

Pablo v. Ak-Chin Indian Community: A Path for Tribal Courts to Protect Indigenous Sovereignty and Same-Sex Marriage

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I. OVERVIEW

In 2015, the United States Supreme Court decided *Obergefell v. Hodges*, obligating states to recognize the right of same-sex partners to marry.¹ The decision was touted as a major victory for LGBTQ+ rights across the country, with one sizable exception: federally recognized Native American tribes were not required under the decision to recognize same-sex unions on their reservations.² Though tribes are generally subject to federal laws relating to criminal jurisdiction and affairs involving non-Indians, governance of most internal affairs, like domestic relationships, is reserved to the tribes under tribal sovereignty principles. Even before *Obergefell*, tribes used their sovereignty to recognize same-sex marriage, like the Coquille Tribe that passed legislation for marriage equality in 2008.³ Today, however, only a fraction of federally recognized tribes have laws that implicitly permit same-sex marriage through gender-neutral language and even fewer have laws that explicitly permit it.⁴ At least ten tribes still have express bans on same-sex marriage.⁵ In 2015, one member of the Ak-Chin Indian Community (Community) tested the validity of the Community’s same-sex marriage ban in light of the decision in *Obergefell*.⁶

The Ak-Chin Indian Community is a federally-recognized tribe with more than 1,100 enrolled members who are comprised primarily of

1. *Obergefell v. Hodges*, 576 U.S. 644, 680-81 (2015).
2. Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 54 (2006).
3. M. Alexander Pearl & Kyle Velte, *Indigenizing Equality*, 35 YALE L. & POL’Y REV. 461, 481 (2017).
4. *Id.*
5. *Id.* at 483.
6. *Pablo v. Ak-Chin Indian Cmty.*, No. CV2015-0024 (Ak-Chin Tribal Ct. Sep. 30, 2015) at 2.

Akimel O'odham and Tohono O'odham people.⁷ The Maricopa (Ak-Chin) Indian Reservation was established in 1912 and encompasses 22,000 acres near the city of Maricopa, Arizona.⁸ On May 10, 2015, Cleo Pablo, an enrolled member of the Ak-Chin Indian Community, married her long-term same-sex partner, Tara Roy, in a licensed ceremony in the state of Arizona.⁹ At the time, Pablo lived on the reservation in tribally owned Community housing with her child, who is also an enrolled member of the Community.¹⁰ She was employed by the Ak-Chin Indian Community as a probation officer.¹¹ Her wife, Roy, is a non-Indian woman that lived off reservation with her own children.¹²

After the wedding ceremony, Pablo asked the Community's benefits plan administrator to add Roy and Roy's dependents to her insurance plan.¹³ The HR coordinator denied the request, saying the benefit plan defined "spouse" as a husband or wife of the opposite sex of the employee.¹⁴ Community council members clarified that the new Arizona marriage laws could not be reflected in the benefits plan because it would violate the same-sex marriage ban in Section 9.1.B of the Ak-Chin Law and Order Code.¹⁵ Pablo decided to obtain separate, more expensive health benefits for Roy and her children.¹⁶ After contacting the Community council, Pablo felt she needed to find a new housing arrangement to live with her wife.¹⁷ She feared she could lose her job, be evicted from her tribal community housing, or even be arrested and charged with cohabitation under the Ak-Chin Indian Community Criminal Law and Order Code.¹⁸ A Community housing employee confirmed to Pablo that same-sex marriage was not recognized by the Council, but that she could pass her home onto an enrolled family member if she moved out.¹⁹

Pablo sought redress by filing a "Notice of Claim" against the Ak-Chin Indian Community in the Community Court on June 23, 2015.²⁰ The

7. *About*, AK-CHIN INDIAN CMTY., <https://www.ak-chin.nsn.us/about/> (last visited Nov. 15, 2021).

8. *Id.*

9. *Pablo*, No. CV2015-0024 at 2.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 2, 15.

16. *Id.*

17. *Id.*

18. *Id.* at 3.

19. *Id.*

20. *Id.*

defendants did not respond, so on September 30, 2015, Pablo filed a complaint for declaratory and injunctive relief and monetary damages against the Ak-Chin Community and several community officials, representatives, and tribal entities.²¹ She alleged that the same-sex marriage prohibition violated her civil rights under both the Ak-Chin Community's Articles of Association and the Indian Civil Rights Act of 1968 (ICRA).²² In 2016, the Community adopted a new version of their constitution, which would take effect on August 4, 2016.²³ The parties agreed that the complaint should be resolved under the amended constitution of the Community, because the language at issue was virtually identical to the language in the earlier version.²⁴

The parties agreed in a Memorandum of Understanding (MOU) on June 8, 2016, that the case could be resolved after the court decided the following dispositive legal question: "Is the right to marry a fundamental liberty of same-sex couples guaranteed under the laws of the Ak-Chin Indian Community?"²⁵ Pursuant to the MOU, Pablo filed a motion to dismiss all defendants other than the Ak-Chin Indian Community.²⁶ The same day, parties filed a motion to appoint a special master.²⁷ On August 29, 2016, Robert N. Clinton was appointed special master by the Ak-Chin Indian Community Court.²⁸

Prior to the hearing, the parties attended status conferences where they agreed that the dispositive question includes consideration of positive law of the Community and any laws of other governments applicable to the Community, including ICRA.²⁹ In a later status conference, the parties agreed that the matter would be resolved at a hearing on cross-motions for summary judgment on the dispositive question on January 4, 2017.³⁰ The special master for the Ak-Chin Indian Community Court *held* that the Constitution of the Ak-Chin Indian Community guarantees same-sex

21. *Id.*

22. *Id.*; see Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(8); The Ak-Chin Indian Community has not given permission for the full-text of its Law and Order Code to be available online. *Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation*, Arizona-Tribal Code, NAT'L INDIAN L. LIBR., <http://www.narf.org/nill/codes/ak-chin/> (last visited Mar. 5, 2022).

23. *Pablo*, No. CV2015-0024 at 3.

24. *Id.*

25. *Id.*

26. *Id.* at 3-4.

27. *Id.*

28. *Id.* at 4.

29. *Id.*

30. *Id.*

couples the right to marry as a fundamental right of liberty. *Pablo v. Ak-Chin Indian Cmty.*, No. CV2015-0024 (Ak-Chin Tribal Ct. Sep. 30, 2015).

II. BACKGROUND

The federal government has severely eroded tribal jurisdiction over the course of United States history. In the early days of the U.S. Supreme Court, three important cases decided during the Chief Justice Marshall court, known as the *Marshall* trilogy, shaped the founding principles of federal Native American law.³¹ The first principle is that Congress, and not the executive or judicial branches, has plenary power over Indian affairs.³² Second, treaties should generally be interpreted in favor of tribes and those treaties created a trust relationship between the U.S. government and Native American tribes and their members.³³ Finally, Indian tribes retain inherent sovereign powers over their own territory and internal affairs.³⁴

In 1934, Congress passed the Indian Reorganization Act of 1934 (IRA) to strengthen tribal self-government.³⁵ The IRA was extensive. Some of its major accomplishments included ending allotment policies, prohibiting the transfer of Indian land or shares outside of the tribe, and setting up a revolving fund to make loans to tribes for economic development.³⁶ It also allowed tribes to adopt individual constitutions and by-laws that would govern their reservations.³⁷ Although the tribal constitutions resembled the Federal Constitution in many ways, the Supreme Court held long before the IRA was enacted that tribes' sovereign authority was not derived from the Federal Constitution, but was instead an inherent, local power.³⁸ Even though Congress had the power to regulate the way tribes asserted their local authority, that did not mean the authority was a grant of federal power.³⁹ In *U.S. v. Wheeler*, the Court clarified that tribes exercise their power as "part of [their] retained sovereignty" that has not been withdrawn by treaty or statute.⁴⁰ In a pair of cases, the Supreme Court confirmed that states did not have authority

31. See generally *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

32. See *id.*

33. See *id.*

34. See *id.*

35. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1934).

36. 25 U.S.C. §§ 461, 464, 470.

37. 25 U.S.C. § 476.

38. See *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896).

39. *Id.* at 384.

40. *United States v. Wheeler*, 435 U.S. 313, 323, 328 (1978).

over civil and regulatory matters in Indian Country because it would infringe on the rights of Native Americans to govern themselves.⁴¹ The Court reinforced the principle that tribes are separate, semi-independent nations with the power to regulate their own internal affairs and are not subject to state laws that apply outside the reservations.⁴²

In 1968, Congress passed the Indian Civil Rights Act, which mirrored the Bill of Rights by imposing a set of restraints on tribes' governance of their people.⁴³ ICRA, however, did not perfectly resemble the Bill of Rights, leaving out an establishment of religion clause, a guarantee of a republican form of government, a requirement for free counsel for indigent defendants, and the right to jury trial in civil cases.⁴⁴ ICRA did, however, include a due process and equal protections clause.⁴⁵ Federal judicial review of tribal action under ICRA was significantly limited by the U.S. Supreme Court in the landmark case, *Santa Clara Pueblo v. Martinez*.⁴⁶ There, a member of the Santa Clara Pueblo Tribe brought suit in federal court requesting a preliminary injunction and declaratory statement to deny enforcement of a tribal ordinance that barred membership in the tribe for children of female tribal members that marry outside the tribe but allowed membership for children of male tribal members that married outside the tribe.⁴⁷ Martinez claimed the rule violated Title I of ICRA by denying equal protection of the law on the basis of gender and ancestry.⁴⁸

In *Martinez*, the Supreme Court held that suits in federal court against tribes under ICRA are barred by sovereign immunity because ICRA contains no express legislative intent to waive the tribe's sovereign immunity in civil suits.⁴⁹ The only remedy expressly provided by ICRA in federal courts is the writ of habeas corpus to test the legality of detention by a tribe.⁵⁰ The Court held that issues arising in a civil context will often depend on tribal customs, so a tribal forum would be better suited to resolve those issues.⁵¹ Tribal forums possess a superior cultural context

41. See *Williams v. Lee*, 358 U.S. 217, 223 (1959); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 181 (1973).

42. *McClanahan*, 411 U.S. at 172-73.

43. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302.

44. *Id.*

45. 25 U.S.C. § 1302(a)(8).

46. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

47. *Id.* at 51.

48. *Id.*

49. *Id.* at 59.

50. *Id.* at 58.

51. *Id.* at 71.

than federal courts, which would be more likely to interpret ICRA provisions in a way that “substantially interfere[s] with a tribe’s ability to maintain itself as a culturally and politically distinct entity.”⁵²

The special master in *Pablo* ultimately elected to follow the reasoning of two major Supreme Court cases that had recently been decided regarding same-sex marriage. In *U.S. v. Windsor*, the Court held that the federal Defense of Marriage Act (DOMA), which excluded same-sex couples from its definition of “spouse,” violated the Due Process Clause of the U.S. Constitution.⁵³ The Court reasoned that DOMA encroached on states’ long established authority to regulate marriage and created an unequal subset of marriages that would be recognized under state law, but not federal law, ensuring those marriages would be “second-class.”⁵⁴

In *Obergefell v. Hodges*, the Supreme Court consolidated a number of suits brought against states that refused to recognize same-sex marriages of citizens who were lawfully married in other states.⁵⁵ The couples claimed the laws denying their right to marry were a violation of their Fourteenth Amendment rights.⁵⁶ The Court held that the right to marry is a fundamental liberty protected by the Constitution and distilled four major principles derived from established precedent.⁵⁷ First, the right to marry is an individual right that exists independent of the marriage partner.⁵⁸ Second, marriage partners are protected by the right to intimate association.⁵⁹ Third, the right to marry protects children and families by providing stability, though it is not dependent on a couples’ ability to procreate.⁶⁰ Finally, the right to marry is key to legal and social order and same-sex couples denied that right are also denied the benefits and stability states associate with marriage.⁶¹ The Court held that to deny same-sex couples the fundamental right to marry as it is provided to opposite-sex couples would be a clear violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that no governmental interest overcomes this violation of a fundamental liberty.⁶²

52. *Id.* at 71-72.

53. *United States v. Windsor*, 570 U.S. 744, 751-52 (2013).

54. *Id.* at 766-67, 771-72.

55. *Obergefell*, 576 U.S. at 653-55.

56. *Id.* at 654.

57. *Id.* at 664-65.

58. *Id.* at 665-66.

59. *Id.* at 666-67.

60. *Id.* at 667-69.

61. *Id.* at 669-70.

62. *Id.* at 675, 681.

III. COURT'S DECISION

Although the wording of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) and of Article IX, Section 1(h) of the Ak-Chin Indian Community Constitution are identical, the Community is free to interpret its own constitution differently, as long as the interpretation does not violate ICRA.⁶³ The plaintiff argued that the Ak-Chin Tribal Court is bound by the decisions in *Windsor* and *Obergefell* because the Community constitution incorporated the rights afforded by both ICRA and the Federal Constitution.⁶⁴ The defendants claimed the arguments in *Windsor* and *Obergefell* have no bearing on decisions in the Tribal Court because the Ak-Chin Community is a separate tribal sovereign and the Federal Constitution does not apply to them.⁶⁵ The special master concluded neither argument is entirely correct.⁶⁶

He found Pablo's argument is incorrect because the Supreme Court does not have binding precedent over the Ak-Chin Community Court.⁶⁷ The stare decisis doctrine only applies when a court has superior jurisdiction to review the decisions of the lower court.⁶⁸ Appellate jurisdiction over tribal court decisions has never been extended to the Supreme Court.⁶⁹ The decisions in *Windsor* and *Obergefell* interpret the language of the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, none of which apply directly to any Indian tribes.⁷⁰

The plaintiff's argument that the Ak-Chin Indian Community has incorporated the rights provided by the due process and equal protection clauses of the Federal Constitution is also incorrect.⁷¹ The Constitution of the Ak-Chin Indian Community incorporates the provisions of ICRA, which differ significantly from several clauses in both the Bill of Rights and the equal protections clause of the Federal Constitution.⁷² The purpose of ICRA was to create a separate Bill of Rights for Indian tribes.⁷³ Although ICRA certainly incorporates some portions of federal law, Ak-

63. *Pablo*, No. CV2015-0024 at 15.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 16.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 16-17.

72. *Id.* at 17.

73. *Id.*

Chin law only incorporates ICRA.⁷⁴ Because the decisions in *Windsor* and *Obergefell* interpret clauses of the Federal Constitution, they do not directly interpret those clauses in ICRA, and thus are not binding on the Community court.⁷⁵

Relying on principles from *Martinez*, the special master proffered a “substantial interference” test for tribal courts to follow.⁷⁶ He reasoned that while tribes are bound by the due process and equal protection guarantees provided in ICRA, they do not have to interpret them in the same way those provisions in the U.S. Constitution have been interpreted.⁷⁷ He reasoned that tribes should interpret the protections guaranteed under the equal protection and due process clauses as the federal government does, unless the tribe proves a compelling tribal interest the federal interpretation would “substantially interfere with.”⁷⁸ The interest must be more than an assertion of sovereign right—it must be a long-held value that is important to the tribe’s identity as a culturally, historically, or politically distinct people.⁷⁹

Although United States Supreme Court decisions are not binding, they still play an important role in decisions made by tribal courts.⁸⁰ Special Master Clinton reasoned that Congress intended the interpretation of ICRA be informed by the Bill of Rights guarantees, but ultimately, ICRA’s purpose was to provide tribes the opportunity to fit those guarantees into their own cultures and traditions.⁸¹ Special Master Clinton found that unless the Ak-Chin Indian Community could show the interpretations asserted in *Windsor* and *Obergefell* substantially interfered with the tribe’s historical, cultural, or political values, the Tribal Court is strongly inclined to follow Supreme Court precedent in interpreting the due process clause and equal protection clause of ICRA, and thus the Ak-Chin Indian Community Constitution.⁸²

The Community offered a number of defenses. First, it asserted that the due process guarantees of neither ICRA nor the Constitution of the Ak-Chin Indian Community provides an individual right to marry as a

74. *Id.*

75. *Id.*

76. *Id.* at 19.

77. *See id.* at 18.

78. *Id.* at 18-19.

79. *Id.* at 19.

80. *Id.* at 17.

81. *Id.*

82. *Id.* at 19.

fundamental right because it was not enumerated in either source.⁸³ The special master quickly dismissed this argument by quoting Article IX, Section 2 of the Ak-Chin Indian Community's Constitution which states, "[t]he enumeration of certain rights in this Constitution shall not be construed to deny or diminish other rights retained by enrolled members of the Ak-Chin Indian Community."⁸⁴ The special master concluded that the Community intended to reserve rights beyond those expressly written into its constitution, like marriage, which is a fundamental right of both Indigenous and Western communities.⁸⁵

After finding the right to marry does exist under the Community's constitution, the special master then turned to the question of whether the Community can burden that right.⁸⁶ Although *Obergefell* and *Windsor* found no compelling governmental interest in distinguishing same-sex marriage from heterosexual marriage, the tribal interest test must be administered independently and take into account individual tribes' histories, cultures, and geographic relationships.⁸⁷ The plaintiff argued that same-sex marriage prohibitions could never satisfy the "substantial interference" test because of the cultural tradition of two-spirit people among the Plains Indian tribes.⁸⁸ Two-spirit people represented a third gender in Indian communities, performed the roles of both male and female members, and were allowed to be in relationships with or even marry members of either gender.⁸⁹ The plaintiff argued that the ban on same-sex marriages assimilates Western culture and does not honor the traditions of Plains Indians.⁹⁰ Special Master Clinton found the plaintiff's evidence was insufficient to prove that neither the O'odham peoples that make up the Community, nor the Ak-Chin Indian Community itself traditionally honored two-spirit individuals.⁹¹ The special master reasoned, for the purpose of interpreting ICRA and the Ak-Chin Indian

83. *Id.* at 21.

84. *Id.* (citing Article IX, Section 2 of the Ak-Chin Indian Community's Constitution. The Ak-Chin Indian Community has not given permission for the full-text of its constitution to be available online); *Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation*, Arizona-Tribal Code, NAT'L INDIAN L. LIBR., <http://www.narf.org/nill/codes/ak-chin/> (last visited Mar. 5, 2022).

85. *Pablo*, No. CV2015-0024 at 21.

86. *Id.*

87. *Id.* at 23.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

Community's Constitution, cultural traditions cannot be generalized.⁹² Even though the tradition was recognized in many Plains Indians tribes, the evidence must show the tradition was recognized specifically by the Ak-Chin Indian Community or the O'odham peoples that constitute it.⁹³

The special master recognized, however, that the burden of proof was on the Community to prove that Pablo's same-sex marriage interfered with the Community's ability to maintain its distinct cultural or political identity.⁹⁴ Even though the Community purports a sovereign right to legislate domestic rights, it recognized it is bound by the due process and equal protection clauses of its constitution and conceded that tribal members are protected from prohibitions on interracial marriage.⁹⁵ The special master found the Community's evidence that same-sex marriage interferes with the tribe's distinct identity to be insufficient.⁹⁶ The Community offered two primary reasons that same-sex marriage interfered with their cultural identity.⁹⁷ First, the Community argued it had never approved of same-sex marriage.⁹⁸ Second, it offered evidence that a majority of members of the Community had voted against same-sex marriage in an advisory questionnaire in 2016.⁹⁹ The evidence offered to support the first claim was an affidavit from Elaine Peters, museum director and community advisor for Ak-Chin culture.¹⁰⁰ Ms. Peters was responsible for researching the Community's contemporary cultural beliefs about marriage prior to the passage of the same-sex marriage ban.¹⁰¹ In her affidavit for the hearing, she stated that her research on Ak-Chin traditions and interviews with Community elders led her to conclude that the Community had long held that marriage should be between a man and a woman and that same-sex marriage could not be condoned.¹⁰²

The special master concluded that the the affidavit from Ms. Peters was insufficient evidence because it only proved Community members did not approve of same-sex marriage in 2000, when same-sex unions were not recognized by a single jurisdiction in the world.¹⁰³ The special master

92. *Id.*

93. *Id.*

94. *Id.* at 23-24.

95. *Id.* at 22, 24.

96. *Id.* at 24.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 25.

102. *Id.* at 24.

103. *Id.* at 26.

noted Ms. Peters never offered any explanation or source in her research to support her conclusion that the Ak-Chin Indian Community was historically and culturally opposed to same-sex marriage and that those beliefs were important to the O'odham people.¹⁰⁴ “*Martinez* requires more than merely trotting out culture and tradition as a trump card. It requires establishing the precise tribal interest that would be impaired by following federal and state interpretations of federal constitutional rights like due process and equal protection.”¹⁰⁵ Special Master Clinton also found that the Community’s argument was undercut by the fact that another tribe comprised of O’odham peoples had recently legalized same-sex marriage and that nearly half of the Ak-Chin Indian Community’s members were willing to overturn the ban in the advisory questionnaire on same-sex marriage in 2016.¹⁰⁶

The questionnaire asked two questions: “[should] the Community’s laws allow same-sex couples to be married within the community” and “[s]hould the Community’s laws recognize same sex marriages from outside the Community?”¹⁰⁷ Over 43% of Community members voted yes on the first question and over 45% voted yes on the second.¹⁰⁸ The special master found the near split in the Community’s beliefs about same-sex marriage provided little support for the argument that it was a deeply-held value within the Community.¹⁰⁹

Special Master Clinton also took issue with the questionnaire as evidence because it suggests that a constitutional right can be governed by the opinion of the community rather than a legal interpretation of the Constitution.¹¹⁰ He noted that if the Court in *Loving*, *Windsor*, and *Obergefell* had considered public opinion, the results of those cases would likely have been very different.¹¹¹ The purpose of fundamental rights, like freedom of religion and the right to marry, is to protect minority members from being burdened by the majority and cannot be constrained by Community approval.¹¹²

The special master also found the prohibition on same-sex marriage is both an irrational legal decision and a practical impossibility for the

104. *Id.*

105. *Id.*

106. *Id.* at 26-27.

107. *Id.* at 25.

108. *Id.*

109. *Id.* at 27.

110. *Id.*

111. *Id.*

112. *Id.* at 28.

management of tribal affairs.¹¹³ The ban is legally irrational because Ak-Chin Law and Order Code Section 9.1.4 requires the Ak-Chin Community to recognize marriages licensed in other jurisdictions.¹¹⁴ This provision includes marriages of Community members who live on the reservation as long as one partner lived off-reservation when the marriage occurred.¹¹⁵ Regardless of the legislators intention, the plain language of Section 9.1.4 requires that the Community recognize same-sex marriages that have occurred legally in the United States and other jurisdictions.¹¹⁶ Interpreted alongside the same-sex marriage ban in Section 9.1.1(B), the Community may not perform or recognize same-sex marriages between two members who live on the reservation, but must recognize those that were lawfully entered into outside the reservation as long as one spouse lived off-reservation.¹¹⁷ This interpretation would create a situation in which the only same-sex marriages that would not be recognized would be a union between two members of the Ak-Chin Indian Community that live on the reservation.¹¹⁸ The result is an irrational legal scheme that violates equal protection guarantees because it only discriminates against Community members who live on the reservation.¹¹⁹

The special master also found that the combination of Sections 9.1.4 and 9.1.1(B) creates a practical impossibility because the Community would refuse to recognize same-sex marriages for tribal purposes, but be required to recognize them for federal and some state purposes.¹²⁰ Though the Ak-Chin Indian Community is a separate sovereign, it regularly interacts with state and federal officials.¹²¹ Marriage is built into many of the governmental functions of the Community and many federal programs that provide grants and support for the Community are bound by the federal definition of marriage.¹²² The Community's definition of marriage could cause serious conflict in the administration of federally-backed programs.¹²³ Special Master Clinton offered HUD-funded housing as an example.¹²⁴ After *Obergefell*, HUD instituted a rule prohibiting housing

113. *Id.* at 29.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 30.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 32.

providers from inquiring about the sexual orientation or gender identity of applicants or occupants and from using that information to deny housing.¹²⁵ Reservation housing funded by HUD would have to allow same-sex couples to live there, but Community-funded housing could deny those same couples.¹²⁶ Same-sex couples living in HUD-funded housing would then be violating the Community's Criminal Law and Order Code, which forbids cohabitation.¹²⁷

The special master also wrote that the same-sex marriage ban could cause issues for Harrah's Ak-Chin Hotel and Casino, which is located on the reservation and is a major source of income for the Community and its members.¹²⁸ If the Community prohibited same-sex couples from occupying the same room at the hotel, the ban could create negative press and harm business.¹²⁹ If, however, the Community allowed same-sex couples to occupy rooms together, couples that are members of the Community under its criminal jurisdiction could be charged with cohabitation, even if they did not live together on the reservation.¹³⁰ The same-sex marriage ban would create a dynamic in which Community members face discrimination non-members do not.¹³¹ Additionally, the special master noted the casino would be faced with a legally impossible decision when reporting the marital status of employees for state tax collection through the casino gaming licence.¹³² Reporting that employees are married to a spouse of the same sex would violate the Community's own laws, but to report them as single would violate Arizona's laws.¹³³

Though the Ak-Chin Indian Community is a separate, sovereign entity, it does not exist in a vacuum.¹³⁴ The political decisions of the surrounding jurisdictions clearly affect the practical realities of the Community.¹³⁵ For these reasons, the special master held that the same-sex marriage ban not only violates the equal protection clause of ICRA and the Constitution of the Ak-Chin Indian Community, but also creates

125. *Id.*

126. *Id.* at 33.

127. *Id.*

128. *Id.* at 31.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 34.

135. *Id.*

impractical and illogical decisions for the Community's management of day-to-day life on the reservation¹³⁶

IV. ANALYSIS

The outcome in *Pablo v. Ak-Chin Indian Community* is important, not because it sets binding precedent for other courts or Indigenous communities, but because it is an example of the ways that tribal court systems can respect the rights of individual LGBTQ+ tribe members while maintaining the sovereignty and self-governance of the tribe. Though each federally-recognized tribe is its own sovereign entity and has no obligation to follow or consider the legal decisions of other tribes, this case could still prove influential. Tribal leaders and judges do consider the decisions and actions of culturally similar tribes. In fact, the special master's decision in *Pablo* was influenced by nearby tribes that had already recognized same-sex marriage.¹³⁷

The "substantial interest" test developed by the special master in this case could certainly be adopted by other tribal courts to reach a similar outcome. Other tribal courts could argue that the principles the special master pulled from *Martinez* to derive the test cannot be seamlessly applied in a tribal court setting. In *Martinez*, the Supreme Court held that federal courts lacked jurisdiction over ICRA issues, because if they made the decision there would be a strong likelihood the court would supplant tribal interests and interfere with tribal identity.¹³⁸ *Martinez* purports that federal courts should not apply their own interpretations to ICRA where it interferes with tribal interest.¹³⁹ In *Pablo*, the "substantial interest" test determines whether following federal court precedent would substantially interfere with tribal interests.¹⁴⁰ Critics of the test could argue it encroaches on tribal sovereignty by obligating tribes to follow federal precedent unless they have a significant reason not to do so. The special master's reasoning, however, protects tribal sovereignty by excepting them from following federal precedent if it interferes with their culture or identity, which are key facets of their sovereignty. It also provides tribal courts with a roadmap to protect the rights of its LGBTQ+ members without the direct involvement of the federal government.

136. *Id.*

137. *Id.* at 26.

138. *Martinez*, 436 U.S. at 71-72.

139. *See id.*

140. *Pablo*, No. CV2015-0024 at 18-19.

If Cleo Pablo or a similarly situated plaintiff in the future brought this suit in federal court, it could create a scenario under which tribal sovereignty over members' civil rights could be limited. A federal court could certainly construe the holding in *Martinez* broadly and decide it lacks jurisdiction over the issue of same-sex marriage.¹⁴¹ It is also possible, however, to distinguish a case about marriage equality from *Martinez*, which was ultimately a case about tribal membership, which is a core facet of a tribe's political and cultural identity.¹⁴² If a federal court decided to hear such a case, decided it had jurisdiction, and interpreted ICRA as protecting same-sex couples right to marriage, many outside of the tribe would see it as a win for LGBTQ+ Native Americans. Similarly, if Congress amended ICRA to protect the right to marry for same-sex couples, tribes across the country would then be obligated to recognize same-sex marriages on their reservations.¹⁴³

Advocates for LGBTQ+ rights and tribal sovereignty, however, reject both of these federally-imposed approaches to achieve marriage equality on reservations.¹⁴⁴ They argue instead that marriage equality on reservations should come from the tribes themselves, because anything else would further erode tribal sovereignty.¹⁴⁵ Such a large demonstration of federal authority could put LGBTQ+ tribal members at risk of being the recipient of hostile reactions from other members of the tribe.¹⁴⁶ Federally-imposed marriage equality would also undermine the efforts of LGBTQ+ tribal members and advocates to increase education about traditional acceptance of two-spirit and third-gender Indians.¹⁴⁷ Their progress within their own communities could be wiped away because of its association with the erosion of tribal sovereignty.¹⁴⁸

Internal changes to laws prohibiting same-sex marriage, however, would bolster those movements and support their efforts to convince other tribal members that same-sex marriage is not a colonist ideal being forced on Native Americans.¹⁴⁹ Rather, colonization turned them away from traditional acceptance of two-spirit and third-gender peoples and toward

141. Pearl & Velte, *supra* note 3, at 484.

142. *Id.* at 484-87.

143. *Id.* at 487-88.

144. *Id.*

145. *Id.* at 490.

146. *Id.* at 490-91.

147. *Id.*

148. *Id.*

149. *Id.* at 495-96.

European heteronormativity.¹⁵⁰ One cannot understate the importance of a tribal court deciding in favor of same-sex marriage in *Pablo v. Ak-Chin Indian Community*. The case provides a clear framework for other tribal courts to utilize to protect the rights of their LGBTQ+ members while maintaining tribal sovereignty. After the *Martinez* decision, Francine Jaramillo, an Isleta Pueblo member and tribal judge said, “[Tribal court litigants] want to be treated fairly. And do we need ICRA or the federal government to tell us how to do it and this is the way you have to do it? I’d have to say no, we don’t.”¹⁵¹

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150. *Id.* at 493-96.

151. Michigan State University College of Law, Indigenous Law and Policy Center 5th Annual Indigenous Law Conference, Forty Years of the Indian Civil Rights Act—History, Tribal Law, and Modern Challenges (Oct. 10-11, 2008).

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