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,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team No. 876
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

CONSTITUTIONAL PROVISIONS

LEGISLATIVE HISTORY

OTHER AUTHORITIES

QUESTIONS PRESENTED

I. Is Tribal member Petitioner a non-Indian for Congress's purposes in VAWA?

II. How did Petitioner's court-appointed attorney satisfy the relevant legal requirements?

STATEMENT OF THE CASE

Just over five years ago, in 2013, Congress took action on a problem that has plagued Indian country for years–basic, systemic roadblocks to prosecuting the abuse of tribal member women. In the Violence Against Women Reauthorization Act of 2013 ("VAWA"), 25 U.S.C. § 1304, Congress acted to "recognize the tribes' 'inherent' sovereign authority" in order to help tribes prosecute offenders. H.R. Rep. No. 112-480, pt. I, at 58 (2012). By doing so, Congress knowingly raised the issue of its constitutional authority to recognize inherent tribal sovereignty over non-Indians. *Id*. Nonetheless, in light of statistics claiming as many as "88 percent of the perpetrators of violence against Indians are non-Indians," Congress persisted. *Id*. at 59.

As Congress was strengthening protections for women, Petitioner Robert Reynolds was attending college with a member of the Amantonka Nation (the "Tribe"). Record ("R") at 6. The two married and moved into Tribal housing on the Tribe's Indian country, the Amantonka Nation Reservation, where both began working. *Id*. At that point, Reynold's status as a non-Indian was entirely consistent with the "ties to the Indian Tribe" Congress enumerated in VAWA. 25 U.S.C. § 1304 (b)(4)(B) (2013).

Petitioner, himself, changed his status and underwent efforts to become a tribal member. In keeping with the Tribe's historical marital practice as codified within its Tribal Code, R. at 12-13, he undertook a multilayered and time-consuming process of applying for and completing the steps to become an enrolled member of the Tribe. R. at 6.

I. STATEMENT OF THE PROCEEDINGS

In 2015, Petitioner Robert Reynolds assaulted his wife, Amantonka Tribal member Lorinda Reynolds. R. at. 2, 6. The Tribe, Amantonka Nation, is federally-recognized. R. at 6. The Tribe's reservation is located within the State of Rogers, the fifty-first state of the United States. *Id*.

Petitioner became a Tribal member prior to the domestic violence incident. *Id*. The assault was committed on the Tribe's reservation. *Id*. The Tribe's chief criminal prosecutor filed criminal charges against Petitioner for the domestic offense under the Tribal Code. and violated Tribal criminal provision Title 5, Sec 244. R. at 2. The provision states, "[a] person commits the offense of partner or family assault if the person: (1) intentionally causes bodily injury to a partner or family member." R. at Amantonka Nation Code ("*") 13.

Petitioner filed three pretrial motions. R. at 3. He argued the United States Supreme Court holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978), prevented the Tribe having criminal jurisdiction over non-Indians. R. at 3. Next, he argued his court-appointed public defender did not satisfy the requirements of Special Domestic Violence Criminal Jurisdiction under VAWA. *Id*. Lastly, he argued if he was a non-Indian, his equal protection rights under the Fourteenth Amendment of the United States Constitution were violated, on the basis that his legal counsel failed to satisfy legal requirements. R. at. 4.

The Tribal District Court rejected all three of his pretrial arguments. R. at 3. The Court reasoned because Petitioner volunteered to become a tribal member, *Oliphant* ruling did not apply; as an Indian, he was under tribal criminal jurisdiction. *Id*. Next, the Court reasoned because he was a member and thus considered an Indian, VAWA did not need to apply. *Id*. Lastly, the Court reasoned even if VAWA requirements were applied, his U.S.

constitutional rights were not violated because his legal counsel was sufficiently qualified under Tribal Code. R. at. 4. Petitioner went to trial and he was found guilty. R. at 5. He filed a motion to set aside the verdict and filed the same pretrial motions. *Id*. Again, all three motions were denied. *Id*. His conviction was affirmed. *Id.*

Petitioner appealed to the Supreme Court of the Amantonka Nation on four bases. R. at 7. He argued federal law required a person must have Indian blood before an Indian tribe may recognize them as a tribal member. He argued because of his non-Indian status, the court-appointed public defender was substandard under VAWA. *Id*. He argued that both his right of equal protection under the U.S. Constitution was violated because his court-appointed public defender was substandard due to his status as a non-Indian under Special Domestic Violence Criminal Jurisdiction of VAWA and, if found Indian, his Tribal public defender was less qualified than one appointed to a non-Indian, which was a violation of his constitutional right of equal protection. *Id*. Petitioner lastly argued his constitutional equal protection rights were violated due to the minimum standards the Tribal Code set for defense and the potential disparities between Tribal and State law exams. *Id*. Petitioner submitted no facts to support these arguments. *Id*.

The Tribal Supreme Court rejected all four arguments. *Id*. The Court cited *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978), holding the tribe has the authority to assign Petitioner, having voluntarily become a Tribal member, the responsibility of being subject to Tribal code because under *Martinez*, it has the authority to "define and control its own membership." Next, the Court held VAWA requirements did not apply because Petitioner knowingly subjected himself to Tribal jurisdiction through acquiring Tribal membership. *Id*. Thirdly, the Court held qualifications for the Tribal court-appointed public

defender satisfied both substandard arguments, because Petitioner's counsel obtained a Juris Doctorate from an accredited A.B.A. law school and passed the Tribal bar examination. *Id*. Lastly, the court reasoned despite the Tribe's code not prohibiting a non-lawyer from legally practicing in Tribal court, all currently serving attorneys, including Petitioner's counsel, hold a Juris Doctorate from an accredited law school. *Id*. Thus, Petitioner's conviction was affirmed. *Id*.

Petitioner continued his appeal outside the Tribe's court system. R. at 8. He filed a petition of Habeas Corpus in the United States District Court for the State of Rogers. *Id*. He argued his conviction was a violation of the following federal laws: 1) a violation of the Fifth Amendment of the United States Constitution; 2) a violation of the Indian Civil Rights Act of 1968; and, 3) a violation as substandard counsel under Special Domestic Violence Criminal Jurisdiction of VAWA. *Id*.

The U.S. District Court of Rogers granted his petition. *Id*. The Court held Petitioner was improperly prosecuted as an Indian. *Id*. The Court found federal law required a degree of Indian blood for a person to be a member of a federally-recognized tribe. *Id*. The Court did not cite a federal law. *Id*. The Court further ruled the Tribal courts failed to provide the indigent defense counsel required under VAWA. *Id*. Consequently, Petitioner was granted review of his conviction. *Id*.

The Tribe filed an appeal to the United States Thirteenth Circuit Court. R. at 9. The Thirteenth Circuit reversed the decision of the lower District Court. *Id*. The lower court was instructed to deny the Petitioner's writ of Habeas Corpus. *Id*. Petitioner filed writ of certiorari to the Supreme Court of the United States. R. at 10. His petition was granted by this Court. R. at 10.

II. STATEMENT OF THE FACTS

Petitioner Robert R. Reynolds is an Amantonka Nation Tribal member who lived on the Amantonka Nation Reservation in a tribal housing complex when he was arrested for assault of his wife, also an Amantonka Tribal member, on June 15, 2017. R. at 6-7.

On that date, Amantonka Nation police were called to the Tribal apartment complex where Petitioner and his wife resided. R. at 6. Petitioner had slapped his wife forcefully enough that she had fallen, hitting a coffee table and cracking her rib. *Id.* While police had never previously seen signs of physical abuse, police had been called to the apartment before and Petitioner had a history of being verbally abusive to his wife. *Id.* At the time, Petitioner was experiencing a ten-month period of unemployment and had taken to drinking heavily. *Id.*

Petitioner was not always a Tribal member. *Id.* Petitioner, as a non-Indian, met his Tribal member wife at University of Rogers, where both were students. *Id.* He then married her and moved to the Tribe's reservation. *Id.* He got a job at the Amantonka factory. *Id.* He moved with his wife into their Tribal housing. *Id.*

To become eligible for Tribal membership, Petitioner took multiple steps. Marrying a citizen of Amantonka Nation is one requirement for Tribal enrollment. R. at *12. Petitioner did that. R. at 6. Living on the Amantonka Reservation for a minimum of two years is another requirement. R. at *12. Petitioner did that. R. at 6.

Petitioner applied for Tribal membership immediately after clearing the eligibility requirements. R. at 6-7. He then took multiple additional steps to fulfill the requirements for membership. According to the Amantonka Nation Code, these include completing a course in the Tribe's culture, completing a course in the Tribe's laws and government, passing the Tribe's membership test, and performing at least 100 hours of community service within the

Tribe's government. R. at *12. Petitioner voluntarily completed all of the requirements for Tribal membership. R. at 7.

Amantonka Nation is a federally-recognized Tribe with a long history of welcoming those who marry Tribal members into the Tribe. R. at 6-7. After successfully completing the process to obtain membership which envelops the Tribe's longstanding customs and traditions, Petitioner was able to take the oath of citizenship. R. at 7. He did so and became a Tribal ID card-carrying Tribal member of the Amantonka Nation. *Id*.

After the Tribal police arrested the Petitioner, he was taken to the Tribal jail for the night before he was charged. *Id*. The record does not reflect he objected. R. at 1-9.

SUMMARY OF THE ARGUMENT

The U.S. Court of Appeals for the Thirteenth Circuit correctly upheld the Amantonka Nation Supreme Court decision affirming the Petitioner's conviction.

I. As a Tribal member, Petitioner was properly convicted. The question of whether Petitioner is a Tribal member is not for this Court but for Congress. Congress has plenary authority over tribes as part of its constitutional power over Indian affairs. Congress has not required that all tribes maintain a certain degree of Indian blood as a requirement for tribal membership. Decisions on tribal enrollment are retained by the tribes as part of their sovereign power to determine their own membership. Historically, tribes have their own practices for making these determinations. Petitioner voluntarily sought out eligibility to apply and then applied to be part of the Tribe following its tradition of spousal enrollment. Petitioner was granted Tribal membership, and as such subjected himself within the Tribe's Indian country to Tribal law. Petitioner may therefore be correctly regarded as non-Indian for the purposes of VAWA.

II. If this Court allows Petitioner to be considered non-Indian for purposes of VAWA's Special Domestic Violence Criminal Jurisdiction, it should still affirm the U.S. Court of Appeals for the Thirteenth Circuit's affirmation of the Amantonka Nation Supreme Court's decision that the VAWA requirements were nonetheless satisfied. The domestic abuse by Petitioner, in such instance, against his Tribal member wife, is precisely the type of crime to which Congress intended VAWA to apply. Petitioner's crimes meet the qualifications of domestic violence under VAWA. Furthermore, Petitioner's ties to the community, including marrying a Tribal member and availing himself of a residence and employment on the Tribe's Indian country, where the crime occurred, implicate Petitioner, if non-Indian, as the type to whom VAWA provides relief against.

III. As the Tribe ensured by its Tribal Code, Petitioner's court-appointed defense counsel satisfied relevant legal requirements whether or not Tribal member Petitioner is considered Indian. Petitioner's counsel either met or exceeded all legal requirements including those determined by ICRA and VAWA. Furthermore, Petitioner failed to make any showing of deficiencies within his appointed defense counsel or his representation.

IV. Petitioner's argument that the ability to differentiate counsel on the basis of Indian status denied him equal protection of the laws is moot as there was no differentiation in these proceedings. Even if there was, the right to counsel has developed differently between federal, state, and tribal courts. It is Congress, through its constitutional plenary power, that in its authority has enacted constitutional-style protections for tribes on their own Indian country, which have protected their own membership far predating the constitution. As part of this trust relationship Congress chose not to apply the recently-formed right to counsel. It is Congress, not the Court, which therefore has the power to amend these rights.

ARGUMENT

I. ENROLLED TRIBAL MEMBER SATISFIED CONGRESS'S INTENT OF INDIAN IN VAWA.

A. Congress has constitutional power over Indian affairs. Where Congress has not exerted authority, tribes maintain sovereign power.

Congress has "plenary power" over Indian affairs, based on tribes "relation to the United States." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *United States v. Kagama*, 118 U.S. 375, 383–84 (1886); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Historically, this doctrine has been summarized to include several "fundamental principles": tribes possess "all the power of any sovereign state," conquest limits the external, but not internal, powers of tribes, tribes are subject to express Congressional legislation, "but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and their duly constituted organs of government." Felix Cohen, Handbook of Federal Indian Law 123 (1942). Therefore, tribes maintain powers not expressly limited by Congress.

Congress has passed laws related to tribal criminal jurisdiction. *See, e.g.*, General Crimes Act of 1817, 18 U.S.C. § 1152; Act of August 15, 1953, 25 U.S.C. § 1360; and Indian Civil Rights Act (1968), 25 U.S.C. § 1301. In addition to the VAWA, 25 U.S.C. § 1305 (amended 2016), Congress has passed acts which specify crimes outside of tribal jurisdiction, including 18 U.S.C. § 1153; 18 U.S.C. § 1162. All remaining crimes thus fall with the jurisdiction of tribes and the remaining Courts of Indian Offenses. 25 C.F.R. § 11.114 (2012).

B. The Tribe has the power to establish criminal laws for its members.

Amantonka Nation is a federally recognized Indian tribe. R. at 6. As a federally recognized government, the Tribe may establish criminal laws for its members. See *United States v. Lara*, 541 U.S. 193, 197-98 (2004) (detailing how Congressional action has "enlarge[d] the tribes' own 'powers of self-government' to include 'the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians,' including nonmembers")(citations omitted)).

The Tribe's jurisdiction extends over its Indian country. The Amantonka Nation reservation is within the Tribe's Indian country. *See* 18 U.S.C. § 1151 (1948) (including in "Indian country… all land within the limits of any Indian reservation"). The domestic violence took place on the reservation, where Petitioner resided. R. at 6.

C. Petitioner is a Tribal member subject to Tribal law.

i. The Tribe has the power to establish its enrollment criteria.

Congress does not mandate a degree of Indian blood for tribal membership. In its plenary power over Indian Affairs, Congress has set no blood quantum requirement for all tribes. For tribes to whom such language had been applied, Congress has engaged in repeal. In the recent repeal of such requirements from restrictions on land imposed by the Stigler Act affecting among the most populous tribes, the Senate Report specifically addressed this intention, and went on to consider such a requirement as inconsistent with Congressional policy:

> Moreover, this blood quantum requirement is inconsistent with how the [] Tribes define membership, as none of the [] Tribes maintain a minimum degree blood quantum for membership. Additionally, the blood quantum requirement is inconsistent with other federal laws…

S. Rep. No. 115-398, at 4 (2018).

The Court has in the past utilized blood quantum. A historical test, adapted by the Court from *United States v. Rogers*, 45 U.S. 567 (1846), considered the defendant's degree of Indian blood and recognition as an Indian by a tribe or the federal government or both. *See, e.g., United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) ("noting four circuits and state courts that apply this test" (citations omitted)); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005); Felix Cohen, Handbook of Federal Indian Law § 3.03[4] (LexisNexis 2012) (noting how this "common test that has evolved after *United States v. Rogers,* for use with both of the federal Indian country criminal statutes, considers Indian descent, as well as recognition as an Indian by a federally recognized tribe.")

This history behind blood quantum follows from a federal legacy from the era of *United States v. Rogers* of awarding certain enhanced rights based on blood to "half-breeds" and "quarter breeds" who the federal government wavered in valuing and even engaged in treaty-making with. See, e.g., H.R. Doc. No. 229 (1839); H.R. Doc. No. 2 (1845); see also S. Journal, 31st Cong., 1st Sess. 945-46 (1849) (discussing the "treaty with the Half-Breeds of the Sioux Nation of Indians"). Federal policy has shifted from using such distinctions to now recognizing tribe's political status. See generally Bethany R. Berger, *"Power Over This Unfortunate Race": Race, Politics and Indian Law in United States v. Rogers*, 45 Wm. & Mary L. Rev. 1957, 2052 (2004); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. Rev. 1, 50 (2006).

Similarly, "the mere fact that nonmembers resident on the reservation come within the definition of 'Indian'," has been held insufficient to conclude Congress intentionally exempted those residents from the civil reach of a state. *Duro v. Reina*, 495 U.S. 676, 690 (1990); see also *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S.

134, 156 (1980). However, this is a question of criminal jurisdiction which should not be conflated with civil demands of state citizenship. As a criminal matter, Petitioner's act were committed on Amantonka's tribal lands against a tribal victim, and subject federal and tribal jurisdiction.

Thus, while tribes may choose to include a blood quantum requirement, the status of tribes as political identities with a right to maintain their own membership is absolute.

ii. Petitioner completed Tribal enrollment.

Amantonka Nation has a process, codified in Title 1, Chapter 2, Section 201 of the Tribal Code, through which persons who (1) marry a citizen of Amantonka Nation, and (2) have lived on the Amantonka reservation for a minimum of two years may apply to the Amantonka Citizenship Office to initiate the Tribal membership process. R. at *12.

"Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together," this Court noted in *Obergefell v. Hodges*, 135 S.Ct. 2584, 2594 (2015). Likewise, "[i]n recognition of and accordance with the Amantonka Nation's historical practice of adopting into [Amantonka's] community those who marry citizens of the Amantonka Nation" the Amantonka National Council created a process through which those who marry a citizen of the Amantonka Nation may apply to become a naturalized citizen of the Amantonka Nation. R. at *12. Petitioner married a member of the Amantonka Nation in the fall of 2014, after the two graduated the college where they'd met. R. at 6.

Petitioner and his wife had lived for more than two years on the Amantonka Reservation when, in the fall of 2016, Petitioner applied for membership into the Tribe. *Id*. Thus, Petitioner satisfied the two requirements for application to qualify to apply for membership into the Tribe.

To become a naturalized citizen of the Amantonka Nation, Petitioner further fulfilled multiple Tribal requirements per the Amantonka Nation Code. *See* R. at *12. These included completing two courses, one course in Amantonka culture and one course in Amantonka law and government. *Id*. Petitioner also had to pass the Amantonka citizenship test and perform 100 hours of community service with a unit of the Amantonka Nation government. *Id*. Petitioner then had to be sworn in as a citizen of Amantonka Nation. *Id*. These deliberate acts of Petitioner showcase his intention to be a Tribal member, and thus subject to the Tribe.

II. EVEN IF PETITIONER'S CHOICE TO SUBJECT HIMSELF TO TRIBAL LAW AND THE TRIBE'S SOVEREIGN POWER TO DETERMINE ITS MEMBERSHIP ARE INSUFFICIENT TO ESTABLISH PETITIONER'S TRIBAL MEMBER STATUS FOR THIS PURPOSE, PETITIONER'S PROSECUTION WAS PROPER UNDER VAWA.

A. VAWA sets forth eligible crimes for prosecution: Petitioner's crimes qualify.

VAWA extends tribes abilities to exercise "special domestic violence criminal jurisdiction over all persons." 25 U.S.C. § 1304(b)(1). VAWA defines criminal conduct to mean "domestic violence or dating violence that occurs in the Indian country of the participating tribe." *Id*. at § 1304(c)(1). In *United States v. Castleman*, the Court considered what "domestic violence" meant in 25 U.S.C. § 1304, including regarding "physical force." 572 U.S. 157, 180 n.6, 7 (2014). Because of this, tribes "have been cautious not to exceed their authority under Section 1304, implementing tribes' prosecutors have hesitated to prosecute a non-Indian who attempts or threatens to cause his Indian spouse or partner bodily injury, without causing physical injury." *Draft Legislation to Protect Native Children and*

Promote Public Safety in Indian Country: Oversight Hearing Before the S. Comm. on Indian Affairs, 114th Cong. (May 18, 2016) (testimony of Dir. Tracy Toulou, Office of Tribal Justice).

One result of this caution has been tribes declining to prosecute. *Id*. One tribe declined to prosecute an intoxicated non-Indian man who "attempted to punch his Indian girlfriend but missed and fell to the ground." *Id*. The man later returned to assault his girlfriend. *Id*. In this case, police had been called to Petitioner's Tribal housing before, and while Petitioner had a history of verbal abuse and intoxication, he never been prosecuted. R. at 6. Here, Petitioner did not miss– at his hand, his wife fell to the ground, cracking a rib. R. at 6. Any attempts at discrediting the attempted harm in domestic violence to the victim under VAWA are thus overcome by the real and physical harm Petitioner's physical force caused his wife which was rightfully prosecuted.

B. VAWA sets forth eligible connections for prosecution: Petitioner's ties qualify.

VAWA defines the person committing domestic violence to mean "a current or former spouse or intimate partner of the victim… a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or… a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs." 25 U.S.C. § 1304(a)(2). Petitioner is the spouse of the victim, R. at 6. Petitioner was also cohabitating with the victim. *Id.* Furthermore, Petitioner met the Tribe's definition of such a partner. R. at *13. Petitioner therefore satisfies multiple categories under VAWA of a person committing domestic violence.

VAWA considers "ties" to cover a defendant who "(i) resides in the Indian country of the participating tribe; (ii) is employed in the Indian country of the participating tribe; or (iii) is a spouse, intimate partner, or dating partner of— (I) a member of the participating tribe." Petitioner resides in the Indian county of the participating tribe. R. at 6; see previous discussion of Indian country. Also, though Petitioner was not employed at the time, Petitioner was the spouse of a member of the Tribe. *Id.* Petitioner therefore satisfies multiple categories under VAWA of a person with ties to the Tribe.

III. PETITIONER'S COURT-APPOINTED ATTORNEY SATISFIES RELEVANT LEGAL STANDARDS.

Petitioner argues that any discrepancy in the type of attorney he would receive as an Indian or non-Indian would violate equal protection. R. at 7. But, as the Amantonka Nation Supreme Court found, Petitioner claimed no factual differences between the State of Rogers bar exam and the Tribal bar exam, and furthermore pointed to no errors on behalf of his counsel. *Id.* Instead, the facts show that Petitioner's counsel exceeded relevant legal requirements under the Indian Civil Rights Act and VAWA, and met no standard of other ineffectiveness. Under the American Bar Association's (ABA) Model Rules of Professional Conduct, "The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." R. 5.5 cmt. (2018). Here, Petitioner's counsel was not only qualified, but exceeded all relevant legal standards.

A. Petitioner's counsel exceeded Tribal Code legal requirements.

The Tribal Code, Title 2, Chapter 5, proscribes qualifications for admissions as an attorney. These include being a member in good standing of the bar association. R. at *5. Petitioner's counsel was a member in good standing of the Amantonka Bar Association. Also required is the successful completion of the local bar examination. *Id.* Petitioner's counsel had done so. Chapter 5 also discusses the right to counsel. It mandates counsel for both non-Indian defendants and Indian defendants when indigence is satisfied. R. at *6. Here, there is no record of Petitioner as indigent. R. at 1-9. Thus the Tribe providing counsel exceeded the requirements of the Code.

The Tribal Code, Title 2, Chapter 6, proscribes qualifications for the Office of Public Defender. R. at *8. There is no argument Petitioner's counsel did not meet these requirements. The Tribal Code, Title 2, Chapter 7, proscribes a Code of Ethics for Attorneys. R. at *8. There is no argument Petitioner's counsel did not comply with this Code. Among the many other provisions, even were Petitioner argued a particular discrepancy there appears no way by which Petitioner's counsel did not satisfy Tribal Code requirements, and alternatively showings that these requirements were exceeded.

B. Petitioner's counsel exceeded ICRA legal requirements.

Petitioner argued his rights were violated under ICRA. R. at 8. As described doctrinally above, tribes are subject to their tribal laws and function as extra-constitutional governments. Tribes are distinguished in the U.S. Constitution from federal and state governments, instead existing as "domestic dependent nations." *Cherokee Nation*, 30 U.S. at 17. Tribes are not considered by the Constitutionally-conferred controls on federal and state powers, thus the determination in *Talton v. Mayes* that the provisions of Bill of Rights do not

apply to tribal court prosecutions. 163 U.S. 376 (1896). As also described, tribes are subject to the plenary power of the U.S. Congress. Congress, in 1968, used its power to enact the Indian Civil Rights Act (ICRA), which included similar provisions to the Bill of Rights. 25 U.S.C.A. §§ 1301 et seq.

Unlike the Bill of Rights, ICRA does not, however, mandate the attachment of right to counsel for tribal members in tribal courts:

> [C]ourts have been careful to construe the terms 'due process' and 'equal protection' as used in the Indian Bill of Rights with due regard for the historical, governmental and cultural values of an Indian tribe. As a result, these terms are not always given the same meaning as they have come to represent under the United States Constitution.

Tom v. Sutton, 533 F.2d 1101, n.5 (9th Cir. 1976). Thus as Tribe was not required to provide Tribal member Petitioner with counsel, and yet did so, Petitioner's counsel exceeded ICRA legal requirements.

C. Petitioner's counsel exceeded VAWA legal requirements.

In a criminal proceeding where a tribe, exercising powers of self-government, imposes a term of imprisonment under its Special Domestic Violence Criminal Jurisdiction (SDVCJ), VAWA imposes certain legal requirements. 25 U.S.C. § 1302(c), 1304(d)(2). In particular, it requires the tribe "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," *id.* at § 1302(c)(1), which it clarifies means:

> [A]t 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.

25 U.S.C. § 1302(c)(2).

Here, the Tribe is exercising its sovereign domestic violence criminal jurisdiction. While initial pilot projects were approved on an accelerated track to do so, codification made it clear this is the Tribe's "inherent" power to exercise SDVCJ. Pilot Project for Tribal Jurisdiction Over Crimes of Domestic Violence, 78 Fed. Reg. 35,963 (June 14, 2013); 25 U.S.C. § 1304(b)(1). As noted in the national five-year report on VAWA SDVCJ, "it is up to each individual tribe to decide whether or not they would like meet the specific statutory requirements." National Congress of American Indians, *VAWA's 2013 Special Domestic Violence Criminal Jurisdiction Five-Year Report* 38 (2018).

Whether or not the Tribe was required to do so based on Petitioner's noted tribal member status, the Tribe nonetheless met the specific statutory requirements under VAWA. As the District Court for the Amantonka Nation found, the Petitioner's counsel was "sufficiently qualified even if SDVCJ standards apply." R. at 4. At the expense of the tribal government, Petitioner received court-appointed counsel. R. at 3.

Petitioner's counsel is licensed to practice law by a jurisdiction in the United States. Amantonka Nation, the reservation which is the Tribe's Indian country, is "within the State of Rogers, the 51st state in the United States." R. at 6. Tribes have long been recognized to hold jurisdiction over their Indian country. *See, e.g.*, Act of June 12, 1858, § 2, 11 Stat. 329; 25 U.S.C. § 264 (1957); Act of Mar. 3, 1885, § 9, as amended at 18 U.S.C. § 1153; 18 U.S.C. § 3242. It is historically beyond dispute in American jurisprudence that the Tribe's jurisdiction is in the United States. *See generally* Cohen's Handbook of Federal Indian Law § 4.01 [2][d] (LexisNexis 2012).

The jurisdiction in which Petitioner's counsel practices, furthermore, applies appropriate professional licensing standards. This includes requiring admission to the

jurisdiction's bar association, the Amantonka Nation Bar Association. R. at 7. Among tribes that have exercised SDVCJ, many require defense counsel to be members of the tribal court's bar, including tribes which were federally approved to implement SDVCJ on an accelerated track. *See, e.g.*, Pascua Yaqui Tribal Code 3 § 2-2-310 (2013) ; Tulalip Tribal Code § 2.25.070(3)(a)(2018) .

The Amantonka Nation qualifications for public defenders exceed those of many states. Petitioner argues that the minimum qualifications required by the Amantonka Nation Tribal Code result in less qualified counsel and that there is a difference between a state and tribal bar exam which is unacceptable. R. at 7. Neither does the Petitioner offer any explanation of any qualifications lacking nor do the facts do not show this to be the case. Like many district courts have no requirement that an attorney be admitted to practice in the state where the district court presides over its jurisdiction, there is no requirement that Petitioners counsel be admitted in the State of Rogers where the Tribal court presides over its jurisdiction. R. at 7-8. All of the Tribe's licensed public defenders, including Petitioner's counsel, "hold a JD degree from an ABA accredited law school." *Id.*

Petitioner's counsel passed a litany of qualifications to practice in Amantonka Nation. Petitioner's counsel had to be "of high moral character and integrity" and not dishonorably discharged from the Armed Services. *Cf. Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 246 (1957) (considering only "present" good moral character*); Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430 at fn. 3 (E.D. Va. 1995) (citing a state bar regarding other than honorable discharge from any branch of the armed service as simple "cause for further inquiry"). Petitioner's counsel had pass a background check and complete a probationary

period. R. at 8. Despite having a JD, Petitioner's counsel also had to have training in Amantonka law and culture. *Id*.

The American Bar Association (ABA), encourages adoption of its code of ethics by jurisdictions but cannot require that, and while "some states are more demanding than the [ABA] rules. Elsewhere they are weaker." Stephen Gillers, *One Lasting Change: Bar Association's Ethics Rules*, N.Y. Times, July 11, 2016, https://nyti.ms/2DCVfYE. The Petitioner points to no evidence that the State of Rogers Bar Association has requirements that meet that of the ABA, let alone the Amantonka Bar Association. The ABA can and has required "law schools must teach legal ethics to get the association's approval." *Id*. As noted, Petitioner's counsel attended and graduate from an ABA-approved school. R. at 7.

The Tribe further effectively ensures the competence and professional responsibility of its licensed attorneys through its Amantonka Bar Association membership requirement. Petitioner had to successfully pass the Amantonka Nation Bar examination, as noted. In addition to membership, Petitioner's counsel is in good standing with Bar Association. *Id*. Furthermore, the Amantonka Nation Tribal Code in Title 2, Chapter 7 of the lays out a robust Code of Ethics for its courts that Petitioner's counsel had to follow.[1] R. at 8-12.

Even under the strictest standard, considering Petitioner as non-Indian and SDVCJ to attach, all facts show that Petitioner's counsel not only met but exceeded VAWA legal requirements.

[1] The Code also proscribes a "Rule of Court for Handling Complaints Against Attorneys," detailing a process by which an aggrieved party may seek relief. R. at 12. There is no evidence that Petitioner attempted, let alone exhausted, this remedy, nor does the Petitioner claim any of the exceptions to exhaustion annunciated in *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). *See also Burlington N.R. Co. v. Crow Tribal Council,* 940 F.2d 1239, 1244 (9th Cir. 1991) ("non-Indian defendants must exhaust tribal court remedies before seeking relief in federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction.").

D. Petitioner did not show his counsel was ineffective.

Petitioner has not argued relevant legal requirements for effective assistance of counsel were unmet. *Strickland v. Washington* persuasively provides that to satisfy an ineffective assistance of counsel Petitioner must show (1) that his counsel's performance fell below an "objective standard of reasonableness" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668 (1984).

Petitioner has failed to attempt to show either of these requirements. Petitioner's counsel was authorized to practice law as "a member in good standing of the Amantonka Nation Bar Association." R. at 7. Petitioner's counsel also graduated from an American Bar Association ("ABA") accredited law school. Here, as the Tribe's Supreme Court found, Petitioner has "not pointed to any errors allegedly committed by his defense counsel." R. at 7.

IV. NON-TEXTUAL RIGHTS TO COUNSEL DO NOT SUPERSEDE EXTRA-CONSTITUTIONAL RIGHTS OF TRIBES.

Petitioner argues that "classified as an Indian, the fact that the attorney he is entitled to is less qualified... is a violation of equal protection." R. at 7. The qualifications of Petitioner's counsel having been discussed, it is notable that as a political, not racial, identity, Petitioner's membership in the Tribe's recognized political community does not create an Equal Protection cause of action under ICRA. Nor are Congress's constitutional plenary powers weakened through the evolving Court definition right to counsel.

As noted by the Amantonka Nation Supreme Court, this Court has previously considered a tribe's right to define and maintain its own membership. R. at 7. In *Santa Clara*

Pueblo v. Martinez, the Court found there was no cause of action or federal relief available for those questioning what is a quasi-suspect classification, gender. 436 U.S. 49 (1978).

Here, the challenged classification does not even rise to that level. The court, in *Foley v. Connelie*, after citing to *Worcester v. Georgia*, 31 U.S. 515 (1832), held:

> A new citizen has become a member of a Nation, part of a people distinct from others. The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized "a State's historical power to exclude aliens from participation in its democratic political institutions," as part of the sovereign's obligation "'to preserve the basic conception of a political community.'"

435 U.S. 291, 295-96 (1978) (citations omitted).

As had been noted in *Worcester*, Congressional acts "manifestly consider [Tribes] as distinct political communities." 31 U.S. at 557. Thus, any review of the Tribe's right to establish its own enrollment criteria triggers rational basis review. See, e.g., *Morton v. Mancari*, 415 U.S. 535, 551 (1974) (noting membership classifications are political distinctions, not "invidious racial discrimination").

ICRA has been reviewed. In considering ICRA's constitutionality, the Court in *Martinez* found ICRA "manifest[s] a congressional purpose to protect tribal sovereignty from undue interference." 436 U.S. at 63. ICRA exists as an assumption of Congress's trust responsibility ("rationally related" to a "legitimate" government interest, per *United States v. Carolene Products Co*., 304 U.S. 144 (1938)). Moreover, it clearly evinces Congress's constitutional plenary powers over Indian affairs. As this Court noted in *Miles v. Apex Marine Corp*., "Congress is aware of existing law when it passes legislation." 498 U.S. 19, 32 (1990).

A. Congress's constitutional right to relax restrictions on tribes should not be restricted by the Court.

Petitioner further implicates the aforementioned Congressional constitutional power in arguing that, per *Oliphant v. Suquamish Indian Tribe*, no tribal non-Indian jurisdiction can exist. In *Oliphant*, the Court upheld a common law doctrine against tribal jurisdiction over non-Indians "except in a manner acceptable to Congress." 435 U.S. 191, 204 (1978).

While tribes have been restricted in application of criminal law to nonmembers, Congress, through its plenary power, also has the authority to relax such restrictions, and has chosen to exercise that power, *e.g.*, *United States v. Lara*, 541 U.S. 193, 202-206 (2004), including based on certain "ties to the Indian Tribe." VAWA, 25 § 1304 (b)(4)(B). After the Supreme Court decided in *Duro v. Reina* that tribal criminal jurisdiction over non-member Indians was not restricted but removed, 495 U.S. 676 (1990), Congress made it clear immediately that tribes indeed maintained these rights. 105 Stat. 646 (1990) (the so-called "*Duro* Fix"). The Court has reaffirmed the Congressional ability to do so, repeatedly concluding in *Lara* that "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do" and that "Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority." 541 U.S. at 200, 205.

In VAWA, Congress then narrowly relaxed a small piece of remaining restrictions on Tribal jurisdiction, as Special Domestic Violence Jurisdiction over non-Indians operating in the tribe's Indian country. *See* 25 U.S.C. § 1304 (b)(1) (recognizing "special domestic violence criminal jurisdiction" as inherent within the jurisdiction of Indian tribes defined by ICRA). This expansion employs protections comparable to the Constitution but does not

function as an amendment expanding constitutional rights to Indian country. This is further consistent with Indian law canons of construction to liberally construe the statutes in favor of Tribes and their sovereignty. Felix Cohen, Handbook of Federal Indian Law § 2.02 (LexisNexis 2012). This is not a restriction of a right to counsel in federal or state court, it is a constitutionally-permissible relaxation of restrictions on tribes' rights in Indian country.

B. Rights to counsel do not redraw Indian country sovereignty.

Petitioner argued that varying standards for counsel in Tribal court violated "equal protection." R. at 7. The Equal Protection clause of the Fourteenth Amendment provides "nor shall any State… deny to any person within its jurisdiction the equal protection of the laws". U.S. Const. art. VI, cl. 2. Petitioner seems thus to suggest his counsel was ineffective to the extent of facing unequal protection of the laws of the Tribal jurisdiction.

In 1938, the Court in *Johnson v. Zerbst* granted criminal defendants in federal court the right to retain counsel, requiring the federal government to provide counsel if the defendant was indigent, for felony cases. 304 U.S. 458, 462-63 (1938). Congress, in 1948, then enacted legislation to provide counsel for criminal defendants in federal court for capital cases. 18 U.S.C. § 3005.

In 1963, *Gideon v. Wainwright*, the Court applied a right to counsel as a requirement to the jurisdictions of states, using the Fourteenth Amendment's Due Process Clause, for certain cases. 372 U.S. 335, 342 (1963).

In 1968, Congress again stepped in and enacted legislation, passing ICRA, and rebuking the perception of any counsel requirement restricting the jurisdiction of tribes by including other comparable protections to the constitution, but not court-defined right to counsel. *See* 25 U.S.C. 1301-1304 (1968); *see also Martinez*, 436 U.S. at 63 n.14 (noting

"[t]he provisions of the Second and Third Amendments, in addition to those of the Seventh Amendment, were omitted entirely).

In ICRA, Congress provided for a defendant in tribal court "at his own expense to have the assistance of counsel for his defense." 25 U.S.C. § 1302. This coincides with a defendant's constitutional right to retain counsel. *Chandler v. Fretag*, 348 U.S. 3 (1954). Congress actively considered balancing tribal rights and the customs, practices, and procedures of Tribes, *see, e.g. Hearings on S. 961-68 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 212-13 (1965), with protecting the right to counsel which the Court had recently expanded. *See, e.g.*, *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

As Petitioner filed a writ of habeas corpus, R. at 8, from which federal courts have derived their jurisdiction over the actions herein involving ICRA per this Court's ruling in *Martinez*. 436 U.S. at 58-59. However, it is notable that it has been tribal courts which have been the primary enforcement mechanism of ICRA since that ruling. Federal courts have chosen to decline jurisdiction over rights such as free speech and freedom of assembly, restating the power of Congressional constitutional plenary authority, stating, such as in *Barnes v. White*:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

494 F. Supp. 194, 198 (N.D.N.Y. 1980).

Federal courts have also recognized tribes' sovereignty in matters of equal protection. In *Snow v. Quinault Indian Nation*, a tribe set a lower tax rate for employing tribal members. 709 F.2d 1319, 1321 (9th Cir. 1983). In regards to the tribe's retained sovereignty, the Ninth Circuit found this to be an exercise of inherent sovereignty. *Id*. at 1323. Here, the aspect of retained sovereignty is far more substantial than who a tribe decides to tax, more substantial even than the extent to which two individuals become bound in marriage– at stake is who composes the tribe itself. As a polity, tribes have no right more inherent than determining their membership, and while Congress could act to restrict this, this Court should not.

CONCLUSION

The judgment of the Thirteenth Circuit should be affirmed.

Respectfully submitted,

Counsel of Record