 (codified at 25 U.S.C. § 1302).

Federal jurisdiction in Indian country is also motivated by the federal government's obligations and interests in preserving tribal sovereignty. Federal jurisdiction in Indian country was established, in part, to exclude states from asserting jurisdiction there, and therefore encroaching on tribal sovereignty. *See Kagama*, 118 U.S. at 383 ("[T]he states where [tribes] are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power" of the federal government to criminally prosecute); *see also Worcester v.*

[2] Tribes can only impose limited sentences, so the threat of federal prosecution ostensibly helps to provide a deterrent and maintain law and order in Indian country. *See* 25 U.S.C. § 1302.

[3] This presumption was, of course, entirely false. Tribes historically operated complex and effective institutions of self-governance. It was only when the federal and state governments began eroding tribal institutions than any "inadequacies" manifested.

Georgia, 31 U.S. (5 Pet.) 515, 556-62 (1832). In short, exercise of federal criminal jurisdiction seeks to preserve—in accordance with the United States' trust obligation—the sovereignty and welfare of Indian tribes.

Tribal criminal jurisdiction, too, directly promotes the federal policy of promoting tribal sovereignty and self-governance. Abrogating tribal authority to prosecute their own members for violating tribal law, like Petitioner's infraction of the Amantonka code, "would detract substantially from tribal self-government." *Wheeler*, 109 U.S. at 331. So important is the maintenance of tribal sovereignty, that restrictions on tribal jurisdiction are appropriately relaxed where sovereignty is imperiled. This principle was demonstrated in the legislative reinstatement of tribal jurisdiction over non-member Indians, as discussed above. Likewise, the court in *Kelsey v. Pope* found that the Little River Band of Ottawa Indians had authority to prosecute a tribal official for an act of sexual violence committed against a tribal member outside of Indian country. 809 F.3d 849 (6th Cir. 2016). In so holding, the court recognized that membership is the fundamental criterion on which tribal criminal jurisdiction and that "tribal power is at its zenith where membership and territory intersect." In this case, however, membership alone was sufficient to justify tribal criminal jurisdiction because the nature of the extra-territorial crime threatened the integrity of tribal self-governance and core internal relations. *Id.* Here, denying the Amantonka jurisdiction to prosecute their own member for an act of domestic violence committed against another member *within Indian country*—in other words, where tribal sovereignty should be "at its zenith"—would frustrate self-governance and undermine the ability of the tribe to protect the welfare of its own members.

In sum, while the requirement of Indian blood might be appropriate for federal jurisdiction—perhaps in recognition of the duties that flow from the United States to the descendants of those tribes with whom the United States entered into treaties—application of the blood quantum requirement to tribal jurisdiction would represent a bizarre abrogation of tribal sovereignty. Such an abrogation would run contrary to the long-held and fundamental federal policy of promoting tribal self-government. It would also contravene the rule that absent explicit action from Congress tribal sovereignty should not be disturbed or reduced. "Unless and until Congress acts, the tribes retain their historic sovereign authority." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014).

B. Even if Petitioner was not a Tribal Member, the Tribe has Special Domestic Violence Criminal Jurisdiction Under VAWA.

Even assuming *arguendo* that Petitioner is a non-Indian, the Amantonka Nation maintains authority to criminally prosecute him for his act of domestic violence. Through the Violence Against Women Act (VAWA), Congress has returned to the tribes criminal jurisdiction over non-Indians who perpetrate domestic or dating violence. 25 U.S.C. § 1304. Domestic violence is statutorily defined as an act of violence committed against a spouse or intimate partner. *Id.* at § 1304 (a)(2). Petitioner's heinous beating of his wife falls squarely within this definition.

VAWA criminal jurisdiction is a component of inherent tribal sovereignty. To that end, the statute "recognize[s] and affirm[s]" that tribes may "exercise special domestic violence jurisdiction over all persons." *Id.* at § 1304 (b)(1); *see also U.S. v. Lara*, 41 U.S. 193, 199 (2005). The only exceptions to tribal jurisdiction over acts of domestic violence occurs where (1) neither perpetrator nor victim is an Indian; or (2) the defendant lacks

sufficient ties to the tribe. *Id.* at § 1304 (b)(4). Because Petitioner's wife is undisputedly an Indian, the first exception does not apply.

The second exception is equally inapposite. Under the statute, sufficient ties exist where one of the following criteria are satisfied: The defendant (1) is married or in an intimate relationship with a tribal member; (2) lives within the Indian country of a participating tribe; OR (3) is employed within the Indian country of a participating tribe. *Id.* at § 1304 (b)(4)(B). Here, petitioner satisfies not just one of these requirements, but all three of them. Petitioner is married to a tribal member, he lives on the Amantonka reservation, until recently he was employed by the tribe, and he continues to work on the reservation. More generally, because Petitioner is a tribal member—and therefore eligible to participate in tribal civic society and receive tribal benefits—it would be absurd to conclude that he is not intimately connected with the tribe.

As a tribal member, Petitioner is an Indian subject to general tribal criminal jurisdiction; jurisdiction to which he freely consented. Even assuming, however, petitioner is not an Indian, the tribe has criminal jurisdiction to prosecute him for his crime of domestic violence under VAWA.

II. Petitioner's Court-Appointed Attorney Satisfied the Relevant Legal Requirements.

A. Petitioner is an Indian and so, Pursuant to the Amantonka Tribal Code and Federal Law, His Court-Appointed Attorney Satisfied the Relevant Legal Requirements.

This Court's jurisprudence has made it abundantly clear that it is the Indian Civil Rights Act and not the Constitution that polices the limits of tribal sovereignty with respect to assistance of counsel. Neither the Fifth nor Sixth Amendments apply to the tribes, foreclosing from Petitioner the Constitution as grounds for relief. The Nation's code and the appointed counsel for Petitioner fully satisfy the requirements of ICRA pertaining to

assistance of counsel, due process of law, and equal protection. Finally, even if an equal protection or due process violation is found in the tribal court proceedings, the appropriate test for whether such a classification is lawful is based upon the "political" status of Indian. This test clearly favors the Nation, revealing Petitioner's claim to be as frivolous as the contention that he is a non-Indian.

1. Petitioner, as an Indian, Had No Right to Indigent Counsel Because Tribes Are Not Subject to the Constitution.

As argued above, Petitioner is an Indian for purposes of SDVCJ. The Indian Civil Rights Act governs the standard for indigent counsel in Indian country. ICRA only requires tribes to provide counsel to indigent Indian defendants if the "total term of imprisonment" exceeds one year. 25 U.S.C. § 1302(c). The Court has recently recognized, "[t]he right to counsel under ICRA is not coextensive with the Sixth Amendment right" and "[i]n tribal court, therefore, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel." *United States v. Bryant,* 136 S. Ct. 1954, 1962 (2016). The *Bryant* Court also reaffirmed the principle that, due to tribal sovereignty "pre-existing the Constitution . . . [t]he Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings." *Id*. *See also, Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (holding "[t]he Bill of Rights does not apply to Indian tribes"). Lower courts have quickly internalized the lesson of *Bryant*. *See United States v. Kirkaldie*, 670 Fed. Appx. 452 (9th Circuit, Nov. 1, 2016) (reversing district court decision issued prior to *Bryant* that rejected the use of uncounseled tribal court convictions in federal proceedings). In short, "a criminal defendant has no absolute right to counsel in tribal court unless provided for by his or her tribe." *State v. Spotted Eagle*, 316 Mont. 370, 376-77 (2003).

Here, Petitioner was only sentenced to seven months incarceration. Order Entering Judgment and Sentence. ICRA and this Court's jurisprudence, particularly in *Bryant*, make clear the Nation was not legally obligated to provide Petitioner with an attorney. Petitioner had no right—under the Sixth Amendment or ICRA—to appointed counsel. Nevertheless, the Nation's code provides a blanket guarantee of assistance of counsel to all indigent defendants. Contrary to Petitioner's claim, the Nation thus more than satisfied the relevant law in providing Petitioner with counsel.

This Court's consistent reiteration that the Bill of Rights does not apply to the tribes also undermines the Petitioner's argument to the extent he claims a Fifth Amendment Due Process Clause violation. As with the rest of the Bill of Rights the Sixth Amendment, does not govern tribal court proceedings. *Plains Commerce Bank*, 554 U.S. at 337. Additionally, as the *Bryant* Court recognized, ICRA already requires tribes to provide due process of law to all defendants (*see* 25 U.S.C.A. § 1302(a)(8)) and allows defendants to challenge the "fundamental fairness" of tribal court proceedings via a habeas petition (*see* 25 U.S.C.A. § 1303). *United States v. Bryant*, 136 S. Ct. at 1966. Ultimately, the Court concluded, "[p]roceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions." *Id*. As a result, the fact that the defendant in *Bryant* was not given counsel in his tribal court proceedings related to charges of domestic violence, did not mean his rights under ICRA or the Constitution were violated. *Id.*, at 1965.

Here, the Nation guarantees due process of law to all indigent defendants—Indian and non-Indian—by guaranteeing them the effective assistance of counsel. Petitioner has also taken advantage of his right to file a habeas petition and thereby challenge the adequacy of tribal court proceedings. Those proceedings, however, have fully complied with ICRA.

The Amantonka Supreme Court and the 13th Circuit determined as much. In light of *Bryant*, a *counseled* tribal court conviction of an Indian indigent defendant sentenced to less than one year in jail, is the epitome of due process under ICRA.

2. The Nation's Code and Petitioner's Particular Defender Satisfy ICRA, And Thus Respect Petitioner's Equal Protection Rights.

i. The ICRA Equal Protection Clause Does Not Guarantee Petitioner Identical Counsel as Non-Indian Defendants.

While ICRA forbids tribes from denying those within its jurisdiction "equal protection of its laws," § 1302(a)(8), this Court's relevant decisions illustrate why tribes need not equalize indigent counsel between Indian and non-Indian defendants. As discussed above, *Bryant* held that the Sixth Amendment does not apply to tribes and so no indigent defendant in tribal court has a right to appointed counsel. In *Santa Clara*, this Court recognized that ICRA, "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara*, 436 U.S. at 62. This Court specifically noted that ICRA does not "require . . . appointment of counsel for indigents in criminal cases." *Id.* at 63. Finally, this Court noted that Congress through ICRA, "'intended to promote the well-established federal policy of furthering Indian self-government.'" 436 U.S. at 62 (citing *Morton*, 417 U.S. at 551). As discussed above, *Santa Clara* was an equal protection case, that upheld a tribe's sex-based ordinance governing tribal membership.

Here, Petitioner has failed to show how the Nation's code regarding public defenders constitutes unequal treatment. Providing higher requirements for those representing non-Indian indigent defendants under the tribe's recently acquired SDVCJ simply reflects a sound policy judgment by the tribe. To hold that the equal protection clause of ICRA requires

equal indigent counsel for Indian and non-Indian defendants would ignore this Court's finding in *Santa Clara*, that ICRA represents Congress's determination of how to best fit the Bill of Rights to the, "unique political, cultural, and economic needs of tribal governments."

The Nation's political and cultural needs are served by the dual public defender system because the Nation has tailored the minimum standards for indigent counsel according to its own views of appropriate criminal justice for Indians and non-Indians respectively. It should be unsurprising that the Nation's government saw fit to ensure non-Indian defendants received an attorney qualified according to the laws of the sovereign the non-Indian defendant inevitably hails from. This facilitates the formation of a frank, effective attorney-client relationship. This policy also provides further evidence of the impartiality and fairness of the Nation's court. Moreover, because the majority of the Nation's court proceedings involve Indians, the Nation has sound financial reasons to only guarantee JD-trained lawyers to non-Indian, SDVCJ defendants. Nevertheless, Petitioner would have the Court find that a right unenumerated in ICRA forms the basis of a valid claim under the ICRA equal protection clause. This attempts to smuggle into tribal court a right to indigent counsel that this Court has held Congress expressly declined to extend to all tribal defendants.

The fact that VAWA 2013 carved a new statutory right to counsel for a very narrow class of defendants–non-Indians subject to the tribe's SDVCJ–does not change the application of the ICRA equal protection clause. VAWA 2013 represents an unequivocal Congressional conferral of a procedural right on certain defendants in tribal courts. It cannot have been intended to give rise to an equal protection claim in a case like Petitioner's,

namely that an Indian tribal court defendant is entitled to the same counsel a non-Indian defendant would be entitled to. As the Court held in *Morton*:

> It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation related private employers to provide Indian preference.

Morton, 417 U.S. at 548.

It would be similarly "anomalous" to conclude here, that Congress sought to *sub silentio*, impose through VAWA 2013 an equal protection requirement that denied tribes the autonomy to operate their justice systems as they saw fit. VAWA 2013 was explicitly designed to advance tribal sovereignty and, as indicated in the statute itself, "the powers of self-government of a participating tribe include the *inherent power of that tribe*, which is hereby recognized and affirmed to exercise special domestic violence criminal jurisdiction . . ." 25 U.S.C.A. § 1304(b)(1) (emphasis added).

Bolstering this understanding of deference to tribal sovereignty implicit in VAWA and ICRA in the context of indigent counsel, is the Montana Supreme Court decision in *State v. Spotted Eagle*. The *Bryant* Court favorably cited *Spotted Eagle* for the proposition that, "principles of comity support recognizing uncounseled tribal-court convictions that complied with ICRA." *Bryant*, 136 S. Ct. at 1966. In *Spotted Eagle*, the Montana Supreme Court upheld the validity of an uncounseled tribal court conviction and subsequent application of that conviction to enhance the Indian defendant's state DUI conviction from a misdemeanor to a felony. *Spotted Eagle*, 316 Mont. at 379. The court, in discussing how comity justifies this decision, stated:

> To disregard a valid tribal court conviction would imply that Montana only recognizes the Blackfeet Tribe's right to self-government until it conflicts with Montana law. Moreover, it would suggest that Montana recognizes the legitimacy of

> the judgments of the tribal courts to the extent that the procedures mirror Montana procedure. Such a position would contradict the judicial policy of this state and indirectly undermine the sovereignty of the Blackfeet Tribe.

Id. at 378-79.

If uncounseled tribal court convictions are appropriate out of judicial solicitude for tribal self-government and the legitimacy of tribal courts, then certainly the counsel provided to Petitioner satisfied the relevant legal requirements. Petitioner's attorney holds a JD from an ABA-accredited law school and, as the Amantonka Supreme Court observed, Petitioner has not "pointed to any errors allegedly committed by his defense counsel." *Reynolds v. Amantonka Nation*, Op. No. 17-198 (S. Ct. Amantonka Nat., 2017). Such counsel entitles the Nation to the benefit of comity as articulated in *Spotted Eagle* and embraced by this Court in *Bryant*.

As further testament to the authority of tribes to implement their own standards for legal advocates, circuit courts have respected tribal laws permitting lay counsel to represent indigent defendants. For example, in *United States v. Long*, the 8th Circuit upheld a defendant's tribal court conviction for domestic violence as a predicate offense for purposes of a federal law prohibiting firearms use. Relying on *Bryant*, the court rejected the defendant's claim that he was entitled to a licensed attorney, because the 6th Amendment does not apply in tribal court and "lay counsel are admitted to practice before the tribal court." *United States v. Long*, 870 F.3d 741, 747 (8th Circuit, August 29, 2017). Additionally, the defendant in *Spotted Eagle* was represented by a court-appointed "defender" (a non-lawyer trained to advise defendants of possible consequences, penalties, and their ICRA rights). *Spotted Eagle*, 316 Mont. 370, 372.

The Nation's admission of lay counselors does not advance Petitioner's equal protection argument as his public defender was not a lay counselor and instead possessed a JD from an ABA accredited law school. The use of lay counselors, does however, illustrate a cultural and financial dimension to the Nation's dual public defender system. The policy is cultural insofar as the Nation's Executive Board has determined that members sufficiently learned in Amantonka law, by virtue of having completed a course on the topic and passing a tribal bar exam, may adequately represent any party before the tribal court (except for those expressly guaranteed a public defender). It is financial, because admitting lay counselors empowers those without the means to attend law school, the opportunity to contribute to the tribal community through advocacy before tribal court. Petitioner's argument for judicial intervention in the Nation's inherent power over maintaining its internal justice system, betrays the principle announced in *Santa Clara* that ICRA be interpreted in alignment with Congress' intent for it to "fit the unique political, cultural, and economic needs" of the tribes.

Petitioner's more specific contention regarding equal protection is unsupported by the record and case law. He claims an equal protection violation because, as an Indian, the public defender he is legally entitled to is definitionally less qualified than counsel a non-Indian is entitled to. Petitioner argues that the Nation's requirements to be an attorney are too minimal and the difference between a state and tribal bar exam is so great, that an attorney who has only passed the latter is not as qualified as one that has passed the former.

The requirements to be a public defender for indigent Indian defendants are comparable to those required in states such as Arizona and Louisiana. The former shares the same age requirement, moral character requirement, physical ability requirement, and requirement of training in the jurisdiction's law. A.R.S. Sup. Ct. Rules, Rules 33-37. The

Nation's code, however, goes further in barring those dishonorably discharged from the Armed Services. A.N.C. § 607(a)(3). Louisiana's requirements are even simpler: an applicant must only be 18 years of age, a US citizen, and of "sound mind, good moral character and fitness to practice law." L.A. Sup. Ct. Rules, Rule XVII. The Nation's code has more stringent requirements for prospective public defenders of indigent Indian defendants than Louisiana does for admitting applicants to its bar association. The only requirement missing from the Nation's code but found in both Arizona and Louisiana's requirements, is that the applicant possess a JD from an ABA-accredited law school. But this is not a universal requirement in the United States. California, Vermont, Virginia, and Washington each operate a Law Office Study Program which permits applicants to sit for the bar after studying law in a law office or judge's chambers, rather than having to attend law school. *See* Sean P. Farrell, *The Lawyer's Apprentice*, N.Y. TIMES, at 22 (July 30, 2014). These state practices vindicate the Amantonka's approach to licensing tribal attorneys, as each state's admission rules are beyond reproach. To the extent public defenders for indigent Indian defendants differ from those for non-Indian defendants, a comparison to other jurisdictions reveals that this distinction has no bearing on the quality of representation. Petitioner's equal protection argument thus rests on a fictitious inequality.

This leaves Petitioner with the sole argument that tribal bar exams are per se inferior to state bar exams and can never qualify an attorney to represent a defendant prosecuted under a tribe's SDVCJ. As the Amantonka Supreme Court found, Petitioner has presented no facts elucidating the difference between the bar exams and cannot present new evidence at this, the final appellate stage.

Conceptually, there is no reason why a tribe with as complex a code as the Amantonka Nation, would have an inadequate tribal bar exam. The code provides detailed provisions establishing the tribal court system, the admission of attorneys, and numerous ethical canons. To suggest the bar exam administered by the Amantonka Nation is necessarily inadequate as compared to a state bar exam is an affront to the Executive Board's effort in promulgating the Nation's code and not rooted in identifiable facts about the Nation. Moreover, this Court's precedents have made clear that control of tribal courts is a core prerogative of tribal sovereignty, especially with respect to a tribe's own members. *See, e.g.*, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56 (1978).

ii. The Nation's Public Defender System is Lawful Under ICRA's Equal Protection Clause Because it is Rationally Tied to a Legitimate, Nonracially Based Goal.

If the disparate requirements were, nevertheless, held to be an equal protection violation under ICRA, then the Nation would still be permitted to maintain them. Under the most stringent standard applicable to a Indian-status based classification, the one articulated in *Morton*, the Amantonka code passes muster.[4] The classification must be, "reasonably and directly related to a legitimate, nonracially based goal." *Morton*, 417 U.S. at 554. Only if the "special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," will it be sustained. *Id.* at 555. As ICRA explicitly acknowledges tribal sovereignty as a fundamental aim, severely undermining a tribe's authority to regulate its

[4] While this Court has not determined what standard is appropriate for adjudicating ICRA equal protection clause claims against tribal court proceedings, the Sixth Circuit held recently that where a tribe's, "criminal procedures do not 'differ significantly from those commonly employed in Anglo–Saxon society' ... federal constitutional standards are employed in determining whether the challenged procedure violates the Act." *Kelsey v. Pope*, 809 F. 3d 849, 864 (6th Cir. 2016) (citing *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988)). Here, the Amantonka Nation Code closely resembles those "commonly employed" by many states and the federal government with respect to the assistance of counsel.

criminal proceedings for "cultural, practical, and presumably, financial reasons," cannot fulfill Congressional intent. *Spotted Eagle,* 316 Mont. at 379. In *Santa Clara,* the Court echoed this sentiment in recognizing that equal protection concerns must be balanced with the Congressional goal of promoting tribal sovereignty via ICRA. *See* 436 U.S. at 64.

Aside from the select few defendants prosecuted under the Nation's SDVCJ, the vast majority of tribal court defendants are tribal members. Requiring heightened qualifications for all such indigent counsel would "undermine the authority of tribal forums" in the Nation. In the present case, requiring indigent counsel to belong to a state bar association rather than only demonstrate mastery of the Nation's law, would undermine the authority of Amantonka forums. Judicial elevation of state bars above tribal bars thus conveys the sense that Amantonka law is inadequate, perpetuating the myth that Indians and their forms of self-government are inadequate as compared to Anglo-American institutions. This justification is "rationally tied" to the fulfillment of Congress' obligations towards the tribe, as it is critical to the preservation and expansion of tribal sovereignty and self-government. This is a decidedly non-race-based goal and involves a distinction based upon the *political,* not *racial,* status of being Indian.

3. The Nation's Code and Petitioner's Public Defender Satisfy ICRA, and Thus Respect Petitioner's Due Process Rights.

In addition to guaranteeing equal protection under the law, ICRA prohibits tribes from depriving "any person of liberty or property without due process of law." 25 U.S.C.A. § 1302. As discussed above, the Court in *Santa Clara* held that ICRA expressly declined to enumerate the right to indigent counsel. 436 U.S. at 63. Nevertheless, the Nation's code guarantees a public defender to all indigent Indian defendants. A.N.C. § 503. Such counsel must meet certain minimum requirements to serve as an Amantonka Nation public defender.

These include: being at least 21 years old; possess high moral character and integrity; not have been dishonorably discharged from the United States military; be physically capable of performing the duties of public defender; and the individual must have passed a bar examination administered in conformity with the orders of the Nation's Executive Board; and be trained in Nation law and culture. A.N.C. § 607(a)(1-6).

Here, public defenders for all indigent defendants, Indian and non-Indian, are qualified under Amantonka law. As the Nation is not held to the assistance of counsel requirement of the Sixth Amendment, its statutory guarantee to provide such counsel exceeds any of the Nation's legal obligations under ICRA. Petitioner asks for an interpretation of the ICRA Due Process clause that requires not just indigent counsel for Petitioner, but the specific 'quality' of counsel Petitioner identifies public defenders for non-Indian indigent defendants as possessing. As with respect to the Equal Protection clause of ICRA, such a reading would smuggle in a right to counsel absent from ICRA.

Petitioner could prove his due process claim by demonstrating some deficiency in the application of Amantonka law to his case, as such arbitrary state action would impeach the "fundamental fairness" of the proceedings below. There is, however, no evidence that Petitioner's court-appointed public defender did not meet the requirements of § 607(a). In fact, his attorney exceeds the requirements of the tribal code insofar as he possess a JD from an ABA-accredited law school, something not strictly required by the text.[5] Additionally, lay counselors may not represent indigent defendants prosecuted under the tribe's SDVCJ, as such public defenders must have a JD from an ABA accredited law school. A.N.C. § 607(b). Thus, the Nation only provides indigent counsel that have more qualifications than lay

[5] All currently serving Amantonka public defenders hold a J.D. degree from an ABA accredited law school. *Reynolds v. Amantonka Nation*, Op. No. 17-198 (S. Ct. Amantonka Nat., 2017).

counselors. In light of cases like *Bryant* and *Long*, affirming tribal court convictions in which defendants was represented by lay counselors, such a tribal practice cannot violate the ICRA Due Process Clause.

B. If Petitioner is Held to be a Non-Indian, His Court-Appointed Attorney Satisfied the Relevant Legal Requirements.

As with the rights of Indian defendants in tribal court, ICRA governs the rights on non-Indian defendants being prosecuted under a tribe's SDVCJ. 25 U.S.C.A. § 1304(d)(2). ICRA requires that indigent defendants facing terms of imprisonment greater than one year be provided "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.A. § 1302(c) (emphasis added). VAWA 2013 extended this right to counsel to any indigent defendant prosecuted under a tribe's special domestic violence criminal jurisdiction, "if a term of imprisonment of any length may be imposed." 25 U.S.C.A. § 1304(d)(2).

Here, the Amantonka Nation's requirements satisfy ICRA. The Amantonka Nation is undeniably a "jurisdiction in the United States," and as such attorneys licensed under the Nation's standards provide adequate counsel for indigent defendants. The relevant definition in Black's Law Dictionary defines jurisdiction as, "a geographic area within which political or judicial authority may be exercised." This definition clearly encompasses the Amantonka Nation, which is a "sovereign entity" with the authority to "make its own laws and be governed by them." *See e.g. Williams v. Lee*, 358 U.S. 217, 220 (1959); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-33; *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Additionally, the Nation's code requires that non-Indian indigent defendants receive representation from a public defender holding a "JD degree from an ABA accredited law

school." A.N.C. § 607(b). This ensures an attorney, rather than a lay counselor, will always be provided to indigent non-Indians and that, with respect to the competence of a public defender, the Nation "applies appropriate professional licensing standards." That is, unless Petitioner means to suggest a JD degree from an ABA-accredited law school is not per se evidence that a bar applicant has received an adequate legal education.

That the Nation "applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys" can also be seen in its ethical rules. Title 2, Chapter 7: Code of Ethics for Attorneys and Lay Counselors contains several virtually identical standards to the Model Rules of Professional Conduct and the ethical rules codified in many states. For example, Canon 1 of the Nation's code, "Competence," is a near-carbon copy of Model Rule 1.1. A.N.C. of Ethics—Canon 1. Competence. The only difference is that Canon 1 uses the term "attorney" rather than "lawyer," and Canon 1 specifies that the term "attorney" includes lay counselors. Model Rule of Professional Conduct 1.1. Canon 1 is similarly analogous to New York Rules of Professional Conduct 1.1(a), a portion of that state's competence requirement and Rule 1.1 of the Arizona Rules of Professional Conduct. Additionally, Canon 6 – Confidentiality of Information is comparable to Model Rule 1.6—Confidentiality of Information, insofar as both direct lawyers to not reveal information communicated by clients. If anything, the Amantonka rule is stricter, in that the only exceptions are death or serious bodily harm and in connection with proceedings concerning the attorney's representation. By contrast, the Model Rule contains additional exceptions for substantial financial or property injury and to resolve conflicts of interests. Arizona Rule 1.6 also tracks the Model Rule, further aligning the tribal code with other jurisdictions.

These similarities underscore how the Nation's code, pursuant to ICRA, "applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." Amantonka Nation lawyers are held to the same ethical obligations as lawyers barred in any of the States. They possess similarly impeccable moral character and fitness as their colleagues in state bar associations and are as qualified as their peers to practice in their particular jurisdiction. In short, Petitioner's argument that the Nation does not have adequate professional accountability standards, inescapably implies the Model Rules of Professional Conduct and comparable state provisions are similarly inadequate. Such a position is untenable and illustrates the baselessness of Petitioner's attack on the Nation's professional licensing standards.

Petitioner is once again left with the unsubstantiated argument that a tribal bar exam is necessarily legally inadequate. This argument is no more persuasive in assessing Petitioner's counsel assuming *arguendo* that Petitioner is a non-Indian, than under the proper understanding that Petitioner is an Indian. Without evidence regarding the Amantonka Nation's bar exam, Petitioner cannot warrant his claim. In conjunction with this fact is the complexity and seriousness of the Nation's tribal code. The code, and the bar exam based upon it, constitute appropriate licensing standards that ensure attorney competence and professional responsibility.

This understanding of the rights of non-Indian defendants under ICRA is further reinforced by the Act's broad grant of authority to the tribes. For example, 25 U.S.C. § 1302(d) provides tribes great flexibility in sentencing criminal defendants. Not only can defendants be sentenced to federal, state, or tribal correctional centers (subject to various conditions), but the tribal court may sentence a defendant to "serve another alternative form

of punishment" as provided for in tribal law. 25 U.S.C. § 1302(d)(2). This deference to unique forms of punishment favored by tribes reflects Congressional solicitude for the customs and independence of tribes to conduct internal affairs as they see fit, the same solicitude recognized in *Santa Clara*. In the context of indigent counsel, this suggests tolerance for tribal requirements that differ from those of States or the federal government. Yet the Nation has requirements and an ethical code substantially similar to those in other jurisdictions, avoiding the need for this Court to inquire as to the degree of this solicitude for tribal practices. This further illustrates how the Nation has more than satisfied the relevant legal requirements in appointing Petitioner's counsel.

As discussed in the preceding section, ICRA guarantees due process of law to all tribal court defendants. Given the Court's recent affirmance of *uncounseled* tribal court convictions for domestic violence in *Bryant*, Petitioner's argument that a seven-month prison sentence handed down after he received competent representation violates ICRA, strains credulity. All petitioner can point to is the fact that his counsel is not a member of a state bar association. As illustrated above, this fact in no way undermines Petitioner's rights under ICRA and VAWA 2013. The fact that the defendant in *Bryant* was an Indian while Petitioner is, for purposes of this section, being examined as a non-Indian, is also irrelevant. Pursuant to the Court's precedent, ICRA is the standard by which tribal court proceedings are tested, regardless of the Indian status of a defendant. The fact that VAWA 2013 amended ICRA to apply when tribes utilize their SDVCJ, and thus prosecute non-Indians in tribal court, reinforces this principle. The Amantonka tribal code protects the rights of defendants pursuant to ICRA, the Petitioner received such protection in the form of a legally adequate public defender, and his conviction should be affirmed.

CONCLUSION

In his effort to evade justice, petitioner argues for a perverse abrogation of tribal sovereignty. From the Founding through to the present, the core of tribal sovereignty has remained ability of tribes to enforce laws against their own members. Restricting a tribe's ability to hold its own members to account for acts of domestic violence would impermissibly impair tribal sovereignty. Petitioner mistakenly invokes both blood quantum and ICRA to undergird his claims. He first seeks to smuggle in an inapposite federal definition of "Indian," and then attempts to twist statutory rights under ICRA to undermine the adequacy of his highly-qualified, J.D.-holding public defender. The Amantonka Nation, like its fellow 573 federally recognized tribes, has the sovereign prerogative to determine who is a member and thus "Indian" for the purposes of tribal criminal jurisdiction. The Nation similarly has the authority to operate a justice system, including its public defender program, in a way that reflects the Amantonka's history, culture, and economic circumstances. In light of these settled principles, both of Petitioner's core claims—that he is not an "Indian" and that his public defender was legally inadequate—fail.

For the reasons stated above, Respondent respectfully requests that this Court affirm the Thirteenth Circuit's holding and deny the petition for a Writ of Habeas Corpus.

Date: January 14, 2019.

Respectfully submitted,

Team #577.