15-675

No.

In the Supreme Court of the United States

DAMIEN ZEPEDA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Major Crimes Act, 18 U.S.C. § 1153, makes it a federal crime for an "Indian" to commit any one of thirteen enumerated acts in "Indian country." In this case, the en banc Ninth Circuit held that an element of the offense in prosecutions under this statute is proof that the defendant has "Indian blood," whether or not that blood tie is to a federally recognized tribe. The question presented is:

Whether, as construed by the Ninth Circuit, Section 1153 impermissibly discriminates on the basis of race.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Damien Zepeda, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-34a) is reported at 792 F.3d 1103. The opinion of the panel (App., *infra*, 34a-58a) is reported at 738 F.3d 201. That panel opinion replaced an earlier panel decision reported at 705 F.3d 1052. The district court's criminal judgment (App., *infra*, 59a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2015. App., *infra*, 1a. On September 28, 2015, Justice Kennedy extended the time for the filing of a petition for certiorari until November 19, 2015. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In relevant part, the Fifth Amendment to the U.S. Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

Title 18, U.S. Code § 1152, the "Indian General Crimes Act," provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in

> any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Title 18, U.S. Code § 1153(a), the "Indian Major Crimes Act," provides:

> 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

This Court has long held that Congress has the constitutional authority to enact "legislation that singles out Indians for particular and special treatment." *Morton* v. *Mancari*, 417 U.S. 535, 554-555

(1974). That authority derives from "the unique legal status of Indian tribes," and the special treatment accorded individual Indians therefore is permissible when directed "to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 551, 554. In this context, permissible legislation singling out Indians "is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes." *Id.* at 553 n.24.

In this case, however, the en banc Ninth Circuit gave a very different construction to the Indian Major Crimes Act ("IMCA"), 18 U.S.C. § 1153, which makes it a federal crime for an "Indian" to commit specified offenses in Indian country.[1] In the decision below, that court held that a discrete element of the Section 1153 offense is that the defendant be an "Indian" in a *racial* sense, in addition to and wholly apart from the defendant's connection with a federally recognized Indian tribe. As Judge Kozinski explained, that "holding transforms the Indian Major Crimes Act into a creature previously unheard of in federal criminal law: a criminal statute whose application turns on whether a defendant is of a particular race." App., *infra,* 25a. For the reasons explained below, that extraordinary holding should not stand.

A. Federal Indian criminal law.

Criminal law in Indian country is a patchwork of federal, state, and tribal legal regimes. In 1817, Congress enacted the predecessor to what is now the Indian General Crimes Act, 18 U.S.C. § 1152. That

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[1] "Indian country" is an expressly defined term. 18 U.S.C. § 1151.

statute extends the general criminal laws of the United States to Indian country, but exempts conduct where an "Indian" is both the offender and the victim. See generally *United States* v. *Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (recounting pertinent statutory history).

In *United States* v. *Rogers*, 45 U.S. 567 (1846), this Court considered the meaning of the term "Indian" in what is now Section 1152. The Court held that the term Indian "does not speak of members of a tribe, but of the race generally—of the family of Indians." *Id.* at 573. The Court thus found that a "white man" who had been adopted by the Cherokee nation and was a citizen of that tribe could not qualify as "Indian" for purposes of the Indian General Crimes Act.

Subsequently, in *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Court considered an Indian defendant who had been sentenced to death by a federal court for murdering another Indian on tribal land. Reasoning that the Indian General Crimes Act did not extend to crimes between Indians, the Court granted a writ of habeas corpus.

In response, Congress enacted, in 1885, the Indian Major Crimes Act, currently codified at 18 U.S.C. § 1153. See *Keeble* v. *United States*, 412 U.S. 205, 209 (1973) ("The Major Crimes Act was passed by Congress in direct response to the decision of this Court in [*Crow Dog*]."). Section 1153 provides federal criminal jurisdiction over specified felonies committed by "Indians" in "Indian country." But Section 1153 does not define the term "Indian" for purposes of the statute.

Courts, however, have broadly settled on a two-part test for determining "Indian" status for purposes of both Sections 1152 and 1153—the so called "*Rogers* test." "The common test that has evolved after *United States* v. *Rogers*, for use with both of the federal Indian country criminal statutes, considers Indian descent, as well as recognition as an Indian by a federally recognized tribe." Cohen's Handbook of Federal Indian Law § 3.03[4] (Nell Jessup Newton ed., 2005). Under this test, the government must demonstrate that the defendant (1) has some quantum of "Indian blood" and (2) is affiliated with a federally recognized tribe. This case concerns the meaning of the first part of this test.

B. Proceedings below.

1. On October 25, 2008, petitioner, after an evening of drinking and smoking marijuana, shot at and injured persons at a home on the Ak-Chin Reservation in Arizona. App., *infra*, 4a-7a.

The United States charged petitioner with nine counts, five of which were either direct or conspiracy violations of Section 1153. App., *infra*, 7a. To establish that petitioner is an "Indian" within the meaning of the statute, at trial the government introduced into evidence a document entitled "Gila River Enrollment/Census Office Certified Degree of Indian Blood." *Id.* at 7a-8a. This document stated that petitioner "was an enrolled member of the Gila River Indian Community." *Ibid.* "It listed [petitioner's] 'blood degree' as one-fourth Pima and one-fourth Tohono O'Odham, for a total of one-half Indian blood." *Ibid.* Petitioner's brother, Matthew, testified that petitioner is half Indian, with blood from the "Pima and Tiho" tribes. *Id.* at 8a.

After denying petitioner's motions for acquittal on grounds of insufficient evidence (App., *infra*, 39a-40a), the district court instructed the jury that, to convict petitioner, it had to find, among other things, that he "is an Indian." *Id.* at 8a-9a. See also D. Ct. Trans. 824:23-825:8, 825:18-826:4. The jury instructions did not provide any further explanation of who qualifies as an "Indian" for purposes of Section 1153 (*ibid.*), and "[t]he court did not instruct the jury how to make that finding." App. *infra*, 9a. The jury then convicted petitioner on all nine counts, and the district court sentenced him to a term of ninety years' and three months' imprisonment. *Ibid.*

2. A panel of the court of appeals reversed the convictions dependent on Section 1153. App., *infra*, 34a-58a. As a threshold matter, the panel held "that Indian status 'is an element of the offense that must be alleged in the indictment and proved beyond a reasonable doubt,'" and "that whether a defendant is an Indian is a mixed question of fact and law that must be determined by the jury." App., *infra*, 41a (citation omitted).[2] The panel also explained that Section 1153 requires "that the Government prove two things: that the defendant has a sufficient degree of 'Indian blood,'" and that he has "tribal or federal government recognition as an Indian." *Ibid.* (citation and internal quotation marks omitted).

Here, the panel found that the government offered insufficient evidence to make the first of these showings. Looking to the Ninth Circuit's prior holding in *United States* v. *Maggi*, 598 F.3d 1073, 1075

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[2] The panel also held that whether a particular tribe is federally recognized is a question of law that may be the subject of judicial notice. App., *infra*, 50a.

(9th Cir. 2010), the panel explained that, "[t]o be considered an Indian under * * * [§] 1153, the individual must have a sufficient connection to an Indian tribe that is *recognized by the federal government.*" App., *infra*, 46a (quoting *Maggi*, 598 F.3d at 1078 (emphasis in original)). That requirement "stemmed from judicial and legislative acknowledgement that federal criminal jurisdiction over Indians is not dependent on a racial classification, but upon the federal government's relationship with the Indian nations as separate sovereigns." *Id.* at 48a. As a consequence, the first prong of the Section 1153 test "requires that the defendant's 'bloodline be derived from a federally recognized tribe.'" *Id.* at 11a (quoting *Maggi*, 598 F.3d at 1080). And in this case, the panel found insufficient evidence to make that showing: the "government introduced *no* evidence that any of [the groups with which petitioner was connected by blood is] a federally recognized tribe." *Id.* at 53a. The panel therefore reversed petitioner's convictions under Section 1153. *Id.* at 58a.[3]

3. The court of appeals subsequently granted the government's petition for rehearing en banc and "overrule[d] *Maggi*." App., *infra*, 24a. It held that, to satisfy the blood requirement of Section 1153, "the government need only prove that the defendant has some quantum of Indian blood, whether or not traceable to a federally recognized Indian tribe." *Id.* at 3a. Thus, the court held that the government could establish "Indian" status for these purposes by showing

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[3] Judge Watford issued a one-paragraph dissent. In his view, a rational jury could "infer that the reference in Zepeda's tribal enrollment certificate to '1/4 Tohono O'Odham' is a reference to the federally recognized Tohono O'odham Nation of Arizona." App., *infra*, 59a (Watford, J., dissenting).

"that the defendant (1) has some quantum of Indian blood and (2) is a member of, or is affiliated with, a federally recognized tribe." *Ibid.* Under this holding, all that is required for satisfaction of the first statutory prong is "'ancestry living in America before the Europeans arrived.'" *Id.* at 11a. "Affiliation with a federally recognized tribe is relevant only to [the] second prong" of the test. *Ibid.* On the first prong, the court continued, "the court should instruct the jury that it has to find beyond a reasonable doubt that the defendant has some quantum of Indian blood." *Id.* at 20a.

The court offered two responses to petitioner's argument that this understanding of the test's first prong would make the required showing under Section 1153 racial rather than political. First, the court did "not concede that a requirement of Indian blood standing alone is necessarily a racial rather than a political classification." App., *infra*, 13a. In support of this view, the court cited three statutory provisions and a regulation that it understood to define an Indian solely in terms of race. *Id.* at 13a-14a. Second, the court stated that, "even if" the blood quantum requirement were a racial classification, the "second prong" of the analysis—the requirement of affiliation with a federally recognized tribe—"is enough to ensure that Indian status is not a racial classification." *Id.* at 14a.

Based on this construction of "Indian," the court found that there was sufficient evidence in the record to sustain petitioner's conviction. App., *infra*, 22a-23a. Because it overturned *Maggi*, the en banc court did "not reach the question whether [petitioner] is right that the government did not introduce sufficient evidence to satisfy the definition of 'Indian' un-

der *Maggi*." *Id.* at 13a. And although the court of appeals acknowledged that the trial court "erred by instructing the jury to find whether [petitioner] was an Indian without telling it how to make that finding," it found that the "erroneous jury instruction did not affect [petitioner's] substantial rights because * * * there was clear and undisputed evidence that [petitioner] * * * had Indian blood." App., *infra*, 22a.

4. Judge Kozinski, joined by Judge Ikuta, concurred in the judgment only. In Judge Kozinski's view, "[t]he majority's holding transforms the Indian Major Crimes Act into a creature previously unheard of in federal law: a criminal statute whose application turns on whether a defendant is of a particular race." App., *infra*, 25a (Kozinski, J., concurring in the judgment). As Judge Kozinski explained, petitioner "will go to prison for over 90 years because he has 'Indian blood,' while an identically situated tribe member with different racial characteristics would have had his indictment dismissed." *Ibid.* Judge Kozinski thought that outcome intolerable: "It's the most basic tenet of equal protection law that a statute which treats two identically situated individuals differently based solely on an unadorned racial characteristic must be subject to strict scrutiny." *Ibid.*

Judge Kozinski noted that "[t]he Supreme Court has stressed time and again that federal regulation of Indian *tribes* does not equate to federal regulation of the Indian *race*." App., *infra*, 27a. *Maggi*, he continued, "ensured that we tied [Section 1153's] racial component to this political relationship" and "to an established political entity," rather than "an unadorned racial characteristic." *Id.* at 25a. "By overruling *Maggi*," Judge Kozinski concluded, the majority leaves the [Indian Major Crimes Act]—and a host of

other federal statutes governing tribes—shorn of even a colorable non-racial underpinning." *Ibid.*[4]

Judge Ikuta filed a separate concurrence in the judgment, which Judge Kozinski joined. App., *infra*, 31a-34a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case for three reasons. *First*, and most obviously, the decision below reads Section 1153 to be "a criminal statute whose application turns on whether a defendant is of a particular race." App., *infra*, 25a (Kozinski, J., concurring in the judgment). This is a "creature previously unheard of in federal law" (*ibid.*), and is inconsistent with basic principles of equal protection. *Second*, the decision below creates a conflict in the definition of who qualifies as an "Indian" for purposes of federal criminal law. And *third*, the holding below is one of great practical importance: it affects numerous prosecutions every year—in each of which, when conducted in the Ninth Circuit, a jury will be instructed to make a racial determination. Such an aberrant holding, which will have substantial and far-reaching consequences, warrants review.

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[4] Judge Kozinski nonetheless concurred in the judgment, suggesting that he would either alter the Section 1153 test (by entirely eliminating the blood requirement) or find that the jury had sufficient evidence to determine that petitioner's ancestry was from a federally recognized tribe. App., *infra*, 25a.

A. The Ninth Circuit's decision—which recognizes a naked racial classification as an element of a Section 1153 offense—is wrong.

The decision below conditions application of Section 1153, in part, on whether a defendant has "Indian blood"—whether, that is, the defendant is *racially* Indian. That reading of the statute is incompatible with controlling principles of equal protection.

To be sure, Congress permissibly intended that, to qualify as "Indian" within the meaning of Section 1153 (and 1152), an individual must have an ancestral tie to an Indian *tribe*. But that requirement "is rooted in the unique status of Indians as 'a separate people' with their own political institutions * * * and is not to be viewed as legislation of a 'racial group consisting of Indians.'" *United States* v. *Antelope*, 430 U.S. 641, 646 (1977) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 553 n.24 (1974)). The Ninth Circuit's prior rule, stated in *United States* v. *Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010), properly drew that distinction, turning application of Section 1153 on a defendant's blood tie to a *federally recognized* Indian tribe. The rule stated below in this case disavows that requirement—and therefore rejects the statute's constitutional underpinnings. Further review is warranted for that reason alone.

1. To begin with, the decision of the en banc Ninth Circuit offends fundamental principles of equal protection. The court held that the first prong of the test for establishing that a defendant is "Indian" under Section 1153 is "proof of some quantum of Indian blood, *whether or not that blood derives from a member of a federally recognized tribe*." App., *infra*, 19a (emphasis added). There is no escaping the con-

clusion that this is an "overt racial classification." *Id.* at 27a (Kozinski, J., concurring in the judgment). This Court has defined "racial discrimination [as] that which singles out 'identifiable classes of persons * * * solely because of their ancestry or ethnic characteristics.'" *Rice* v. *Cayetano*, 528 U.S. 495, 515 (2000) (quoting *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987)). Such distinctions are subject to the strictest scrutiny. See, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). By hinging its test simply on "'ancestry living in America before the Europeans arrived'" (App., *infra*, 12a), that is just what the majority below did.

The court of appeals nevertheless stated that it would "not concede that a requirement of Indian blood standing alone is necessarily a racial rather than a political classification." App., *infra*, 13a-14a. But to support that assertion, the court, without further explanation, simply referenced three statutes and a regulation that purportedly also make distinctions as to Indians based, at least in part, on a racial blood tie. *Ibid.* And even assuming that the cited statutes and regulation can be read to make such a distinction, the observation that other federal statutes make racial classifications involving Indians plainly does nothing to defeat the conclusion that the Ninth Circuit's construction of Section 1153 does exactly the same thing.

That racial distinction also cannot be saved on the Ninth Circuit's further theory that, "even if" the first prong of the court's test requires a racial classification, the "second prong"—that a defendant has a current political affiliation with a federally recognized Indian tribe—"is enough to ensure that Indian status is not a racial classification." App., *infra*, 14a.

Judge Kozinski explained succinctly why this proposition cannot be correct: "the presence of a separate and independent 'non-racial prong' cannot save a test that otherwise turns on race." *Id.* at 26a (Kozinski, J., concurring in the judgment). While it certainly is true that Congress may pass laws with respect to *Indian tribes* and their members, that "doesn't mean that Congress can administer those laws in a discriminatory fashion." *Ibid.* Otherwise, it "would be like saying a federal law extending criminal penalties only to those with 'African blood' isn't a racial classification because it can only be applied to people who engage in interstate commerce." *Id.* at 26a-27a.

A "racial classification embodied in a criminal statute," absent satisfaction of strict scrutiny, plainly cannot be tolerated as consistent with principles of equal protection. *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). But, as the en banc court has now construed Section 1153, *every* prosecution under that statute will require the government to prove—and a jury to consider—whether the defendant is, as a racial matter and without reference to connection with a federally recognized tribe, "Indian." This interjection of a previously unheard of racial analysis into federal criminal law demands this Court's intervention.

2. Notwithstanding the clear constitutional infirmity of the decision below, proof of an individual's personal heritage and familial connection to a *federally recognized* Indian tribe *is* a necessary element of establishing "Indian" status under Section 1153. The government conceded as much in the court of appeals. See, *e.g.*, CA9 Dkt. No. 161, at 1 ("It is generally accepted that demonstrating Indian status for the purpose of 18 U.S.C. § 1153 requires the United

States to prove the defendant's 'tribal or government recognition as an Indian' and some 'Indian blood.'").

This is so for several reasons. *First*, in legislating against the background of this Court's construction of Section 1152"s predecessor in *Rogers*, Congress would have expected the term "Indian" as used in Section 1153 to have a blood-tie component; indeed, because Sections 1152 and 1153 work together in complementary fashion, no contrary conclusion is plausible. *Second*, when Congress enacted Section 1153's predecessor in 1885, it would have expected that required blood tie to be to an established and federally recognized tribe. *Third*, that reading of Section 1153 comports with the modern understanding of, and justification for, the special legislative treatment of Indians. And *fourth*, any doubts on that score should be resolved by application of the principle of constitutional avoidance.

a. In *Rogers*, the Court considered the predecessor statute to Section 1152, which "extend[ed] the laws of the United States over the Indian country, with a proviso that they shall not include punishment for 'crimes committed by one Indian against the person or property of another Indian.'" 45 U.S. at 571. There, the defendant, Rogers, was "a white man" who (prior to committing the offense at issue) "voluntarily removed to the Cherokee country, and made it his home." *Ibid.* Rogers "incorporated himself with the said tribe of Indians as one of them"; was "treated, recognized, and adopted by the said tribe, and the proper authorities thereof"; "exercised all the rights and privileges of a Cherokee Indian in the said tribe"; and "became a citizen of the Cherokee nation." *Ibid.*

This Court nevertheless concluded that, for purposes of federal criminal law, Rogers was "not an Indian." 45 U.S. at 573. The statutory term "Indian," the Court held, instead "speak[s] * * * of the race generally, of the family of Indians." *Ibid.* *Rogers* thus understood the predecessor to Section 1152 to provide that, in the absence of a blood tie, a connection to a tribe was insufficient to make a defendant an "Indian" for purposes of the statute.

In 1885, when Congress enacted what is now Section 1153, it undoubtedly was aware of the construction of "Indian" stated in *Rogers*. And it is established that "[t]his Court generally 'presumes that Congress expects its statutes to be read in conformity with th[e] Court's precedents.'" *Porter* v. *Nussle*, 534 U.S. 516, 528 (2002). See also *United States* v. *Merriam*, 263 U.S. 179, 187 (1923) (Congress is presumed to intend judicially settled meaning of terms). Accordingly, every court to consider the issue, so far as we are aware, has held that *Rogers*—and its requirement of a "blood" connection—governs the reach of Section 1153. See, *e.g.*, *United States* v. *Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009); *Scrivner* v. *Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995); *United States* v. *Torres*, 733 F.2d 449, 456 (7th Cir. 1984); *United States* v. *Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979); *United States* v. *Dodge*, 538 F.2d 770, 787 (8th Cir. 1976). See also Cohen's Handbook of Federal Indian Law § 3.03[1] (recognizing that an ancestral tie is an element of the definition of "Indian").

That understanding is also correct for a practical reason: Sections 1152 and 1153 work in tandem to define the reach of federal authority over crimes committed by and against Indians in Indian country.

It would be anomalous if an individual could qualify as "Indian" for one provision but not the other.

b. That leaves the question of just what, in 1885 at the time of Section 1153's enactment, Congress would have understood the required statutory blood tie to encompass. The better reading is that Congress meant the term "Indian" as used in the statute to include persons with ancestral ties to individuals who were themselves members of *federally recognized tribes*.

At that time, Congress was accustomed to thinking of Indians in tribal and political terms; it legislated against a background that characterized Indian tribes as sovereign political entities. At least as early as *Worcester* v. *Georgia*, 31 U.S. 515, 519 (1832), this Court explained that "[t]he Indian nations ha[ve] always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." Congress was familiar with the *Worcester* opinion and its definition of Indian tribes as "independent political communities." The decision figures prominently in many congressional documents from the time of Section 1153's enactment, especially those dealing with the issue of Indian status. See S. Rep. 744, 45th Cong. at 18-22 (1879); see also Bureau of Ed., Indian Education and Civilization, S. Exec. Doc. No. 95, at 130-132 (1885); Bureau of Ethnology, Fifth Annual Report, H. Mis. Doc. No. 167, at 264-266 (1884). It therefore is likely that Congress would have intended the required blood tie to be to an "Indian nation[]"—that is, to a federally recognized tribe.

Indeed, at the time Congress enacted what is now Section 1153, the term "Indian" was widely un-

derstood to denote, at least in part, persons who had an ancestral tie to members of an established tribe. See, *e.g.*, William C. Anderson, *A Dictionary of Law Consisting of Judicial Definitions and Explanations of Words, Phrases, and Maxims, and an Exposition of the Principles of Law* 535 (1889) (Indian "[i]ncludes descendants of Indians who have an admixture of white or negro blood, *provided they retain their distinctive character as members of the tribe* from which they trace descent" (emphasis added)); Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 577 (1879) ("The term Indian, in a statute, should not be restricted to persons of full Indian blood * * *. As generally used, it includes descendants of Indians who have an admixture of blood * * * *if they still retain their distinctive character as members of the tribe* from which they trace descent." (emphasis added)). Common and legal usage of the term therefore demonstrates that Congress understood the word to require a personal ancestral tie.[5]

And Congress would have been accustomed to thinking of Indians politically, as well as racially, because most of its dealings with Indians at that time involved describing the boundaries of sovereign territories and dictating what powers tribes had over

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[5] It is not surprising that the political aspect of Indian status involves the requirement of a tribal blood tie. Tribes have "inherent power to determine tribal membership" (*Montana* v. *United States*, 450 U.S. 544, 564 (1981)), and tribes typically hinge tribal citizenship on a blood connection to the tribe, often requiring lineal descent from a member listed on the historic federal census rolls of Indian tribes. See, *e.g.*, Cherokee Nation Const. art. IV; Choctaw Nation Const. art. II; Muscogee (Creek) Nation Const. art. III..

those areas. See, *e.g.*, Select Comm. To Examine into the Condition of the Sioux & Crow Indians, Condition of Indian Tribes in Montana and Dakota, S. Rep. No. 283 (1884) (discussing how to re-divide some of the Dakota Sioux reservation); Secretary of the Interior, Decisions on Rights of Indians to Impose Taxes in Indian Territory, S. Exec. Doc. No. 74 (1878) (considering the power of Indian tribes to impose taxes in the territories). Thus, when using the term in legislation, Congress typically spoke of Indians in the political sense.

Similarly, Congress recognized Indian blood as a measurement of political affiliation with sovereign tribes. Many statutes contemporaneous with Section 1153's predecessor used blood requirements to separate those who were part of sovereign Indian nations from those who were not. An 1862 statute barred "any person of Indian blood belonging to a band or tribe who receive, or are entitled to receive, annuities from the Government of the United States" from trespassing on the lands of any "Indian being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations" and who had left the political community by adopting "the habits and customs of civilized life."An Act to Protect the Property of Indians Who Have Adopted the Habits of Civilized Life, ch. 101, § 2, 12 Stat. 427, 427 (1862) (codified at 25 U.S.C. § 163) (repealed 1934). Here, an individual's Indian blood tie is clearly linked to the government's political relationship to tribes as independent sovereign nations.[6]

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[6] Other congressional action dating to the same period confirms that Congress customarily treated "Indian" status as hav-

Shortly after the enactment of Section 1153, this Court upheld its validity in *United States* v. *Kagama*, 118 U.S. 375, 385 (1886). In doing so, the Court emphasized the political component of the definition of "Indian," reiterating that Indian tribes "always have been[] regarded as having a semi-independent position * * * with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided." *Id.* at 381-382. Even though *Kagama* at times speaks of Indians in terms of "race," it nevertheless states that Congress interacts with "the Indians in their existence as tribes distinct from the ordinary citizens of a state or territory." *Id.* at 378.

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ing a political element. See, *e.g.*, "A Bill Authorizing the Secretary of the Interior To Create a Commission To Try and To Dispose of Claims for Citizenship in the Cherokee, Choctaw, Creek, Chickasaw, and Seminole Indian Nations," H.R. 4057, 48th Cong. § 3 (1884) (recognizing Indians as entitled "to all the privileges, benefits, and immunities which all other citizens or members of such nation have and enjoy"); S. Rep. No. 744, at 18 (1879) (discussing "A Bill To Establish a United States Court in the Indian Territory," S. 1802, 45th Cong. (1879), and noting concern that it "will be an invasion of rights of the Choctaw and Chickasaw nations, always hitherto recognized by the Government of the United States"). And many other contemporaneous statutes use an Indian blood tie as a representation of federal political relationships to sovereign tribes. For example, an 1872 statute, regarding the removal of the Flathead tribe to its reservation, applied to all individuals who shared a racial or political affiliation with the tribe. The statute explicitly included tribal members "whether of full or mixed blood" and "all other Indians connected with said tribe, and recognized as members thereof." An Act To Provide for the Removal of the Flathead and Other Indians from the Bitter Root Valley, in the Territory of Montana, ch. 308, § 1, 17 Stat. 226, 226 (1872).

c. This connection with a federally recognized tribe also comports with the modern understanding of the rationale for legislation that "singles out Indians for particular and special treatment." *Mancari*, 417 U.S. at 554-555. As the Court has explained, such legislation is grounded on "the unique legal status of Indian tribes under federal law" and associated concepts of "Indian self-government." *Id.* at 551, 554. In this context, and when linked to recognized tribes, legislation requiring an ancestral tribal connection is "not directed towards a 'racial' group consisting of 'Indians'" and "does not constitute 'racial discrimination.'" *Id.* at 553 & n.24.

In *United States* v. *Antelope*, 430 U.S. 641 (1977), the Court sustained a Section 1153 prosecution against an equal protection challenge for precisely this reason. The Court emphasized that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians" *Id.* at 645 (citing Art. I, § 8 (Indian Commerce Clause)). Thus, legislation like Section 1153 "is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Id.* at 646 (quoting *Mancari*, 417 U.S. at 553 n.24). In this setting, the Court noted that the defendants in *Antelope* "were not subject to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe"; the Court explained that, "[a]s was true in *Mancari*, federal jurisdiction under the Major Crimes Act does

not apply to 'many individuals who are racially to be classified as Indians.'" *Id.* at 646-647 n.7.

The Ninth Circuit's earlier holding in *Maggi*—that an individual qualifies as an "Indian" under Section 1153 if, and only if, he or she has an ancestral (that is, "blood") tie to a federally recognized Indian tribe—got this point right. The court there explained that, "[t]o be considered an Indian under §§ 1152 or 1153, the individual must have a sufficient connection to an Indian tribe that is *recognized by the federal government.*" *Maggi*, 598 F.3d at 1078. As the court put it, "[a]ffiliation with a tribe that does not have federal recognition does not suffice." *Ibid.* This is necessary, the court continued, to preclude identifying "individuals as Indian solely in a racial or anthropological sense," and instead to "identify individuals who share a special relationship with the federal government." *Ibid.* Thus, although *Rogers* requires a "blood" tie, *Maggi* held that "implicit in this discussion of Indian blood is that the bloodline be derived from a federally recognized tribe." *Id.* at 1080.

Accordingly, because a federally recognized Indian tribe is a political entity—and not, or at least not solely, a racial construct—classifications made based on ancestral affiliation with a federally recognized tribe fall within the principle of *Mancari* and *Antelope*. Such a relationship "is political rather than racial in nature" and, for this reason, "is not directed towards a 'racial' group consisting of 'Indians.'" *Mancari*, 417 U.S. at 554 n.24.

d. Finally, if there is any doubt on this score, the principle of constitutional avoidance dictates reading Section 1153 to require a blood connection to a *federally recognized* Indian tribe. "[W]hen an Act of Congress raises a serious doubt as to its constitutionali-

ty," this Court must "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] questions may be avoided." *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) (citations omitted). Here, for the reasons we have explained and Judges Kozinski and Ikuta articulated, there are, at a minimum, serious doubts about the constitutionality of Section 1153 under the Ninth Circuit's construction. Those doubts would be avoided by reading the statute as the court did in *Maggi*.

B. The decision below creates a conflict in the lower courts.

Not only is the holding below contrary to fundamental principles of equal protection, but it is also at odds with the approach taken by the Supreme Court of Utah.

In *State* v. *Reber*, 171 P.3d 406, 409 (Utah 2007), that court addressed the question whether the State had criminal jurisdiction over the defendants, which turned on whether they qualified as "Indians" for purposes of "federal law." Relying on *Solem* v. *Bartlett*, 465 U.S. 463, 465 n.2 (1984), which in turn had construed Sections 1152 and 1153, the court noted that "states have jurisdiction over victimless crimes committed by non-Indians in Indian country." *Reber*, 171 P.3d at 409 n.15.

The state court accordingly looked to *Rogers* in considering whether the defendants had "a significant degree of Indian blood." 171 P.3d at 409-410. And the court found that the defendants were not "Indian" for purposes of federal criminal law because their ancestors were listed on the "Ute Partition Act," which had caused those ancestors to "los[e] their legal status as Indians." *Id.* at 410. Although

the defendants undeniably had Indian *racial* heritage (they had 1/16th Indian ancestry), the court concluded that, because the defendants and their immediate ancestors were not members of the Ute Indian Tribe, "[d]efendants ha[d] no Indian blood for purposes of being recognized by an Indian tribe or the federal government." *Ibid.* For this reason, and wholly apart from the second prong of the Sections 1152 and 1153 test, the court concluded that the defendants "fail[ed] the first element of the *Rogers* test." *Ibid.* That holding is incompatible with the decision below. This Court should resolve such a conflict over the meaning of an important federal statute.

C. The question presented is important.

Finally, the decision below is notable for more than its constitutional defects; it is a holding of considerable practical importance. Under the Ninth Circuit's ruling, *every* prosecution under Section 1153 will now turn, in part, on a proof of racial classification. Whether that is compatible with basic equal protection principles is a question that this Court should resolve.

First, the decision below stated the standard that will now govern all trials in the Ninth Circuit under Section 1153. Following that decision, the Ninth Circuit issued a new model jury instruction, titled "determination of Indian status for offenses committed within Indian country." Ninth Circuit Manual of Model Criminal Jury Instructions § 8.113, http://goo.gl/irB7WP. The instruction provides, in relevant part:

> In order for the defendant to be found to be an Indian, the government must prove the following, beyond a reasonable doubt:

> First, the defendant has some quantum of Indian blood, whether or not that blood is traceable to a member of a federally recognized tribe; and
>
> Second, the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense.

Thus, whenever a Section 1153 case goes to trial in the Ninth Circuit, the jury will be instructed that it must determine whether "the defendant has some quantum of Indian blood." And whenever a defendant pleads guilty, an element of his or her plea will be an invocation of his or her racial background. This requirement, uniquely, makes race an aspect of federal criminal prosecutions.

Second, this issue will arise with great frequency. "The status of the defendant or victim as an Indian is a material element in most Indian country offense prosecutions." *Who Is an Indian?*, U.S. Attorneys' Manual § 686, http://goo.gl/cRV4mO. And there are many such prosecutions: for the fiscal year ending September 30, 2013, the United States reports that it brought a total of 1,279 cases for violent and non-violent crime in Indian country, against a total of 1,475 defendants. See Exec. Office of U.S. Attorneys, *U.S. Attorneys' Annual Statistical Report: Fiscal Year 2013*, at 60 tbl.3a. http://goo.gl/yn9e2m. (Another report identifies 1,462 federal defendants in 2013 in Indian country. See U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions: 2013*, at 26, http://goo.gl/C51snt.) Such prosecutions are increasing—in 2011, there were 1,395 "Indian country defendants," which was itself an increase from the 1,235 such defendants in 2009. See U.S. Dep't of Jus-

tice, *Tribal Crime Data Collection Activities, 2015*, at 5, http://goo.gl/idsT3J.[7]

Given the geographic location of Indian country, the Ninth Circuit's holding has oversized implications. Roughly a third of the Nation's Indian population lives in the Ninth Circuit. See U.S. Census Bureau, Population Div., *Annual Estimates of the Resident Population by Sex, Race Alone or in Combination, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2014* (June 2015), http://goo.gl/hOuer3. In 2013, U.S. attorneys "resolved" a total of 2,542 "Indian country matters." See *Indian Country Investigations and Prosecutions*, at 42-43. Of these, 1,146—or about 45%—were in judicial districts within the Ninth Circuit. *Ibid.*

Third, this case presents a suitable vehicle for resolution of the issue presented because the en banc court's error is outcome-determinative here. Applying the *Maggi* test, the panel concluded that the government failed to prove that petitioner has an ancestral tie to a federally recognized tribe. If, as we submit, that test is correct, there is little doubt that the jury instructions—which permitted the jury improperly to regard the defendant's race as an element of the offense—were prejudicial error. This Court should set aside the rule that allows such a verdict to stand.

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[7] Although these statistics do not expressly distinguish prosecutions under Section 1152, Section 1153, and the Assimilative Crimes Act (18 U.S.C. § 13), (see *Tribal Crime Data Collection Activities* at 2 n.3), it is reasonable to infer that many—and probably most—of these cases involve Section 1152 or 1153 offenses, and thus turn on the question posed here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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