

No. 19-231

IN THE
Supreme Court of the United States

ROBERT R. REYNOLDS,
Petitioner,

v.

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

**On Petition for Certiorari
for the U.S. Court of Appeals for the Thirteenth Circuit**

BRIEF IN SUPPORT OF RESPONDENTS

TEAM NUMBER 610

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QUESTIONS PRESENTED

- I. Whether Robert R. Reynolds is able to prove that he is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction when he is a naturalized citizen of the Amantonka Nation due to his marriage status and residency.
- II. Whether Robert R. Reynolds' tribal court-appointed attorney satisfies the necessary legal requirements under the Indian Civil Rights Act of 1968, the Tribal Law and Order Act of 2010, and the Amantonka Nation Code.

STATEMENT OF THE CASE

I. Statement of Facts

This case concerns the ability of the Amantonka Nation (“the Nation” or “AN”) to exercise jurisdiction over naturalized citizens within the reservation boundaries to protect its community. The Nation is a federally recognized tribe located within the State of Rogers. R. at 6. The AN has an established judicial branch, with courts of record and code provisions to which the courts and its representatives must follow. *See generally* Amantonka Nation Code. AN police also maintain safety in the community. Unfortunately, the AN police have been called to Robert Reynolds (“R. Reynolds”) apartment on more than one occasion. R. at 6. On June 15, 2017, the AN police were called to R. Reynolds’ apartment and saw evidence of physical abuse against R. Reynolds’ wife, Lorinda Reynolds. At the time of the offense, R. Reynolds was a naturalized citizen of the Nation. R. at 3, 6. The assault occurred at the Reynolds’ apartment, which is part of tribal housing and is located on the Amantonka reservation. R. at 2, 3.

R. Reynolds and his wife, Lorinda, met while the two were attending college at the University of Rogers. R. at 6. After graduating college, the couple married and moved back to

the AN reservation. R. at 6. Lorinda is a citizen of the Nation. R. at 6. R. Lorinda and R. Reynolds moved into tribal housing, and Lorinda found employment as an accountant for the Amantonka Casino, while R. Reynolds started a job as the manager for the Amantonka shoe factory. R. at 6. Two years after getting married, R. Reynolds applied to become a naturalized citizen of the Nation. R. at 6. The Nation has a long history of welcoming into the tribe those who marry tribal members. R. at 7. This long-standing custom and tradition is embodied in the Nation's Naturalization process which is codified in Title 3 of the Amantonka Nation Code ("AN Code"). R. at 6, 7. After successfully completing the naturalization process, R. Reynolds took the oath of citizenship, and received his AN identification card. R. at 6, 7. R. Reynolds voluntarily applied for and completed this process, which culminated in citizenship in the AN. R. at 6, 7.

When the Amantonka Shoe Factory closed, R. Reynolds lost his job. R. at 6. He began to drink heavily and could not find work. R. at 6. The Reynolds' marriage suffered and R. Reynolds became verbally abusive toward Lorinda. R. at 6. Soon, his abuse toward his wife escalated, and on June 15, 2017, police were called to the couple's apartment. R. at 3, 6. This was not the first occasion in which police had been called to the Reynolds' home. R. at 6. According to the evidence presented at trial, R. Reynolds struck his wife across the face with an open palm. R. at 2, 6. Lorinda was struck with such force that she was thrown to the floor, and on her way down, she collided with a coffee table, causing a cracked rib. R. at 6. The responding AN officer arrested R. Reynolds and transported him to the AN Jail. R. at 6.

II. Statement of the Proceedings

The District Court for the Amantonka Nation ("AN District Court") filed suit against R. Reynolds for knowingly striking his wife, Lorinda Reynolds, causing her injury, in violation of

Title 5 section 244 of the AN Code. R. at 2. R. Reynolds filed the following pretrial motions: (1) dismissal of the charges because he is a non-Indian and therefore the AN lacks criminal jurisdiction; (2) appointment of an attorney because he is a non-Indian accused of domestic violence against an Indian within Indian country, and therefore entitled to counsel under the AN's exercise of Special Domestic Violence Criminal Jurisdiction ("SDVCJ"); and (3) a violation of equal protection because R. Reynolds' court-appointed counsel is insufficiently qualified to serve as his counsel. R. at 3, 4. R. Reynolds argued that equal protection requires that his attorney possess the same qualifications as required by law to represent non-Indians. R. at 3, 4, 7. R. Reynolds further argued that the Violence Against Women Act 2013 ("VAWA") requires appointed attorneys must be members of a state bar association under SDVCJ. R. at 3, 4, 7, 8.

The AN District Court denied all three motions finding that: (1) R. Reynolds is a citizen of the AN and therefore an Indian; (2) since R. Reynolds is an Indian, he is an Indian accused of committing a crime against another Indian and that crime does not fall within the SDVCJ of VAWA 2013; and (3) the attorney appointed to represent R. Reynolds on the current charges is qualified to do so under Title 2, Chapter 6 of the AN Code and there is no equal protection violation as counsel was sufficiently qualified, even if SDVCJ standards do apply. R. at 7.

At trial, the jury returned a verdict of guilty. R. at 7. R. Reynolds made a motion to set aside the verdict, but the Court denied the motion and entered Judgement and Sentence. R. at 3, 5. Given the serious nature of the injuries inflicted upon R. Reynolds' wife, the court sentenced him to the following: (1) seven month incarceration; (2) \$5,300 restitution to compensate the victim for the destruction of property, medical bills, and lost income from work as a result of her

injuries; (3) batterer rehabilitation and alcohol treatment programs through Amantonka Nation Social Services Division; and (4) \$1,500 fine. R. at 5.

Upon the victim's request, the court dropped the protection order issued at the time of arraignment. R. at 5. R. Reynolds and his wife were in counseling and the counselor supported the victim's request. R. at 5. However, the court held that R. Reynolds was placed on notice that his behavior will be monitored, and further incidents of violence will not be tolerated. R. at 5. Further, the court granted his motion to continue his bond while the appeal was pending. R. at 5. However, the court conditioned the motion on R. Reynolds wearing an ankle monitor and having regular appointments with the Amantonka Nation Probation Services office. R. at 5.

Dissatisfied with the results, R. Reynolds filed an appeal with the Supreme Court of the Amantonka Nation ("AN Supreme Court"). He argued that the federal definition of Indian controls, requiring a person possess some degree of Indian blood and be recognized as a member of a tribal community. R. at 7. R. Reynolds asserted that he could not be an Indian for purposes of SDVCJ and the attorney appointed to him was inadequate as a matter of law. R. at 7. He contended that because he is non-Indian, AN jurisdiction must rest on SDVCJ pursuant to VAWA 2013. R. at 7. He argued that the attorney appointed to him must meet the SDVCJ standard. R. at 7. Further, R. Reynolds argued that if he is an Indian, the fact that the attorney he is entitled to is less qualified than the attorney to which a non-Indian is entitled to, is a violation of equal protection. R. at 7.

The AN Supreme Court was not persuaded by R. Reynolds' arguments and affirmed all convictions. R. at 7. The AN Supreme Court found *Santa Clara Pueblo v. Martinez* established that a tribe has the right to define and control its own citizenship, and therefore R. Reynolds is an Indian and the AN possesses criminal jurisdiction over him. R. at 7 (citing 436 U.S. 49 (1978)).

Additionally, the AN Supreme Court found R. Reynolds was an Indian and thus VAWA 2013 did not apply. R. at 7. The AN Supreme Court further rejected R. Reynolds' alternative argument on the grounds that the difference in qualification is not material nor relevant and he gave no evidence of ineffective assistance of counsel. R. at 7.

On March 7, 2018, R. Reynolds filed a petition for writ of habeus corpus under 25 USC 1303, and the writ was granted. R. at 8. The U.S. District Court for the District of Rogers held that federal law clearly limits criminal jurisdiction over Indians and the federal definition of Indian requires some degree of Indian blood. R. at 8. The court reasoned that since R. Reynolds possesses no Indian blood, he cannot be considered an Indian for purposes of criminal jurisdiction. R. at 8. The court further held that the AN failed to provide him with the indigent defense counsel required under VAWA 2013. R. at 8.

On August 20, 2018, the U.S. Court of Appeals for the Thirteenth Circuit reversed and remanded the lower court decision and denied R. Reynolds the writ of habeus corpus. R. at 9. The Thirteenth Circuit concisely stated that its decision was based on "the reasons articulated by the Amantonka Nation Supreme Court." R. at 9. On Oct. 15, 2018, the Supreme Court of the United States granted a writ of certiorari to decide two issues: (1) whether R. Reynolds is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction; and (2) if R. Reynolds court appointed attorney satisfies the relevant legal requirements. R. at 10.

SUMMARY OF THE ARGUMENT

This Court should uphold the U.S. Court of Appeals for the Thirteenth Circuit's decision and effectively affirm the ruling of the Supreme Court of the Amantonka Nation. The AN Supreme Court correctly held that the VAWA 2013 does not apply to R. Reynolds because he is an Indian for purposes of SDVCJ. Further, the AN Supreme Court correctly rejected R. Reynolds

equal protection argument because R. Reynolds was appointed a qualified AN public defender and no errors were allegedly committed by counsel.

The AN Supreme Court correctly held that R. Reynolds is an Indian for purposes of SDVCJ because tribes retain their sovereign authority to define their own citizenship standards. R. Reynolds is married to a natural-born tribal citizen of the Nation. He lives and works on the reservation and has participated substantially in tribal culture and enjoys tribal privileges such as tribal housing. R.Reynolds should not be able to now reject the Indian status he voluntarily obtained simply for criminal jurisdiction purposes.

Further, this Court should find that blood quantum requirements are an inappropriate test for determining Indian status for purposes of criminal jurisdiction. While blood quantum may be argued as a factor for determining Indian status, it should not be dispositive. R. Reynolds social ties to the community and his voluntary decision to become a naturalized citizen of the Nation should outweigh the lack of Nation blood, especially because the AN Code contains no blood requirements for citizenry.

Finally, the Court should be persuaded by the AN Supreme Court's analysis of R. Reynolds equal protection argument. The Nation appointed R. Reynolds a qualified and licensed public defender. The qualifications and licensing requirements under the AN Code comply with the Indian Civil Rights Act of 1968 ("ICRA") and therefore there is no equal protection violation. Additionally, because R. Reynolds is an Indian, the requirements under VAWA 2013 do not apply to this crime.

ARGUMENT

I. Robert Reynolds cannot be classified as a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction because Reynolds must be considered an Indian under existing laws.

Generally, tribes possess the inherent sovereignty to define their own citizenship. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). R. Reynolds is classified as an Indian person for purposes of SDVCJ because he voluntarily became, and currently remains, a naturalized citizen of the Nation. Through marriage to his wife, a natural-born citizen of AN, R. Reynolds applied for, and was subsequently accepted as, a naturalized citizen of the Nation. As a citizen of the Nation, he lives and works in a tribal community on the reservation, and is also entitled to all the privileges afforded to all AN citizens. AN Code 3, §§ 2-201, 202, 203. This includes the ability to live in tribal housing, where he and his wife presently reside.

Tribes have the inherent sovereignty to define their own citizenship, and therefore the Nation, as a federally recognized tribe, validly choose to exclude blood quantum from their citizenship requirements. Additionally, tribal citizenship is, and has historically been treated by this Court as, a political classification, not a racial classification. *Morton v. Mancari*, 417 U.S. 535, 553 n. 24 (1974).

A. Robert Reynolds is an Indian person for purposes of criminal jurisdiction and therefore Special Domestic Violence Jurisdiction under the Violence Against Women Act of 2013 is inapplicable.

In order to effectively explain why R. Reynolds should be considered an Indian for purposes of criminal jurisdiction, it is necessary to understand the background of applicable existing laws. Unlike criminal jurisdiction in the majority of the United States, tribal criminal jurisdiction requires substantially more analysis. To determine whether a tribe has criminal jurisdiction over a crime, status of the land on which the crime was committed, classification of

the offender (whether an Indian or non-Indian person), classification of the victim (whether an Indian or non-Indian person), and classification of the type and nature of the crime committed. 18 U.S.C. § 1151-53 (2012). The first requirement in determining whether a tribe has criminal jurisdiction over a crime is determining the status of the land on which the crime was committed. 18 U.S.C. § 1151 defines Indian country as all land within the limits of an Indian reservation under the jurisdiction of the United States government, all dependent Indian communities within the borders of the United States, and all Indian allotments to which Indian title has not been extinguished.

The first case in which a conflict arose over the ability of a tribe to prosecute a crime upon a reservation was *Ex Parte Crow Dog*, where Crow Dog, a tribal member, murdered another tribal member on the reservation. 109 U.S. 556 (1883). The tribe prosecuted the crime, and sentenced Crow Dog. However, the federal government was unsatisfied with the sentence and sought to hold him accountable under a federal murder statute contained within the General Crimes Act (“GCA”). The GCA extended federal jurisdiction in part to certain crime in Indian country. *Id.* at 557-58. The Court held that the because the federal murder statute in question did not expressly address crimes by Indians against Indians within Indian country, it could therefore not be applied to Crow Dog. *Id.* at 571-72.

Following *Crow Dog*, Congress sought to remedy the jurisdictional void in Indian country by passing the Major Crimes Act of 1885 (“MCA”), which extended federal jurisdiction to murder and six other major crimes within Indian country. Stephen L. Pevar, *The Rights of Indians and Tribes*, 79 (4th ed. 2012). The extension of federal jurisdiction under the MCA was questioned in *U.S. v. Kagama*, where the Court affirmed the constitutionality of the MCA. 118 U.S. 375 (1886).

The GCA and MCA allowed for Indian-against-Indian crimes to be prosecuted in Indian country by the federal government, however, problems still remained. Indians, considered separate from other citizens under the Constitution did not have the protections afforded by the Bill of Rights extended to them, as the Constitution considered Indians separately from citizens of the United States, and tribes and their governments were seen to have predated the Constitution. U.S. Const. art. I, § 8, cl. 3; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896). In part due to this issue, Congress passed ICRA, which extended a majority of the protections afforded to the majority of citizens of the United States to the tribes, with only a few differences, such as the absence of an establishment clause, in order to help promote tribal sovereignty. Pevar, *supra*, at 243. ICRA extended equal protection and due process to crimes prosecuted in Indian country. *Id.* Further, ICRA applies to any individual who is subject to jurisdiction of a tribe. 25 U.S.C. § 1302.

In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court addressed the issue of tribal rights to prosecute non-Indians. 435 U.S. 191 (1978). The court held that without an expressed intent from Congress to the contrary, tribes did not have the jurisdiction to prosecute non-Indian offenders for crimes occurring on the reservation. *Id.* at 212. The Court took this one step further in *Duro v. Reina*, where it determined that tribes did not have the authority to prosecute not only non-Indians, but also non-tribal citizens who Indian for crimes occurring on the reservation. 495 U.S. 676 (1990). *Duro* unintentionally created a jurisdictional void in Indian country through this holding, which Congress remedied in a statute known as the “*Duro* fix,” which upholds tribal sovereignty and extends tribal criminal jurisdiction over all Indians who commit crime in Indian country. 25 U.S.C. § 1301(2). Finally, in *United States v. Lara*, the Supreme Court upheld the statute as constitutional. 541 U.S. 193 (2004).

Tribal jurisdiction has been extended further since *Lara*. In 2010, Congress enacted the Tribal Law and Order Act (“TLOA”). The TLOA serves, in large part, as an extension to the provisions previously set out in ICRA allowing tribes to prosecute crimes on their reservations. Where ICRA had previously set limits on incarceration to one year, and fines to a limit of \$5,000, the TLOA allows tribes to sentence defendants to up to three years for any one crime when represented by counsel and impose fines of up to \$15,000. 25 U.S.C. § 1302(a)(7)(B)-(C). Though the TLOA extended tribal jurisdiction, tribes remained limited in their ability to prosecute non-Indians for crimes occurring on the reservation.

Notably, one area in which this limitation remained especially problematic was in crimes involving violence against women. Therefore, in 2013, the Violence Against Women Act was reauthorized, and it extended jurisdiction to tribes over many of these crimes. 25 U.S.C. § 1304. Importantly, VAWA 2013 allows tribes the jurisdiction to prosecute non-Indian offenders in cases of domestic violence, dating violence, and violations of orders of protection, where the offender is a non-Indian. 25 U.S.C. § 1304 (b)(4)(B)-(C). This extension of jurisdiction is known as SDVCJ. In order for tribes to exercise SDVCJ over these offenders, the offender must be non-Indian, and either reside within the reservation boundaries of the prosecuting tribe, be employed by the tribe, or be the spouse, intimate partner, or dating partner of a member of the prosecuting tribe. 25 U.S.C. § 1304.

Though VAWA provides tribes with the ability to prosecute non-Indian offenders of domestic violence against women, the SDVCJ at issue applies to non-Indian defendants, hence the “special” aspect to the jurisdiction. *Id.* Where SDVCJ does not apply to these crimes for the reason that the defendant is an Indian, tribes have retained jurisdiction. *Crow Dog*, which limited federal jurisdiction in Indian country without a statute expressly stating otherwise, also

recognized that when no federal statute exists limiting tribal sovereignty, tribes retain the sovereign authority to exercise exclusive jurisdiction. 109 U.S. at 558.

Similar to *Crow Dog*, R. Reynolds does not allege that his crime should fall under an applicable federal law, and therefore, the tribe has jurisdiction to prosecute this crime. R. Reynolds alleges, incorrectly, that the tribe should have applied SDVCJ to this crime, and subsequently charged him as a non-Indian. However, because R. Reynolds should be considered Indian for purposes of the law, the tribe may exercise jurisdiction over this crime without doing so under VAWA 2013's SDVCJ.

R. Reynolds must be considered an Indian for purposes of the law because he is a naturalized citizen of the Nation. R. Reynolds is the spouse of a tribal citizen, and therefore committed an act of domestic violence against his spouse. He resides within the reservation of the prosecuting tribe and he is a tribal citizen. Thus, the tribe may prosecute him without exercising SDVCJ under VAWA 2013. The only instance in which the tribe would prosecute R. Reynolds under SDVCJ of VAWA would be if he was considered non-Indian, which does not apply to this scenario. Therefore, the tribe is well within its rights to exercise tribal jurisdiction over R. Reynolds for his crime without asserting SDVCJ.

B. Tribes possess the ultimate authority to define their own citizenship standards through the tribe's inherent sovereignty.

Tribes possess inherent sovereignty, which gives them the right and ability to define their own citizenship as they see fit. *Martinez*, 436 U.S. at 72 n. 32. The inherent sovereignty of the Amantonka Nation allows the Nation to extend citizenship to the spouses of natural-born tribal citizens as naturalized citizens of the Amantonka Nation. 3 AN Code 2, § 201(a).

Tribes inhabited the lands that now are the United States of America since time immemorial, with their own governments, communities, and cultural practices. Matthew L.M.

Fletcher, *American Indian Tribal Law*, 1, 11 (2011). When Europeans began to settle in the Americas, these long-standing practices were altered. In *Johnson v. McIntosh*, Justice Marshall recognized this occurrence, known as the doctrine of discovery, as the first legal concept to effectively limit tribal inherent sovereignty. 21 U.S. 543 (1923). The concept of the doctrine of discovery as a limiting factor upon tribal inherent sovereignty was further discussed by Justice Marshall in *Cherokee Nation v. Georgia*. 30 U.S. 1 (1831). In *Cherokee Nation*, Justice Marshall recognized that tribes, due to their unique qualities from the United States government, were to be considered similarly to “foreign” states, which, with their now limited sovereignty, were “domestic dependent nations,” where the tribes were sovereign entities, only subject then to the sovereignty of the United States government. *Id.* at 10. While limitations on tribal sovereignty were recognized by Justice Marshall in *Worcester v. Georgia* as oversight by the United States government in matters of land conveyance and dealings with foreign entities, Justice Marshall also noted that all other internal tribal matters remained subject only to the sovereignty of the tribes themselves, due to their unique status as “distinct, independent, political communities.” 31 U.S. 515, 519 (1832).

As recognized in *Worcester*, tribal citizenship is an internal matter. *Id.* Tribal citizenship is integral to tribal survival. *Id.* at 581. This Court has held that tribes have the right to define their own citizenship. *Martinez*, 436 U.S. at 72. In *Santa Clara Pueblo v. Martinez*, Justice Marshall stated, “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. *Id.* at 72 n.32.

The tribal right to define its own citizenship is, as recognized by Justice Marshall, long and enduring. *Id.* Historically, tribal citizenship was defined by factors such as family, marriage, residence, and cultural affiliation. Matthew Fletcher, *American Indian Tribal Law*, 219-47

(2011). When a tribal member married outside of the tribe, in many cases, tribal affiliation was then extended to the spouse. *Id.* at 19-20. Additionally, tribal citizenship was historically determined on basis of residence. *Id.* at 19.

In the present case, the Nation extends the right to become a naturalized citizen to spouses of tribal citizens. 3 AN Code § 2-201. R. Reynolds is the spouse of a natural born AN citizen and chose to exercise this right and became, and still remains, a citizen of the Nation. He has lived and worked on the reservation for at least two years. R. at 3, 6. Through applying for and subsequently being accepted as a citizen of the Nation, R. Reynolds has also taken part in the cultural practices of the tribe, and thus affiliated himself with the tribe in that manner. According to the AN Code, for a tribal citizen's spouse to become a naturalized citizen, they must participate in a defined naturalization process, in which they must complete courses on Amantonka culture, law, and government, pass a citizenship test, and also perform 100 hours of community service within a unit of the Amantonka government. 3 AN Code § 2-202(a)-(d). This process is voluntary and therefore, R. Reynolds chose to complete the process and thus established himself as a naturalized member of the Nation.

Additionally, R. Reynolds and his wife reside in tribal housing. R. at 6. Tribal housing is a privilege of tribal citizenship. Therefore, Petitioner has, and continues to have rights to the privileges extended to him as a naturalized citizen of the Nation. This further supports the contention that R. Reynolds is classified as an Indian person.

C. A blood quantum requirement is inappropriate because classification as Indian is political, not racial.

The well-established rule is that the classification of an individual as Indian is a political, not racial distinction. *Mancari*, 417 U.S. at 553 n. 24. The United States has a long history of “special treatment” of Indians supporting this distinction. *Id.* at 554-55. The United States

focuses on tribal enrollment and citizenship, not simply Indian race, to determine Indian status. *Id.* at 553 n. 24. Additionally, the United States' actions should be in furtherance of tribal self-governance. *Id.* at 541-42.

Since tribes have the ultimate authority to define their own citizenship, it is up to the tribes to determine the necessary requirements for tribal citizenship. *Martinez*, 436 U.S. 49. While many federally recognized tribes have a blood quantum component to their citizenship requirements, such requirements vary significantly on a tribe-by-tribe basis. Since tribes have the ultimate authority to define their own citizenship, it is therefore valid to include or exclude a blood quantum requirement. *Id.* In our case, the AN Code has no blood quantum requirement for citizenship. As tribes define their own citizenship requirements, the lack of such a requirement is therefore valid.

If this Court were to determine that R. Reynolds is non-Indian for purposes of criminal jurisdiction, it would do so on the basis of Indian blood alone, which would effectively render tribal citizenship as a solely racial distinction, not a political one. By reducing tribal citizenship to a racial classification alone, strict scrutiny is triggered, which would potentially overturn the majority of existing Indian law in the United States. *See generally Mancari*, 417 U.S. at 555.

In *Morton v. Mancari*, this Court addressed the issue of tribal citizenship as a political classification. *Mancari*, 417 U.S. at 535. The constitutionality of a BIA hiring preference for Indian individuals was at issue. *Id.* This Court held that the preference was “not directed towards a ‘racial group consisting of Indians.’” *Id.* at 553 n. 24. Instead, the Court held that the preference applied only to citizens of ‘federally recognized’ tribes.” *Id.* Therefore, the preference operated to exclude individuals who were not citizens of federally recognized tribes. *Id.* The preference

could still exclude persons who were racially Indian, but not those who were enrolled as tribal citizens, thus rendering the distinction as political and not racial. *Id.*

Without the political relationship between tribes and their citizens, Indian persons become part of a “constitutionally impermissible racial classification.” Kirsty Gover, 33 Am. Indian L. Rev. 243, 262-73. R. Reynolds, by asserting that he should be considered as a non-Indian person, while still a citizen of a federally recognized tribe, simply for purposes of criminal jurisdiction, is effectively asserting that only Indian blood should matter for a person to be considered as Indian under the law. This argument thus diminishes tribal citizenship to a racial classification which is not permitted under the Constitution.

While R. Reynolds counter-argues that blood quantum is a requirement for federal courts to determine Indian status, we urge this Court to hold that blood quantum is not a mandatory factor, but that the tribal codes themselves should be the determining factor for establishing tribal citizenship, and thus Indian status. In *United States v. Zepeda*, the Ninth Circuit emphasized the blood quantum requirement as a determining factor in its analysis. 792 F. 3d 1103 (9th Cir. 2015). However, the tribal code itself in *Zepeda* contained a blood quantum requirement. *Id.* at 1108. In our case, the AN Code contains no blood quantum requirement and instead focuses on social ties to the community.

In *United States v. Bruce*, the general rule for federal courts to use when determining Indian status is as follows: (1) degree of Indian blood; and (2) tribal or government recognition as an Indian. 394 F. 3d 1215, 1223-24 (9th Cir. 2005). In analyzing the second prong of the test, the Court focused on a factor test including: (1) social recognition; (2) enjoyment of tribal benefits; (3) government recognition; and (4) tribal enrollment. *Id.* at 1224. The focus on blood quantum could lead to a racial distinction of Indian persons and contradict long-standing

precedent in Federal Indian law. See Matthew L.M. Fletcher, *Federal Indian Law* 326 (2016).

While the federal circuits have continued to apply this two-part test, the Court's analysis on the second-prong is particularly important, focusing on social recognition of the tribe and reinforcing tribal sovereignty. *United States v. Sytmiest*, 581 F. 3d 759 (8th Cir. 2009); *United States v. Maggi*, 598 F. 3d 1073 (9th Cir. 2010).

The Court should focus on tribal recognition and reiterate the principles of sovereign immunity and affirm the Nation's right to retain their inherent authority to govern themselves. Thus, the test for determining Indian status must focus on the tribal code itself and not a blood quantum.

II. Robert Reynolds' court appointed attorney satisfies the relevant legal requirements because Reynolds is an Indian and there is no Indian Civil Rights Act violation.

The ICRA, as amended by the TLOA and the VAWA 2013, controls whether an indigent defendant has a right to appointed counsel in tribal court proceedings. R. Reynolds' attorney, a tribally-appointed defense attorney, satisfies all relevant legal requirements under the U.S. Code and the AN Code to adequately represent R. Reynolds. R. Reynolds has not given any evidence to support the contention that a tribally licensed attorney has lesser credentials than a state licensed attorney. No evidence has been offered to support the alleged difference between a state bar exam and a tribal bar exam. He has further given no evidence to show that his tribally-appointed attorney has in any way erred in the representation of R. Reynolds. Therefore, R. Reynolds' tribally-appointed defense attorney is qualified to represent him.

A. Robert Reynolds is an Indian for purposes of criminal jurisdiction; therefore, the Indian Civil Rights Act of 1968, the Tribal Law and Order Act of 2010, and the Amantonka Nation Code apply; The Violence Against Women Reauthorization Act of 2013 does not apply.

1. *The Indian Civil Rights Act of 1968 applies to Robert Reynold's crime as he is a tribal citizen and therefore, an Indian for purposes of the law.*

ICRA was enacted as a means of extending many of the protections offered by the Bill of Rights to tribal citizens. *Martinez*, 436 U.S. at 61. Under ICRA, a tribal defendant may appoint defense counsel at his own expense. 25 USC 1302 (a)(6). However, there is no provision within ICRA that requires tribes to appoint an attorney to criminal defendants, absent a sentence of incarceration of over one year. Under 25 U.S.C. § 1302(c)(1)-(2):

[I]n a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall . . . at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.

Therefore, under ICRA alone, the Nation is not required to provide R. Reynolds with counsel at all for this crime since his sentence was less than one year.

2. *The Tribal Law and Order Act of 2010 applies to this case.*

Under TLOA, tribes may sentence criminal defendants to up to three years incarceration for any one crime and may fine defendants up to \$15,000. 25 U.S.C. § 1302 (a)(7)(B)-(C). In the present case, TLOA only applies as to the fine of \$5,300 restitution and \$1,500 tribal imposed upon R. Reynolds. R. at 5. Under TLOA, tribal defendants must only be provided with assistance of counsel building on the limits set by ICRA, for sentences carrying a penalty of incarceration of up to three years. 25 U.S.C. § 1302(c)(1)-(2). Therefore, under TLOA, the Nation is again not required to provide R. Reynolds with counsel.

3. *The Amantonka Nation Code applies to this case.*

The AN Code also applies because R. Reynolds is an Indian for purposes of criminal jurisdiction. R. Reynolds has been charged under Title 5, Section 244 of the AN Code for partner family member assault. Because he is a tribal citizen, the Nation may exercise jurisdiction in this matter.

Unlike ICRA and TLOA, the Amantonka Nation Code does guarantee indigent defendants, both non-Indian as well as Indian, the right to assistance of counsel. 2 AN Code § 5-503. R. Reynolds was appropriately appointed a tribal defense attorney to represent him in this prosecution, and therefore, this legal requirement has been more than satisfied.

4. *The Violence Against Women Act of 2013 is inapplicable to Robert Reynolds' situation because the Court should determine that he is an Indian for purposes of Special Domestic Violence Criminal Jurisdiction.*

Additionally, it should be noted that VAWA 2013 provided tribal courts with the jurisdiction to punish non-Indian defendants who committed crimes against Indian victims within the reservation boundaries. 25 U.S.C. § 1304. Therefore, the SDVCJ under VAWA 2013 is not applicable to R. Reynolds because R. Reynolds is considered an Indian and VAWA 2013 requirements of appointed counsel are not relevant or applicable.

B. *The qualifications of Robert Reynolds' tribally-appointed defense counsel complies with equal protection.*

Equal protection, though still applicable to tribes, operates somewhat differently under ICRA than under the Bill of Rights of the United States Constitution. The origin of this difference comes from *Talton v. Mayes*, where an Indian was charged with murder of another Indian on tribal land. 163 U.S. 376 (1896). In *Mayes*, this Court held that tribes are not subject to the United States Constitution if they are acting upon their retained powers under tribal

sovereignty. *Id.* 384-85. Therefore, the Bill of Rights does not apply to tribes. Because the Bill of Rights did not apply to tribes, Congress enacted ICRA to extend many of the same protections offered by the Bill of Rights. Under ICRA, there is a provision for equal protection. 25 U.S.C. § 1302(a)(8).

In *Morton v. Mancari*, the BIA provided for hiring and promotional preferences for Indians working for the BIA under the Indian Reorganization Act of 1934 through the Equal Employment Opportunity Act. 417 U.S. 535. The Court held this was valid because the preference was meant to further tribal sovereignty and self-government and therefore the preference was a political one and not a racial one. *Id.* Since Indian persons were a political group instead of a racial group, there was no equal protection violation. The BIA was free to treat Indian persons differently.

Here, in the same way, ICRA provides for a different standard for qualifications for tribal attorneys. While the standards are not analogous to federal standards for attorney licensure, there is no equal protection violation because this section of ICRA is furthering tribal sovereignty and self-government. The AN has its own standards and qualifications and this Court must respect the tribe's inherent sovereignty. Additionally, the ANC standards are even higher than ICRA standards and thus provide for even greater protection, once again showing they are a capable independent nation.

Under the ICRA, counsel representing tribal criminal defendants must be licensed by the bar of their jurisdiction of practice. 25 U.S.C. § 1302(c)(2)-(3). There is no requirement, however, for representation to hold a J.D. degree or for representation to have graduated from an ABA accredited law school. The tribal defense attorney appointed to R. Reynolds both possesses a J.D. degree from an ABA accredited law school and is licensed by the Amantonka Nation Bar

Association. R. at 7. As the tribally-appointed defense attorney holds both a J.D. degree as well as license to practice under the Amantonka Nation Bar Association, the attorney is also fully in compliance with applicable tribal law. 2 AN Code § 7-607. The AN Code provides that tribal defense attorneys must hold a J.D. degree from an accredited law school, must be licensed by the tribal bar association, must have requisite cultural training, and also are held to a set of prescribed ethical standards. *Id.* Therefore, R. Reynolds' tribally-appointed attorney has more than sufficient qualifications to represent him as a matter of law.

A tribally licensed attorney is in no way less qualified than a state licensed attorney under ICRA. R. Reynolds has provided no evidence to prove that there is any difference between a tribal bar exam and a state bar exam. Simply because a tribal bar exam may be, in some aspects, different than a state bar exam does not mean that a tribally licensed attorney is in any way less qualified than an attorney licensed elsewhere.

Additionally, R. Reynolds has offered no evidence to support the contention that his attorney has erred in any way. The AN Code sets out strict ethical requirements to which tribal attorneys must adhere. 2 AN Code § 7. There is no evidence that any of these standards have been violated by his attorney. Further, the record supports no contention that the attorney erred in representation of R. Reynolds.

CONCLUSION

For the foregoing reasons, the Court should find that Robert Reynolds is an Indian, and therefore Special Domestic Violence Criminal Jurisdiction is inapplicable. Further, the Court should find that the tribal court-appointed public defender satisfies all legal requirements under the United States Code and the Amantonka Nation Code.

