No. 19-

In the Supreme Court of the United States

GEORGE LEE NOBLES,

Petitioner,

V.

NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the North Carolina Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Major Crimes Act, 18 U.S.C. § 1153, grants the federal courts exclusive jurisdiction over listed offenses committed by an "Indian."

The Questions Presented are:

I. How does one determine whether a defendant is an Indian?

II. Is Indian status a jury question?

RELATED PROCEEDINGS

North Carolina Supreme Court: *State v. Nobles*, No. 34PA14-2 (Feb. 28, 2020)

North Carolina Court of Appeals: *State v. Nobles*, No. COA17-516 (July 3, 2018)

Jackson County (N.C.) General Court of Justice, Superior Court Division: *State v. Nobles*, No. 12 CRS 1362-1363, 51719-51720 (Nov. 26, 2013)

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PETITION FOR A WRIT OF CERTIORARI

George Lee Nobles respectfully petitions for a writ of certiorari to review the judgment of the North Carolina Supreme Court.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court (App. 1a) is published at 838 S.E.2d 373. The opinion of the North Carolina Court of Appeals (App. 41a) is published at 818 S.E.2d 129.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on February 28, 2020. On March 19, 2020, the Court extended the deadline for filing certiorari petitions due on or after that date to 150 days from the date of the lower court judgment. Order, 589 U.S. ___ (Mar. 19, 2020). This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

The Major Crimes Act, 18 U.S.C. § 1153, provides in relevant part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

STATEMENT

Under the Major Crimes Act, 18 U.S.C. § 1153, the federal courts have jurisdiction, exclusive of the state courts, over several serious offenses committed in Indian country by an "Indian." In a prosecution for such an offense, whether the defendant is an Indian determines the court system in which he will be tried. The federal courts have exclusive jurisdiction if the defendant is an Indian, while the state courts have jurisdiction if he is not.

The term "Indian" is not defined in the statute. So how does one determine whether a defendant is an Indian?

Faced with this recurring question, the lower courts have come up with three inconsistent methods of determining whether a defendant is an Indian under the Major Crimes Act. A defendant who is classified as an Indian in some jurisdictions would be classified as a non-Indian in others. This case provides an excellent opportunity to bring some clarity to a big muddle.

This case will also allow the Court to resolve a related question. Until the decision below, one thing upon which the lower courts *had* been able to agree was that a defendant's Indian status is a question for the jury. Now, however, the North Carolina Supreme Court has broken with this consensus by holding that a defendant's status as an Indian is not a jury question but is a question of law for the court to decide. This case will allow the Court to restore uniformity.

1. The Eastern Band of Cherokee Indians is a federally-recognized Indian tribe. App. 24a. They are

the descendants of the small group of Cherokees who resisted removal in the 1830s, when most of the Cherokees were forced to leave their ancestral lands for the Indian Territory. *Id.* at 120a, 122a. Today the Eastern Band of Cherokee Indians has over 16,000 members.

The tribe's territory, known as the Qualla Boundary, consists of approximately 82 square miles of land in western North Carolina. This land is held in trust by the United States for the tribe's benefit. *Id.* at 2a. There is no dispute that the Qualla Boundary is Indian country as defined in 18 U.S.C. § 1151. *Id.* at 7a.

Tribal membership in the Eastern Band of Cherokee Indians is limited to those with a blood quantum of at least 1/16. *Id.* at 90a-91a. Cherokee law also recognizes a status called "First Descendant," which refers to a tribe member's child who lacks the required blood quantum to be a member him- or herself. *Id.* at 87a-88a. First Descendants enjoy some, but not all, of the privileges of tribal membership. *Id.* at 91a-95a.

When petitioner George Nobles was charged in this case, Cherokee law was clear that First Descendants, like tribe members, are "Indians" for criminal jurisdiction purposes.[1] When a person is arrested within the Qualla Boundary, he must be taken before a magistrate to determine whether he is an

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[1] The relevant provision of Cherokee law, Rule 6 of the Cherokee Rules of Criminal Procedure, has since been amended. *See* Cherokee Code, ch. 15, app. A (2019), https://library.municode.com/tribes_and_tribal_nations/eastern_band_of_cherokee_indians/codes/code_of_ordinances?nodeId=PTIICOOR_CH15CRPR_APXATHCHRUCRPR_RULE_6INAP.

Indian, so that he may be tried in the appropriate court system. App. 107a-108a (quoting Eastern Band of Cherokee Indians R. Crim. P. 6(a)(1)). The magistrate must inquire whether the defendant is a member of any federally-recognized tribe or is a First Descendant of the Eastern Band of Cherokee Indians. App. 108a (quoting Rule 6(b)(1)(A) and (B)). If he falls within either category, "the inquiry ends there," and the defendant is deemed an Indian. App. 109a (quoting Rule 6(b)(1)). *See Eastern Band of Cherokee Indians v. Lambert*, 2003 WL 25902446, at *2-*3 (Eastern Cherokee Ct. 2003) (holding that First Descendants are Indians for the purpose of criminal jurisdiction); *Eastern Band of Cherokee Indians v. Prater*, 2004 WL 5807679, at *1-*2 (Eastern Cherokee Ct. 2004) (contrasting First Descendants, who qualify as Indians for criminal jurisdiction purposes, with the children of First Descendants, who ordinarily do not).

2. The parties stipulated below that petitioner George Nobles is a First Descendant. App. 3a, 116a. Nobles' mother is an enrolled member of the Eastern Band of Cherokee Indians. *Id.* at 3a. Nobles' father, a white man, abandoned the family when Nobles was an infant. *Id.* at 4a, 37a. Nobles is not eligible to be a tribe member because his blood quantum is below 1/16. *Id.* at 7a, 86a.

In November 2012, Nobles and two other people were arrested for a robbery and murder that took place within the Qualla Boundary. *Id.* at 2a. The two other arrestees, as enrolled members of federally-recognized tribes, were brought before a Cherokee magistrate to determine their Indian status. *Id.* Nobles, however, was not. *Id.* The arresting officers de-

cided that he was not an Indian because he was not listed in the Cherokee enrollment database. *Id.* The enrollment database includes only tribe members; it does not include First Descendants. *Id.* at 106a. As a result, the arresting officers were apparently unaware that Nobles is a First Descendant who was classified as an Indian under Cherokee law. Nobles was thus charged in state court rather than federal court.

In the state trial court, Nobles moved to dismiss the charges for lack of jurisdiction, on the ground that because he is an Indian, the Major Crimes Act vests exclusive jurisdiction in the federal courts. *Id.* at 2a. After hearing the testimony of twelve witnesses, considering an extensive documentary record, and making 278 detailed findings of fact, some with numerous subparts, the trial court denied the motion to dismiss. *Id.* at 72a-146a. Nobles moved in the alternative that the issue of his Indian status should be submitted to the jury. *Id.* at 5a. The trial court denied this motion as well. *Id.*

After a jury trial, Nobles was convicted of first-degree murder and armed robbery. *Id.* He was sentenced to life imprisonment without parole. *Id.*

3. The North Carolina Court of Appeals affirmed. *Id.* at 41a-71a.

The Court of Appeals held that Nobles is not an Indian under the Major Crimes Act. *Id.* at 46a-60a. While the Act "does not explicate who qualifies as an 'Indian' for federal criminal jurisdiction purposes," the court explained, "to answer this question federal circuit courts of appeal employ a two-pronged test suggested by *United States v. Rogers*, 45 U.S. 567,

573 (1846)." *Id.* at 48a (parallel citations omitted). Under this test, the court continued, a court must inquire whether the defendant has some Indian blood and whether he is recognized as an Indian by a tribe or by the federal government. *Id.* The court noted that because Nobles has some Indian blood, the only dispute is over the second prong of this test—whether Nobles is recognized as an Indian. *Id.*

The Court of Appeals observed that "there is a federal circuit split in assessing *Rogers*' second prong." *Id.* On one side of the split, the court noted, is the Ninth Circuit, which "considers only the following four factors and 'in declining order of importance.'" *Id.* at 48a-49a. These factors are: first, "enrollment in a federally recognized tribe"; second, "government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes"; third, "enjoyment of the benefits of affiliation with a federally recognized tribe"; and fourth, "social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe." *Id.* at 49a (quoting *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015) (en banc)).

On the other side of the split, the court observed, is the Eighth Circuit, which "considers these factors but assigns them no order of importance, other than tribal enrollment which it deems dispositive of Indian status, and allows for the consideration of other factors." App. 49a (citing *United States v. Stymiest*, 581 F.3d 759, 763-66 (8th Cir. 2009)).

The Court of Appeals rejected Nobles' argument that "he satisfied this prong as a matter of law because he presented evidence that he is a first descendant of an enrolled member of the EBCI, and the EBCI recognizes all first descendants as Indians for purposes of exercising tribal criminal jurisdiction." *Id.* at 50a. The Court of Appeals held that the tribe's recognition of First Descendants as Indians "is only one factor to consider when assessing *Rogers*' second prong." *Id.* at 51a. Because this inquiry requires "a balancing of multiple factors to determine Indian status," the court reasoned, "we reject defendant's argument that the EBCI's decision to exercise its criminal tribal jurisdiction over first descendants satisfies *Rogers*' second prong as a matter of law." *Id.*

The Court of Appeals then turned to the four factors constituting "the Ninth Circuit's test," *id.*, and determined that Nobles does not satisfy any of them. First, Nobles "is not an enrolled tribal member of the EBCI." *Id.* at 52a. Second, although Nobles had obtained free medical care as a child from the tribal hospital, the court held that this tribal assistance took place too long ago to satisfy the "receipt of assistance" factor. *Id.* at 54a-55a. Third, the court found that Nobles had not sufficiently availed himself of the benefits of affiliation with the Eastern Band of Cherokee Indians, because he had not made use of many of the benefits available to First Descendants. *Id.* at 57a. Finally, the court determined that Nobles was not socially recognized as being affiliated with the tribe, because as an adult he lived within the Qualla Boundary for only a short time and had not participated in Cherokee cultural events or religious ceremonies. *Id.* at 59a.

The Court of Appeals accordingly concluded that "the evidence presented did not demonstrate that defendant is an 'Indian.'" *Id.* at 60a.

The Court of Appeals also held that the trial court was correct in refusing to submit the question of Nobles' Indian status to the jury. *Id.* at 60a-64a.

The Court of Appeals acknowledged that where a defendant challenges the court's *territorial* jurisdiction, the jury must find that the charged offense took place within North Carolina. *Id.* at 61a. But the Court of Appeals reasoned that the rule is different where a defendant challenges the court's jurisdiction based on his Indian status. *Id.* at 63a. The court held that where an offense occurs in Indian country, the state has no burden "to prove a defendant is *not* an Indian beyond a reasonable doubt." *Id.*

In the final portion of its opinion, the Court of Appeals rejected additional claims of error that are not relevant to this certiorari petition. *Id.* at 64a-69a.

4. A divided North Carolina Supreme Court affirmed. *Id.* at 1a-40a.

The court first held that Nobles is not an Indian under the Major Crimes Act. *Id.* at 6a-19a. The court began its analysis by noting that the Major Crimes Act "does not provide a definition of the term 'Indian.'" *Id.* at 7a. The court continued: "The Supreme Court of the United States, however, suggested a two-pronged test for analyzing this issue in *United States v. Rogers*, 45 U.S. 567, 572-73 (1846)." *Id.* (parallel citations omitted). "To qualify as an Indian under the *Rogers* test, a defendant must (1) have some Indian blood, and (2) be recognized as an Indi-

an by a tribe or the federal government." *Id.* (citations and internal quotation marks omitted).

The court observed that because there was no dispute that Nobles satisfied the first prong of this test, "only the second prong of *Rogers* is at issue—that is, whether defendant has received tribal or federal recognition as an Indian." *Id.* To make that determination, the court explained, "both federal and state courts around the country have frequently utilized—in some fashion—the four-factor balancing test first enunciated in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988)." *Id.* at 8a. The court noted that this "*St. Cloud* test" consists of four factors:

> 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.

Id.

The court explained that "[c]ourts have varied, however, in their precise application of the *St. Cloud* factors," to the point where "[a] circuit split has emerged about whether certain factors carry more weight than others." *Id.* at 9a (citation and internal quotation marks omitted). On one side of the split, the court observed, are the Ninth Circuit and the state courts of Connecticut, Montana, Idaho, and Washington. *Id.* These courts "deem the four factors set out in *St. Cloud* to be exclusive and consider them in declining order of importance." *Id.* (internal quotation marks omitted). On the other side of the split, the court continued, are the Eighth and Tenth

Circuits, which hold that the factors are not exclusive and should not be considered in any order of importance. *Id.*

"After thoroughly reviewing the decisions from other jurisdictions addressing this issue," the court adopted the view of the Eighth and Tenth Circuits. *Id.* at 10a. The court based this decision "on our belief that this formulation of the test provides needed flexibility for courts in determining the inherently imprecise issue of whether an individual should be considered to be an Indian." *Id.*

Before applying this version of the *St. Cloud* test, however, the court first rejected Nobles' argument that "consideration of the *St. Cloud* factors is unnecessary because his status as a first descendant conclusively demonstrates—as a matter of law—his 'tribal or federal recognition' under the second *Rogers* prong." *Id.* The court held that this argument was incorrect because "such an approach would reduce the *Rogers* test to a purely blood-based inquiry, thereby conflating the two prongs of the *Rogers* test into one." *Id.* In the court's view, "[s]uch an approach would defeat the purpose of the test, which is to ascertain not just a defendant's blood quotient, but also his social, societal, and spiritual ties to a tribe." *Id.* at 11a. For this reason, the court refused to defer to Cherokee law, under which Nobles is classified as an Indian because he is a First Descendant. *Id.* at 12a-14a.

The court then turned to the *St. Cloud* test and determined that Nobles did not satisfy it. *Id.* at 14a-19a. The court considered seven factors to be relevant in this determination, factors that did not all point in the same direction. First, Nobles was not

enrolled in any tribe. *Id.* at 19a. Second, he received limited assistance from the Eastern Band of Cherokee Indians in the form of free health care as a child. *Id*. Third, as a child he attended a Cherokee school. *Id.* Fourth, he lived and worked in the Qualla Boundary for fourteen months as an adult. *Id.* Fifth, he did not participate in Indian social life and "his demonstrated celebration of his cultural heritage was at best minimal." *Id.* Sixth, he had never previously been subjected to tribal jurisdiction. *Id.* And seventh, "he did not hold himself out as an Indian." *Id.* Balancing all these factors, the court held that Nobles is "not an Indian" for purposes of the Major Crimes Act. *Id.*

The North Carolina Supreme Court also held that Indian status under the Major Crimes Act is not a question for the jury. *Id.* at 19a-23a. The court concluded that "it would make little sense to hold that a jury was required to decide the purely legal jurisdictional issue presented here." *Id.* at 21a. In the court's view, a defendant's Indian status under the Major Crimes Act is "an inherently legal question properly decided by the trial court rather than by the jury." *Id.* at 22a.

Justice Earls dissented on both issues. *Id.* at 23a-40a.

On the issue of how to determine whether a defendant is an Indian under the Major Crimes Act, Justice Earls explained that she would place "significant weight" on the "tribal determinations that First Descendants are Indians." *Id.* at 37a. In light of Cherokee law, she concluded, Nobles had been sufficiently "recognized by a tribe" as an Indian under the second prong of the *Rogers* test. *Id.* at 39a.

On the issue of whether Indian status is a jury question, Justice Earls pointed out that the majority's view is contrary to that of several federal courts of appeals, which have held that "a determination of Indian status [under the Major Crimes Act] involves fundamental questions of fact such that a defendant's Indian status itself is a factual dispute." *Id.* at 29a (citations and internal quotation marks omitted). She noted that the multi-factor test used by the majority "requires an inherently factual inquiry." *Id.* at 31a. Justice Earls accordingly concluded that Indian status under the Major Crimes Act is a question for the jury. *Id.* at 31a-32a.

REASONS FOR GRANTING THE WRIT

On the first question presented—how to determine a defendant's status as an Indian under the Major Crimes Act—there is a deep three-way conflict among the lower courts. In the absence of any guidance from this Court on how to decide who qualifies as an Indian under the statute, the lower courts have filled the vacuum with three different tests, two of which involve lists of "factors" that appear nowhere in the statute. As a result, a person who is an Indian in some jurisdictions (and who is thus triable only in the federal courts) is not an Indian in other jurisdictions (and is thus triable only in the state courts).

On the second question presented—whether Indian status is a jury question—the North Carolina Supreme Court has taken a position contrary to that of every other court to address the issue. Whether a defendant is an Indian is a factual question. The conventional view is the correct one: Indian status under the Major Crimes Act is a question for the jury.

Both questions recur frequently. In 1885, when the Major Crimes Act was enacted, perhaps it was a simple matter to determine whether a defendant was an Indian. It is not a simple matter today. There has been so much intermarriage between Indians and non-Indians over the past 135 years that many defendants have connections to both communities.

George Nobles is typical in this respect. His mother is an enrolled member of a federally-recognized Indian tribe. His father is white. As a child, Nobles lived for a time within the Qualla Boundary, but he also lived for a while outside the Qualla Boundary. Some years he attended Cherokee tribal schools, but other years he attended North Carolina public schools. As a First Descendant, Nobles is eligible for certain tribal benefits, but not others. Like many people, Nobles is part Indian and part non-Indian.

In most realms of life, this kind of blended identity poses no problem, and indeed it is often celebrated. Most Americans are part one thing and part another. But blended identities pose a recurring problem when courts interpret the Major Crimes Act, under which defendants must be classified in a binary way—either as Indian or non-Indian—before they can be prosecuted.

Several of the lower courts, including the courts below, have responded to this recurring problem by formulating multi-factor balancing tests that attempt to weigh a defendant's Indianness against his non-Indianness. This approach has yielded confusion and inconsistent results. A much better approach is the one Congress intended in the Major Crimes Act. Whether a defendant is an Indian should be deter-

mined, not by judges acting as amateur anthropologists, but by the Indian tribes themselves.

I. The Court should decide how to determine Indian status under the Major Crimes Act.

The Major Crimes Act mandates exclusive federal jurisdiction over "[a]ny Indian who commits" one of several listed crimes "within the Indian country." 18 U.S.C. § 1153(a). *See Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) ("[F]ederal jurisdiction over the offenses covered by the Indian Major Crimes Act is exclusive of state jurisdiction.") (internal quotation marks omitted); *United States v. John*, 437 U.S. 634, 651 (1978) (same).

Under a companion statute, the Indian Country Crimes Act, 18 U.S.C. § 1152, federal criminal law extends to the Indian country, except for "offenses committed by one Indian against the person or property of another Indian," and except for "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe."

To apply these statutes, courts need definitions of "Indian" and "Indian country." The term "Indian country" is defined in 18 U.S.C. § 1151. But the term "Indian," for purposes of these two statutes, is undefined.

Definitions of "Indian" elsewhere in the U.S. Code are not helpful, because "federal statutory definitions of who is an Indian vary considerably from statute to statute." *Cohen's Handbook of Federal Indian Law* 179 (§ 3.03[4]) (Nell Jessup Newton ed., 2012). As a result, "a person can be an Indian for one purpose, but not for another." *Id.* at 172 (§ 3.03[1]).

Lacking statutory guidance as to who counts as an Indian for criminal jurisdiction purposes, the lower courts have all turned to *United States v. Rogers*, 45 U.S. 567 (1846). In *Rogers*, the Court interpreted an 1834 statute that was a predecessor of the Indian Country Crimes Act. The statute excepted from federal jurisdiction "crimes committed by one Indian against the person or property of another Indian." *Id.* at 572. The defendant in *Rogers* was a white man who claimed immunity from federal prosecution because he had become a member of the Cherokee nation. The Court held that the defendant did not qualify as an Indian under the statute. "[W]e think it very clear," the Court explained, "that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception" to federal jurisdiction for Indians. *Id.* at 572-73. Rather, "*the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race*." *Id.* at 573 (emphasis added).

The lower courts have all interpreted *Rogers* to mean that a person is an Indian under the Major Crimes Act and the Indian Country Crimes Act if (1) he is of Indian descent (often crudely described as having some "Indian blood"), and (2) he is recognized as an Indian by either the federal government or a federally-recognized tribe. *See, e.g.*, App. 7a; *Cohen's Handbook* at 177 (§ 3.03[4]) ("The common test that has evolved after *United States v. Rogers* … considers Indian descent, as well as recognition as an Indian by a federally recognized tribe.").

The lower courts are in accord on two aspects of this test. First, "[t]here is no specific percentage of Indian ancestry required to satisfy the 'descent'

prong of this test." *Id.* Any amount will do. Second, "enrollment on a formal tribal membership list is not required in order to satisfy the 'tribal recognition' component." *Id. See United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) ("[E]nrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction."). One can be an "Indian" without being a tribe member.

A. The lower courts are divided into three camps.

Beyond those two points, however, the lower courts are in disarray. "Lacking specific guidance from the United States Supreme Court on how to establish 'tribal recognition,' the federal circuits have struggled to achieve consistency." *Cohen's Handbook* at 177-78 (§ 3.03[4]). Courts and commentators have discussed this conflict for years. *See State v. Salazar*, --- P.3d ---, 2020 WL 239879, at *3 n.4 (N.M. Ct. App. 2020) (noting the conflict); Daniel Donovan & John Rhodes, *To Be or Not to Be: Who Is an "Indian Person?"*, 73 Mont. L. Rev. 61, 64 (2012) ("The question of who is an Indian has not captured the attention of the Supreme Court since the Antebellum Period, fostering circuit splits and biting dissents during the 21st century."); Jacqueline F. Langland, *Indian Status Under the Major Crimes Act*, 15 J. Gender, Race & Just. 109, 136 (2012) (observing that "courts have reached disparate rulings in factually similar cases"); Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 Harv. J. Racial & Ethnic Just. 241, 242 (2010) (noting the conflict); Katharine C. Oakley, *Defining*

Indian Status for the Purpose of Federal Criminal Jurisdiction, 35 Am. Indian L. Rev. 177, 177-78 (2010) ("The state and federal courts have used several different tests to approach the question."). Both appellate courts below recognized the conflict. App. 9a, 48a-49a.

The lower courts have adopted three different methods of determining whether the defendant is "recognized as an Indian" by a tribe.

Method 1: The Seventh and Tenth Circuits and the Utah Supreme Court simply ask whether the tribe recognizes the defendant as an Indian. In these courts, there are no "factors" to balance. If the tribe calls someone an Indian, he's an Indian. *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984) (stating that the test is merely "*tribal or governmental recognition as an Indian*," without any specified list of factors) (citation and internal quotation marks omitted); *Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995) (same); *State v. Perank*, 858 P.2d 927, 932-33 (Utah 1993) (same). This view was also taken by then-Chief Judge Kozinski in dissent in *United States v. Cruz*, 554 F.3d 840, 852 (9th Cir. 2009) (Kozinski, C.J., dissenting) (criticizing the majority's use of a four-factor test as an overly "fine mincing of the evidence" not supported by *Rogers*).

In *Perank*, for example, the defendant was not a tribe member at the time of his conviction, but "the Tribe formally recognized Perank as an Indian." *Perank*, 858 P.2d at 933. That was enough for the Utah Supreme Court to classify him as an Indian. *Id.* In *Cruz*, the defendant was not a tribe member, but like Nobles, he had the status of a "descendant," which entitled him to some of the benefits of mem-

bership, and like Nobles, he had not availed himself of many of these benefits. *Cruz*, 554 F.3d at 852 (Kozinski, C.J., dissenting). That was enough for Chief Judge Kozinski to classify him as an Indian, "because the test is whether the *tribal authorities* recognize him as an Indian, not whether he considers himself one." *Id.*

Under this view, Nobles is an Indian. The Eastern Band of Cherokee Indians classified First Descendants as Indians for criminal jurisdiction purposes, and Nobles is a First Descendant. That ends the inquiry.

Method 2: The Ninth Circuit and the Connecticut and Montana Supreme Courts use a four-factor test, in which the factors are considered in declining order of importance. The factors are: (1) enrollment in a federally-recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally-recognized tribes; (3) enjoyment of the benefits of affiliation with a federally-recognized tribe; and (4) social recognition as someone affiliated with a federally-recognized tribe through residence on a reservation and participation in the social life of a federally-recognized tribe. *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015) (en banc); *Cruz*, 554 F.3d at 846; *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005); *State v. Sebastian*, 701 A.2d 13, 24 (Conn. 1997); *State v. LaPier*, 790 P.2d 983, 986 (Mont. 1990). The courts that use this four-factor test attribute its origin to *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988), so these four factors are often called the "*St. Cloud* factors."

Under this test, Nobles may or may not be an Indian. There is so much leeway in factors two through four that either outcome is possible. On factor two, the "receipt of assistance" available only to Indians, Nobles did receive some assistance, in the form of free medical care as a child. Whether that is enough assistance to tip this factor in his favor is in the eye of the beholder. On factor three, "enjoyment of the benefits of affiliation" with a tribe, Nobles has enjoyed some benefits, including medical care and education, but he has not availed himself of many of the benefits of his First Descendant status. Is that enough to tip this factor in his favor? There is no clear answer. On factor four, "social recognition" as someone affiliated with the tribe, the tribe has 16,000 members spread over 82 square miles of land. How many people need to recognize a person before this criterion is satisfied? No one knows.

Method 3: The Eighth Circuit and the Idaho Supreme Court, and now the North Carolina Supreme Court as well, use an even more amorphous multifactor test. These courts consider all conceivable relevant factors, in no order of importance. *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009); *State v. George*, 422 P.3d 1142, 1146 (Idaho 2018); App. 10a.[2] As the Eighth Circuit explained, "the *St. Cloud* factors may prove useful, depending upon the

[2] Below, the North Carolina Supreme Court erroneously included the Tenth Circuit in this camp. App. 10a (citing *United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014) (unpublished opinion)). Because *Nowlin* is an unpublished, nonprecedential opinion, it did not supersede *Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995), in which the Tenth Circuit simply looked to whether the defendant was recognized by the tribe as an Indian.

evidence, but they should not be considered exhaustive. Nor should they be tied to an order of importance." *Stymiest*, 581 F.3d at 764.

Under this potentially infinite-factor test, it is even less clear whether Nobles is an Indian. The North Carolina Supreme Court decided he is not, based on matters such as failing sufficiently to celebrate his cultural heritage. App. 19a. The Court of Appeals faulted him for having tattoos—an eagle and an Indian headdress—that are too generically Indian and not closely enough connected to the Eastern Band of Cherokee Indians in particular. *Id.* at 59a. When a person is part Indian and part non-Indian, a test that allows courts to weigh every aspect of his life will allow courts to reach either result in almost any case.

In the jurisdictions that apply one of these multi-factor tests to decide who is an Indian, "case outcomes have not formed a consistent pattern." *Cohen's Handbook* at 178 (§ 3.03[4]). In *Stymiest*, for example, the defendant lived and worked on the reservation, had previously been arrested by tribal authorities, and identified himself as an Indian to others. The Eighth Circuit classified him as an Indian. *Stymiest*, 581 F.3d at 765-66. In *Cruz*, the facts were similar. The defendant lived as a child on the reservation, attended school and worked on the reservation, and had once been prosecuted in tribal court. *Cruz*, 554 F.3d at 846-47. Yet the outcome was completely different. The Ninth Circuit reversed his conviction—even applying the plain error standard of review because his challenge was not preserved—and directed a judgment of acquittal on the ground that no reasonable jury could find that he is an Indian. *Id.* at 851.

B. The decision below is wrong.

An amorphous multi-factor test is no way to make threshold decisions about which court system has jurisdiction to try a defendant. "[A]dministrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.*

Below, merely to determine whether Nobles should be tried in a state court or a federal court, the trial court had to hear the testimony of twelve witnesses, including representatives of six different agencies of tribal government, representatives of two state agencies, the victim's husband, and the defendant's mother and uncle. App. 73a, 76a, 81a, 86a, 89a, 96a, 100a, 103a, 105a, 111a, 112a. The trial court had to examine Nobles' school records, medical records, employment records, and probation records. *Id.* at 75a, 77a, 104a, 113a. The trial court had to become familiar with several aspects of Cherokee tribal government, including the health care and education it provides, the property rights it administers, and its system of voting. Ultimately the trial court had to make 278 numbered findings of fact covering an enormous range of subjects, from the history of the Eastern Band of Cherokees to the cultural significance of Nobles' tattoos. *Id.* at 73a-145a. Only then could the real proceedings begin.

To put it bluntly, this is nuts. As the leading Indian law treatise observes, "[i]n the area of criminal jurisdiction, bright lines and clear rules are preferred to multi-factored tests." *Cohen's Handbook* at

747 (§ 9.02[1][d][i]). "This Court pursues clarity and efficiency in other areas of federal subject-matter jurisdiction," *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 555 (1995) (Thomas, J., concurring in the judgment), and it should do the same here.

Rather than balancing "factors," whether a closed list of four or an open catalogue of as many as the court deems relevant, courts should simply ask whether the defendant is recognized as an Indian by the tribe. Tribes already make this determination in order to exercise their own criminal jurisdiction, *see* Addie C. Rolnick, *Tribal Criminal Jurisdiction Beyond Citizenship and Blood*, 39 Am. Ind. L. Rev. 337, 391-403 (2015), because their own jurisdiction generally extends only to Indians. *See United States v. Lara*, 541 U.S. 193 (2004). Just as tribes have the right to define their own membership, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978), they have the right to define whom they will recognize as an "Indian" for criminal jurisdiction purposes. The tribes are certainly in a better position to make this determination than state or federal judges are.

Such was the intent of the Congress that enacted the Major Crimes Act in 1885. At that time, the prevailing definition of "Indian" for criminal jurisdiction purposes was the one this Court provided in *Rogers*. This definition was extremely simple and included no "factors" for courts to balance. An Indian was someone whom Indians themselves "regarded as belonging to their race." *Rogers*, 45 U.S. at 573. Nothing in the Major Crimes Act indicates that Congress intended to weaken this deference to the tribes.

Indeed, the text of the Major Crimes Act strongly suggests that Congress intended to retain *Rogers*' deference to the tribe's view of whether a defendant is an "Indian." As the Court has explained, "[t]he Major Crimes Act was passed by Congress in direct response to the decision of this Court in *Ex parte Crow Dog*." *Keeble v. United States*, 412 U.S. 205, 209 (1973). In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Court held that the federal courts lacked jurisdiction to try an Indian for the murder of another Indian in Indian country. The Major Crimes Act filled this gap by extending federal jurisdiction over listed crimes committed by Indians in Indian country. To describe these crimes, Congress used a phrase virtually identical to the one the Court had interpreted in *Rogers*. The statute at issue in *Rogers* referred to "crimes committed by one Indian against the person or property of another Indian." *Rogers*, 45 U.S. at 572. The original text of the Major Crimes Act began with the nearly-identical phrase "all Indians, committing against the person or property of another Indian or other person any of the following crimes." 23 Stat. 362, 385 (1885). By using language with an established meaning in the statute, Congress signaled its intent to retain that meaning. *See Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, 139 S. Ct. 628, 633-34 (2019) ("we presume that when Congress reenacted the same language" in a new statute, "it adopted the earlier judicial construction of that phrase").

Letting the tribes, rather than the state courts, decide who is an "Indian" is also consonant with the purpose of the Major Crimes Act. The reason for establishing exclusive federal jurisdiction was to protect Indians from being mistreated in state court

systems. As the Court explained in upholding the constitutionality of the Major Crimes Act, the tribes "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). The federal government, by contrast, owed the Indians a "duty of protection." *Id.* The statute thus aimed to protect Indians from vindictive state judges and prosecutors. In light of this purpose, it would have made no sense to let the state courts decide who is an "Indian." That determination was left to the tribes themselves.

Moreover, the statute the Court interpreted in *Rogers* still exists today, in scarcely-amended form, as the Indian Country Crimes Act, 18 U.S.C. § 1152. *Cohen's Handbook* at 738 (§ 9.02[1][a]) ("The current statute has not been substantively amended since 1854."). It still exempts from federal proscription offenses "committed by one Indian against the person or property of another Indian," just like it did in *Rogers*. It would be very strange if the term "Indian" meant different things in the two statutes. If the word had two different meanings, it would be possible for federal law to proscribe an offense under section 1152 but for federal courts to lack jurisdiction to try that offense under section 1153. "Indian" under section 1153 thus has to mean the same thing as "Indian" in *Rogers*. And in *Rogers*, the Court held that if a person of Indian descent is considered by the tribe to be an Indian, he's an Indian for purposes of criminal jurisdiction.

The subsequent enactment of the Indian Civil Rights Act further supports the view that courts should defer to the tribe's view of whether the de-

fendant is an Indian. The Indian Civil Rights Act regulates the tribes' inherent criminal jurisdiction over certain offenses committed by Indians. It defines "Indian" with reference to the Major Crimes Act, as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4). A person who is an "Indian" for *tribal* jurisdiction must therefore also be an "Indian" for *federal* jurisdiction under the Major Crimes Act. A tribe surely has some discretion, within any applicable bounds set by federal law, to determine who counts as an Indian for purposes of its own criminal jurisdiction. It must therefore have the identical discretion, within the same bounds, to determine who counts as an Indian under the Major Crimes Act.

Our case demonstrates the good sense of Congress's intent to defer to the tribes' determination of whether a defendant is an Indian. Rather than holding a lengthy hearing with a dozen witnesses and a vast documentary record, the trial court should simply have consulted Rule 6(b) of the Cherokee Rules of Criminal Procedure, which was placed before the court, and which showed that the Eastern Band of Cherokee Indians classified First Descendants as Indians for criminal jurisdiction purposes. Rather than writing an extraordinarily long opinion stuffed with hundreds of findings of fact covering virtually every aspect of Nobles' life, App. 72a-146a, the trial court should simply have granted the motion to dismiss.

Below, the North Carolina Supreme Court erroneously reasoned that deferring to the tribe's definition

of "Indian" would "transform the *Rogers* test into one based wholly upon genetics," a result that "would defeat the purpose of the test, which is to ascertain not just a defendant's blood quotient, but also his social, societal, and spiritual ties to a tribe." App. 10a-11a. This was a gross misunderstanding of *Rogers*. Indian status under *Rogers* extends to "those who by the usages and customs of the Indians are regarded as belonging to their race." *Rogers*, 45 U.S. at 573. It is up to the tribe, as a political community, to determine who counts as an Indian. If a tribe chooses to classify the children of members as Indians for this purpose, the courts should respect that decision as one of the "usages and customs" of the tribe to which *Rogers* referred. *Rogers* certainly did not require a defendant to demonstrate "social, societal, and spiritual ties to a tribe" in order to be classified as an Indian. *Rogers* only required that the tribes themselves classify the defendant as an Indian, based on whatever "usages and customs" the tribes themselves consider relevant.

II. The Court should decide whether Indian status under the Major Crimes Act is a question for the jury.

In the decision below, the North Carolina Supreme Court became the first court in the country to decide that Indian status under the Major Crimes Act is not a jury question. So far as we are aware, every other court to address the issue has held that when Indian status is placed in dispute by the defendant, it *is* a jury question. *See United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984) ("we hold that the district court properly instructed the jury on

the issue of what constitutes an Indian for purpose of 18 U.S.C. § 1153"); *United States v. Stymiest*, 581 F.3d 759, 763 (8th Cir. 2009) (holding that Indian status "must be submitted to and decided by the jury"); *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015) (en banc) ("the government has the burden of proving to a jury that the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense"); *United States v. Diaz*, 679 F.3d 1183, 1187-88 (10th Cir. 2012) (discussing Indian status as a jury question).

The conventional view is the correct one. The *Rogers* test consists of two questions. The first question, whether a person is of Indian descent, is a question of fact. The second question, whether a tribe recognizes a person as an Indian, is also a question of fact. When we put these two questions together, the result is a two-part question of fact. It is a question for the jury.

In a pair of cases decided soon after the enactment of the Major Crimes Act, the Court held that the determination of Indian status, for the purpose of ascertaining which court system has criminal jurisdiction, is a question that must be decided by the jury. *Lucas v. United States*, 163 U.S. 612, 617 (1896) (holding that where the deceased victim's Indian status was essential to the court's jurisdiction, "[t]he burden of proof was on the government to sustain the jurisdiction of the court by evidence as to the status of the deceased, and the question should have gone to the jury as one of fact"); *Smith v. United States*, 151 U.S. 50, 55 (1894) (likewise referring to Indian status as a jury question).

Below, the North Carolina Supreme Court attempted to distinguish the federal court of appeals' cases on the ground that in federal court a defendant's status as an *Indian* is essential to the court's jurisdiction, while in state court a defendant's status as a *non*-Indian is essential to the court's jurisdiction. App. 22a-23a. But this is no distinction at all. Either way, a federal statute makes the court's jurisdiction depend upon a fact about the defendant. Like any other fact essential to a court's jurisdiction, such as the location of the charged offense, or (for many federal crimes) a connection to interstate commerce, it must be proven to a jury. *See Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016).

The courts below seem to have been led astray because they considered this issue only after discussing the appropriate legal standard for determining whether a defendant is an Indian. Perhaps for this reason, the North Carolina Supreme Court described Indian status as "an inherently legal question." App. 22a. But factual questions decided by juries are always governed by legal standards. That does not make them questions of law.

In some cases (including this one, if our view on Question I is correct), all reasonable jurors will have to reach the same result, so a defendant will be an Indian or a non-Indian as a matter of law. Again, however, that is true of all factual questions within the province of the jury.

And even if the determination of Indian status is best understood as a mixed question of law and fact, it would still be a question for the jury. *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (observing that "the application-of-legal-standard-to-fact sort of

question … commonly called a 'mixed question of law and fact,' has typically been resolved by juries").

This issue is especially important if, contrary to our view on Question I, it is appropriate for courts to use a multi-factor test to decide whether a defendant is an Indian. Such an inquiry can be extraordinarily fact-intensive. Here, for example, to determine that George Nobles is not an Indian, the trial court needed to make 278 numbered findings of fact. App. 73a-145a. Moreover, such an inquiry often requires hearing the testimony and assessing the credibility of witnesses, a task conventionally assigned to the jury. Here, the trial court heard twelve witnesses, who testified to matters ranging from Nobles' childhood to the cultural beliefs of Cherokee people. If it takes this much factfinding to decide whether a defendant is an Indian, it is even more emphatically a job for the jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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