No. 19-231

In the

Supreme Court of the United States

ROBERT R. REYNOLDS,

Petitioner,

v.

WILLIAM SMITH, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS

Team 882

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QUESTIONS PRESENTED

I. Is Petitioner, an enrolled member of a federally-recognized Indian tribe, a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction simply because he possesses no Indian blood?

II. Whether the Amantonka Nation violated Petitioner's right to equal protection when it provides Indians and non-Indians all legal rights they are entitled to under the Indian Civil Rights Act and the Violence Against Women Act of 2013?

STATEMENT OF THE CASE

I. Statement of Facts

Petitioner Robert R. Reynolds is naturalized citizen and enrolled member of the Amantonka Nation, a federally-recognized Indian tribe. R. at 6. Reynolds met his wife Lorinda Reynolds when they were both students at the University of Rogers. R. at 6. Lorinda is also a citizen and enrolled member of the Nation. R. at 6. After graduation, the couple married and found employment on the Amantonka Nation Reservation in the State of Rogers. R. at 6. The couple moved to an apartment on the Reservation, where they still live today. R. at 6. Two years later, Reynolds applied to become a naturalized Nation citizen. R. at 6.

Reynolds completed all the steps required by the Nation's Code to become a naturalized citizen.[1] R. at 6. He married an Amantonkan citizen. R. at 6. He lived on the Reservation for two years. R. at 6. He completed courses on the Nation's culture, laws, and government. R. at 6, 12. He took and passed a Nation citizenship test. R. at 6, 12. And he performed one-hundred hours of community service for the Nation's government. R. at 6, 12. After completing these lengthy steps, Reynolds took an oath of citizenship and received a Nation ID card. R. at 6. From this point forward, Reynolds has been considered an enrolled member of the Amantonka Nation. R. at 6. Although possessing no Indian blood, Reynolds was now entitled to all the privileges of Amantonkan citizenship. R. at 6, 8, 13.

One year after obtaining citizenship, Reynolds lost his job on the Reservation. R. at 6. He began verbally abusing Lorinda during his ten months of unemployment. R. at 6. And on June 15, 2017, Reynolds verbal abuse escalated to physical abuse. R. at 6. That evening, Reynolds struck Lorinda with an open palm across her face. R. at 6. Reynolds struck

[1] The Amantonka Nation Code provisions regarding the naturalization process, along with all other relevant Nation and U.S. Code provisions, are reproduced in full in Appendix A.

Lorinda so hard that she fell to the ground. R. at 6. During her fall, Lorinda hit a coffee table, cracking her rib. R. at 6. The Nation Police responded to a call at the couple's apartment, where the physical assault occurred, and arrested Reynolds. R. at 6. This was not the first time the Police responded to a call at the couple's apartment. R. at 6.

The Nation charged Reynolds under its criminal code with Criminal Partner Assault. R. at 6–7. The Nation provided Reynolds with a public defender according to their Nation Code. R. at 3. The Nation allows both attorneys and lay counselors to serve as public defenders if they meet all the eligibility requirements, including training in Amantonkan law and culture, adhering to the Nation's Code of Ethics for Attorneys and Lay Counselors, and passing the Amantonka Nation bar examination. R. at 8. Currently, all public defenders serving the Amantonka Nation are licensed attorneys with JDs from ABA-accredited law schools. R. at 7 n.1.

At trial, a jury in the Nation's District Court found Reynolds guilty of this assault. R. at 5. The District Court sentenced Reynolds to seven-months incarceration, $5300 in restitution to Lucinda, batterer rehabilitation and alcohol treatment classes, and a fine of $1500. R. at 5.

II. Statement of Proceedings

The Nation's chief prosecutor filed criminal charges against Reynolds for assaulting his wife in violation of the Nation's Code. R. at 6–7. Reynolds filed three pretrial motions contesting these charges. First, Reynolds argued that he was a non-Indian subject only to the Nation's Special Domestic Violence Criminal Jurisdiction (SDVCJ) under the 2013 Amendments to the Violence Against Women Act (VAWA 2013). R. at 3. The District Court denied this motion, concluding that Reynolds was subject to the Nation's inherent criminal jurisdiction as an Amantonkan citizen. R. at 3. Second, Reynolds requested an appointed attorney under VAWA 2013's appointed-counsel requirements for non-Indians

prosecuted under SDVCJ. R. at 3. The District Court concluded that this statute does not apply as Reynolds is a naturalized Indian citizen. R. at 3. Finally, Reynolds claimed that his appointed counsel violated equal-protection requirements. R. at 3–4. But again the District Court denied the motion because even if VAWA 2013 applied, his attorney was appropriately qualified. R. at 4.

After the jury returned a guilty verdict, Reynolds appealed his conviction to the Amantonka Nation Supreme Court, renewing his pretrial objections from the District Court. R. at 6–7. The Supreme Court affirmed the District Court's finding that Reynolds is not a non-Indian for purposes of SDVCJ. R. at 7. The Court rejected Reynolds' contention that the federal definition of "Indian"—requiring a person to possess some Indian blood—applies to SDVCJ. R. at 6. Instead, the Court held that Reynolds was subject to the Nation's jurisdiction as a naturalized citizen and enrolled member. R. at 6.

The Court also denied his contention that his appointed counsel must meet the VAWA 2013 standard. R. at 7. Because the Court had previously concluded he was an Indian for purposes of jurisdiction, VAWA 2013's SDVCJ does not apply. R. at 7. Finally, Reynolds claimed that if he was classified as an Indian, he was the victim of an equal-protection violation. R. at 7. But the Court determined that any alleged differences between a state bar examination and the Nation's bar examination were without proof or merit. R. at 7. It also found that any differences in attorney qualifications were not "material or relevant." R. at 7. Moreover, the Court noted that all its public defenders hold JD degrees from ABA-accredited law schools. R. at 7 n.1.

Reynolds has now filed a writ of habeas corpus under 25 U.S.C. § 1303 in the United States District Court for the District of Rogers challenging his conviction in the Nation District Court. R. at 8. The U.S. District Court reversed the Amantonkan Supreme Court's

holding, concluding that the federal definition of "Indian" requires some Indian blood and that Reynolds' appointed counsel did not meet VAWA 2013 standards. R. at 8. On appeal, the Thirteenth Circuit reversed the District Court, and denied Reynolds' petition. R. at 9. Finally, this Court granted Reynolds' Writ of Certiorari.

SUMMARY OF ARGUMENT

Reynolds is a naturalized Amantonkan citizen subject to its inherent criminal jurisdiction over enrolled members. This Court first recognized Indian tribes' authority to prosecute enrolled members in *United States v. Wheeler*, 435 U.S. 313, 324–25 (1978). As a naturalized Amantonkan citizen, Reynolds falls squarely within the scope of the Nation's criminal jurisdiction under *Wheeler*. Reynolds argues that he is instead a non-Indian subject only to tribal prosecution under Special Domestic Violence Criminal Jurisdiction (SDVCJ). SDVCJ applies to persons otherwise immune from tribal prosecution under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). But *Oliphant* does not preclude the Nation from prosecuting enrolled members possessing no Indian blood. Reynolds, therefore, cannot be a non-Indian for purposes of SDVCJ because he is not a person over whom the Nation could not otherwise prosecute without SDVCJ.

Although Reynold's membership in the Nation should end the jurisdiction analysis, he argues that he must be a non-Indian because he does not possess any Indian blood. But that fact does not make Reynolds a non-Indian for purposes of SDVCJ. Although the definition of "Indian" for purposes of federal criminal jurisdiction requires that a person possess Indian blood, Congress did not adopt that definition when it recognized SDVCJ. Compelling the Nation to adopt the federal definition would undermine a fundamental aspect of its sovereignty: The ability to define and control its membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Because Petitioner is not a non-Indian for purposes of SDVCJ, the District Court's jurisdiction should be affirmed.

The Amantonka Nation Code adheres to the statutory requirements found in the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq*., and VAWA 2013, 25 U.S.C. § 1304. These federal statutes set the floor as to what rights a tribe is obligated to provide its

members. ICRA contains a set of ten fundamental rights that roughly mirror the U.S. Bill of Rights. But there are noticeable differences between the two documents, including the rights to counsel and equal protection under ICRA.

VAWA 2013 is a recent expansion of tribal jurisdiction in a Congressional effort to address the crisis of domestic violence against Indian women in Indian country. VAWA 2013 allows tribes to prosecute non-Indian defendants with tribal connections who commit domestic violence against a spouse or intimate partner. To exercise this SDVCJ, the tribes must provide non-Indian defendants increased rights. The Amantonka Nation Code mirrors the rights of VAWA 2013 and even gives Indian defendants more rights than ICRA requires.

Despite the Nation meeting its statutory obligations, Reynolds contends that if he is classified as an Indian, he has had his equal-protection rights violated. But Reynolds fails to establish where his equal-protection right is rooted. This Court has conclusively held time and again that tribes are not constrained by the U.S. Constitution. Therefore, Reynolds cannot have a Fourteenth-Amendment Equal-Protection claim. But even looking at a Fourteenth-Amendment claim, Reynolds fails to meet his burden under a strict-scrutiny or rational-basis analysis. ICRA's equal-protection rights are narrower than those guaranteed by the U.S. Constitution. So if Reynolds cannot meet his burden under the Fourteenth Amendment, he also cannot meet his burden under ICRA. A review of ICRA and its statutory language and history shows this to be the case.

The Amantonka Nation satisfied all relevant legal requirements in its Nation Code. It met all its legal requirements when it appointed counsel to Reynolds. Reynolds fails to adequately establish his alleged equal-protection violation. Because the Nation followed its obligation under statutes that pass a rational-basis analysis, Reynolds' writ of habeas corpus should be denied.

ARGUMENT

I. Reynolds is not a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction because he is a naturalized Amantonkan citizen.

It is well-established that Indian tribes possess inherent authority to prosecute enrolled members who violate tribal law. *United States v. Wheeler*, 435 U.S. 313, 324–25 (1978). The Amantonka Nation wielded this well-established authority when prosecuting Reynolds, a naturalized citizen and enrolled member of the Nation. Reynolds cannot dispute the Nation's settled jurisdiction over its members, so he instead argues that he is a non-Indian subject only to the Nation's Special Domestic Violence Criminal Jurisdiction (SDVCJ) because he does not possess any Indian blood.

But this argument conflates the scope of tribal and federal criminal jurisdiction. Although a person must have Indian blood to be considered an "Indian" under federal criminal jurisdiction, this Court has never compelled tribes to adopt that definition for purposes of tribal criminal jurisdiction. And Congress did not incorporate the federal definition when it granted tribes' SDVCJ in VAWA 2013. Instead, Congress enacted SDVCJ to supplement tribes' existing prosecutorial authority by recognizing criminal jurisdiction over persons otherwise not subject to tribal prosecution. Reynolds was already subject to the Nation's inherent criminal jurisdiction over enrolled members, so he is not a non-Indian for purposes of SDVCJ.

A. The Nation exercised its inherent criminal jurisdiction over enrolled members when prosecuting Reynolds, not SDVCJ, which only applies to non-Indian defendants.

In enacting VAWA 2013, Congress enhanced tribes' existing criminal jurisdiction by granting additional authority to prosecute non-Indians committing domestic-violence offenses. *See* Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23 (2013) (codified at 25 U.S.C. § 1304 (Supp. 2017)). This SDVCJ narrowly restored criminal jurisdiction over non-Indians, a

class of defendants previously immune from tribal prosecution under this Court's holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Here, the Nation did not rely on SDVCJ in prosecuting Reynolds. It instead exercised its inherent criminal jurisdiction over enrolled members because Reynolds is a naturalized citizen and enrolled member of the Nation. The Nation can therefore prosecute Reynolds under its inherent criminal jurisdiction over enrolled members. Because Reynolds is not otherwise immune from the Nation's criminal jurisdiction, he does not fall within the class of persons barred from tribal jurisdiction under *Oliphant*. Thus, Reynolds is not a non-Indian for purposes of SDVCJ and is instead subject to the Nation's inherent criminal jurisdiction over its enrolled members.

1. The Nation had criminal jurisdiction over Reynolds under *Wheeler* because he is an enrolled member of the tribe.

Indian tribes, though subject to ultimate federal control, are separate and self-governing sovereigns. *Wheeler*, 435 U.S. at 322. Because their existence pre-dates European colonization, tribes retain all "aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* at 323. One aspect of sovereignty retained by tribes is the authority to exercise criminal jurisdiction over enrolled tribal members. *Id.* at 324–25. A tribe's inherent prosecutorial authority over its members is one "Congress has repeatedly recognized . . . and declined to disturb." *Id.* at 325. This inherent authority is justified by the "voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Duro v. Reina*, 495 U.S. 676, 694 (1990). In short, Indian tribes possess inherent criminal jurisdiction over tribal members, who consent to jurisdiction by voluntarily obtaining tribal membership.

Here, the Nation exercised its inherent criminal jurisdiction over Reynolds—an enrolled member. The Nation defines its membership to include persons who become

naturalized citizens by marrying current citizens. Naturalization reflects a "historical practice of adopting into [the Nation's] community those who marry citizens of the [] Nation." 3 Am. Nation Code § 201. Reynolds married an Amantonkan citizen under this historical practice, hoping to become a naturalized citizen "entitled to all the privileges afforded all [Nation] citizens." *Id.* § 203. This required Reynolds to live on the Reservation for two years, complete courses in Amantonkan government and culture, pass a citizenship test, and perform one-hundred hours of community service for the Nation. *Id.* § 202(a)–(d). These voluntary acts culminated in Reynolds's citizenship, with the Nation adding Reynolds to its list of enrolled members. *Id.* § 203. Like any other enrolled member, Reynolds was subject to the Nation's inherent criminal jurisdiction under *Wheeler*.

2. The Nation did not assert SDVCJ because Reynolds is not a non-Indian otherwise excluded from tribal prosecution by *Oliphant*.

Although Reynolds's membership in the Nation should end the jurisdiction analysis, Reynolds contends that he is a non-Indian subject only to SDVCJ. SDVCJ narrowed a jurisdictional gap created by *Oliphant*. After *Oliphant*, Indian tribes could not exercise criminal jurisdiction over non-Indians absent specific authorization from Congress. 435 U.S. at 212. Recognizing the epidemic of domestic violence against Indian women committed by non-Indians in Indian country, Congress enacted VAWA 2013, enhancing tribes' authority to prosecute these offenders through SDVCJ. *See* 25 U.S.C. § 1304. The plain text of VAWA 2013 confirms that SDVCJ applies exclusively to non-Indian defendants previously shielded from tribal prosecution under *Oliphant*. Because Reynolds is not a non-Indian shielded from tribal prosecution under *Oliphant*, he is not a non-Indian for purposes of SDVCJ.

VAWA 2013's text confirms that SDVCJ complements existing tribal criminal jurisdiction. Congress defined SDVCJ as "the criminal jurisdiction that a participating tribe may exercise under [Section 1304] but could not otherwise exercise." *Id.* § 1304(a)(6).

Jurisdiction under Section 1304 includes any act of "domestic violence or dating violence that occurs in the Indian country of the participating tribe." *Id.* § 1304(c)(1). Participating tribes can exercise this SDVCJ over "all persons." *Id.* § 1304(b)(1). The "all persons" language, when read together with the earlier definition, plainly conveys the complementary nature of SDVCJ: It applies to all persons over whom tribes could not otherwise assert criminal jurisdiction.

The persons over whom tribes could not otherwise assert criminal jurisdiction before Congress recognized SDVCJ were non-Indians under *Oliphant*. In *Oliphant*, the Suquamish Indian Tribe prosecuted two defendants for crimes committed on the Port Madison Reservation in the State of Washington. 435 U.S. at 194. The Tribe claimed criminal jurisdiction over all persons who committed crimes within the territorial borders of the Reservation. *Id.* at 193–94. Both defendants were "non-Indian residents" on the Tribe's Reservation. *Id.* at 194. The *Oliphant* Court held that the Tribe could not prosecute the defendants because tribes cannot exercise criminal jurisdiction over non-Indians absent specific authorization from Congress. *Id.* at 212. So after *Oliphant*, Indian tribes could not assert criminal jurisdiction over non-Indian defendants.

But *Oliphant* does not preclude tribes from asserting jurisdiction over naturalized citizens with no Indian blood—naturalized citizens exactly like Reynolds. Neither defendant in *Oliphant* was a Suquamish Indian Tribe member. Pet'r App. at 33, 45, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (No. 76-5729). And the Suquamish limited its membership to persons with at least one-eighth Suquamish blood. *Id.* at 44. Reynolds, unlike the *Oliphant* defendants, is an enrolled member and naturalized citizen of a tribe that does not require Indian blood to become a member. In *Oliphant*, the Suquamish could not prosecute the defendants because they were nonmembers and therefore non-Indian. But here,

the Nation can prosecute Reynolds because he is an enrolled member and naturalized Amantonkan citizen. Because *Oliphant* permits tribal jurisdiction over naturalized citizens, Reynolds is not a person over whom the Nation could not otherwise assert criminal jurisdiction without SDVCJ. Put differently, he is not a non-Indian for purposes of SDVCJ because he is a person over whom the Nation already possessed criminal jurisdiction.

Reynolds may argue that he is a non-Indian for purposes of SDVCJ because he possesses the necessary ties to an Indian tribe listed in § 1304. It is undoubtedly the case that when asserting SDVCJ over a non-Indian defendant, the defendant must possess at least one of the ties to an Indian tribe listed in § 1304. 25 U.S.C.§ 1304(b)(4)(B). Those ties include residence or employment in the tribe's Indian country, or marriage to a tribe member. *Id.* Reynolds possess all these ties—he is married to an Amantonkan member, employed by the Nation, and resides on the Nation Reservation. But none of these facts confers non-Indian status on Reynolds for purposes of SDVCJ.

The "ties to an Indian tribe" provision defines an exception to the applicability SDVC. It does not define non-Indian. Congress inserted this provision to the "Exceptions" subsection of 1304(b). When Congress inserts an exception to a statutory rule, that exception generally does not to define the scope of the rule itself. *E.g.*, *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 264 (2013). Here, the definition in § 1304(a), not the exceptions clause in § 1304(b), defines the scope of SDVCJ. In other words, SDVCJ—which grants tribes criminal jurisdiction over non-Indians otherwise immune by *Oliphant* from tribal prosecution—applies unless the non-Indian defendant does not possess one of the enumerated tribal ties. So if Reynolds were a non-Indian, SDVCJ would apply because he possesses the requisite tribal ties. But merely possessing one those ties does not make him a

non-Indian for purposes of SDVCJ. Reynolds is instead a naturalized Amantonkan citizen prosecuted under the Nation's inherent criminal jurisdiction over its enrolled members.

B. Although Reynolds does not possess Indian blood, that fact does not make him a non-Indian for purposes of SDVCJ.

Reynolds next argues that he is a non-Indian for purposes of SDVCJ because he does not possess any Indian blood. The federal common law definition of "Indian" for purposes of criminal jurisdiction does require that a person possess some Indian blood. But Congress did not adopt that definition when it recognized SDVCJ and the Nation is not obligated to follow the federal approach when exercising its inherent criminal jurisdiction over enrolled members. Holding otherwise would invade the Nation's fundamental right to define its membership requirements to the detriment of tribal sovereignty.

1. The definition of "Indian" for purposes of federal criminal jurisdiction does not apply to SDVCJ under VAWA 2013.

Federal criminal jurisdiction over offenses committed in Indian country often turns on whether the defendant or victim was an Indian. *E.g.*, 18 U.S.C. § 1153(a) (2012). Because the statutes granting federal jurisdiction do not define Indian, federal courts have developed a two-part definition. *E.g.*, *United States v. Zepeda*, 792 F.3d 1103, 1106 (9th Cir. 2015) (en banc). To meet the federal common law definition, a person must: (1) possess some Indian blood, and (2) be recognized by a tribe or the federal government as Indian. *Id.* Reynolds argues that under the federal definition, he is a non-Indian because he lacks Indian blood.

But the federal definition of Indian does not apply here for two reasons. First, the principal case establishing the federal definition, *United States v. Rogers*, 45 U.S. 567 (1846),, clearly distinguishes between tribal and federal definitions of Indian. Second, Congress did not incorporate the *Rogers* definition when it recognized SDVCJ. For these

reasons, the federal definition of Indian for purposes of criminal jurisdiction does not apply here.

First, the principal case establishing the federal definition, *Rogers*, clearly distinguishes between tribal and federal jurisdiction. *Rogers* involved a federal prosecution under a federal criminal statute for a murder committed in Cherokee Nation territory. *Id.* at 571–72. The statute permitted federal jurisdiction over offenses committed in Indian country unless both the defendant and victim were Indian. *Id.* at 572. The defendant argued that as adopted Cherokee citizens, both he and the victim were Indians exempt from federal prosecution under the statute. *Id.* at 572. Both the *Rogers* victim and defendant were white men with no Indian blood adopted as Cherokee citizens through marriages to Cherokee women. *Id.* at 567–68. The *Rogers* Court rejected that argument, holding instead that neither the victim nor the defendant was an Indian within the meaning of the federal statute's exception because they did not possess any Indian blood. *Id.* at 572–73.

Rogers does not apply here because it expressly distinguished between federal and tribal definitions of Indian for purposes of criminal jurisdiction. The *Rogers* Court concluded that a white man "adopted in an Indian tribe does not thereby became an Indian" under the federal criminal statute. *Id.* The next sentence, however, limits that conclusion to the federal definition. That sentence emphasized that a defendant, although not an Indian for purposes of federal criminal jurisdiction, could by tribal adoption "become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages." *Id.* at 573. This Court later affirmed *Rogers*' distinction between federal and tribal definitions of Indian for purposes of criminal jurisdiction. *See Norfire v. United States*, 164 U.S. 657, 661–62 (1896) (affirming the Cherokee Nation's exclusive jurisdiction over a murder committed by two full-blooded Cherokee of a white victim adopted by marriage as Cherokee). So under

Rogers, a person without Indian blood but adopted by a tribe can be subject that tribe's criminal jurisdiction.

Here, Reynolds may not meet the federal definition because he lacks Indian blood, but he does meet the Nation's definition. Like the *Rogers* defendant, Reynolds is a naturalized Nation citizen "entitled to all the privileges" of Nation citizenship. 3 Am. Nation Code § 203. But unlike the *Rogers* defendant, Reynolds challenges tribal—not federal—jurisdiction. He has by adoption as an Amantonkan citizen "become entitled to certain privileges in the tribe, . . . mak[ing] himself amenable to their laws and usages." *Rogers*, 45 U.S. at 573. Whatever the significance of Reynolds' blood status on federal jurisdiction, that status does not allow Reynolds to evade the Nation's inherent jurisdiction over its enrolled members. In sum, *Rogers* does not apply here because it recognizes that a defendant may be an Indian for purposes of tribal jurisdiction but not for federal jurisdiction.

Second, the federal definition should not apply here because Congress did not adopt the *Rogers* definition when it recognized SDVCJ. SDVCJ grants jurisdiction over persons otherwise precluded from tribal prosecution. *See* 25 U.S.C. § 1304(a)(6), (b)(1). Those persons are non-Indians under *Oliphant*. But *Oliphant* did not adopt the *Rogers* definition of Indian and neither did Congress when it recognized SDVCJ.

Oliphant did not adopt the *Rogers* definition of Indian and does not impose a blood requirement. *Oliphant* mentions *Rogers* once. 435 U.S. at 208–09. That sole mention was for the proposition that Indian reservations are territory of the United States. *Id.* But the opinion never cites *Rogers*'s blood requirement or applies that requirement to tribal courts. *Oliphant* instead bars tribal criminal jurisdiction over nonmembers, a limitation this Court has continued to recognize. *Wheeler*, 435 U.S. at 326 (describing *Oliphant* as holding that

Indian tribes "cannot try nonmembers in tribal courts"). *Oliphant*'s silence on *Rogers*' blood requirement strengthens the conclusion that the federal definition does not apply here.

The text and legislative history of VAWA 2013 similarly strengthen the conclusion that SDVCJ does not rely on the federal definition of Indian. This Court has long-recognized the principle that when interpreting statutes affecting Indian tribes, "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). Any intention to undermine Indian self-government requires an unambiguous expression in the statutory text. *Id.* Here, interpreting Section 1304 as incorporating the federal Indian definition would significantly undermine the Nation's ability to define its membership and assert jurisdiction over its members.

No such intention appears in the text of Section 1304. The definitions subsection does not define Indian. *See* 25 U.S.C. § 1304(a). Unlike other statutes incorporating the federal definition, Section 1304 does not refer to statutes that rely on the *Rogers* definition. *See*, *e.g.*, 25 U.S.C. § 1301(4) (defining "Indian" by reference to the Major Crimes Act definition, which federal courts interpret under the *Rogers* test). Moreover, the VAWA 2013 committee reports make several references to *Oliphant* but nowhere mention *Rogers*. H.R. Rep. No. 112-480, at 58 (2012); S. Rep. 112-153, at 9 n.23 (2012); S. Rep. 112-265, at 5–6 (2012). Any intent to incorporate a blood requirement is entirely absent in the text and history of VAW 2013. VAWA 2013 unambiguously does not deviate from *Oliphant* and adopt the *Rogers* definition of Indian.

2. Compelling the Nation to adopt the federal definition for purposes of tribal criminal jurisdiction undermines tribal sovereignty.

Interpreting SDVCJ as incorporating the blood requirement in the federal definition offends fundamental principles of tribal sovereignty. An essential component of tribal sovereignty is the power to define membership for tribal purposes. *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 72 n.32 (1978). This power is "central to [a tribe's] existence as an independent political community." *Id.* A tribe's inherent criminal jurisdiction over its enrolled members flows from this power. *Wheeler*, 435 U.S. at 322. Consequently, any "[f]ederal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government." *Id.* at 332. Adopting Reynolds's view, that a non-Indian under SDVCJ must possess some Indian blood, would detract substantially from the Nation's self-government.

Reynolds asks this Court to hold that Indian tribes must apply the federal Indian definition before asserting criminal jurisdiction over enrolled members. But the 573 federally recognized Indian tribes do not define their membership uniformly. *See* Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 Am. Indian L. Rev. 337, 395–97 (2015). Some tribes, including the Amantonka Nation, assert criminal jurisdiction over persons lacking Indian blood but accepted as community members. *E.g.*, *Navajo Nation v. Hunter*, No. SC-CR-07-95, 1996 Navajo Sup. LEXIS 4, at *10–11 (Navajo, Mar. 8, 1998). Others limit membership to those with a certain amount of Indian blood and do not prosecute persons without that amount of Indian blood. *E.g.*, Little Traverse Bay Bands of Odawa WOTC Const. art. V (limiting membership to persons with more than one-fourth North American Indian blood quantum); Sac & Fox Tribe of the Mississippi Code ch. 22, § 22-1101 (2009) (defining "Indian" as a person who would be subject to federal criminal jurisdiction under the Major Crimes Act).

Whichever approach tribes have adopted, the choice is theirs to make—not the federal government's. There may be sound reasons for limiting membership and jurisdiction to persons possessing some Indian blood. But the ability to reach that conclusion lies solely with each individual tribe. And the Nation, an independent political entity, determined that it

would include among its members persons like Reynolds who marry into the tribe and complete the naturalization process, even if they lack Indian blood. The Nation's longstanding tradition of inclusivity demands respect and compelling it to adopt the federal definition would deny it a core feature of its sovereign powers of self-government.

In conclusion, Reynolds is not a non-Indian for purposes of SDVCJ under VAWA 2013. SDVCJ applies to non-Indians previously immune from prosecution under *Oliphant*. But Reynolds was not immune from prosecution under *Oliphant* because that case allows tribal prosecution of enrolled members without any Indian blood. Reynolds' not having any Indian blood also does not confer non-Indian status on him for purposes of SDVCJ. Congress did not incorporate the federal Indian definition requiring Indian blood when it recognized SDVCJ. And *Rogers*, the principal case supporting the federal definition, acknowledges the crucial distinction between tribal and federal jurisdiction. Forcing the Nation to adopt the federal definition offends the Nation's inherent sovereign right to prosecute tribal members.

II. The Amantonka Nation met the statutory requirements of both the Indian Civil Rights Act and the Violence Against Women Act of 2013, and neither statute violates the equal protection of Indians.

The Amantonka Nation is a federally recognized tribe. As such, it is required to guarantee basic rights to both Indians and non-Indians under ICRA and VAWA 2013. In its Nation Code, the Amantonka Nation guarantees all rights to those it prosecutes in its tribal courts. It even provides greater rights to Indians than ICRA requires. Despite meeting these requirements, Reynolds claims the Nation violated his equal-protection rights in appointing him a public defender. But Reynolds fails to distinguish whether his right stems from the U.S. Constitution or ICRA. He also cannot establish that the difference in rights has no rational basis. Therefore, the Nation did not violate Reynolds' equal-protection rights, and Reynolds' petition should be denied.

A. The Amantonka Nation Code meets the statutory requirements to prosecute Indians under the Indian Civil Rights Act.

The Indian Civil Rights Act strikes a careful balance between respecting tribal sovereignty and protecting individuals from "arbitrary and unjust actions of tribal governments." *Martinez*, 436 U.S. at 61. ICRA recognizes both the right of quasi-sovereign Indian tribes to create and enforce laws within their own jurisdiction and the long-standing principle that Congress has the Constitutional power to "prescribe a criminal code in Indian country." *United States v. Antelope*, 430 U.S. 641, 648 (1977) (citing to *United States v. Kagama*, 118 U.S. 375 (1886)).

ICRA's importance stems from the principle established in *Talton v. Mayes*—Indian nations existed prior to the formation of the U.S. Constitution and are therefore not controlled by its restrictions. 163 U.S. 376, 384 (1896). ICRA, codified in 25 U.S.C. §§ 1301–1304, fills in this gap. It provides American Indians the same "broad constitutional rights" given to non-Indian Americans under the U.S. Constitution. *Martinez*, 436 U.S. at 61. ICRA sets the minimum standards a tribe must guarantee those under its jurisdiction. The two ICRA requirements at issue here are that tribes only must provide defense counsel "at [the defendant's] own expense" and only have to provide the "equal protection of *its* laws." 25 U.S.C. § 1302(a)(1), (6) (2012) (emphasis added).

While much of ICRA mirrors the U.S. Constitution and Bill of Rights, it is not an exact reflection. Some ICRA provisions do track word-for-word. For example, the Fourth Amendment is replicated in 25 U.S.C. § 1302(a)(2), and two Fifth Amendment clauses are replicated in 25 U.S.C. § 1302(a)(3)–(4).

Where ICRA differs, especially in its lowered right to counsel, it reflects the "unique political, cultural, and economic needs of tribal governments." *Martinez*, 436 U.S. at 62. These unique cultural needs include tribal use of alternative fact-finding systems. *See United*

States v. Doherty, 126 F.3d 769, 779 (1997). The unique economic needs include the financial strains faced by many tribes. In considering ICRA, Congress heard testimony from tribal representatives who shared that their tribes were simply unable to afford indigent defense counsel for defendants. *Id.*; *Martinez*, 436 U.S. at 64. Ultimately, Congress changed the language from the U.S. Constitution and Bill of Rights when it enacted ICRA.

It changed the language to only require that tribes allow defendants counsel at their own expense. As part of a 2010 Amendment, ICRA does also require that Indian defendants be given the right to counsel if the tribe "imposes" a sentence with over a year of imprisonment. 25 U.S.C. § 1302(c). But Reynolds received only a seven-month prison sentence, so this right does not attach in his case.

Under ICRA, the Amantonka Nation was simply required to allow Reynolds counsel at his own expense. But the Nation decided to expand the right to counsel above ICRA's statutory requirements. The Nation entitles indigent Indian criminal defendants to a qualified public defender. 2 Am. Nation Code § 503. The qualifications for attorneys admitted to the Amantonka bar are regulated by professional-licensing standards and all attorneys held to a Code of Ethics. *See* 2 Am. Nation Code §§ 501; 607; and ch. 7.

Here, Reynolds was tried and convicted under 5 Am. Nation Code § 244, the Amantonka Nation's law against partner or family member assault. Reynolds is an enrolled member of the Amantonka Nation. His wife is an enrolled member of the Amantonka Nation. The crime was located on the Amantonka Reservation. As discussed in Part I, Reynolds is subject to the Amantonka Nation's inherent criminal jurisdiction over its enrolled members.

Reynolds' rights are determined only by ICRA and the Amantonka Nation Code. ICRA entitled him to retained counsel. The Amantonka Nation Code entitled him to a

qualified public defender because he met the standard for indigence. But he nevertheless maintained the right to hire his own counsel. The tribe appointed him a qualified public defender when he requested one. Because the Amantonka Nation provided indigent counsel to Reynolds, it satisfied both its ICRA and Nation Code obligations to him.

B. The Amantonka Nation also meets the statutory requirements for prosecuting non-Indians under VAWA 2013.

In 2013, Congress again exercised its right to prescribe for tribes a criminal code. *Antelope*, 430 U.S. at 648. For years, Congress had been working on a solution to the staggering statistics regarding domestic violence against Indian women. *See United States v. Bryant*, 136 S. Ct. 1954, 1959–60 (2016). Because of the "complex patchwork of federal, state, and tribal law," enforcing domestic-violence laws against non-Indian offenders was spotty at best. *Id*; *Duro*, 495 U.S. at 680. To help remedy the situation, Congress passed the Violence Against Women Act of 2013.

The pertinent provisions of VAWA 2013 were codified as part of ICRA in 25 U.S.C. § 1304. VAWA 2013 carves out a limited ability for non-Indians to be prosecuted in tribal courts. This limited ability is known as special domestic violence criminal jurisdiction. SDVCJ applies only to defendants that the tribe does not already have jurisdiction over—generally, non-Indians. 25 U.S.C. § 1304(a)(6).

Tribes exercising SDVCJ must provide extra protections to non-Indian defendants. These increased rights include the right to effective assistance of counsel equal to or greater than that provided by the U.S. Constitution. 25 U.S.C. § 1304(d). They also require a tribe-provided 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" if the crime carries with it any potential imprisonment. 25 U.S.C. § 1302(c).

This is a departure from the rights given to Indians in ICRA. ICRA does not provide a right to an attorney provided by the tribal government. And the rights created by 25 U.S.C. § 1302—rights given to a non-Indian for any crime with a *potential* prison sentence—apply to Indians only if a sentence greater than one year is imposed. *Id*.

Looking more closely to the language of the requirements for counsel under VAWA 2013, one right is to effective assistance of counsel. Neither the U.S. Constitution nor federal statute explicitly spell-out what exactly constitutes this right. *See, e.g.*, 18 U.S.C. § 3006A (2012) (defining when the right to "adequate representation" attaches, but not what qualifications are required to provide such representation). Instead, this right is governed by *Strickland v. Washington*. 466 U.S. 668 (1984). If a defendant's appointed counsel performs deficiently—making errors "so serious" that the attorney no longer functions as the counsel guaranteed the defendant by the Sixth Amendment—and that deficient performance prejudices the defense—making errors "so serious" that the trial's result is no longer reliable, —then the Sixth Amendment right to counsel has been violated. *Id.* at 687.

Second, the defense-counsel-qualifications provision is vague. Contrary to Reynolds' contention that an attorney must be a state-bar-admitted attorney, VAWA 2013 merely requires that the attorney be licensed in "*any* jurisdiction" that ensures the appropriate licensing, competence, and professional responsibility of its bar-admitted attorneys. 25 U.S.C. § 1302(c) (emphasis added). Looking to the plain meaning of this statute, "any jurisdiction" does not exclude attorneys who are admitted to practice law in tribal jurisdictions, provided the tribe controls its licensing standards and requires its licensed attorneys be competent and uphold their professional responsibilities. If Congress had wanted to require VAWA 2013 attorneys to be state-bar admitted, it could easily have included "any *state* jurisdiction" in the statute. But it did not.

The Amantonka Nation Code meets these requirements. First, when prosecuting a non-Indian defendant pursuant to its SDVCJ statute, the Nation Code requires the defendant be appointed a public defender. 2 Am. Nation Code §§ 105, 503. To qualify as a SDVCJ public defender, the attorney must have (1) earned a JD degree from an ABA-accredited law school, (2) passed the Amantonka Nation Bar Examination, (3) taken the oath of office, and (4) cleared a background check. *Id.* § 607(b). These requirements more clearly set out what the qualifications are for a public defender than what the U.S. Code provides. The Nation's qualifications also help prevent ineffective assistance of counsel claims under *Strickland*. They help ensure appointed defense counsel avoid making serious errors that would prejudice the defendant and cast doubt upon the reliability of the trial itself.

Second, the Nation also meets the jurisdictional requirement. It is a valid jurisdiction within the United States. It applies appropriate professional-licensing standards by requiring all attorneys admitted to practice in its tribal court to pass its Amantonkan bar examination and be a member in good standing of a tribal, state, or federal bar. *Id.* § 501. The Amantonka Nation Code also includes a Code of Ethics for Attorneys and Lay Counselors. This Code of Ethics requires minimum levels of competence, as set forth in Canon 1, and speaks to the expected levels of professionalism in Amantonka Nation bar-admitted attorneys. *Id.* at ch. 7. The Code of Ethics also contains a canon on handling complaints to ensure all attorneys meet its requirements.

These requirements comport with VAWA 2013 standards. Non-Indian defendants are ensured of effective assistance of counsel. The Nation provides defendants with an appropriately licensed attorney. In this case, even if Reynolds is found to be a non-Indian, the Nation met its obligations when it appointed him a public defender who had a JD from an ABA-accredited law school and was a member in good standing of the Amantonka Nation

Bar Association. Therefore, the Amantonka Nation met its obligation to Reynolds under both VAWA 2013 and its own Nation Code.

C. The Amantonka Nation did not violate Reynolds' Equal-Protection rights under the U.S. Constitution or the Indian Civil Rights Act because both statutes pass the applicable rational-basis analysis.

The question on certification to the Court asks whether Reynolds' tribal attorney satisfied the relevant legal requirements. After looking at the legal requirements under both ICRA and VAWA 2013, the answer is a conclusive yes. But Reynolds still claims that the Amantonka Nation failed to meet its obligations to him because of an equal-protection violation. Because Reynolds fails to distinguish between an equal-protection claim arising under the U.S. Constitution and a claim under the Nation Code, both are analyzed below. Ultimately, Reynolds cannot validate either claim because no such violation has occurred.

1. Reynolds' equal-protection claim must fail if it stems from the Sixth Amendment of the United States Constitution because the Sixth Amendment is not incorporated against the Amantonka Nation.

Reynolds suggests that he suffered an equal-protection violation if he is classified as an Indian because Indian and non-Indian rights differ under ICRA, VAWA 2013, and the Amantonka Nation Code. Under these laws, Indians who are charged with a crime of domestic violence are not entitled to a public defender who has graduated from an ABA-accredited law school. In fact, the Nation Code does not guarantee that the appointed counsel will be an attorney, since lay counselors also met the qualifications. But non-Indians are guaranteed an attorney who "holds a JD degree from an ABA-accredited law school." *Id.* § 607.

The Supreme Court of the Amantonka Nation rejected Reynolds' equal-protection argument. It found that the difference in its Nation Code as to attorney qualifications is immaterial and irrelevant. *Reynolds v. Amantonka Nation*, No. 17-198, at 7 (Nov. 27, 2017).

Moreover, the Court noted that all public defenders for the Nation do hold JD degrees from ABA-accredited law schools. *Id*. at n.1. The Court suggested that Reynolds was confusing the minimum requirements under the statute with the on the reality of the Nation's licensed attorneys. *Id*. at 7.

The differences in Indian and non-Indian rights in the Amantonka Nation Code are reflections of the VAWA 2013 statute itself. VAWA 2013, as codified in 25 U.S.C. § 1304 authorizes "*special* domestic violence criminal jurisdiction." 25 U.S.C. § 1304(a)(6) (emphasis added). This phrase is defined to include only those individuals that a tribe could not prosecute without the statute. *Id*. In other words, non-Indians.

VAWA 2013 gives non-Indians additional rights when a tribe exercises its SDVCJ. These rights explicitly differ from the rights given Indians under ICRA. VAWA 2013 requires tribally provided defense counsel if a term of imprisonment "*may* be imposed." *Id*. at (d)(2). This ensures the non-Indian defendant receives "effective assistance of counsel at least equal to that guaranteed by the United States Constitution." 25 U.S.C. § 1302(c)(1). Under ICRA, the tribe is only required to provide defense counsel to an Indian defendant if the defendant actually receives a prison sentence of over a year. *Id.* § 1302(c). So the equal-protection violation alleged by Reynolds is rooted in the U.S. Code and merely reflected in the Amantonka Nation Code.

A foundational principle of tribal sovereignty requires tribes, who were not present nor represented at the signing of the U.S. Constitution, be free from Constitutional constraints on tribal authority. *Martinez*, 436 U.S. at 56. Recently, this Court has addressed whether this freedom from constraint applies to the Sixth Amendment. *Bryant*, 136 S. Ct. 1954. It conclusively answered that "the Sixth Amendment does not apply to tribal-court proceedings." *Id*. at 1958.

The text of ICRA supports this Court's interpretation that the Sixth Amendment does not apply to tribal criminal justice. ICRA did adopt some rights under the U.S. Constitution wholesale. But the right to equal protection was not one of those rights. The Fourteenth Amendment requires "the equal protection of the laws". U.S. Const. amend. XIV. But ICRA requires only "the equal protection of *its* laws". 25 U.S.C. § 1302(a)(8) (emphasis added). One canon of statutory construction presumes meaningful variation. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion"). Another canon of statutory construction requires national statutes to be liberally construed in favor of Indians. *Chickasaw Nation v. United States*, 534 U.S. 84, 88 (2001). When these canons are paired together, a clear picture emerges that the right to equal protection under ICRA is narrower than under the U.S. Constitution.

Even if the plain meaning of the statute and Supreme Court precedent were not clear, the legislative history also shows that the difference in rights was intentional. In enacting SDVCJ, Congressional concern was focused on non-Indian defendants tried under the new special domestic violence criminal jurisdiction. *See, i.e.*, H.R. Rep. No. 112-480, 58–59; S. Rep. No. 112-153, at 10. The main concern was the lack of Constitutional protections given to non-Indians who could be prosecuted under SDVCJ. *Id.* Congress specifically recognized that the Constitution does not apply to sovereign Indian nations. *Id.* The difference in rights for Indians and non-Indians under VAWA 2013 was not a mistake or an accident. It was a purposeful addition to the statute to protect non-Indians who would be tried in tribal courts, courts which may use customs and traditions with which a non-Indian is unfamiliar.

Looking to statutory purpose is another crucial component to analyzing Constitutional questions like equal protection. In *Morton v. Mancari*, this Court looked to the overriding

purpose behind preferring Indians for employment within the Bureau of Indian Affairs. 417 U.S. 535 (1974). The purpose for the preference was to help Indians "assume a greater degree of self-government". *Id*. at 542. This is the same purpose at issue under VAWA 2013. Due to the epidemic of domestic violence against Indian women, Congress sought a solution that would help tribes combat this abuse. S. Rep. No. 112-153, at 8–9.

The purpose of expanding jurisdiction to non-Indians in VAWA 2013 was to help expand the ability for tribes to "investigate, prosecute, convict, and sentence" non-Indians who assaulted their Indian spouse, intimate partner, or dating partner in Indian country. *Id.* at 8–9, 32. This expanded jurisdictional reach is limited—it only extends to domestic violence against a spouse or intimate partner and requires the non-Indian defendant to have a tie to the tribe itself. The purpose of VAWA 2013 is to address situations exactly like the one before the Court now.

Equal-protection claims are rooted in the Fourteenth Amendment. Since the Fourteenth Amendment as incorporated into ICRA is narrower than the Fourteenth Amendment to the U.S. Constitution, it follows that if Reynolds cannot establish a claim of discrimination under the Fourteenth Amendment, neither could he establish a claim under ICRA. *See, e.g.*, *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971).

Under the Fourteenth Amendment, equal-protection claims require state action. U.S. Const., amend. XIV ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws"). Here, there is no state action. Simply because tribes are subject to federal regulation does not "render them arms of the federal government." *Doherty*, 126 F.3d at 777. As sovereign entities, tribes simply cannot act as the state.

Next, Reynolds seems to be arguing that the requirements under VAWA 2013 constitute invidious racial discrimination. Racial classifications require a "strict scrutiny"

analysis. *Adarand Constructors v. Pena*, 515 U.S. 200, 236 (1995). But this Court held in *Morton v. Mancari* and affirmed in *United States v Antelope* that the term "Indian" does not denote a racial preference. *Morton*, 417 U.S. at 553; *Antelope*, 430 U.S. at 645. Instead, federal regulation is based on the political classification of people who have their own institutions "as members of quasi-sovereign tribal entities." *Morton*, 417 U.S. at 554; *Antelope*, 430 U.S. at 646. This Court has noted the difference between being an enrolled member of a tribe—an individual choice—and a member of a racial category—something you are born into. *Antelope*, 430 U.S. at 646.

Under a strict-scrutiny analysis, claiming that the use of "Indian" in a federal statute connotes a racial classification gives rise to concerns over the legitimacy of the entire field of U.S. Indian Law. If the classification of Indian formed an "invidious" racial group—rather than a discrete political group—the entire body of law dealing with Indian affairs would be "effectively erased." *Morton*, 417 U.S. at 552. No statutory class of people known as "Indian" could exist. But because the term "Indian" has been established to refer to a political classification, the Court does not use a strict-scrutiny analysis.

Because strict scrutiny does not apply, the appropriate test is the rational-basis test, the same test used in *Morton*. The rational-basis test requires the state to show its purpose is "constitutionally permissible" and the classification is necessary. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978). Looking at the purpose of the statute, a rational basis clearly emerges. Like in *Morton*, the purpose of VAWA 2013 is to "further Indian self-government." *Morton*, 417 U.S. at 555. VAWA 2013 allows tribes to have more control in "stem[ming] the tide of domestic violence experienced by Native American women." *Bryant*, 136 S. Ct. at 1960.

Expanding tribal jurisdiction to include SDVCJ holds non-Indian perpetrators accountable for their acts of violence. But before expanding tribal jurisdiction, Congress was concerned with making sure non-Indians would still receive all the Constitutional rights they were used to. To that end, it passed the specific provision in 25 U.S.C. § 1304 that gave non-Indian defendants more rights than Indian defendants. This expansion of rights to non-Indians prosecuted under tribal jurisdiction was reasonably and rationally related to the purpose of VAWA 2013. Therefore, it passes a rational-basis analysis.

In response, perhaps Reynolds will claim that these concerns for non-Indian defendants were already met when Congress included the requirement that the victim be Indian or that the defendant met criteria showing his ties to the Indian tribe. 25 U.S.C. § 1304(b)(4). But this fundamentally misunderstands the rational-basis test. The test looks at whether *any* rational basis exists to support the legislation, not whether the rational basis proposed is the only solution. *See City of Cleburne v. Cleburn Living Ctr.*, 473 U.S. 432, 452–53 (1985). VAWA 2013 has a rational basis for its classification and its purpose is Constitutionally permissible. Therefore, it passes rational-basis scrutiny and Reynolds cannot maintain his equal-protection claim under the U.S. Constitution.

2. Because the Equal-Protection Clause under ICRA is narrower than the same clause under the U.S. Constitution, Reynolds also cannot establish an equal-protection violation under the Amantonka Nation Code.

As this Court recognized in *Martinez* and the Tenth Circuit recognized in *Groundhog*, the equal-protection guarantees under ICRA are lesser than those guaranteed by the Fourteenth Amendment. *Martinez*, 436 U.S. at 63 n.14; *Groundhog*, 442 F.2d at 682. ICRA's equal-protection provision requires only equal protection under its own laws. 25 U.S.C. § 1302(a)(8). Therefore, similarly situated people under ICRA must receive equal

treatment. Under both ICRA and its own Nation Code, the Amantonka Nation treated Reynolds in the same manner it would have treated any other enrolled member of a tribe.

Indeed, ICRA's legislative history, like the legislative history of VAWA 2013, shows that Congress was not interested in passing ICRA if it would exactly mirror the U.S. Constitution and Bill of Rights. *Groundhog*, 44 F.2d at 681–82. The equal-protection requirements of the Fourteenth Amendment were not intended to be "embraced" in ICRA. *Id.* This difference in rights between Indians under ICRA and non-Indians under the U.S. Constitution was not overlooked but was instead "notable." *Id.*

Just as VAWA 2013 survives a rational-basis analysis, so too does ICRA for the same reasons. ICRA makes no invidious racial classifications, but instead promotes the self-governance of Indian tribes by protecting individuals from arbitrary action by the tribal government. The difference in rights is a Congressional recognition of the unique status of Indian tribes as sovereign nations with their own unique political and social customs.

Reynolds may be specifically objecting to the Nation's including "lay counselors" within the tribe's definition of "counsel." 2 Am. Nation Code §§ 501, 503, 607. Under the Nation Code, lay counselors who pass the Amantonka Nation bar examination are eligible to practice before the court. *Id.* § 501(b). None of the section 607(a) eligibility requirements for a public defender representing an Indian prevents the Nation from using a lay counselor. *Id.* § 607(a).

But this is not at odds with ICRA and is not an equal-protection violation. No Indian has a statutory right to an attorney under 25 U.S.C. § 1302, unless he is sentenced to prison for over a year. Indeed, one reason for not mandating a right to an attorney was to preserve Indian economic and social traditions, including their unique beliefs and attitudes. *Martinez*, 436 U.S. at 75 (J. White, dissenting). These protected traditions include alternative fact-

finding proceedings that do not mirror the American judicial system. *Doherty*, 126 F.3d at 779. Lay counselors may be part of these alternative proceedings. Moreover, using lay counselors may be a response to the concern shown by Congress that tribes may not be able to afford the costs of providing appointed counsel to every Indian criminal defendant. *Id*. Using lay counselors still gives indigent defendants representation while alleviating some of the financial burdens on the tribe.

Rather than show the Nation's failure to provide equal protection, Reynolds makes no claims that he has been treated differently than any other enrolled member of an Indian tribe. The Amantonka Nation provided him with a public defender who had graduated from an ABA-accredited law school and who was a member in good standing of the Amantonka Nation Bar. This met the Nation's statutory obligation under both ICRA and VAWA 2013. Both ICRA and VAWA 2013 pass a rational-basis analysis. Therefore, because the Amantonka Nation met its statutory requirements, Reynolds equal-protection claim cannot survive.

CONCLUSION

For the foregoing reasons, Respondents William Smith, John Mitchell, and Elizabeth Nelson request that this Court affirm the decision of the Thirteenth Circuit and find that Petitioner Robert R. Reynolds is an not a non-Indian for purposes of SDVCJ and that the Amantonka Nation met its statutory obligations to him without violating his right to equal protection.

Respectfully Submitted,

January 13, 2019

Counsel for Respondents

APPENDIX A

Selected Provisions of the Amantonka Nation Code

Title 2 – The Courts
Title 2, Chapter 1. The Amantonka Nation District Court

Sec. 105. Criminal Jurisdiction of the Court.

(a) *Generally*. The Amantonka Nation District Court is vested with jurisdiction to enforce all provisions of this Code, as amended from time to time, against any person violating the Code within the boundaries of the Amantonka Nation's Indian country. The Court is also vested with the power to impose protection orders against non-Indians in accordance with the provisions of this Code.

(b) *Criminal jurisdiction over non-Indian domestic or dating violence*. The Amantonka Nation District Court is vested with jurisdiction to enforce all provisions of this Code against a non-Indian who has committed an act of dating violence or domestic violence against an Indian victim within the Amantonka Nation's Indian country providedthe non-Indian has sufficient ties to the Amantonka Nation.

(1) A non-Indian has sufficient ties to the Amantonka Nation for purposes of jurisdiction if they:

(A) Reside in the Amantonka Nation's Indian country;
(B) Are employed in the Amantonka Nation's Indian country; or
(C) Are a spouse, intimate partner, or dating partner of either:
(i) A member of the Amantonka Nation, or
(ii) A non-member Indian who residesin the Amantonka Nation's Indian country.

(c) *Criminal jurisdiction over non-Indian protection order violations*. The Amantonka Nation District Court is vested with criminal jurisdiction to enforce all provisions of this Code related to violations of protection orders against a non-Indian who has sufficient ties to the Nation as identified in Section 105(b)(1) and who has violated a protection order within the Amantonka Nation's Indian country provided the protected person is an Indian, and the following conditions are met:

(1) The protection order was issued against the non-Indian,
(2) The protection order is consistent with18 U.S.C. 2265(b), and
(3) The violation relates to that portion of the protection order that provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, the protected person.

Title 2, Chapter 5. Attorneys and Lay Counselors

Sec. 501. Qualifications for admissions as attorney or lay counselor.

(a) Attorneys. No person may practice as an attorney before the District Court or Supreme Court unless admitted to practice and enrolled as an attorney of the District Court upon written application. Any attorney at law who is a member in good standing of the bar of any tribal, state, or federal court shall be eligible for admission to practice before the District Court upon approval of the Chief Judge, and successful completion of a bar examination administered as prescribed by the Amantonka Nation's Executive Board.

(b) Lay counselor. Any person who meets qualifications established in this Section shall be eligible for admission to practice before the Court as a lay counselor upon written application and approval of the Chief Judge. To be eligible to serve as a lay counselor, a person
    (1) Must be at least twenty-one (21) years of age;
    (2) Must be of high moral character and integrity;
    (3) Not have been dishonorably discharged from the Armed Services;
    (4) Must have successfully completed a bar examination administered as prescribed by the Amantonka Nation's Executive Board;
    (5) Must not have been convicted of a felony in any jurisdiction.
(c) Any person whose application to practice as an attorney or lay counselor is denied by the Chief Judge may appeal that determination to the Amantonka Nation's Supreme Court within fifteen (15) days of the denial. The Supreme Court shall request a statement of the reasons for the denial from the Chief Judge, and after receiving such statement shall review the application and any other record which was before the Chief Judge and may, in its discretion, hear oral argument by the applicant. The Supreme Court shall determine de novo whether the applicant shall be admitted, and its determination shall be final.

Sec. 503. Right to counsel.

(1) Any person at his/her own expense may have assistance of counsel in any proceeding before the District Court.
(2) Any non-Indian defendant accused of a crime pursuant to the Nation's criminal jurisdiction under Title 2 Section 105(b), who satisfies the Nation's standard for indigence, is entitled to appointment of a public defender qualified under Title 2 Section 607(b).
(3) Any Indian defendant accused of a crime pursuant to the Nation's criminal jurisdiction, who satisfies the Nation's standard for indigence, is entitled to appointment of a public defender qualified under Title 2 Section 607(a).
(4) The District Court in its discretion may appoint counsel to defend any person accused of a crime.

Title 2, Chapter 6. District Court Prosecutor and Public Defender

Sec. 607. Qualifications

(a) To be eligible to serve as a public defender or assistant public defender, a person shall:
    (1) Be at least 21 years of age;
    (2) Be of high moral character and integrity;
    (3) Not have been dishonorably discharged from the Armed Services;
    (4) Be physically able to carry out the duties of the office;
    (5) Successfully completed, during their probationary period, a bar examination administered as prescribed by the Amantonka Nation's Executive Board; and
    (6) Must have training in Amantonka law and culture.
(b) A public defender who holds a JD degree from an ABA accredited law school, has taken and passed the Amantonka Nation Bar Exam, and who has taken the oath of office and passed a background check, is sufficiently qualified under the Indian Civil Rights Act to represent a defendant imprisoned more than one year and any defendant charged under the Nation's Special Domestic Violence Criminal Jurisdiction.

Title 2, Chapter 7. Code of Ethics for Attorneys and Lay Counselors.

Cannon 1. Competence.
An attorney shall provide competent representation to a client. Competent legal representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. As employed in this Code, the term "attorney" includes lay counselors.

The full Code of Ethics is found in Chapter 7 of the complete Amantonka Nation Code.

Title 3 – Citizenry.
Title 3, Chapter 2. Naturalization.

Sec. 201. Eligibility.
In recognition of and accordance with the Amantonka Nation's historical practice of adopting into our community those who marry citizens of the Amantonka Nation, the Amantonka National Council has hereby 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. Any person who has
(a) Married a citizen of the Amantonka Nation, and
(b) Lived on the Amantonka reservation for a minimum of two years

May apply to the Amantonka Citizenship Office to initiate the naturalization process.

Sec. 202. Process.
To become a naturalized citizen of the Amantonka Nation, applicants must
(a) Complete a course in Amantonka culture;
(b) Complete a course in Amantonka law and government;
(c) Pass the Amantonka citizenship test;
(d) Perform 100 hours of community service with a unit of the Amantonka Nation government.

Sec. 203. Citizenship Status.
Upon successful completion of the Naturalization process, the applicant shall be sworn in as a citizen of the Amantonka Nation. The name of each new citizen shall be added to the Amantonka Nation roll, and the new citizen shall be issued an Amantonka Nation ID card. Each new citizen is thereafter entitled to all the privileges afforded all Amnatonka citizens.

Title 5 – Criminal code.

Sec. 244. Partner or family member assault.
(a) A person commits the offense of partner or family member assault if the person:
    (1) intentionally causes bodily injury to a partner or family member;
    (2) negligently causes bodily injury to a partner or family member with a weapon; or
    (3) intentionally causes reasonable apprehension of bodily injury in a partner or family member.
(b) For the purpose of this section, the following definitions apply:
    (1) Family member means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and

adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.

(2) Partners means spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship.

(c) Violation of this section carries with it a penalty of

- a minimum of 30 days imprisonment and a maximum of three years imprisonment; and/or • a fine of up to $5000; and/or
- restitution in an amount determined by the District Court; and/or
- participation in a rehabilitation program; and/or
- a term of community service as established by the District Court.