IN THE AK-CHIN INDIAN COMMUNITY COURT
CIVIL DIVISION
47314 W. Farrel Road
Maricopa, Arizona 85239

CLEO PABLO, a married woman,

Plaintiff,

v.

THE AK-CHIN INDIAN COMMUNITY, A Federally chartered tribe under the Indian Reorganization Act,

Defendant.

Case Number: CV-2015-00024-CO

SPECIAL MASTER'S REPORT

APPEARANCES:

Sonia Martinez, Counsel for Plaintiff CLEO PABLO

William Strickland and Amy Courson, Counsel for Defendant THE AK-CHIN INDIAN COMMUNTIY

BEFORE: ROBERT N. CLINTON, Special Master

As the parties were in agreement that no genuine issues of material fact existed between them, this matter is before the Special Master pursuant to designation of a dispositive issue set forth below and on orally agreed upon cross-motions for summary judgment based on the court record in this case and the Defendant Ak-Chin Indian Community's Disclosure of Affidavits, Documentary Evidence, and Written Materials dated October 14, 2016 that was received into the record for resolution of the cross-motions for summary subject to the objections lodged in Plaintiff's Objections to Defendant's Affidavit Exhibits filed October 24, 2016. For reasons discussed more fully below, the Special Master determines and recommends that the Plaintiff's Motion for Summary Judgment should be granted and the Defendant's Cross-Motion for Summary Judgment should be denied. While the Special Master might not have phrased the Dispositive Question identically to the agreed-upon language of the parties, specifically:

> Is the right to marry a fundamental right of liberty of same-sex couples guaranteed under the laws of the Ak-Chin Indian Community?,

the Special Master finds and recommends for reasons set forth below that the Dispositive Question must be answered in the affirmative based on the Civil Code of the Ak-Chin Indian Community, the current Constitution of the Ak-Chin Indian Community, which took effect on August 4, 2016, and, in particular, the Equal Protection and Due Process Clauses of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community and the federal Indian Civil Rights Act of 1968, 28

U.S.C. § 1302(8).

Background

A. Factual Background

Cleo Pablo (Pablo), the Plaintiff in this proceeding, is an enrolled member of the federally recognized tribe, known as the Ak-Chin Indian Community (Community). She grew up in the various O'Odham cultures that comprise the Ak-Chin Indian Community. She was at all times relevant to this proceeding and is employed by the Tribe as the Tribe's probation officer. She is the biological mother of a minor child who is also an enrolled tribal member. On May 10, 2015, Pablo married the love of her life, her same-sex partner, Tara Roy (Roy), under Arizona law in a state-licensed ceremony celebrated off-reservation. Roy is non-Indian and has children of her own. Prior to their marriage, Pablo dated Roy for ten years although they resided in separate locations, Pablo with her son in tribally-owned Community housing on the Reservation and Roy with her children off the reservation.

After their state-licensed marriage, Pablo contacted the Ak-Chin Indian Community's Human Resources Benefit Coordinator of the Plan Administrator ("HR"), in an effort to obtain insurance benefits for her same-sex spouse and their dependents. The HR coordinator, Ms. Connie Miguel, allegedly explained to Mrs. Pablo that the Tribe's benefit plan did not recognize insurance eligibility for same-sex spouses or their children. Ms. Miguel, who was also the Benefits Plan Administrator, indicated that under the benefits plan the term "spouse" is defined as "an employee's husband or wife, *of the opposite sex*" [emphasis added].

Thereafter, Mrs. Pablo reached out to various members of Community Council for clarification on the Plan and the Community's denial of her insurance benefits for her same-sex spouse and dependents. Community Council Member, William Antone, responded to Mrs. Pablo's email on December 18, 2014, and stated that:

> H.R.'s citation to the Benefit Trust Plan ("Plan") does not presently provide benefits to a same-sex partner. The Plan is written the way it is because of the Community's laws. The Council is aware that Arizona's marriage laws have change[d]. This change occurred in October, after U.S. District Court for the District of Arizona declared Arizona's same-sex marriage prohibition to be unconstitutional and, to date, the Community's marriage laws have not been amended. If the plan were changed, it would be inconsistent with the [C]ommunity's laws [...].

Following Pablo's email exchange with Mr. Antone, she continued to email H.R. about her special enrollment rights. The Tribe's H.R. Office denied Pablo's persistent requests for spousal insurance eligibility because she was married a person of the same-sex. Accordingly, Pablo obtained separate health benefits for Roy and her children at a substantially higher cost.

After the marriage, Pablo decided that in order to live together as a single married family she had to arrange alternative living arrangements for herself, Roy, and their children because the Ak-Chin Criminal Law & Order Code, Section 8.5 prohibited their living together as a family at Pablo's previous residence, 44980 Ross St, Maricopa, AZ 85139, a tribally-owned housing residence. If Pablo

and Roy lived together as a couple in the Ak-Chin Tribal Housing Community, Pablo feared she could have been arrested for and charged with co-habitation under Section 8.5 of the Ak-Chin Indian Community Criminal Law and Order Code because she believed Ak-Chin law did not recognize her same-sex spouse. She also feared she could have been evicted for the same reason. As the Tribe's probation officer, she was not willing to risk the potential of being arrested, charged or possibly convicted of a crime, and consequently, losing her job. Accordingly, Pablo believed that Ak-Chin laws forced her to relinquish her rights to her existing tribally-owned house on the Ak-Chin Reservation. In email correspondence on this issue, Marlene A. Garcia, a Community housing employee, allegedly wrote Pablo, saying:

> Cleo, as of today the same-sex marriage is still not recognized. It won't be until the decision is made to recognize by the Council. You can pass the house on to a family member, but it has to be approved by the Board [...]. Just remember that even though you give up your home you can always come back and get on the waiting list. Because you didn't get evicted, [and] you['re] leaving on your own."

After the Tribe persisted in its refusal to recognize Pablo's otherwise legal state-licensed marriage to Roy, Pablo turned to the Community Court for redress.

B. Procedural Background

Pablo filed a "Notice of Claim" against the Ak-Chin Indian Community and others on June 23, 2015. Defendants did not respond to the Notice. On September 30, 2015, Pablo filed her Complaint for Declaratory and Injunctive Relief ("Complaint"), against the Ak-Chin Indian Community, several other Community officials, representatives, and tribal entities. Pablo alleged in her Complaint that the Ak-Chin Community's same-sex marriage prohibition violates her civil rights under the Ak-Chin Community's Articles of Association, as amended, as well as the federal Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) ("ICRA"). While her Complaint was pending, the Ak-Chin Indian Community adopted approved at new Constitution of the Ak-Chin Indian Community which took effect on August 4, 2016. While the wording of portions of the Bill of Rights provisions of the Ak-Chin Community's Articles of Association, as amended (which was in effect when the Complaint in this matter was filed) and the similar provisions of the newly adopted Constitution of the Ak-Chin Indian Community vary somewhat, the language of the provisions at issue in this case are virtually identical. Accordingly, the parties appeared to agree at oral argument that this matter should be decided under the newly-adopted Constitution of the Ak-Chin Indian Community and the Special Master has placed primary reliance on the Constitution of the Ak-Chin Indian Community that entered into force on August 4, 2016.

On June, 08, 2016, Mrs. Pablo and the Ak-Chin Indian Community entered a Memorandum of Understanding ("MOU"), where the parties agreed that this case can be resolved after the following dispositive legal question (Dispositive Question) is judicially resolved:

> Is the right to marry a fundamental right of liberty of same-sex couples guaranteed under the laws of the Ak-Chin Indian Community?

Pursuant to Rule 53(A) of the ACIC Rules of Civil Procedure, the parties jointly filed on June 8, 2016 a Motion to Appoint a Special Master. Pursuant to the MOU, Pablo filed a Motion to Dismiss all

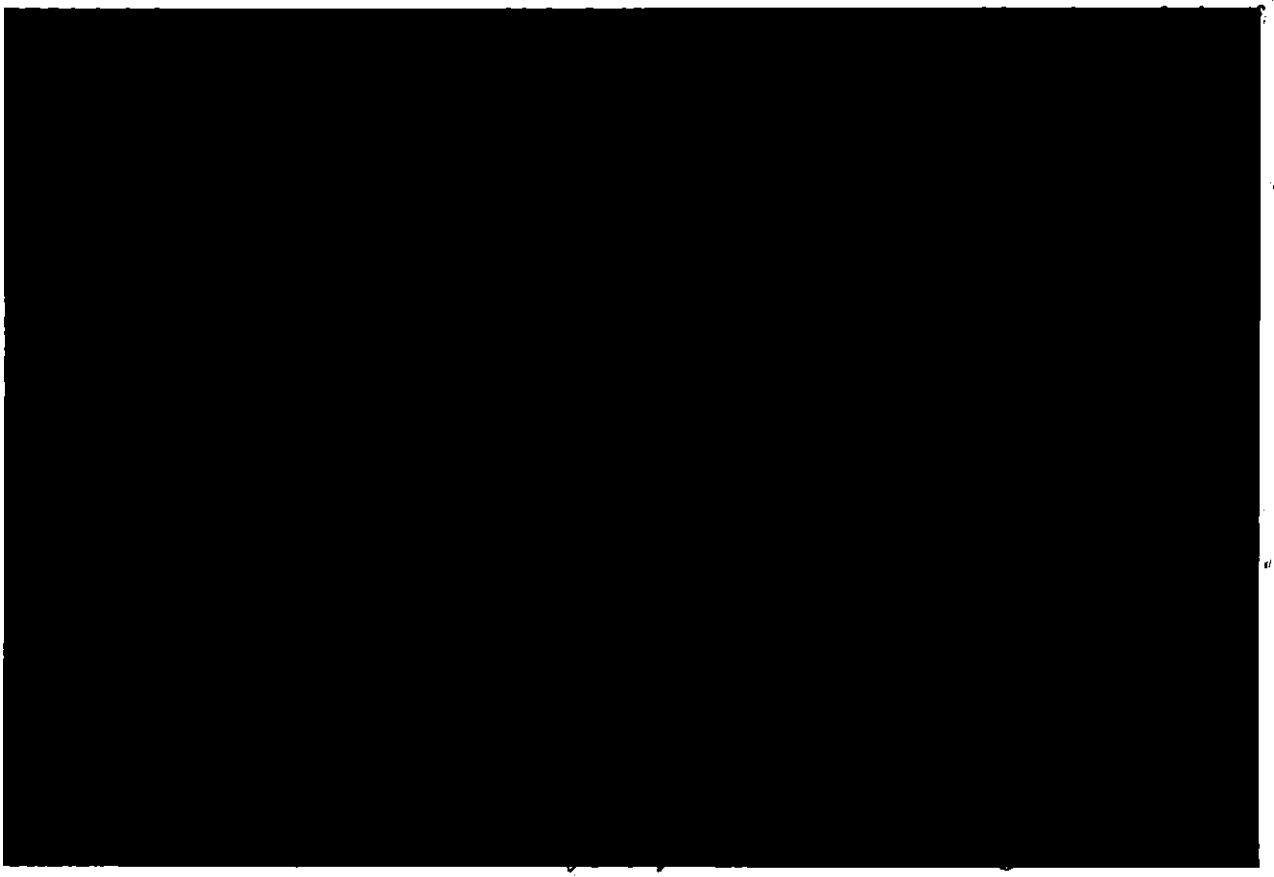
defendants, except the Ak-Chin Indian Community on June 28th, 2016 and withdrew her claim for monetary damages against the Ak-Chin Indian Community. Pablo retained her claims for declaratory and injunctive relief. The Ak-Chin Indian Community filed their Answer to Complaint (as Modified by Plaintiff's Dismissal of Defendants and Monetary Claims) (Answer) on July 14th, 2016.[1] On August 29, 2016, the Ak-Chin Indian Community Court ordered the appointment of Robert N. Clinton to serve as the Special Master for purposes of determining the Dispositive Question.

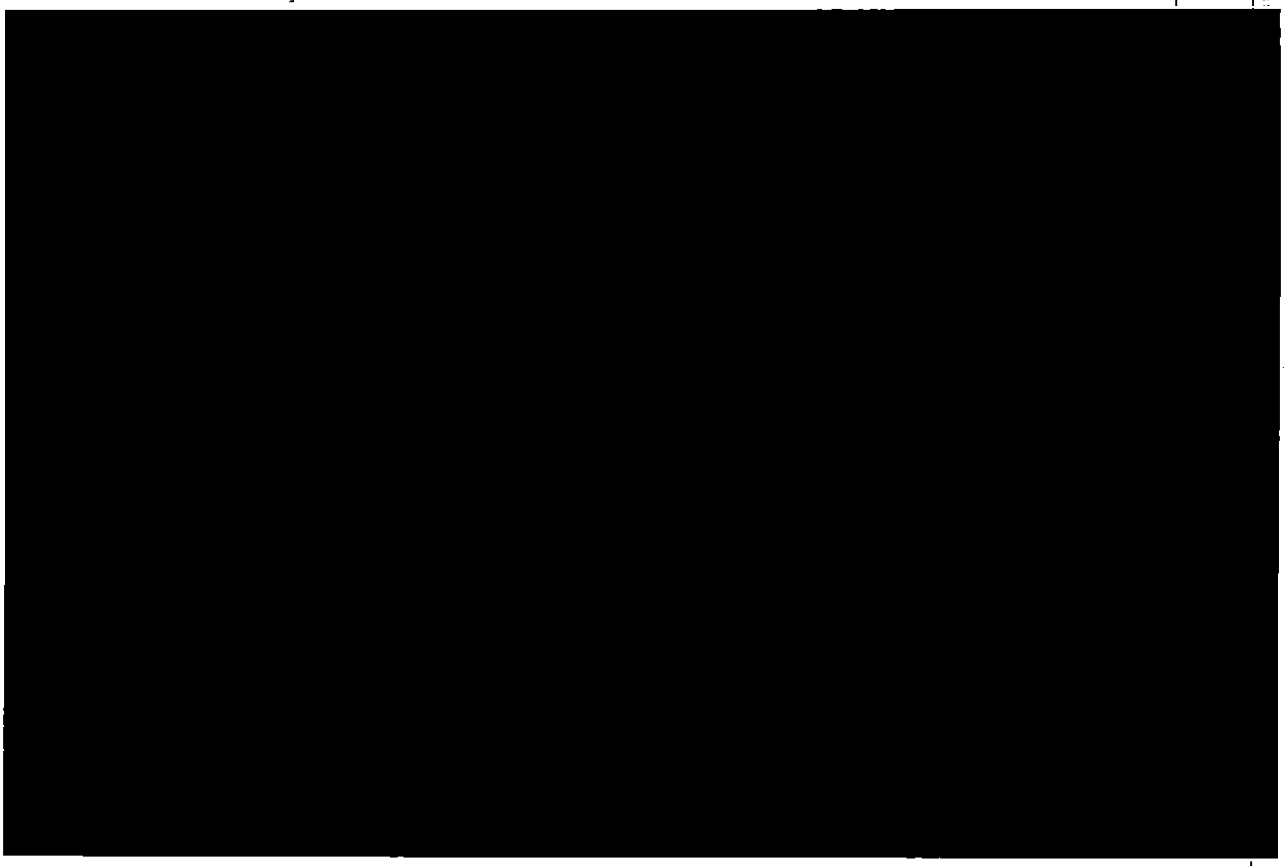
The Special Master conducted two telephonic status conferences with the parties on September 21, 2016 and November 3, 2016, respectively. As reflected in the Scheduling Order issued by the Special Master on September 29, 2016, at the first status conference both sides agreed that the dispositive question submitted for report to the undersigned Special Master – Is the right to marry a fundamental right of liberty of same-sex couples guaranteed under the laws of the Ak-Chin Indian Community – includes consideration of the positive law of the Ak-Chin Indian community, and established customary laws of the Ak-Chin Indian Community, and any laws of other governments directly applicable to the Ak-Chin Indian Community, including but not limited to the federal Indian Civil Rights Act of 1968, codified as amended in relevant part at 25 U.S.C. § 1301 set seq. The parties also agreed to a process for exchanging or objecting to additional evidence and a potential briefing schedule. At the November 3, 2016 status conference the Special Master ruled that the Defendant Ak-Chin Indian Community's Disclosure of Affidavits, Documentary Evidence, and Written Materials dated October 14, 2016 should be received into the record for resolution of the cross-motions for summary subject to the objections lodged in Plaintiff's Objections to Defendant's Affidavit Exhibits filed October 24, 2016. The parties also agreed to treat the matter as if it should be resolved on oral cross-motions for summary judgment following the briefing schedule agreed upon in the September 29, 2016 Scheduling Order. Following the submission of excellent and helpful briefs from both parties, a hearing on the cross-motions for summary judgment on the Dispositive Question was held by the Special Master at the Ak-Chin Indian Community Courthouse on January 4, 2017.

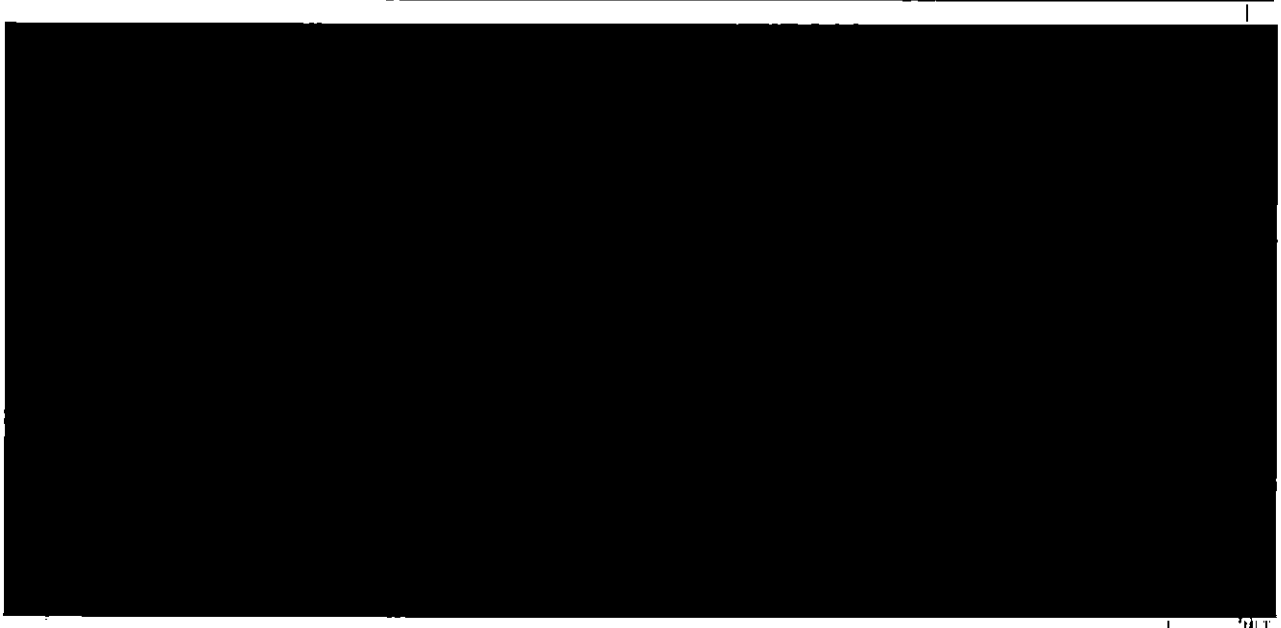
[redacted]

[redacted]

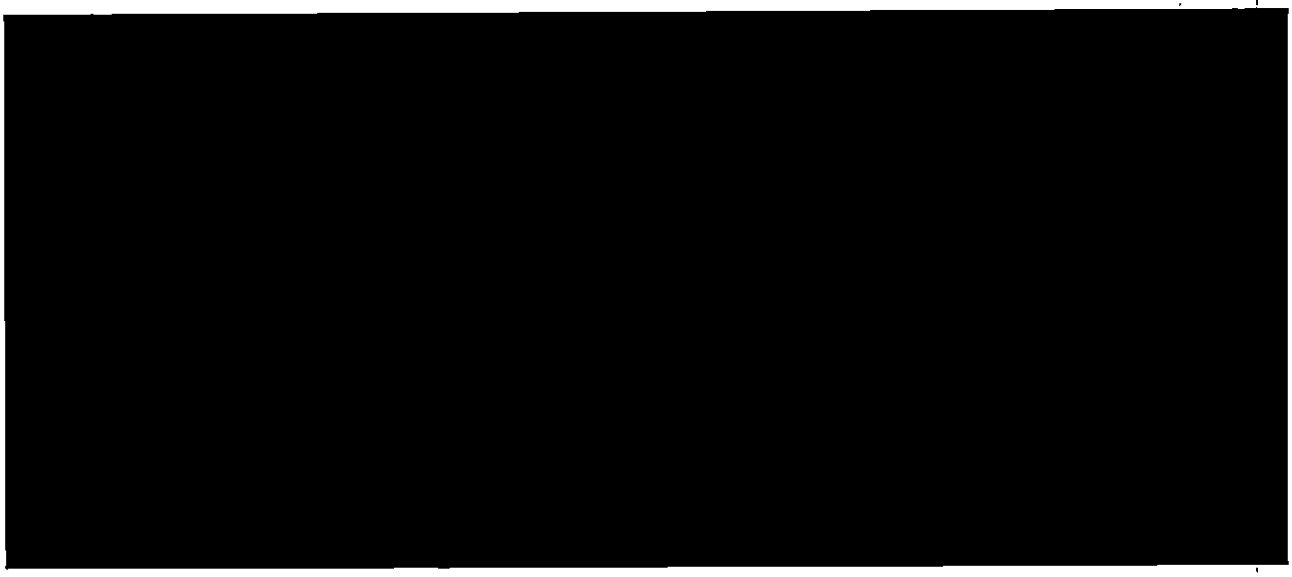
[redacted]

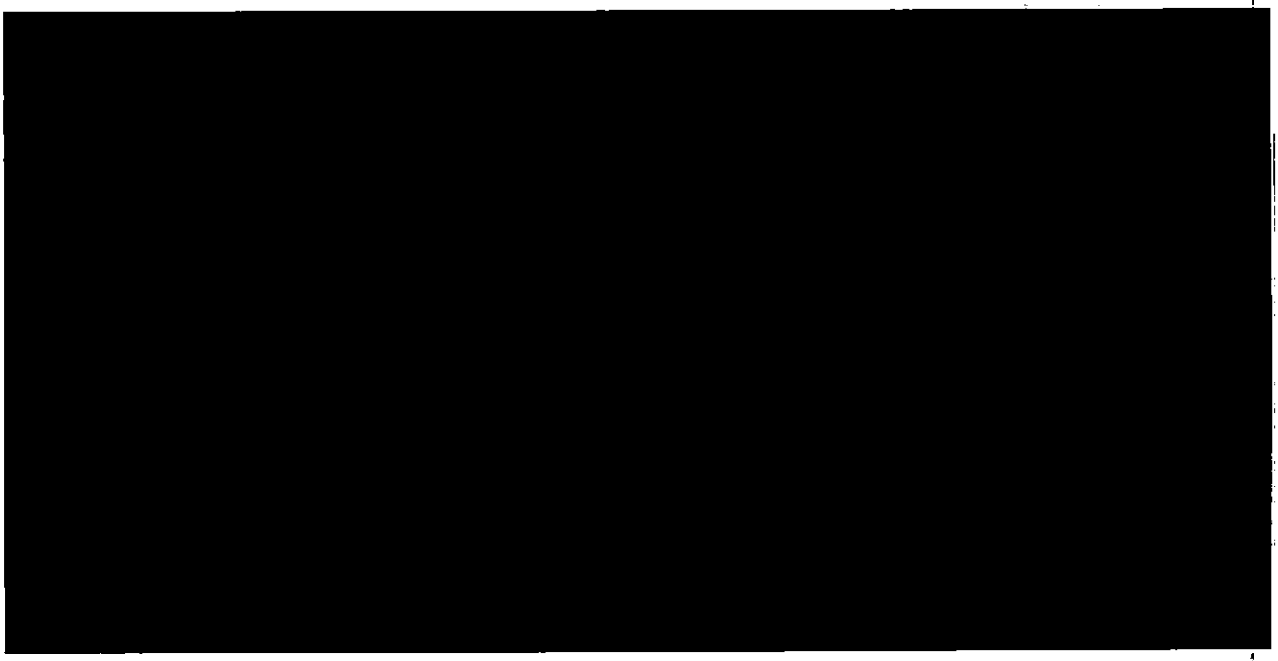


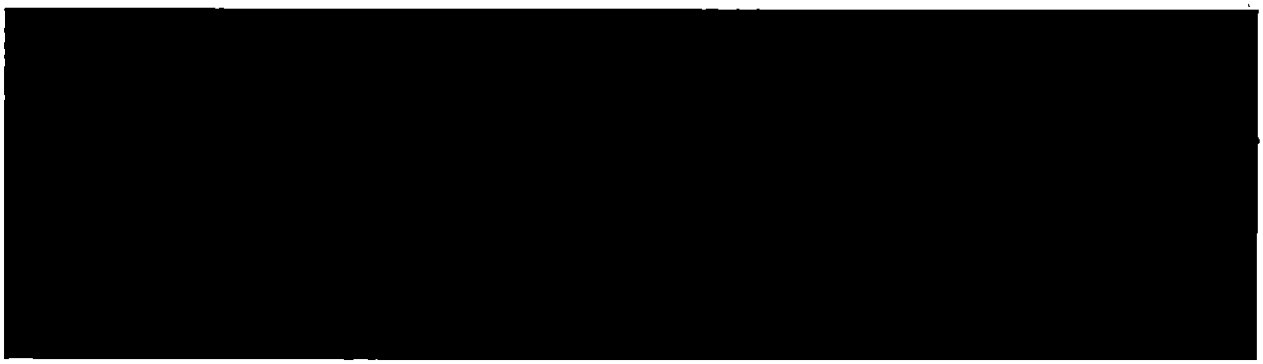




[redacted]







[redacted]

[redacted]

couples," the Special Master believes that phrasing slightly misstates the correct legal question. In American constitutional law all rights, expect perhaps State and Tribal rights, are individual, not group, rights. While marriage of any type clearly creates a union of two people and therefore a group, if any rights exist they are rights of individuals. Both *Windsor* and *Obergefell* were careful to ask whether the individual right to marry was fundamental and, having concluded that it was, only to then ask whether differentiating in the right to exercise that fundamental individual right to marry based whether the proposed marriage partner was of the same or the opposite sex constituted a denial of Equal Protection. While Indian tribes need not subscribe to the individual rights conceptions of western legal thought and law that are so antithetical to their world-view, *see* Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 Ariz. L. Rev. 739-47 (1991), in this case the Ak-Chin community has chosen to do so by expressly incorporating most of original language of the Indian Civil Rights Act of 1968 into Article IX, Section 1 of the Constitution of the Ak-Chin Indian Community. In particular the Due Process and Equal Protection guarantees of both documents apply to "any person," not to any group. Thus, the Special Master will address the question posed by the Dispositive Question from an individual, rather than group, rights prospective. That means the real issues raised by the Dispositive Question are whether all persons have a fundamental right to marry anyone under Ak-Chin law and whether the prohibition of Section 9.1.1(B) on sex-sex marriages denies Equal Protection and Due Process by illegally denying the right to marry and differentiating between different prospective partners based on their gender.

While the Equal Protection and Due Process guarantees of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8), and those of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community are worded identically, no legal requirement demands that they be interpreted the same way. Just like a state is entitled to interpret its state constitutional guarantees of rights differently and perhaps more expansively than the Fourteenth Amendment to the United States Constitution demands, the Ak-Chin Community can interpret its constitutional Bill of Rights however it desires so long as it does not violate the Indian Civil Rights Act of 1968 in its actions. Nevertheless, in this case neither party has suggested that or provided any reason why the Equal Protection and Due Process guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community should not be interpreted in parallel with and identically to the same identically-worded ICRA guarantees found in 25 U.S.C. § 1302(8). What the Community resists is interpreting them identically to the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendment. For this reason, the Special Master has treated the Equal Protection and Due Process guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community as affording precisely the same rights and having the same meaning as the same guarantees in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8). This section therefore discusses them together, rather than separating them, even though the ICRA guarantees are matters of federal statutory law and the Article IV guarantees are matters of tribal constitutional law.

The Plaintiff argues that these questions are easily decided since "the Ak-Chin Tribal Court is *bound* by the constitutional decisions of Windsor and Obergefell because Ak-Chin's Tribal Constitution appears to incorporate federal constitutional rights and the Indian Civil Rights Act ("ICRA"), into tribal law." Amended Special Master Brief for Plaintiff Cleo Pablo, pp. 1-2 (Emphasis in italics supplied). By contrast, the Community argues that as a separate tribal sovereign, the Constitution of the United States simply does not apply to the Community and the Supreme Court decisions in *Windsor* and *Obergefell* therefore are not controlling and need not be followed. Unfortunately, the Special Master believes that both arguments are mostly incorrect.

First, the Ak-Chin Indian Community Court and therefore the Special Master are not bound by the constitutional decisions in *Windsor* and *Obergefell* in the manner in which courts sometimes are *bound*, that is as precedent by the so-called doctrine of *stare decisis*. Precedents are only binding under the doctrine of *stare decisis* if they were issued by a court of superior jurisdiction which holds the power of review over the deciding forum. As the California Supreme Court explained the doctrine in *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2D 450 (1962):

> Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California.

Since the United States Supreme Court has no established power in federal or tribal law to directly review the decisions of the Ak-Chin Indian Community Courts, it does not constitute a superior jurisdiction within the meaning of the doctrine of *stare decisis*. Therefore, contrary to common belief, its decisions are not directly binding on the tribal courts as binding precedents under the doctrine of *stare decisis*.

Second, *Windsor* and *Obergefell* are cases deciding the meaning of the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment respectively. None of these constitutional clauses directly applies to any Indian tribe. By its terms the Bill of Rights of the United States Constitution, including the Fifth Amendment, only applies to the federal government and does not directly apply to Indian tribes. *Talton v. Mayes*, 163 U.S. 376 (1896); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). By their express terms the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment only apply to a State, a term the Supreme Court has refused to find includes an Indian Tribe. *Talton v. Mayes*, 163 U.S. 376 (1896). The Community attempted to make a similar point by arguing that Indian tribes are not a part of the United States Constitution and its provisions therefore do not apply to them. While the conclusion the Community advances it mostly correct, it is not for the reason that it argues. It is not that the Constitution does not apply to them, it is that the particular provisions of the Bill of Rights and the Fourteenth Amendment relied upon here do not. As the Special Master pointed out at the hearings, the Thirteenth Amendment prohibiting slavery or involuntary servitude anywhere in the United States unquestionably applies to all Indian tribes, including the Ak-Chin Indian Community, and courts have so held. *In re Sah Quah*, 31 Fed. 327 (D. Alaska 1886). Thus, at least one provision of the United States Constitution unquestionably applies directly to tribal governments.

Apparently recognizing that *stare decisis* does not bind the Ak-Chin Community Courts to follow the decisions in *Windsor* and *Obergefell*, Plaintiff also offers a different and clever reason why they should be bound – incorporation. She argues that this Court must follow those decisions "because Ak-Chin's Tribal Constitution appears to incorporate federal constitutional rights and the Indian Civil Rights Act ("ICRA"), into tribal law." Amended Special Master Brief for Plaintiff Cleo Pablo, pp. 1-2. While there is some force to the incorporation argument, as discussed below, the Special Master cannot accept and recommends that the Community Court reject the bald and simplistic manner in which the Plaintiff has advanced her incorporation argument. She simply assumes that since Article IX, Section 1 of the Constitution of the Ak-Chin Indian Community, like Article V, Section 2 of the prior Articles of Articles of Association of the Ak-Chin Indian Community, incorporates the provisions of the Indian

Civil Rights Act of 1968, it therefore incorporates the Due Process and Equal Protection guarantees of the Fifth Amendment and the Fourteenth Amendment and makes them verbatim the law of the Ak-Chin Community. Nothing could be further from the truth. Article IX, Section 1 of the Constitution of the Ak-Chin Indian Community and Article V, Section 2 of the prior Articles of Articles of Association of the Ak-Chin Indian Community incorporate the provisions of the Indian Civil Rights Act of 1968, not the Bill of Rights or the Fourteenth Amendment. This fact is demonstrated by the variance between the Indian Civil Rights Act (and Article IX, Section 1) and the Bill of Rights (as well as the Fourteenth Amendment) on certain key issues not directly applicable to this case, such as the lack of a right to appointed counsel, the lack of an establishment clause, the lack of any grand jury requirement, the lack of any right to bear arms either in defense of self or Community, the lack of any civil jury trial guarantee, and the greater guarantee of a jury trial in criminal cases than exists under the Bill of Rights. And, of course, there exists no parallel to the provisions of the Third Amendment prohibiting the quartering of soldiers in private homes. In fact, the Indian Civil Rights Act was passed in 1968 precisely because the federal constitutional Bill of Rights did not directly apply to the Indian tribes. See, *Talton v. Mayes*, 163 U.S. 376 (1896). Thus, to the extent that Ak-Chin law incorporates any body of federal law, it is most portions of the rights guarantees of the Indian Civil Rights Act of 1968 which Article IX incorporates, not the federal constitutional provisions of the Bill of Rights or the Fourteenth Amendment. Thus, one fairly could say that Article IX incorporates some federal law, specifically the Indian Civil Rights Act of 1968, and makes it part of Ak-Chin law, but it does *not* incorporate any portion of the United States Constitution. Since *Windsor* and *Obergefell* purport to interpret the federal constitutional Due Process and Equal Protection guarantees rooted in the Fifth and Fourteenth Amendments, they do not directly interpret the meaning of the same guarantees found in either the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8), or the meaning of those guarantees in Article IX. Thus, as a technical matter, those decisions do not *bind* the Community Court through incorporation, as argued by the Plaintiff.

The fact that a legal decision is not binding precedent, does not mean it cannot provide persuasive support for an analysis. Courts often look to the decisions from other non-superior jurisdictions to provide guidance and analysis even when they are not technically binding. In wading through the swamp of difficult legal analyses, courts frequently find it helpful to follow the lead of judicial explorers who preceded them even when they are not bound by their decisions. In this case the history and purposes of the Indian Civil Rights Act of 1968 (which the Ak-Chin Community twice chose to incorporate almost verbatim into its own constitutional Bill of Rights), strongly suggests that Congress intended the application of that to be informed by the federal constitutional Bill of Rights guarantees subject to adaptation as legitimate tribal religious, cultural, and historical interests otherwise dictated. The fact that Congress intended the Indian Civil Rights Act of 1968 to adopt on a statutory basis only those federal constitutional rights that could be accommodated with tribal cultural and tradition without disruption is evident on the face of the statute in at least two different ways. First, Congress omitted any Establishment Clause (although it included a Free Exercise Clause) precisely because some of the Tribes, like Hopi, were traditionally theocratic in some of their organization. Likewise, the Indian Civil Rights Act only guarantees retained counsel in criminal cases, omitting any right to appointed counsel that exists under the Sixth and Fourteenth Amendment precisely because in 1968 few, if any, Indian tribes could afford to provide the accused with counsel. *See*, 25 U.S.C. § 1302(6). Then and now, many Indian tribes have enough trouble finding, affording, and retaining trained prosecutors, lay or law-trained, without being saddled with the additional involuntary burden of providing defense counsel at tribal expense. In short, by the plain terms of the Indian Civil Rights Act of 1968, Congress intended to assure that Indian tribes would afford federal-like guarantees of the described *statutory* rights where

they could and where not inconsistent strong competing tribal interests. The federal courts have recognized that purpose and have held that short of cases of detention governed by the habeas corpus jurisdiction afforded by ICRA, 25 U.S.C. § 1303, Congress meant to leave to the tribes the difficult work of accommodating the federal statutory rights guarantees of the ICRA with competing tribal interests. Thus, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the United States Supreme Court ruled, in another case involving the same Equal Protection guarantees of ICRA, that federal courts lacked jurisdiction to hear individual rights claims seeking to assert rights under ICRA where not brought under the habeas corpus jurisdiction to challenge detention. The opinion for the Court in the *Martinez* case suggested:

> By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. Our relations with the Indian tribes have "always been .... anomalous . . . and of a complex character." . . . Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, . . ., we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments. . . .. As is suggested by the District Court's opinion in this case, . . . efforts by the federal judiciary to apply the statutory prohibitions of 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.

Martinz, 436 U.S. at 71 (internal citations omitted). Thus, in *Martinez*, the United States Supreme Court suggested two principles. First, the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 expressly imposed on Indian tribes the statutory obligation to afford all persons with whom they dealt some of the rights afforded by the federal Bill of Rights particularly in the criminal context. Second, it expressly recognized that in the civil context, including of course domestic relations, Indian tribes, while bound by the statutory Due Process and Equal Protection guarantees of 25 U.S.C. §1302(8), must be free to interpret and apply them in a way that does not "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." Unlike federal and state governments which are formed from pluralistic communities composed of many and varied racial, ethnic, religious and cultural groups, most Indian tribes, and in particular the Ak-Chin Community, frequently are composed of homogenous peoples of common cultural, linguistic, and religious orientation whose central struggle since first contact with Euro-American settlers (some might say invaders or perhaps, more charitably, undocumented immigrants) has been to maintain their distinctive cultural and political identity as distinctive people and nations. The *Martinez* decision recognizes, honors, and facilitates that important tribal objective.

As a consequence of *Martinez*, the Special Master understands the statutory Due Process and Equal Protection guarantees of 25 U.S.C. §1302(8) (as well as the constitutional guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community which merely incorporates and adopts the provisions of 25 U.S.C. §1302(8)) to require that the Community follow the tests employed for federal constitutional Equal Protection and Due Process guarantees under the Fifth and Fourteenth Amendments and to afford the same protections that federal or state governments must afford under

those guarantees unless the Community demonstrates a compelling tribal interest and shows how the federal interpretation of the right in question would " substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." This substantial interference test requires that the Community must show more than merely asserting its sovereign right as an Indian tribe to be different. The claimed interest must substantially interfere with deep seated values in the Community's culture, history or political identity as a separate people. Under this test, therefore, the interpretation of Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments respectively offered in *Windsor* and *Obergefell* presumptively should be followed by Indian tribes in applying and interpreting the statutory Due Process and Equal Protection guarantees of 25 U.S.C. §1302(8) (as well as the constitutional guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community which merely incorporate and adopt the provisions of 25 U.S.C. §1302(8)) unless the Community presents evidence of substantial interference with the type of tribal interest described in *Martinez*. In that sense *Windsor and Obergefell* are informative and persuasive, but *not* binding.

While the preceding discussion suggests that the Plaintiff's argument that the Community is *bound* by *Windsor* and *Obergefell* simply fails as a matter of law, it also does not support the Community's argument that Ak-Chin is free to simply ignore *Windsor and Obergefell* until such time as the Community Council decides, in the exercise of the sovereign authority of the Ak-Chin Community, to repeal Section 9.1.1(B). Rather, this discussion suggests that *Windsor and Obergefell* constitute persuasive precedents as to the meaning of both the statutory guarantees of Due Process and Equal Protection set forth in the Indian Civil Rights Act of 1968, 25 U.S.C. §1302(8) as well as the constitutional guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community which merely incorporate and adopt the provisions of Section 1302(8).

The Special Master need not re-canvass in detail the analytical ground plowed by Justice Kennedy in his path-breaking decisions for the majorities in *Windsor* and *Obergefell*. Suffice it to say that those cases taken collectively stand for two propositions. First, freedom to marry constitutes a fundamental liberty interest protected by the Due Process guarantees. The freedom to marry constitutes an individual right existing independently of the marriage partner. As a unanimous United States Supreme Court held in *Loving v. Virginia*, 388 U.S. 1 (1967) (declaring unconstitutional state laws prohibiting interracial marriage on Due Process and Equal Protection grounds):

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *See also Maynard v. Hill*, 125 U.S. 190 (1888).

Loving, 388 U.S. at 12. While this individual freedom to marry is certainly important to the survival of the species since it furthers child bearing and upbringing, it is not limited to that purpose since marital unions represent the foundation of almost every society's social organization irrespective of children. Thus, adults who are beyond their child bearing years fully share this vital personal right, which *Loving* called on of the basic civil rights of man, with those who can still conceive and rear children. The analysis of *Windsor* and *Obergefell* simply builds on the recognition in *Loving* that the individual right to marry constitutes a fundamental right and one of the most important civil rights of all persons. It is therefore protected as a fundamental liberty by the Due Process guarantees. Second, as in *Loving*, the

decisions in *Windsor* and *Obergefell* found the governmental interests offered to support the burdens that federal and state governments purported to place on this individual right to marry in each case woefully inadequate to overcome the harm done to such a basic right. In *Loving*, the Court concluded its opinion as follows:

> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Id. Echoing the *Loving* opinion, Justice Kennedy's opinion for the majority of the United States Supreme Court in *Obergefell* expressly rejected the existence of any legitimate governmental interest in distinguishing between opposite-sex and same-sex marriage and eloquently concluded:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Obergefell, 135 S.Ct. at 2608. Thus, having recognized the principle that the right to marry constitutes a fundamental individual liberty interest protected by Due Process guarantees, Justice Kennedy's opinions in *Windsor* and *Obergefell* finds that denying same-sex couples the same right to marry enjoyed by opposite-sex couples serves no legitimate governmental interest and thereby denies a fundamental right in violation of the Due Process guarantee and invidiously discriminates against same-sex couples in way that unjustifiably disparages them and their relationships in violation of Equal Protection guarantee.

Since *Martinez* suggests that the Equal Protection and Due Process guarantees of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) and inferentially Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community (which merely incorporate and adopt the provisions of Section 1302(8)) require the Community to follow the tests employed for federal constitutional Equal Protection and Due Process guarantees under the Fifth and Fourteenth Amendments and to afford the same protections that federal or state governments must afford unless the Community demonstrates a compelling tribal interest and shows how the federal interpretation of the right in question would "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity," the question posed for the Special Master is whether the Community has offered any evidence or explanation that would justify a departure at Ak-Chin from the interpretations of Equal Protection and Due Process offered in *Windsor* and *Obergefell* and whether whatever justification was offered satisfies the *Martinez* test of " substantially interfer[ing] with a tribe's ability to maintain itself as a

culturally and politically distinct entity."

As discussed above, *Windsor* and *Obergefell* were based on two separable holdings: (1) that the individual right to marry constitutes a fundamental right of liberty protected by the Due Process guarantees and (2) that governmental prohibitions on same-sex marriages unlawfully burden the fundamental right to marry and invidiously and illegally discriminate against same-sex couples without furthering any legitimate governmental interest. To test the adequacy of the justification offered by the Community in this case, the Special Master turns to the Community's justification relative to each of these holdings.

Surprisingly, at the hearing the Community denied the existence of any individual right to marry as a fundamental right of liberty protected by the Due Process guarantees of either 25 U.S.C. § 1302(8) or Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community. When pressed as to whether the Community could lawfully deny to *all* Ak-Chin members the right to marry by prohibiting marriage of all kinds, the Community argued that the Community Council could do so since the individual right to marry was not a fundamental right protected anywhere by Ak-Chin law. Thus, the Community argued that the Community Council, in exercising the sovereign of the Community and its domestic relations powers under Article IV(h) of the Constitution of the Ak-Chin Indian Community, could simply prohibit *all* marriage. This argument no doubt would come as a great surprise to most Community members and would seem completely inconsistent with the cultures and traditions of the O'odham peoples who compose the Ak-Chin Indian Community.

The core of the Community's argument was simply that marriage was nowhere enumerated in either the Constitution of the Ak-Chin Indian Community or the Indian Civil Rights Act of 1968 as a fundamental right. One need look no further than the Constitution of the Ak-Chin Indian Community to demonstrate that the argument offered by Community is legally unsound and must be rejected. When the Ak-Chin Community formulated and adopted its Bill of Rights in Article IX of the Constitution of the Ak-Chin Indian Community, the Community went beyond the guarantees of the Indian Civil Rights Act of 1968 and expressly provided in Section 2 that "[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." A more unequivocal rejection of the Community's argument is hard to imagine. Plainly the people of the Ak-Chin Community sought to reserve to themselves certain fundamental rights that went beyond those expressly enumerated in the Constitution. The Special Master agrees with *Loving*, *Windsor*, and *Obergefell* that the individual right to marry (perhaps together with certain political rights of participation) constitute the most fundamental right on which any people, indigenous or western, is founded. Thus the Special Master recommends that the Community Court find that the individual right to marry constitutes a fundamental liberty of all adults protected by the Due Process guarantees of both Article IX(h) of the Constitution of the Ak-Chin Indian Community and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8).

Finding that all adults possess an individual liberty to marry under Article IX(h) of the Constitution of the Ak-Chin Indian Community and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) does not, however, answer the much harder question of whether and when the Community can burden their choice of marital partners. *Loving* clearly broke important ground in this arena by holding that the states lacked any legitimate governmental interest in prohibiting the selection of a marriage partner based on race. At the hearing, the Community appeared to recognize that the Due Process and Equal Protection guarantees of Article IX(h) of the Constitution of the Ak-Chin Indian Community and the

Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) limit the Community's domestic relations powers under Article IV(h) to some extent since it appeared to concede that the Community could not, consistent with the Due Process and Equal Protections guarantees, prohibit interracial marriage.[10] So the question posed here is whether prohibiting marriage to a person of the same sex protects and furthers any compelling governmental interest that would justify the burden it places on the exercise of the individual right to marry and therefore whether discriminating against same-sex marriage in favor of opposite-sex marriage can be justified as furthering that interest. Mercifully, the Special Master need not consider that question in the abstract since the rejection of any legitimate federal or state interest supporting the prohibitions of same sex marriages in *Windsor*, and *Obergefell* already canvassed most of that ground. The test articulated here, derived from *Martinez*, basically suggests that *Windsor*, and *Obergefell* should be followed unless the Community can show some distinctive compelling tribal interest that indicates following the *Windsor*, and *Obergefell* interpretations of Due Process and Equal Protection would "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."

Before examining the evidence offered by the Community, the Special Master notes that he can imagine this *Martinez*-test being satisfied in some circumstances in ways that might permit tribes to burden, perhaps even severely burden, the individual right to marry. For example, one can imagine a very small tribe with a blood-quantum citizenship/membership requirement that has a rapidly dwindling membership base caused by exogamous marriage (that is, by marriage of tribal members to persons outside the tribe). One can imagine in that dire situation that a tribe might legitimately both prohibit and even severely punish exogamous marriage of its remaining members in order to increase the tribal population base and prevent the tribe from marrying itself out of existence through exogamous marriage. One might even imagine in such dire circumstances that the tribe might seek to increase its dwindling population base by prohibiting same-sex marriage, at least for its members of child bearing age. Whether such a prohibition on same-sex marriage might satisfy the *Martinez*-test need not be decided here. It is sufficient to note that such a case offers a substantially more difficult and compelling set of issues than those raised in *Windsor* and *Obergefell*. Likewise, in those situations where citizenship/membership is reckoned not merely through blood-quantum or lineal descent but specifically through father or mother who must be a tribal member, the tribe may have a more compelling interest in the nature of the family than might exist under federal or state law. Likewise, for Indian tribes with strong clan structures, particularly where incest-based cultural prohibitions are clan derived from the clan membership of *both* father and mother, one can imagine strong cultural arguments might raise concerns about same-sex marriage. For both this concern and the preceding one related to citizenship/membership, any tribal tradition or law that permits exogamous marriage might ameliorate the strength of these claimed interests. Likewise, a hypothetical tribe whose origin story expressly prohibits same-sex relationships (the Special Master knows of none), might have a stronger claim to avoid the results of *Windsor* and *Obergefell* to maintain its cultural distinctiveness. Finally, if marriage automatically conferred tribal citizenship/membership on a spouse, that fact would raise a completely distinct interest related to tribal political integrity not considered by *Windsor* and *Obergefell*. For a careful analysis of many of the distinctive tribal interests raised by same-sex marriage, *see* Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 Colum. Hum. Rts. L. Rev. 104 (2015), written before *Obergefell* was decided.

10 Nothing in either this sentence or this report should be read to suggest that the Community Council could not prohibit or provide penalties for marriage with non-members if it deemed such measures necessary to maintain the Community as a distinct cultural and political entity.

This discussion suggests that merely because *Windsor* and *Obergefell* held that the federal and state governments lacked any legitimate governmental interest in differentiating between same-sex and opposite-sex marriages and thereby burdening the right individual right to marry does not mean that in all circumstance tribes similarly lack any compelling tribal interest for doing so. The question in each case must be, given the culture, history, geographic and demographic position, and political reality of each tribe what compelling tribal interest does any burden on the individual right to marry seek to further and does the interest asserted satisfy the *Martinez* test.

The Plaintiff apparently argues that Community prohibitions on same-sex marriage never can satisfy the *Martinez* standard because, according to the Plaintiff:

> Historically, "at least 155 Indian Tribes embraced two spirit individuals, which within their tribal communication." Trista Wilson, *Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of A Return to Traditional Two-Spirit Culture*, 36 Am. Indian L. Rev. 161, 172 (2012). "Two spirits" references "3rd gender" individuals that existed historically in Indian communities, where certain individuals could perform both gender roles of male and female members. *Id.* And more importantly, two spirits were permitted to enter long-term relationships or marriages with other tribal members of either sex. *Id.* The Ak-Chin Indian Community's same-sex marriage ban does not adhere to traditional values, but represents assimilation when prohibiting same-sex marriage.

Amended Special Masters Brief for Plaintiff Cleo Pablo, p. 9. The Special Master is aware of the cultural tradition of recognizing, honoring and respecting so-called two spirit individuals, particularly common among numerous Plains Indian tribes, as the Wilson article she quotes suggests. The problem, however, is that Plaintiff conceded at the hearing that she has no evidence and makes no argument that such cultural traditions were known to or honored by the various O'odham peoples who form the Ak-Chin Community. She simply does not know one way or the other.

Origin stories, culture, and traditions of each Indian community are distinct and one cannot generalize from traditions common among many (but perhaps not all) Plains Indian tribes to the cultures and traditions of the Southwest and, more importantly, to the O'odham peoples who form the Ak-Chin Community. The *Martinez* test calls for a tribally-specific inquiry into the cultural practices and traditions of the specific tribal community whose laws are subject to challenge. Ersatz, romanticized pan-Indian arguments simply will not satisfy the *Martinez* test since each tribe is different. Thus, Plaintiff's argument that "Ak-Chin Indian Community's same-sex marriage ban does not adhere to traditional values, but represents assimilation when prohibiting same-sex marriage" completely lacks any tribally-specific supporting evidence, scholarship, or data and for that reason cannot be accepted by the Special Master. The fact that Plains Indian tribes traditionally honored so-called two spirit individuals provides absolutely no evidence that the O'odham peoples of the Ak-Chin Community ever did so.

While the Plaintiff generally has the burden of proof in any constitutional challenge, by showing that she has an individual right to marry and that the Community has denied her the ability to marry her same sex partner and have that marriage recognized for all purposes within the Community, she has shifted the burden to the Community to demonstrate a compelling tribal interest for burdening her right to marry in the fashion in which they have by adopting Section 9.1.1(B) and refusing to recognize her

otherwise lawful foreign marriage to her same-sex partner on that account. Thus, the Special Master must carefully scrutinize the justifications offered by the Community for its prohibition. The test, of course, is whether such justifications satisfy the *Martinez* test of "substantially interfer[ing] with a tribe's ability to maintain itself as a culturally and politically distinct entity."

The arguments offered by the Community to support its same-sex marriage prohibition contained in Section 9.1.1(B) proved to be extraordinarily meager. The Community primarily rested on (1) its sovereign right under Article IV(B) of the Constitution of the Ak-Chin Indian Community to regulate the domestic relations and (2) the claim, with which the Special Master agrees, that the Community is not technically bound by the Fifth and Fourteenth Amendment decisions in *Windsor* and *Obergefell*. The problem with the Community's position, however, is that even though it clearly possesses the sovereign right to regulate domestic relations under Article IV(B) to regulate domestic relations, those regulations are expressly made subject the Bill of Rights adopted by the Community in Article IX of the same document. Even the Community concedes that it could not, consistent with its own constitutional Equal Protection guarantees, use its domestic relations powers to burden the right to marry by prohibiting its members from marrying persons of African-American descent. The reason why such prohibitions would be invalid is that they would serve no compelling tribal interest, even if a majority of the Community Council or even a majority of the Community would be prepared (as they are unlikely to do) to vote in favor of them. So the question that must be answered here is what compelling tribal interest has the Community offered to satisfy the *Martinez* test of "substantially interfer[ing] with a tribe's ability to maintain itself as a culturally and politically distinct entity." Here, what little argument and evidentiary support the Community has offered reduces down to two simple propositions: (1) traditionally the Ak-Chin Community has never had or approved of same sex-marriage and (2) a bare majority of the Community in an advisory referendum voted against permitting same-sex marriage.

The support for these two propositions is found in three documents supplied in Defendant Ak-Chin Indian Community's Disclosure of Affidavits, Documentary, and Written Materials (Ak-Chin Disclosure), filed October 14, 2016 and received into the record subject to the Plaintiff's Objection to Defendant's Affidavit Exhibits filed October 24, 2016. The three primary documents involve two affidavits set forth in Ak-Chin Disclosure, Exhibits A & B, and the results of an advisory questionnaire submitted to the voting members of the Ak-Chin Community on the issue of same-sex marriage set forth in Exhibit C. Exhibit A is an Affidavit from Elaine F. Peters, who is an enrolled member of the Ak-Chin Community and the Museum Director of the Community's Him Dak Department as well as a Community advisor on Ak-Chin culture. The Affidavit, while not purporting to state her personal knowledge of Ak-Chin culture, suggests that as part of an advisory committee on the reform of Ak-Chin laws, which ultimately produced Chapter 9, including the prohibition on same-sex marriage in Section 9.1.1(B) she was tasked with interviewing the Community membership on the issue of same-sex marriage. Her affidavit states:

> 8. Based upon my interviews with multiple Community members, including many elders, and coupled with my research into Ak-Chin cultural traditions and beliefs, I concluded that the Ak-Chin people have long held the belief, and continued to believe, that marriage is to be confined to a man and a woman that marriage between individuals of the same sex was not to be condoned or sanctioned.

Exhibit B is an affidavit from Carmen Narcia, the Cultural Resources Specialist for the Community's

Him Dak Department whose is also an enrolled Ak-Chin member and whose general responsibilities parallel those of Ms. Peters. She assisted Ms. Peters in her investigation since she was employed at the time as an Oral Historian in the same department. Paragraph 6 of Exhibit B confirms Ms. Peter's statement in virtually identical language, although Ms. Narcia's affadavit, unlike that of Ms. Peter's, does not also claim to be based on any personal research into Ak-Chin cultural traditions and beliefs. The Plaintiff objected to both affidavits as largely based on hearsay but the Special Master received them into the record for purposes of resolving the cross-motions for summary judgment subject to and taking account of those objections. Given the expertise of both Ms. Peters and Ms. Narcia based on their job titles and the fact that the Community offered these affidavits in its words "not . . . to validate the existence of some unwritten custom or tradition," but "to document that the Community's written laws governing marital relations were, and continue to be, the product of extensive effort to discern the cultural beliefs and practices of the Community regarding marriage," the Plaintiff's objections are not particularly well taken since the Community apparently have not offered the affidavits to document unwritten tribal customs or tradition so much as to provide the legislative history behind Section 9.1.1(B) and to demonstrate that it emerged from a concerted effort to discern the *contemporary* Community cultural beliefs and practices of the regarding marriage. Brief of Defendant Ak-Chin Indian Community in Response to Special Master Brief for Plaintiff Cleo Pablo, p. 12.

Exhibit C of the Ak-Chin Disclosure contained the results of an advisory questionnaire the Community sent in 2016 to tribal members seeking answers to two questions: (1) "Should the Community's laws allow same-sex couples to be married within the community?" and (2) "Should the Community's law recognize same sex marriages from outside the Community?" As discussed in the preceding section, the second question perhaps unintentionally was misleading since the Community's laws already required the recognition of same-sex marriages from outside the Community. Therefore instead of suggesting a change in the law that would "recognize" such foreign same sex marriages, the second question perhaps might have been better and more accurately phrased as asking the Community law should be changed to prohibit the recognition of same-sex marriages from outside the Community. Whatever the defects in the advisory questionnaire phrasing, the results of the questionnaire certified on February 12, 2016 showed 64 members (43.54%) voted yes on the first question and 83 (56.46%) voted no on the first question while 66 members (45.52%) voted yes on the second question and 79 member (54.48%) voted no on the second question. No explanation was offered as to why two more votes were cast on the first question than on the second.

The questionnaire results also were reported by residence (on or off reservation) and by age (stratified into three categories ages 16-25, 26-54 and 55 or older). Significantly off-reservation members voted for changing the Community laws to both permit and recognize same-sex marriage while those residing within the Community voted against such change. This difference is viewpoint may suggest, but does not prove, that one unintended (or perhaps intended) effect of Section 9.1.1(B) has been to force those who either are in or favor same-sex partnerships to leave the Community, as Pablo already has done with respect to her residence. The results of the questionnaire stratified by age also produced interesting and perhaps surprising results. Both those who resided in the Community and those outside who were in the 18-25 age group favored changing Community law to both permit and recognize same-sex marriage. By numbers (but not percentages) the strongest opponents appear to come from the age group containing most of those of prime child bearing years, ages 26-54, who live in the Community. By contrast those in the same age category living off-reservation favor changing Community law to both permit and recognize same-sex marriage. Likewise, in the 55 and older category those living on-reservation overwhelmingly (and by the largest percentage) opposed any change that would permit or

recognize same-sex marriage while those in the same age category living off-reservation favored both changes. In short, even the elders are divided, and seriously so, mostly stratified by residence and not age. In fact all age categories living off-reservation favored both changes except for a divided 2-2 split on recognition among off-reservation 18-25 year olds. The opposition to change on the issue of same-sex marriage primarily arose from on-reservation members over the age of 25 and overwhelmingly from on-reservation members over 55, but not from those in the same age categories residing off-reservation.

Thus, the question posed for the Special Master on which to recommend a decision involves whether the interests asserted by the Community and the evidence adduced to support them rise to the level of demonstrating that following the interpretation of the Due Process and Equal Protection guarantees offered in *Windsor* and *Obergefell* would " substantially interfer[ing] with a tribe's ability to maintain itself as a culturally and politically distinct entity" under the *Martinez* test and thereby justify the Community's departure from those cases. The Special Master concludes and recommends that the Community Court find that Community's claimed interests do not satisfy the *Martinez* test. The Community expressly disclaims seeking to validate or rely upon "the existence of some unwritten custom or tradition." Brief of Defendant Ak-Chin Indian Community in Response to Special Master Brief for Plaintiff Cleo Pablo, p. 12. Thus, the Community argument appears to be that when the prohibition of same-sex marriage was drafted and adopted in 2000 the customs and traditions at Ak-Chin Indian Community, like every other jurisdiction in the world at that time, had never and did not recognize same-sex marriage and the Community believed then and now (albeit currently by a fairly narrow majority) that marriage should be between one man and one woman. No effort to validate that belief in tribal origin stories, cultural imperatives, cultural taboos, clan structure or other forms of social or political organization beyond marriage has been offered by the Community. No explanation has been offered of what harms, if any, the Community would suffer culturally or politically if it acknowledged Ms. Pablo's right to marry to love of her life. While Ms. Peter's affidavit states that her belief arises not merely from her community discussions, including discussions with elders, but also from her "research into Ak-Chin cultural traditions and beliefs," she never states exactly what those cultural traditions and beliefs were, their source and origin, and their importance in world views of the various O'odham peoples comprising the Ak-Chin Community. *Martinez* requires more than merely trotting out culture and tradition as 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.

The Community's bald and unsupported assertion of an ill-defined and poorly substantiated Ak-Chin culture and tradition against same-sex marriage is further undercut by two observations. First, at least one other Indian tribe containing large numbers of O'odham peoples, the Salt River Maricopa Indian Community, has already legalized same-sex marriage, apparently finding it no major threat to the cultural traditions and political integrity of the community. SRPMIC, Code 1976, § 3.1(A). Additionally, the Special Master was advised at the hearing that Ak-Chin's neighboring O'odham community, the Gila River Indian Community, recently had been poised to do the same thing, although that effort apparently has stalled, temporarily or otherwise. While of considerable less force given the importance of tribally and culturally specific decision making on these questions, the Special Master also notes that other Arizona tribes whose peoples are not culturally or linguistically O'odham have also permitted and recognized same-sex marriage. According to the Plaintiff, these include Fort McDowell Yavapai Nation; Pascua Yaqui Tribe; and White Mountain Apache Tribe. See Fort McDowell-Yavapai Nation, Law & Order Code, 2006, § 10-11; 5 PYTC § 2-10(A); White Mountain

Apache, Domestic Relations Code, 2015, §1.3; San Carlos Apache Tribal Constitution, Art. 5, § XII (1954). Additionally, one scholar notes that as of her writing in an article published in 2015, *before* the Supreme Court rendered the *Overgefell* decision, at least 12 tribes already had recognized same-sex marriage. *See* Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 Colum. Hum. Rts. L. Rev. 104, 110-111 (2015). Thus, tradition, culture and inertia do not appear to have prevented recognition of same-sex marriage among tribes nationwide and even before *Obergefell* required it of states.

The Community's culture and tradition argument is further seriously undercut by the results of the very advisory questionnaire the Community invokes to support it. If any widely held and deeply felt cultural taboo and tradition existed among the peoples of the Ak-Chin Community against same-sex marriage derived from their O'odham heritage, one would not expect nearly half, well over 40%, of the Community to be willing to change it to both permit and recognize same-sex marriage at Ak-Chin. Yet, that is precisely what the Community's questionnaire demonstrates.

The further problem with that questionnaire is that it assumes that the issue of same-sex marriage, like the question of whether to create a casino or a hotel or an Ak-Chin police or fire department, merely constitutes a question of policy, on a which a majority of the Community or the Community Council generally should govern, rather than a question of constitutional right. Pablo's right to marry protected as a fundamental liberty by the Due Process guarantees of Article IX(h) of the Constitution of the Ak-Chin Indian Community and 25 U.S.C. § 1302(8) is not subject to the majority vote of the Community. The Community does not get to vote on her choice of a marriage partner any more than she gets to vote on their choice of a spouse. Surely, in 1967 precisely the same arguments offered by the Community here could have been and were made by the Commonwealth of Virginia against the marriage of the Lovings. Even though the Commonwealth of Virginia had never recognized interracial marriage, had extraordinarily strong (albeit immoral) traditions against it going back to its historical slavery traditions, and a majority of Virginians in 1967 probably would have voted against interracial marriage if afforded that opportunity by referendum or a questionnaire like that employed by the Ak-Chin Community, none of these considerations prevented the United States Supreme Court in *Loving v. Virginia* from validating the fundamental liberty shared by each of the Lovings to marry. The same was true in both the *Windsor* and the *Obergefell* case, although national public opinion supporting same-sex marriage had perhaps become more supportive of that institution by the time *Obergefell* was decided than national or Virginia opinion was of interracial marriage when *Loving* validated that right to marry in 1967.

The absurdity of the Community's argument is evident by considering other rights protected by Article IX Section 1(h) of the Constitution of the Ak-Chin Indian Community and attempting to apply the Community's defense to those rights. If a member of the Ak-Chin Community sought to abandon traditional O'odham religious and cultural traditions and become Jewish, Muslim, or Mormon could his fundamental right to free exercise of religious guaranteed under Article IX, Section 1(a) be denied because there had never been a Jewish or Muslim or perhaps even Mormon Ak-Chin member and a majority opposed the practice? Surely not! If a majority of the Community believes the acquittal of a defendant on a serious criminal charge simply was outrageous and that the judge or jury got it wrong, can a majority of either the Community Council or the members of the Ak-Chin community vote to have him tried again despite his right under Article IX, Section 1(c) not to be placed in jeopardy twice for the same crime. Again, the answer is obviously no. Certainly, if the Community could save money thereby, a majority of the Community Council and perhaps the Community members might vote to

condemn private property for a community project, like a police station, a health facility, or a fire station, without paying the just compensation for the property so seized for a public project as constitutionally required Article IX, Section 1(e). Should they legally be permitted to do so merely because the majority of either the Community Council or the Community as a whole desires to save money by not paying for the property they condemn? Obviously, again the answer is no. These examples make clear a very simple point that the Community seems to have ignored in it discussion of same-sex marriage. The guarantees of constitutional rights in the Bill of Rights set forth in Article IX are expressly designed to limit majoritarian government from trampling on the rights of minorities of any sort, whether they are the minority of one in the case of our hypothetical land owner, or criminal defendants who are accused of disrupting the community, or tribal member adherents to religions that at least are non-traditional and may be strange or even perhaps abhorrent to the majority of the Community. Each is entitled to have their tribal constitutional rights protected ***from the majority***. Their tribal constitutional rights are not subject to popular referendum. Yet, the argument offered here by the Community reduces down to the simple claim that same-sex marriage was virtually unheard of, unknown, and unapproved (perhaps like Judaism and Islam) in 2000 when Section 9.1.1(B) was adopted and remains disfavored today by a slim majority of the Community. The simple answer to that argument is that like freedom of religion, like the protections against double jeopardy, and like the protections of private property from takings for public purpose without just compensation, Pablo's fundamental right to marry constitutes a liberty protected by the Due Process Clause of Article I, Section 1(h) and emphatically is *not a* proper subject community approval or disapproval. Her right to engage in perhaps the most fundamental relationship of all persons therefore is not and was not up for vote! The Special Master recommends that this answer should be supplied by the Community Court.

Surprisingly, in its brief and arguments the Community did not rely on the one argument about same-sex marriage that does mark a distinctive Community political interest – its membership rules. This concern instead was raised on his own motion by the Special Master. Specifically, and somewhat uniquely, Article II, Section 2(b) of the Constitution of the Ak-Chin Indian Community permits a person who is quarter-blood Indian who is not enrolled in any other federally-recognized tribe who has been married to the same enrolled Ak-Chin member for at least 20 years and who resided on the Ak-Chin Reservation to be adopted into the Ak-Chin Community as an enrolled member if "approved for membership by a majority vote of the registered voters of the Ak-Chin Indian Community, provided that least thirty percent (30%) of those entitled to vote shall vote in such an election." While not applicable to Pablo, since her partner, Roy, is non-Indian, in some cases marriage at Ak-Chin can create an opportunity for tribal citizenship/membership that creates a tribal interest not considered in either the *Windsor* or *Obergefell* cases. If Article II, Section 2(b) created a *right* to citizenship/membership in the Ak-Chin community derived from marriage, same-sex marriage possibly might have posed a threat to the political distinctiveness of the Community of the type *Martinez* envisions. However, since at most, Article II, Section 2(b) creates only an opportunity at the end of 20 years of marriage and residence within the Community to have the Community vote on citizenship adoption for a very narrow class of people and the Community is free to vote down the membership application for any reason, the Special Master does not believe that this unique consequence of marriage at Ak-Chin represents the kind of distinctive tribal interest that satisfies the *Martinez* test.

As a consequence of the foregoing discussion, the Special Master determines and recommends that the Community Court find that the Community has presented no distinctive, compelling tribal interest that would satisfy the *Martinez* test and justify a departure from the presumption of the Indian Civil Right Act of 1968 (and the Ak-Chin Bill of Rights which incorporates most of it verbatim in Article IX,

Section 1 of the Constitution of the Ak-Chin Indian community) that the Community must follow the interpretation of the Equal Protection and Due Process guarantees offered in the *Windsor* and *Obergefell* cases. That determination requires that the Special Master to answer the Dispositive Question in the affirmative and recommend that the Community Court find that the right to marry constitutes a fundamental right of liberty of same-sex couples guaranteed under the laws of and those applicable to the Ak-Chin Indian Community.

Two other considerations also highlight manner in which the prohibition on same-sex marriage creates such an irrational pattern of legal decision making as to be both illegal and unconstitutional under the Equal Protection guarantees of Article IX, Section 1(h) and 25 U.S.C. §1302(8). First, as noted in the preceding section, Section 9.1.4 already expressly requires the Ak-Chin Indian Community to recognize same-sex marriages licensed and solemnized in another jurisdiction including those of Community members resident on the reservation so long as at least one member of the union resided off the reservation at the time of the marriage to assure that the anti-evasion provisions of Section 9.1.4(C) were no violated. While Section 9.1.4 unquestionably contemplated no such result when drafted, its plain language compels that result today and the failure of the Community Council to amend it as more and more foreign jurisdiction recognized same sex-marriages, culminating with the State of Arizona in 2015, plainly produces this, perhaps unintended, result. Since the non-resident same-sex partner to a union could be either an Ak-Chin member or, as is true of Roy, a non-Indian or non-member, Section 9.1.4 can create a crazy-quilt pattern of some same-sex marriages involving both members and non-members being recognized under Ak-Chin law, while others are prohibited. Nothing in either Section 9.1.4 or Section 8.5 of the Ak-Indian Indian Community Criminal Law and Order prevents those same-sex couples containing at least one and perhaps two Ak-Chin members of the same sex who have been lawfully married elsewhere from returning to and living in the Ak-Chin Community.

As a consequence when one compares Section 9.1.4, as interpreted here, to Section 9.1.1(B), it is apparent that, as currently written, Ak-Chin law forbids the performance of same-sex marriage but requires its recognition if lawfully entered into in another jurisdiction where at least one of the partners then resides. Only those same-sex couples both of the members of which are Ak-Chin members and who also both reside on the reservation therefore are forbidden to marry by Section 9.1.1(B). Therefore Section 9.1.1(B) effectively discriminates against members of the Ak-Chin Community who reside on the reservation and affords to couples, including couples partnerships composed exclusively of tribal members, the opportunity to have their otherwise valid same-sex marriage from another jurisdiction recognized at Ak-Chin so long as at least on partner resided off the reservation that time of the marriage. This disparity between Section 9.1.1(B) and 9.1.4 effectively discriminates against Ak-Chin members who reside on the reservation in favor of partners who are either Ak-Chin members living off the reservation or non-members. The Special Master cannot imagine any legitimate, let alone compelling, tribal interest that would justify Ak-Chin in discriminating against its own resident members and in favor of non-resident members and non-Indians when it comes to permitting or recognizing same-sex marriage. While this concern does not require the Ak-Chin Community necessarily to permit same-sex marriage it indicates that enforcement of its anti-evasion provision of Section 9.1.4(C) would create such an irrational pattern of law with respect to same-sex marriage as to render it violated of the Equal Protection guarantees of Article IX, Section 1(h) and 25 U.S.C. Section 1(h). Thus, at a minimum every Ak-Chin member, *irrespective of residence*, should have the right to license and solemnize a same-sex marriage under Arizona law and have it equally recognized under Section 9.1.4. In this additional sense, given the current structure of Ak-Chin law and the plain

language on the recognition of foreign marriages set forth in Section 9.1.4, the Special Master believes that the right to marry constitutes a fundamental right of liberty of same-sex couples guaranteed under the laws of and those applicable to the Ak-Chin Indian Community.

In both its brief and oral submission at the hearing, the Community cleverly argued that the Equal Protection guarantees of Article IV, Section 1(h) and 25 U.S.C. § 1302(8) differed significantly from the language of similar guarantee in the Fourteenth Amendments since the former prohibited tribes from denying Equal Protection of "*it's* laws" while the Fourteenth Amendment prohibited states from denying Equal Protection of "*the* laws." From this clever and startling linguistic observation, the Community argues that *Windsor* and *Obergefell* do not apply since one can only look to Ak-Chin law, not federal law, to establish an Equal Protection violation. Two fatal problems exist with this clever linguistic argument. First, the argument says nothing about Due Process, upon which both *Windsor* and *Obergefell* partially were based since the Due Process guarantee does not contain similar disparate language. Second, and more important, even if one accepts the premise of the Community's argument that one can only look to Ak-Chin law to establish an Equal Protection violation, the Special Master still determines that one exists in the disparate between the prohibition on same-sex marriages found in Section 9.1.1(B) which clearly applies to Community members residing on the reservation and the statutory recognition of same-sex marriages lawfully contracted in other jurisdictions, even by Ak-Chin members, without evading Ak-Chin law that is required under Section 9.1.4.

Finally, one other consideration compels the same result – the practical impossibility and the irrationality of Ak-Chin refusing to recognize same-sex marriages for tribal purposes, yet being forced to recognize them for many federal, and perhaps some state, purposes. This point becomes more evident if one analyses the problem in the manner that the Community argued the case, rather the from the standpoint of the reality of its existing law under Section 9.1.4, The Community's basic position was that as a separate, culturally-distinct sovereign Indian nation with complete control over domestic relations. It neither needed to permit nor recognize same-sex marriage. In its argument to the Special Master, the Community portrayed itself as a separate sovereign enclave (which surely it is) that can and does have different laws than the State of Arizona which surrounds and encompasses it. If the issue merely involved matters that were truly local, like building or fire codes, traffic safety codes, or dog at large ordinances, this argument has considerable force. Marriage, however, is so fundamental a human right that it is built into many of the daily governmental and business functions of the Community in ways that the Community's argument has not and does not anticipate. For example, the Community necessarily will find that on many day to day issues it may need to interact state authorities or individuals on matters that involve the validity of same sex-marriages, particularly those legally contracted off-the reservation under the laws of the State of Arizona or another jurisdiction. Worst still, it is not merely the state, but more importantly the federal government, that most frequently interacts with the Ak-Chin Indian Community on a government to government basis. Increasingly since *Windsor*, federal agencies have adopted or are bound by definitions of marriage completely inconsistent with Section 9.1.1(B). This fact will affect Bureau of Indian Affairs and Indian Health Service funding programs, grants from agencies like the United States Department of Justice of the Department of Housing and Urban Development. Several examples illustrate the practical impossibility Section 9.1.1(B) creates for the Ak-Chin Community in an environment where many neighboring jurisdictions already permit and recognize same-sex marriage.

Since Section 8.5 of the Ak-Chin Indian Community Criminal Law and Order Code prohibits co-habitation, the Community likely will face a major problem at the Harrah's Ak-Chin Hotel and Casino.

If a same sex-couple from Phoenix composed of nonmembers who are legally married off the Reservation seeks to occupy the same room at the Harrah's Ak-Chin Hotel and Casino will the Tribe seek to enforce is criminal prohibition against co-habitation. As a result of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191(1978), the Community probably exercises no criminal jurisdiction over the nonmember couple but it could exclude them either from the Reservation or at least from occupying the same room at the Harrah's Ak-Chin Hotel and Casino. Since the adverse publicity from doing so unquestionably would be extraordinarily detrimental to business, in all probability that Community would not and could not enforce its prohibition on same-sex marriage or its prohibition on co-habilitation against such a married nonmember same-sex couple. Now imagine the couple is composed of a same-sex couple who are Community members and moved off the reservation and permanently reside in Phoenix precisely to avoid the combined force of Section 9.1.1(B) and Section 8.5. Since they actually moved their residence and did just go off the Reservation to evade Community laws and immediately return, they apparently did not violate the anti-evasion provisions of Section 9.1.4(C). The Community clearly has criminal jurisdiction over these members should they return to the Reservation to relax, vacation, and visit relatives at the Harrah's facility. If it enforces Section 8.5 against them and refuses to recognize their otherwise legally valid same-sex marriage either through criminal processes or by declining them hotel service, it likely creates a perverse discrimination against tribal members in favor of nonmembers in same-sex marriages who reside off the reservation. And should the Community decide not to enforce either Section 8.5 or Section 9.1.1(B) against non-resident members in otherwise lawful same-sex marriages, the only persons against whom the Community's ban on same-sex marriages operates is its own members who reside on the Reservation. Thus, continuation of the ban on same sex marriages likely would create a completely irrational pattern of discriminating against resident Community members in or seeking same-sex marital relationships, while recognizing those relationships for those residing off reservation even, perhaps, for tribal members. The Community likely cannot explain this perverse burdening the fundamental liberty of resident tribal members in their choice of marital partners while imposing no such burden on non-members or even members residing off the Reservation.

Likewise, for many other purposes from law enforcement and state tax collection through casino gaming licensing, the Ak-Chin Indian Community frequently is required to report the marital status of persons with whom it deals to the State of Arizona. If the reporting involves a non-Indian employee of the Harrah's facility who is in a same-sex marriage lawfully contracted under Arizona law, will the Community report the employee as married or single? Reporting her as single to the State of Arizona violates Arizona law, while reporting her as married violates Section 9.1.1(B). Of course, various permutations of these problems arise from member same-sex marriage partners, like Pablo, who reside off the Reservation but who work for the Community, as well as potentially nonmember same-sex spouses, like Roy, who resided off Reservation at the time of marriage but who may later move to Reservation with a member spouse and seek tribal employment while residing there. Persisting in adamantly refusing to permit or recognize same-sex marriage when the State of Arizona in which the Ak-Chin Community is located does permit same-sex marriage will create persistent irrational choices for the Community which inevitable will create inequalities contested under the Equal Protection guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8).

The irrational pattern of inequality created by Section 9.1.1(B) is more evident when one considers that Ak-Chin regularly must deal with federal governmental agencies on a regular basis from regulation of its Harrah's Ak-Chin Hotel and Casino, to tax withholding and reporting on both employees and

customers of the casino, to law enforcement reports, to grants for housing, law enforcement, and even this Community Court. Since *Windsor*, federal agencies increasingly have come to recognize same-sex marriage and in some cases federal law prohibits discrimination based on sexual orientation. Perhaps the most obvious and far reaching effect came following *Windsor* in Internal Revenue Service (IRS) Revenue Ruling 2013-17 in 2013-38 IRB 201which noted that:

> more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the terms "spouse," "marriage" (and derivatives thereof, such as "marries" and "married"), "husband and wife," "husband," and "wife." The Service concludes that gender-neutral terms in the Code that refer to marital status, such as "spouse" and "marriage," include, respectively, (1) an individual married to a person of the same sex if the couple is lawfully married under state law, and (2) such a marriage between individuals of the same sex.

Id. at 4. This far reaching Revenue Ruling applies to everything from income taxes to health insurance and medical savings accounts. Given Ak-Chin's growing roster of employees the number of people, like Pablo, who raise these complex problems of recognition of same sex-marriage in their Community's relationships with the IRS is only likely to increase. Whatever the structure of Ak-Chin's laws on permitting and recognizing same-sex marriages under Section 9.1.1(B), Revenue Ruling 2013-17 clearly has the opposite effect for Ak-Chin's dealings with the IRS for those, like Pablo, who validly married a same-sex partner under the laws of the State of Arizona. Ak-Chin clearly will find itself in the untenable and completely irrational purpose of recognizing certain same-sex marriages for some purposes, like federal tax and insurance-related purposes, and not for other tribal purposes. Ultimately these distinctions may not only prove untenable and impractical to manage but irrational under the Equal Protection guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8).

Another example can be found in housing. At the hearing the Special Master was informed that some tribal housing is financed through federal funding, presumably grants or loans from the Department of Housing and Urban Development (HUD), while other tribal housing is Community financed. The particular unit that Pablo voluntarily vacated to avoid any charges of co-habitation in violation of Section 8.5 when the Community declined to recognize her marriage to Roy apparently was Community financed. HUD regulations now specifically prevent inquiries into (and apparently, but less clearly, discrimination based on) sexual orientation or gender identity in the provision of federally-financed and supported housing. Specifically, in a section labeled "Equal access to HUD-assisted or insured housing," 24 CFR 5.105(a)(2)(ii) now provides:

> **Prohibition of inquiries on sexual orientation or gender identity.** No owner or administrator of HUD-assisted or HUD-insured housing, approved lender in an FHA mortgage insurance program, nor any (or any other) recipient or subrecipient of HUD funds may inquire about the sexual orientation or gender identity of an applicant for, or occupant of, HUD-assisted housing or housing whose financing is insured by HUD, whether renter- or owner-occupied, for the purpose of determining eligibility for the housing or otherwise making such housing available. This prohibition on inquiries regarding sexual orientation or gender identity does not prohibit any individual from voluntarily self-identifying sexual orientation or gender identity. This prohibition on inquiries does not prohibit lawful inquiries of an applicant or occupant's sex where the

housing provided or to be provided to the individual is temporary, emergency shelter that involves the sharing of sleeping areas or bathrooms, or inquiries made for the purpose of determining the number of bedrooms to which a household may be entitled.

The HUD initiative to protect against housing discrimination based on sexual orientation or gender identity raises the possibility that should Ak-Chin persist in enforcing Section 9.1.1(B) it might be forced to acknowledge and accept same-sex marriage and other same-sex couples for its federally-financed or supported housing, while rejecting it under that provision for Community financed housing. Differentiations in the provision of tribal housing for same-sex couples based solely on the source of the funding also raise irrational and impractical distinctions that cannot easily be squared with the Equal Protection guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8).

A further example involves the federal Family and Medical Leave Act (FMLA) which may, or may not, apply to Ak-Chin Indian Community as a tribal employer, although the Department of Labor has taken the position that it applies to Indian tribes. *See, Sharber v. Spirit Mountain Gaming Inc.*, 343 F. 3d 974 (9th Cir. 2003); *but see, Morrison v. Viejas Enterprises*, 2011 WL 3203107 (S.D. Cal. 2011) (tribal sovereign immunity barred individual suit against tribal entities for claimed violations of FMLA). The Department of Labor has issued regulations clearly defining marriage for purposes of mandated employee leave under that Act to include same sex-marriage. Specifically, 29 C.F.R. § 825.102 defines a Spouse for all purposes under that Act, including the medical leave required for serious illness of a spouse, as follows:

> Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:
>
> (1) Was entered into in a State that recognizes such marriages; or
>
> (2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Under its definitions, State is not defined to include an Indian tribe. Thus, if FMLA applies to the Ak-Chin Indian Community, as the Department of Labor believes that it does, Ak-Chin may be required to recognize the spouses of same-marriage partners for purposes of FMLA, while simultaneously denying the validity of their marriage and refusing to recognize them for other purposes not covered by federal law. Additionally, Ak-Chin actions required under FMLA recognizing employee same-sex marriage partners as spouses for FMLA purposes surely would call into serious question under the Equal Protection guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) the refusal to recognize same-sex marriage partners as spouses for other purposes, such as the insurance and housing questions raised by this case.

In short, no sovereign is an island, completely isolated, insulated, and divorced from the political decisions made by other surrounding jurisdictions. As demonstrated by the preceding examples, the fact that the State of Arizona now permits and recognizes same-sex marriage clearly will create externalities for the Ak-Chin Indian Community rendering it practically impossible to decline to recognize certain same-sex marriages when compelled to do so by federal and state law. Furthermore the decision to recognize some same-sex marriages where required to do so by federal or state law or merely by the business realities of not alienating customers and retaining competent employees for both the Ak-Chin Indian Community and the Harrah's Ak-Chin Hotel and Casino will certainly cast extraordinary doubt under the Equal Protection guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) on any continued refusal to permit or recognize same-sex marriage at Ak-Chin where not required to do so under federal or state law or the practical realities of business. The resulting pattern of inconsistent and irrational recognition of same-sex marriage for some purposes and not others or for some marriages and not others not only would violate the Equal Protection guarantees of Article IX, Section 1(h) of the Constitution of the Ak-Chin Indian Community and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) but inevitably will become impractical for the Ak-Chin community to actually manage.

Conclusion

All of the foregoing considerations taken together compel the decision that the Dispositive Question must be answered in the affirmative by the Special Master. The Special Master finds that Pablo has a fundamental right to marry recognized by Ak-Chin law and that the refusal to permit or recognize same-sex marriage at Ak-Chin unjustifiably and illegally burdens her selection of a marital partner without any demonstration of a compelling tribal interest supporting that decision. Thus, the Special Master determines and recommends that the Community Court find: (1) that Section 9.1.4(A) and (B) already recognizes same-sex marriages lawfully performed in another jurisdiction except where *both* parties to the marriage are both Ak-Chin members and Ak-Chin residents and the same-sex couple only temporarily went to another jurisdiction to celebrate the marriage in order to evade Ak-Chin law and (2) that the prohibition on same-sex marriage currently contained in Section 9.1.1(B) violates Pablo's fundamental right to marry by (a) burdening her selection of a same-sex marriage partner without furthering any compelling tribal interest that would substantially interfering with a tribe's ability to maintain itself as a culturally and politically distinct entity and (b) creating or threatening to create an irrational, unworkable and impractical crazy-quilt pattern of recognizing some same-sex marriages at Ak-Chin under Section 9.1.4(A) & (B) or where required by the exigencies of federal or state law with which Ak-Chin must interact or where business realities so require, while almost arbitrarily denying recognition to other same-sex partners.

Respectfully submitted this 17th day of January, 2017

By: _____

Robert N. Clinton
Special Master