No. 19-231

IN THE

Supreme Court of the United States

March 2019 Term

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 United States Court of Appeals for the Thirteenth Circuits

BRIEF FOR RESPONDENTS

Team No. 784

Counsel for Respondents

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QUESTIONS PRESENTED

1. Under *Rogers*, tribal members are Indians for the purpose of their tribe's criminal jurisdiction. Reynolds is an enrolled member of the Amantonka Nation (Nation). He was charged and convicted in the Nation's tribal court of committing domestic violence against another tribal member on the tribe's reservation. Is Reynolds an Indian for the purpose of his tribe's criminal jurisdiction?

2. The sufficiently of counsel in tribal court is the providence of tribal law. Reynolds received an attorney qualified to practice before Nation because she passed its tribal bar exam and had training in Nation law. Even if Reynolds is a non-Indian and subject to the tribe's special domestic violence criminal jurisdiction of the Violence Against Women Reauthorization Act of 2013 (VAWA Title IX), his counsel was qualified because the Nation ensures the competency and professionalism of its attorneys. Was Reynolds's attorney qualified to represent him in tribal court?

STATEMENT OF THE CASE

I. Statement of Proceedings

On June 16, 2017, Reynolds was charged with the assault of a partner in violation of Title 5 Section 244 of the Amantonka Nation Code. R. at 2, 5. Reynolds filed three pretrial motions asserting that (1) he is a non-Indian and not subject to the Nation's criminal jurisdiction, (2) that he was entitled to an attorney appointed to him in accordance with 25 U.S.C. § 1302 because he is a non-Indian, and (3) that his court-appointed counsel was insufficiently qualified. R. at 3–4. The District Court for the Nation denied all three motions, holding that Reynolds is subject to the Nation's jurisdiction as an Indian because he is a member of the Nation. R. at 3–4. The Court also found that Reynolds's counsel was qualified to represent him in tribal court under Title 2, chapter 6 of the Amantonka Nation Code. R. at 4. Reynolds was found guilty by a jury and sentenced to serve seven months in prison, pay restriction, complete batterer rehabilitation and alcohol treatment, and pay a $1,500 fine. R. at 5. Reynolds's motion to set aside the jury verdict was denied. R. at 5.

Reynolds appealed his conviction to the Supreme Court of the Amantonka Nation, which affirmed his conviction. R. at 7. The Amantonka Supreme Court held that the Nation has the right to define its own membership, and because Reynolds is an enrolled member, he is subject to its jurisdiction. R. at 7. The Court also held that Reynolds's counsel was qualified to represent him under Nation law. R. at 7. Further, the Court noted that Reynolds's equal protection argument was without merit because there was no distinguishable difference between the Nation bar exam and a state bar exam. R. at 7.

In response, Reynolds filed a petition for a Writ of Habeas Corpus under 25 U.S.C. § 1303 in the District Court for the District of Rogers. R. at 8. The District Court granted the

petition on March 7, 2018. R. at 8. The decision of the District Court was remanded with instruction to deny the petition by the United States Court of Appeals for the Thirteenth Circuit on August 20, 2018. R. at 9. The Supreme Court of the United States granted a petition for a Writ of Certiorari on October 15, 2018. R. at 10.

II. Statement of the Facts

Reynolds was charged and convicted in tribal court for committing a crime against another Indian in Indian country. R. at 2, 5. The charge arose from an incident between Reynolds and his wife, Lorinda. R. at 2. Both are members of the Nation—a federally recognized tribe. R. at 6. Reynolds struck Lorinda knocking her to the ground. R. at 6. During Lorinda's fall, she crashed into a coffee table cracking her rib. R. at 6. The incident occurred in tribal housing on the Nation's reservation. R. at 2.

Reynolds and Lorinda moved into tribal housing on the Nation's reservation over four-years ago. R. at 6. When they met, Lorinda was a member a member of the Nation, but Reynolds was not. R. at 6. Two years after the couple got married, Reynolds applied to become a naturalized citizen of the Nation. R. at 6.

Since time immortal, the Nation has welcomed into the tribe individuals who marry members. R. at 7, 12. The tribe's longstanding custom and tradition is embodied in the Nation's Naturalization process under Title 3 Section 202 of the Amantonka Nation Code. R. at 7, 12. Any person who has married a citizen of the Nation and lived on its reservation for a minimum of two-years is eligible to become a naturalized citizen. R. at 12. To become a naturalized citizen an applicant must: (1) complete a course in Nation culture; (2) complete a course in Nation law and government; (3) pass the Nation citizenship test; and (4) perform 100 hours of community service with a unit of the Nation government. R. at 12. Once an

applicant has successfully completed the process, the applicant is sworn in as a citizen of the Nation, added to the Nation's roll, and issued a Nation ID card. R. at 12–13. Naturalized citizens are entitled to all rights, privileges, and benefits afforded to Nation Indians. R. at 12–13.

As soon as he became eligible, Reynolds applied to become a naturalized citizen. R. at 6. After completing the process, Reynolds became a member of the Nation. R. at 7. He was issued a Nation ID card and added to the tribal roll. R. at 7. Reynolds has continually held himself out as an Indian by carrying his Nation ID card and has never shown an intent to renounce his tribal membership. R. at 6, 7.

Reynolds has been a member of the Nation for over two years. R. at 6. He has lived in tribal housing and worked on the Nation's reservation for over four years. R. at 6. Reynolds continues to live and work on the reservation. R. at 6. And is an Indian under tribal law. R. at 7, 12–13.

SUMMARY OF THE ARGUMENT

This case is about tribal sovereignty and self-governance. As sovereigns, tribes govern internal affairs under tribal law. *United States v. Wheeler*, 435 U.S. 313, 323–325 (1978). Every member of a tribe is an Indian for the purpose of their tribe's criminal jurisdiction because such jurisdiction promotes tribal sovereignty and self-governance. In addition, tribal trained counsel sufficiently protect the rights of parties in tribal court, Indian or otherwise. This Court should hold Reynolds is an Indian for the purpose of Nation criminal jurisdiction, and that his tribe provided him with qualified counsel under tribal law for two reasons.

First, Reynolds is an Indian for the purpose of his tribe's criminal jurisdiction because he is an enrolled member. When a tribe exercises criminal jurisdiction over intra-tribal disputes, all enrolled members are considered Indians because such jurisdiction promotes tribal sovereignty and self-governance. Reynolds was charged with and convicted of committing domestic violence in tribal court for striking his wife, another Nation member. Under *Rogers* and *Duro*, tribal members are considered Indians for the purpose of their tribe's criminal jurisdiction because members consent to their tribe's laws and governance. Because internal tribal affairs are governed by tribal law, the federal definition of Indian does not control for the purpose of tribal criminal jurisdiction. This case is about who is an Indian under tribal law for the purpose of tribal criminal jurisdiction. But even if Reynolds is considered a non-Indian, the Nation has jurisdiction over him under VAWA Title IX.

Second, the Nation provided Reynolds with counsel qualified to represent him in tribal court. Generally, under the Indian Civil Rights Act (ICRA), Indians have only the right to retain counsel at their own expense. Thus, Reynolds's right to appointed counsel is found only under tribal law. The Nation requires counsel appointed to its members to be trained in tribal law and pass its bar exam. Reynolds received qualified counsel under Nation law. Even if Reynolds is deemed to be a non-Indian for purposes of special domestic violence criminal jurisdiction, his counsel was qualified under VAWA Title IX for two reasons. First, the Nation ensures the competency of its licensed attorneys by requiring passage of its bar exam. Second, the Nation holds attorneys accountable to standards of ethics and professionalism found in its tribal code. Allowing attorneys licensed and trained in a tribe to represent all parties in tribal court promotes tribal sovereignty, self-governance, and the purpose of

VAWA Title IX. Therefore, this Court should hold Reynolds is an Indian for the purpose of his tribe's criminal jurisdiction and that his tribe provided him with qualified counsel.

ARGUMENT

I. Reynolds Is an Indian for the Purpose of His Tribe's Criminal Jurisdiction Because He Is an Enrolled Member.

Tribal members should be considered Indians for the purpose of their tribe's criminal jurisdiction.[1] A tribe has criminal jurisdiction over its members. *Wheeler*, 435 U.S. at 322–323 (holding it is "undisputed" that a tribe has criminal jurisdiction over its members as a part of inherent tribal sovereignty). When a tribe exercises criminal jurisdiction over intra-tribal disputes, tribal members are Indians because such jurisdiction promotes tribal sovereignty and self-government. Because he is an enrolled member, Reynolds is an Indian for the purpose of the Nation's criminal jurisdiction.

Tribal members are Indians because tribal status and Indian status are intrinsically dependent. A tribe is a group of Indians, and an Indian is a member of a tribe. *Montoya v. United States*, 180 U.S. 261, 266 (1901); *see also Cohen's Handbook of Federal Indian Law* §§ 3.01, 3.03 (2017). There can be no tribe without Indians. And there can be no Indian without a tribe. For an individual, being a member of a federally recognized tribe legitimizes their status as an Indian, not possession of Indian blood. *See generally* Lisa Rab, *What Makes Someone Native American: One tribe's long struggle for full recognition*, Wash. Post (Aug. 20, 2018) https://www.washingtonpost.com/news/style/wp/2018/08/20/feature/what-makes-someone-native-american-one-tribes-long-struggle-for-full-

[1] *But cf.* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze.* 18 Ariz. L. Rev. 503 (1976). Criminal jurisdiction in Indian country is divided between federal and tribal court and is mostly determined by various federal laws, none of which have a specific definition of "Indian."fed

recognition/?noredirect=on&utm_term=.3f8c39a0c9dc (discussing the cultural importance of federal recognition to tribes and individuals).

A tribe must have criminal jurisdiction over its members to promote public safety and criminal justice because the federal government has failed to uphold law and order in Indian country. Federal criminal jurisdiction in Indian country has been criticized for failing to adequately promote public safety and criminal justice. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 Conn. L. Rev. 777, 784–86 (2006) (criticizing the increasing federal intrusion in public safety when tribal self-governance policies have thrived in other policy areas). Critics believe tribes are better suited to promote public safety and criminal justice in Indian country. *Id.* In this case, if Reynolds is not prosecuted by his tribe, it is unlikely he will be brought to justice and will be free to continue to batter his wife. The Nation must have criminal jurisdiction over Reynolds because he is a member of the tribe and jurisdiction over him promotes public safety and criminal justice.

Reynolds challenges his tribe's criminal jurisdiction over him, arguing he is not an Indian because the federal definition of Indian controls and tribes lack jurisdiction over non-Indians under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Tribes have, at least, concurrent jurisdiction over all crimes committed by an Indian against another Indian in Indian country. *See, e.g.*, *Wheeler*, 435 U.S. at 328–329 ("The conclusion that an Indian tribe's power to punish tribal offenders is part of its own retained sovereignty is clearly reflected in a case decided by this Court more than 80 years ago, *Talton v. Mayes*, 163 U.S. 376 (1896)."); *see also* 18 U.S.C. § 1152 (2012) (General Crimes Act) (extending federal jurisdiction over "the general laws of the United States" to Indian country). Neither Congress nor this Court has defined who is an Indian for the purpose of tribal criminal jurisdiction.

Reynolds argues he is not an Indian because the federal definition of Indian, derived from *United States v. Rogers*, 45 U.S. 567 (1845), controls, and under *Oliphant*, tribes lack criminal jurisdiction over non-Indians. If the federal definition controls, Reynolds would not be an Indian because the federal definition of Indian requires some degree of Indian blood in addition to tribal or governmental recognition. *See United States v. Broncheau*, 597 F.2d 1260, 1262 (9th Cir. 1979). However, Reynolds is an Indian in this case because he is an enrolled member of the tribe asserting jurisdiction, and the Nation unequivocally has jurisdiction over Reynolds because he committed a crime against another enrolled member in his tribe's Indian country.

Reynolds is an Indian for the purpose of his tribe's criminal jurisdiction because he is an enrolled member for two reasons. First, under *Rogers* and *Duro v. Reina*, 495 U.S. 676 (1990), tribal members are Indians for the purpose of their tribe's criminal jurisdiction because members consent to their tribe's laws and governance. Second, because internal tribal affairs are governed by tribal law, the federal definition of Indian does not control for the purpose of tribal criminal jurisdiction. And even if Reynolds is considered a non-Indian, his tribe has jurisdiction over him under VAWA Title IX.

A. Under *Rogers* and *Duro*, Tribal Members Are Indians for the Purpose of Their Tribe's Criminal Jurisdiction Because Members Consent to Their Tribe's Laws and Governance.

A tribe's criminal jurisdiction over its members is a crucial power of internal self-governance. Such jurisdiction allows a tribe to regulate the conduct of its members and preserve its unique customs and social order. Criminal jurisdiction over members is part of a tribe's inherent sovereignty and right of internal self-government. *Wheeler*, 435 U.S. at 322–23. Criminal jurisdiction over members preserves a tribe's unique customs and social order

and promotes internal self-governance. *Duro*, 495 U.S. at 685–86. If the Nation does not have criminal jurisdiction over Reynolds, the tribe's sovereignty and ability to self-govern is severely diminished because the tribe is unable to regulate the conduct of its members and preserve its unique customs and social order.

Under *Rogers*, tribal members are Indians for the purpose of their tribe's criminal jurisdiction because members consent to their tribe's laws and governance by being entitled to the privileges of their tribe. In *Rogers*, this Court addressed the definition of Indian under federal law for the purpose of federal criminal jurisdiction. 45 U.S. at 567. The General Crimes Act exempts from its coverage "crimes committed by one Indian against the person or property of another Indian." *Id.*; *see also* 18 U.S.C. § 1152. This Court held that under federal law, a white man adopted into a tribe was not an Indian for the purpose of federal criminal jurisdiction. *Rogers*, 45 U.S. at 573.

> He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; [. . . The statute] does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them . . . to be governed by Indian usages and customs.

Id. Therefore, for the purpose of federal criminal jurisdiction under federal law, tribal members without a blood quantum are not Indians. But because members have made themselves "amenable" to the laws and jurisdiction of their tribe by becoming entitled to the privileges of their tribe, for the purpose of tribal criminal jurisdiction, tribal members are Indians under tribal law. Reynolds is, therefore, an Indian under his tribe's law because he is entitled to all the rights, privileges, and benefits of Nation Indians.

Under *Duro*, Reynolds consented to being an Indian under his tribe's criminal jurisdiction because he voluntarily became an enrolled member. Because tribal membership

is voluntary, members of a tribe essentially consent to their tribe's laws and governance. *Duro*, 495 U.S. at 693–94 (noting the voluntary nature of tribal membership and differentiating tribal members from nonmembers for purpose of tribal criminal jurisdiction). Reynolds voluntarily completed the entire naturalization process to become an enrolled member of the Nation. And he continues to hold himself out as an Indian by carrying his Nation ID card, taking advantage of tribal housing, and working on his tribe's reservation. Because Reynolds consented to the laws and governance of his tribe and holds himself out as an Indian, Reynolds has consented to being an Indian under his tribe's criminal jurisdiction.

Reynolds is an Indian under Nation law because he is an enrolled member. Enrollment is the best evidence of Indian status. *Compare United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009) (holding enrollment is dispositive of Indian status under the second prong of the federal definition) *with United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009) (clarifying *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) by holding enrollment is the most important factor to consider under the second prong of the federal definition). Enrolled members are almost always found to be Indians. *E.g.*, *United States v. Juvenile Male*, 666 F.3d 1212 (9th Cir. 2012) (holding juvenile was an Indian under the Major Crimes Act, 18 U.S.C. § 1153 (2012), because he was an enrolled tribal member, received tribal assistance, used membership to obtain tribal benefits). And because Reynolds is an enrolled member of the Nation, he is an Indian under tribal law.

Reynolds should not be allowed to renounce his status as an Indian to circumvent his tribe's criminal jurisdiction. If tribal members can circumvent their tribe's criminal jurisdiction by renouncing their Indian status post-criminal episode, that sets a bad precedent. Individuals can renounce their Indian status by leaving their tribe and adopting non-Indian

ways. *E.g.*, *Nagle v. United States*, 191 Fed. 141 (9th Cir. 1911). But Reynolds has neither affirmatively renounced his Indian status nor adopted non-Indian ways. Rather, Reynolds continues to hold himself out an Indian. He still carries Nation ID card. And he lives and works on his tribe's reservation. Additionally, preventing Reynolds from renouncing his Indian status to avoid his tribe's criminal jurisdiction does not preclude others from renouncing their Indian status. Others can renounce their Indian status so long as the purpose is not to circumvent their tribe's criminal jurisdiction.

B. Because Internal Tribal Affairs are Governed Under Tribal Law, the Federal Definition of Indian Does Not Control for the Purpose of Tribal Criminal Jurisdiction.

The federal definition of Indian does not control for the purpose of tribal criminal jurisdiction for three reasons. First, *Rogers* addressed who is an Indian under federal law, and this case is about who is an Indian under tribal law. 45 U.S. at 572–73. This Court acknowledged in *Rogers* the difference between federal and tribal jurisdiction. *Id.* This Court held that while Rogers made himself "amenable" to his tribe's laws, the federal law in question "does not speak of members of a tribe, but of the race generally." *Id.* Therefore, Rogers was not an Indian under federal law for the purpose of federal criminal jurisdiction, but Rogers would have been Indian under tribal law for the purpose of tribal criminal jurisdiction because he made himself "amenable" to his tribe's laws and jurisdiction as a member. *Id.*

Second, *Rogers* can arguably be read as reserving to tribes the decision of who, under "the usage and customs of the Indians," is an Indian. *Id.* Courts have consistently recognized the inherent power of tribes to determine questions of its own membership. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own

membership for tribal purposes has long been recognized as central to its existence."). Membership in the pre-contact period was relatively fluid, and a blood quantum within the tribe was not always required. *Cohen's Handbook of Federal Indian Law* § 3.03. The Nation allows individuals without Indian blood who marry members to become enrolled members. The Nation has a longstanding custom and tradition of doing so. In Indian law and policy, history plays an important role not just as historic precedent, but as a moral imperative. *See, e.g.*, *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word."). Therefore, because the Nation has welcomed individuals without Indian blood into the tribe since time immortal, Reynolds is an Indian under the history of his tribe's "usage and customs."

However, if the federal definition of Indian controls in this case, tribal sovereignty will be diminished. The federal definition controlling who is an Indian for the purpose of tribal criminal jurisdiction deprives tribes their right to define and control their membership. Under the federal definition, tribes would not have criminal jurisdiction over members without a blood quantum. Therefore, tribes would be forced to require a blood quantum as a condition of membership to have criminal jurisdiction over all members.

Third, the federal definition is inherently racial because it requires Indian blood. And Indian is a political, not a racial, classification. *See, e.g.*, *United States v. Antelope*, 430 U.S. 641, 645–46 (1977); *Morton v. Mancari*, 417 U.S. 535, 551–55 (1974) (explaining when the federal government deals with Indians, it is addressing members or descendants of members of political entities (Indian tribes), not persons of a particular race); *see also United States v. Zepeda*, 792 F.3d 1103, 1118 (9th Cir. 2015) (J. Kozinski, dissenting) (referring to language in *Rogers* to the effect that the government had to exercise power over this "unfortunate

race" in order "to enlighten their minds . . . and to save them if possible from the consequences of their own vices").

Adopting the federal definition of Indian for the purpose of tribal criminal jurisdiction requires answering thorny equal protection questions. Courts will be left to determine whether the Indian "blood" must be traced to a federally recognized tribe, if the universe of Indian tribes from which Indian blood can be derived should be limited to tribes that are aboriginal to the United States, and how much blood is enough to be an Indian. And if the federal definition controls, identically situated individuals will be treated differently. In this case, Reynolds is identically situated to all other Nation Indians. He is entitled to all the rights, privileges, and benefits of the tribe. But if the federal definition of Indian controls, Reynolds would not be subject to his tribe's criminal jurisdiction solely because he lacks Indian blood.

Even if this Court decides to abrogate the federal definition for the purpose of tribal criminal jurisdiction by eliminating the first prong and adopting the Ninth Circuit Court of Appeals's *Bruce* factors to determine Indian status, Reynolds is still an Indian because he has a substantial affiliation with a federally recognized tribe. Under *Bruce*, the Ninth Circuit divides the second prong of the federal definition of Indian, tribal or governmental recognition as an Indian, into four nonexclusive factors in declining order of importance. *Zepeda*, 792 F.3d at 1114. (1) Being enrolled in a federally recognized tribe; (2) receiving federal benefits; (3) receiving tribal benefits; and (4) social recognition by living on a reservation and adopting Indian ways. *Id.* (citing *Bruce*, 394 F.3d at 1224). Reynolds is an enrolled member of the Nation—a federally recognized tribe. He is entitled to all of the rights, privileges, and benefits available to Nation Indians. He lives in tribal housing and

works on his tribe's reservation. And he holds himself out as an Indian by carrying his Nation ID card. Therefore, Reynolds is still an Indian under the *Bruce* factors.

Holding Reynolds is an Indian for the purpose of his tribe's criminal jurisdiction does not impact federal law because the federal government can still use the federal definition of Indian to determine Indian status for federal purposes. Depending on the context, the definition of Indian varies. *Cohen's Handbook of Federal Indian Law* § 3.03. This case is limited to addressing Reynolds's Indian status for the purpose of his tribe's criminal jurisdiction. Holding Reynolds is an Indian because he is a member of the tribe asserting criminal jurisdiction does not preclude the federal government from using the federal definition to determine Reynolds's Indian status for federal purposes.

C. Even if Reynolds Is Considered a Non-Indian, the Nation has Jurisdiction Over Him Under Its Special Domestic Violence Criminal Jurisdiction.

In 2013, Congress reauthorized VAWA with tribal provisions in Title IX that lifted a restriction on tribal sovereignty allowing tribes to prosecute non-Indians accused of committing domestic violence. Congress has the power to lift restrictions on tribal sovereignty. *United States v. Lara*, 541 U.S. 193, 200 (2004). And Title IX lifted a restriction on tribal sovereignty by recognizing tribes' "inherent power" to exercise criminal jurisdiction over non-Indians. Pub. L. No. 113-4., 127 Stat. 54 (2012) (codified in relevant part at 25 U.S.C. § 1304(b)(1) (Supp. 2017)). Therefore, even if Reynolds is considered a non-Indian, the Nation has jurisdiction over him under its special domestic violence criminal jurisdiction because he committed domestic violence against an Indian on the Nation's reservation and is married to a member of the Nation. *See* Amantonka Nation Code § 105(b). However, Reynolds argues Congress lacked the authority to enact VAWA Title IX because, under *Oliphant*, criminal jurisdiction over non-Indians is outside the bounds of tribal sovereignty.

The bounds of tribal sovereignty are set by the authority tribes had over persons, property, and events prior to being incorporated into the territory of the United States. *See Lara*, 541 U.S. at 202, 204–05. The ability to determine the bounds of tribal sovereignty is solely vested in the Supreme Court. *See Wheeler*, 435 U.S. at 326; *Oliphant*, 435 U.S. at 210. Tribes do not possess the full-extent of tribal sovereignty because tribal sovereignty was restricted upon incorporation. *Lara*, 541 U.S. at 205; *Oliphant*, 435 U.S. at 209 (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 15 (1831); *Johnson v. M'Intosh*, 8 Wheat. 543, 574 (1823); *Fletcher v. Peck*, 6 Cranch 87, 147 (1810)). And tribal sovereignty can be, and has been, restricted further by treaties and congressional acts. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 358, 364 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 453, 459 (1997); *Duro*, 495 U.S. at 682, 685; *Montana*, 450 U.S. at 564–66. But Congress has the authority enact legislation that lifts restrictions on tribal sovereignty. *Lara*, 541 U.S. at 200 (affirming Congress's authority to enact the *Duro* fix legislation recognizing tribes' "inherent power" to exercise criminal jurisdiction over all Indians).

Congress had the authority to enact VAWA Title IX because VAWA Title IX lifts restrictions on tribes' inherent criminal jurisdiction over all persons within their territorial boundaries. This Court has plainly held "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction." *Lara*, 541 U.S. at 200. Prior to incorporation, Indian territory was entirely the province of the tribes. *Wheeler*, 435 U.S. at 322–23. Tribes had criminal jurisdiction in fact and theory over all persons within their territorial boundaries. *Id.* Congress, therefore, can restore tribal criminal jurisdiction to its full pre-incorporation extent over all persons within their territorial boundaries.

Lara clearly shows Congress had the authority to enact VAWA Title IX because Congress lifted a substantially similar restriction on tribal criminal jurisdiction in the *Duro* fix legislation. In *Lara*, this Court addressed the constitutionality of the *Duro* fix legislation, Pub. L. No. 101-511, 104 Stat. 1856 (1990) (codified at 25 U.S.C. § 1301(2) (2012)), which amended the ICRA to recognize "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." *Id.* at 193. And in VAWA Title IX Congress recognized "the inherent power of [] tribe[s] . . . to exercise special domestic violence criminal jurisdiction over all persons." 25 U.S.C. § 1304(b)(1). Both recognize the "inherent power" of tribes to exercise criminal jurisdiction. In *Duro*, this Court held, for the same reasons articulated in *Oliphant*, that tribes lack criminal jurisdiction over non-member Indians. *Duro*, 495 U.S. at 684–685. The *Duro* fix was upheld because Congress was recognizing the inherent powers of tribal government, not delegated federal powers, and Congress has the authority to lift restrictions imposed on tribes' criminal jurisdiction. *Lara*, 541 U.S. at 193. Therefore, because VAWA Title IX is substantially similar to the *Duro* fix legislation, VAWA Title IX should also be upheld for the same reasons under *Lara*.

Oliphant recognized tribal criminal jurisdiction over all person was restricted upon incorporation. Not, as Reynolds argues, that tribes lack inherent criminal jurisdiction over all persons, or jurisdiction over non-Indians is outside of the bounds of tribal sovereignty. Tribes' inherent criminal jurisdiction was restricted upon incorporation. *Id.* at 205. In *Oliphant*, this Court held tribes do not have criminal jurisdiction over non-Indians because such jurisdiction was not retained upon incorporation. 435 U.S. at 208, 210. Reasoning that tribal sovereignty was restricted during incorporation to not conflict with the interests of the United States, the "overriding sovereignty," and tribal criminal jurisdiction over non-Indians

would conflict with federal interests. *Id.* at 209. Therefore, tribes' inherent criminal jurisdiction was restricted to no longer include jurisdiction over non-Indians. Not that tribes lacked such jurisdiction or that it is outside the bounds of tribal sovereignty.

Because *Oliphant* was a recognition of a restriction placed on tribal sovereignty, Congress maintains the authority to overrule the decision through legislation lifting the restriction. This Court stated tribes could exercise criminal jurisdiction over non-Indians "in a manner acceptable to Congress," further suggesting Congress could lift the restrictions upon tribal criminal jurisdiction. *Id.* at 210. Earlier in the opinion, Justice Rehnquist authored that tribes needed an "affirmative delegation" to assert criminal jurisdiction over non-Indians. *Id.* at 208. However, categorizing the congressional action needed as a "delegation" was a mere solecism because *Oliphant* recognized a restriction on tribal sovereignty, which Congress can lift without delegating any federal authority.

Congress narrowly lifted the restriction on tribal criminal jurisdiction in VAWA Title IX to allow tribes to prosecute non-Indian domestic violence offenders who were not being brought to justice. Non-Indian domestic violence offenders in Indian country were only subject to federal criminal jurisdiction under the General Crimes Act, 18 U.S.C. § 1152, but federal prosecutors failed to adequately prosecute in Indian country where domestic violence is experienced at alarming rates. *See, e.g.*, Steven W. Perry, *Bureau of Justice Statistics*, U.S. Dep't of Justice, NCJ 203097, American Indians and Crime (2004). Because federal prosecutors have failed to adequately prosecute in Indian country, non-Indian violence against Indian women reached "epidemic proportions." *Id.* Cases went uninvestigated allowing non-Indian offenders to recidivate without repercussions. *Id.* VAWA Title IX allows tribes to ensure non-Indian domestic violence offenders are brought to justice. VAWA

Title IX is a restoration of tribal sovereignty that promotes justice and addresses an epidemic problem in Indian country.

II. Reynolds's Attorney Was Qualified to Represent Him in Tribal Court Because His Attorney Satisfied the Nation's Requirements to Practice in Its Courts.

While the source of Reynolds's right to counsel depends on this Court's determination of his Indian status, Reynolds received qualified counsel whether this Court determines he is an Indian or not. The counsel provided by the Nation was qualified under the tribal code. And even if Reynolds is deemed to be a non-Indian for the purpose of VAWA Title IX, the Nation's attorneys are qualified to represent him.

A. The Nation Provided Reynolds, an Enrolled Member, with Appointed Counsel Qualified Under Tribal Law.

The Constitution and Bill of Rights do not apply to proceedings in tribal court. The Indian tribes predate the ratification of the Constitution, and have historically been regarded as separate sovereigns, unconstrained by traditional Anglo-Saxon notions of justice, unless Congress chooses to act. *Santa Clara Pueblo*, 436 U.S. at 56. In 1968, Congress enacted the ICRA, which imported some, but not all, of the Bill of Rights's protections to defendants in tribal court proceedings. 25 U.S.C. §§ 1301–04 (2012 & Supp. 2017). ICRA "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 62. While some of the procedural safeguards are similar to those given to defendants in federal or even state courts, the protections are not identical. *Oliphant*, 435 U.S. at 194.

ICRA does not provide a universal right to appointed counsel for Indian defendants. The right to counsel under ICRA is a notable departure from the right to counsel under the Sixth Amendment. Under ICRA, Indian defendants generally have only the right to retain

counsel at their own expense. 25 U.S.C. § 1302(a)(6); *Tom v. Sutton*, 533 F.2d 1101, 1104 (9th Cir. 1976). But that right may be expanded depending on the nature of the offense, the tribal membership of the defendant, and the length of the prison sentence imposed. 25 U.S.C. §§ 1302(c)(1)–(2), 1304(d)(2). Thus, in a tribal court, it is possible to sentence an Indian defendant to up to one year in prison without affording the defendant the right to appointed counsel. *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016).

1. Reynolds Received Qualified Counsel Under the Nation Code.

Although not required under ICRA, the Nation affords all indigent Indian criminal defendants the right to appointed counsel under its code. Amantonka Nation Code § 503(3). An individual may serve as appointed counsel if she (1) is at least 21 years old, (2) is of "high moral character and integrity," (3) was not dishonorably discharged from the Armed Services, (4) is physically able to carry out the duties of the office, (5) successfully completed the Nation's bar exam, and (6) has training in Amantonka law and culture. Amantonka Nation Code § 607(a). In addition, although not required by the tribal code, all current public defenders hold a Juris Doctorate from an American Bar Association accredited law school.

In this case, Reynolds was properly afforded his right to appointed counsel under the Nation Code. As a member of the Nation, he received an attorney with training in tribal law and culture, who passed the Nation's bar exam. Without this provision in the Nation Code, Reynolds, who was sentenced to less than a year in prison, would not have been entitled to appointed counsel. Therefore, this Court should hold that Reynolds's appointed counsel satisfied the requirements for appointed counsel for Nation members under tribal law.

2. The Distinction Between Indian and Non-Indian Defendants in the Nation Code Is not a Violation of Equal Protection Under ICRA.

Reynolds next argues that the Nation's distinction between Indian and non-Indian defendants for purposes of qualification of appointed counsel is a violation of equal protection. But the equal protection clause under ICRA is not the same as the equal protection clause of the Fifth or Fourteenth Amendments. *Wounded Head v. Tribal Council of Ogalala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1082 (8th Cir. 1975); *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971). And tribes distinguish between non-Indians and Indians in their laws on a regular basis. *Cohen's Handbook of Federal Indian Law* §14.03[b][iv]. Tribes have created their own notions of equal protection consistent with both modern legal principles and ancient tribal customs. *See Ponca Tribal Election Board v. Snake*, 1 Okla. Trib. 209, 230 (Ct. Ind. App. –Ponca Nov. 10, 1988). Thus, the appropriate starting point for this analysis is the law of the tribe. *Id.* at 231.

Here, the Amantonka Nation Supreme Court, interpreting the Nation's laws, found no equal protection violation. R. at 7. It is a long-held principle of federal law to respect state court interpretation of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Murdock v. Memphis*, 87 U.S. 590, 626 (1874). Because tribes are separate sovereigns, their interpretation of their own laws should similarly be respected. *Cohen's Handbook of Federal Indian Law* §4.05 [3], [4]. The Nation Supreme Court found no distinction in the record between a state bar exam and the Nation's bar exam. R. at 7. Without a distinguishable difference between the representation provided to tribal members and non-members, the Nation Supreme Court found Reynolds's argument "without merit." *Id.* This Court should defer to the interpretation of Amantonka Nation Supreme Court and find no equal protection violation here.

Even under the Fourteenth Amendment, the Nation's classification is not a violation of equal protection. Racially-based classifications are subject to "strict scrutiny" under the Fourteenth Amendment, requiring the law be "narrowly tailored" to satisfy a "compelling government interest" to justify the classification. *Abrams v. Johnson*, 521 U.S 74, 91 (1997). But classification as an Indian is inherently political, not racial, qualifying for rational-basis review. *Mancari*, 417 U.S. at 551–55. Here, the Nation's choice to distinguish between members and nonmembers is rationally related to issues of self-governance and tribal membership. For example, the cost of securing counsel with a law degree may be too substantial for the Nation to manage in all cases. Thus, even under the Fourteenth Amendment, this Court should find no equal protection violation here.

B. Even if Reynolds is a Non-Indian, His Counsel Satisfied VAWA Title IX's Requirements Because She Was a Licensed Attorney for the Nation and Subject to Standards for Competence and Professional Responsibility.

Assuming Reynolds is a non-Indian, his appointed counsel satisfied the standard in VAWA Title IX. VAWA Title IX grants non-Indian defendants in tribal court an enhanced right to appointed counsel if any prison time is imposed. 25 U.S.C. §§ 1304(d)(2), 1302(c). Specifically, if a non-Indian is subject to a tribe's special domestic violence criminal jurisdiction, the tribe must provide indigent defendants with counsel licensed to practice law "by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." *Id.*

This Court recently declined to comment on the validity of this enhanced right to counsel under VAWA Title IX. *Bryant*, 136 S. Ct. at n.4. Nevertheless, courts and legal scholars have concluded that this standard would include attorneys licensed to practice in

tribal courts where appropriate licensing standards are used. *United States v. Gillette*, 2018 U.S. Dist. LEXIS 49490, *9–10 (D.S.D. Jan. 29, 2018); Tribal Legal Code Resource: Tribal Laws Implementing TLA, Enhanced Sentencing and VAWA Enhanced Jurisdiction, Tribal Court Clearinghouse (Feb. 2015), http://www.tribal-institute.org/lists/TLOA-VAWA-Guide.htm. The appropriate inquiry in this case, then, is whether the Nation's licensing protocol effectively ensures the competence and professionalism of its attorneys.

1. The Nation Ensures the Competence and Professionalism of Its Licensed Attorneys.

The Nation's procedure for licensing attorneys complies with VAWA Title IX for two reasons. First, the Nation ensures counsel competence by requiring passage of a tribal bar exam. Second, the Nation's code spells out expansive rules on professional responsibility and holds attorneys accountable to those rules.

First, the Nation's bar exam is consistent with licensing requirements in the United States. Every state in the United States administers a bar exam, though not every state requires a law degree to sit for the exam.[2] For example, in New York, California, and Virginia, individuals who complete a law office apprenticeship for a specified period of time may sit for the bar exam. *Id*.

The Nation is not novel in its tribal bar exam requirement. *See, e.g.*, Tulalip Tribal Code § 2.05.080(2). And the tribal bar exam requirement has been approved by the Attorney General for the United States. When VAWA Title IX was passed, Congress authorized the

[2] *See, e.g., Comprehensive Guide to Bar Admission Requirement 2017*, ABA, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2017_comp_guide_web.authcheckdam.pdf

Attorney General to approve initial tribes to participate in a pilot program.[3] Tribes applied, demonstrating how their procedures complied with the new VAWA Title IX requirements. The Attorney General selected three tribes for the program: the Confederated Tribes of the Umatilla Indian Reservation, the Pascua Yaqui Tribe, and the Tulalip Tribes of Washington. *Id.* Two out of three tribes authorize an attorney licensed only in tribal court to represent a non-Indian defendant. Tulalip Tribal Code § 02.05.080; Confederated Tribes of the Umatilla Indian Reservation Criminal Code § 3.28(B). Like the Nation, these tribes may appoint attorneys who are also coincidentally members of another bar. Nevertheless, it is still possible for an attorney licensed only in tribal court to meet the standard articulated both in the tribal codes and VAWA Title IX.

The clear purpose of VAWA Title IX is to provide non-Indian defendants with adequate representation in a tribal court. Requiring a state or federal license would not affect the quality or qualification of the counsel appointed in tribal court. Tribal law trained attorneys are better equipped to navigate the unique legal landscape of tribal law. Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. Rev. Disc. 88, 100–01 (2013). For example, if a tribe employs a dispute resolution system that does not resemble the United States justice system, an attorney trained in that tribe's laws may see an alternative path to victory for her client, while a traditional lawyer would not. *Id*. at 102. The best advocacy, then, may come from an attorney barred and trained in a tribal system.

Thus, the Nation ensures the competency of its attorneys because it administers a bar exam and requires training in Nation law and culture. This Court should not superimpose

[3] *Violence Against Women Act (VAWA) Reauthorization 2013*, U.S. Dep't of Justice (Mar. 26, 2015), https://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0.

American traditions of justice onto tribal courts when determining the competency of tribal attorneys. In tribal court, knowledge of tribal law and culture will ensure the best advocacy for clients, Indian or otherwise.

Second, the Nation ensures the professional conduct of its licensed attorneys using a code of ethics. Attorneys practicing before the Nation's courts are held to standards regarding competence, diligence, communication with clients, and confidentiality, among others. *See, e.g.*, Amantonka Nation Code Canons 1, 3, 4, 6. Many of these rules are drawn directly from the American Bar Association's Model Rules of Professional Conduct. *Compare* Amantonka Nation Code Canon 1 *with* Model Rules of Prof'l Conduct r. 1.1 (Am. Bar. Ass'n 2018). Importantly, the Nation's law provides procedures for enforcement of the rules against attorneys. Amantonka Nation Code Canon 22. Additionally, attorneys practicing in the Nation may be disbarred for "significant violations" of their ethical rules. Amantonka Nation Code § 504.

It is important to note that the Nation did not have to adopt a version of the Model Rules of Professional Conduct to meet the standard in VAWA Title IX. All states in the United States have a code of ethics applicable to attorneys, and many individual courts have adopted their own ethics rules.[4] Some tribes may reference principles based in their own laws supporting ethical conduct. What is important is not the standards themselves, but that the attorneys are held accountable to those standards. So long as a tribal court describes ethical standards for attorneys and has a method to enforce those standards, the tribe is ensuring the professional responsibility of its attorneys.

[4] Professionalism Codes, Am. Bar Ass'n, (Aug. 15, 2016) https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/.

Congress could have unequivocally stated the standard for attorneys for special domestic violence jurisdiction as requiring a license in federal or state court. But they did not. Instead, Congress left us with a standard that plainly allows for an attorney barred only in tribal court to represent a non-Indian in tribal court for purposes of special domestic violence criminal jurisdiction. Reynolds made no allegation that the Nation does not enforce its licensing standards. The counsel provided by the Nation clearly comports with the requirement of VAWA Title IX because all appointed counsel must have passed the Nation's bar exam and the Nation holds its attorneys accountable for violations of ethical rules.

2. Allowing Tribal-Law Trained Advocates to Represent Non-Indians in Tribal Courts Promotes Tribal Sovereignty, Self-Governance, and Is Consistent with the Purpose of VAWA Title IX.

Reynolds's objection to tribal advocates representing non-Indians in tribal court is premised on the assumption that an attorney trained in the legal system of United States is required to ensure fairness in tribal court. Such an assumption is an affront to tribal sovereignty and self-governance. Indian tribes have long been recognized as "distinct, independent political communities." *Wheeler*, 435 U.S. at 323–24. "Unless and until Congress acts, the tribes retain their historic sovereign authority." *Id*. at 328. Preventing tribe-trained attorneys from representing non-Indians in tribal court makes the VAWA Title IX amendment to ICRA a vehicle for federal oversight of a sovereign nation, instead of a tool to protect Indian woman from domestic violence. Jordan Gross, *Through A Federal Habeaus Corpus Glass*, 42 Am. Indian L.Rev. 1, 7 (2017). VAWA Title IX's procedural rules should not become a method of "enhanced scrutiny" of tribal courts. *Id.*

Requiring lawyers who are barred in a state to represent non-Indians in tribal court imports notions of Anglo-Saxon justice onto tribal courts, marginalizing the ability of tribal law trained advocates to make arguments based in tribal law or tradition. Fortin, *supra*, at 102. Tribes should have the ability to shape procedure within their jurisdictions. Lindsay Cutler, Comment: *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. Rev. 1752, 1762 (2016). This is essential to tribal self-government.

Tribal courts have demonstrated fairness with regard to non-Indian defendants for civil purposes. *See* Bethany Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L. J. 1047, 1079, 1094 (2005). There is no compelling argument that tribes would treat non-Indians unfairly in the criminal context. Allowing tribe-trained attorneys to represent non-Indians in tribal court encourages the tribes to adapt and confront the challenge of domestic abuse in Indian country, while still preserving cultural traditions within their communities. *Id.* at 1124. This is the essence of sovereignty, "not the right to stand still in a mythicized past, but as the power to change so as to maintain and strengthen one's community when many of the historic bonds between that community have disappeared." *Id.*

VAWA Title IX was intended to promote tribal sovereignty and empower tribes to prosecute domestic violence offenders who batter Indian women. Indian women experience violence at a higher rate than all other women in the United States. *Bryant*, 136 S. Ct. at 1959. More than 80% of Indian women experience some form of violence and more than half experience sexual violence. *Research Policy Update, Violence Against American Indian and Alaska Native Women*, National Congress of American Indians (Feb. 2018). Of the Indian women who have experienced violence, more than 90% were battered by a non-Indian. *Id.* at

2. Despite these alarming numbers, most states have failed to effectively prosecute non-Indians who batter Indian women. *Bryant*, 136 S. Ct. at 1960.

Congress intended VAWA Title IX to expand the authority of tribes to combat this problem and protect Indian women. So far, special domestic violence criminal jurisdiction under VAWA Title IX has only been adopted in 22 tribes. Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing, National Congress of American Indians (Nov. 2, 2018). Allowing tribe-licensed counsel to represent non-Indians is consistent with the purpose of VAWA Title IX, tribal sovereignty and tribal self-government because it would allow Indian Tribes to combat the systemic problem of violence against women within their jurisdictions. Tribes are more than capable of ensuring fairness and adequate due process within their justice systems. This Court should hold that tribe-licensed attorneys are qualified to represent non-Indians in tribal court.

CONCLUSION

For the forgoing reasons, Respondents request this Court hold Reynolds is an Indian for the purpose of the Nation's criminal jurisdiction and his tribe provided him with qualified counsel under tribal law.

Respectfully submitted,
/s/ Team No. 784
January 14, 2019
Counsel for Respondents