No. 15-675

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

The government embraces a test for Indian status under 18 U.S.C. § 1153 that—as Judge Kozinski put it—"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." Pet. App. 25a-26a. There is no denying that 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." *Id.* at 26a. (Kozinski, J., concurring in the judgment). Review by this Court is imperative.

In its response, the government does not take issue with the key elements of the petition. It does not suggest that, as a general matter, a criminal offense that has a naked racial classification as one of its elements is supportable. It does not deny that the issue presented here is one of considerable practical importance, arising frequently across the Nation. And it evidently recognizes that, under the Ninth Circuit's test, juries in that Circuit will be required, in *every* Section 1153 prosecution, to pass on the defendant's race.

In nevertheless opposing review, the government hinges its argument on one central proposition: that this Court's decisions in *United States* v. *Antelope*, 430 U.S. 641 (1977), and *Morton* v. *Mancari*, 417 U.S. 535 (1974), approved the test used below by the en banc Ninth Circuit. But that contention misreads both of those decisions, which nowhere suggested that a bald racial determination, untethered from a blood connection to a specific *federally recognized tribe*, could be part of a constitutional test. The deci-

sion below therefore is a departure from this Court's holdings that should not stand.

A. The court of appeals improperly interpreted Section 1153, establishing a defendant's *race* as a separate element of the offense.

As we explained in the petition (at 14-16), every court of appeals to consider Section 1153 agrees that, under the test derived from this Court's holding in *United States* v. *Rogers*, 45 U.S. 567 (1846), the government must allege and prove that a defendant has a *blood* connection to an Indian tribe. See Pet. 14-16. The government does not quarrel with this understanding of the governing law.

The dispositive question here, therefore, is whether the blood element required by *Rogers* is to be framed as a *racial* tie (as the en banc Ninth Circuit held below) or as a *political* tie (as the court of appeals previously held in *United States* v. *Maggi*, 598 F.3d 1073 (9th Cir. 2010)). The Equal Protection Clause supplies the straightforward answer: Congress may not define a criminal offense in terms of a defendant's *racial* characteristics. See Pet. 12.

In defending the decision below, the government observes that, in *Antelope* and *Mancari*, this Court held that certain Indian-based classifications are consistent with the Constitution. Opp. 8-12. That characterization is correct, but misses the essential point. *Antelope* and *Mancari* approved Indian classifications that turned on a *political* connection; neither endorsed the sort of naked racial classification adopted below. To the extent that the government means to advance the additional assertion that the second, political prong of the test adopted below viti-

ates the racial element of the separate first prong (*id.* at 12-15), it is simply wrong. And, finally, the government's uncertainty about the scope of the *Maggi* test is no reason to deny certiorari and leave in place an unconstitutional regime of criminal law.

1. To begin with, this Court's decision in *Antelope* supports—rather than undermines—our essential argument. As the government points out, in *Antelope* the defendants challenged the constitutionality of Section 1153 because the statute has been held to "require a quantum of Indian blood." Opp. 9. The Court rejected that challenge on the ground that the defendants "were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." 430 U.S. at 646.

Antelope thus stands for the proposition that Congress may legislate uniquely as to Indians, based on blood ties, when those ties constitute a *political*—rather than *racial*—classification. Although the Court in *Antelope* did not expressly address the specific question at issue here—whether the defendant must be shown to have a blood connection to a *federally recognized tribe*—the answer is apparent from the Court's statement of its holding: application of Section 1153 was permissible because it was "based neither in whole *nor in part* upon impermissible racial classifications." *Id.* at 647 (emphasis added). The implication of this statement is clear: if application of Section 1153 did turn, "in part," on a defendant's purely "racial" characteristic, the prosecution would fail.

Mancari is cut from the same cloth. There, the Court approved a hiring preference for Indian persons, under the view that the preference did "not

constitute 'racial discrimination'" but instead was an "employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." 417 U.S. at 553-554. It therefore regulated "members of quasi-sovereign tribal entities." *Id.* at 554.

To be sure, it appears that the regulation at issue in *Mancari* did have a racial component. See 417 U.S. at 553 n.24. But the Court had no occasion to consider the details of that classification to determine whether the requisite tie constitutionally could be satisfied only by connection to a federally recognized tribe: the challenge to the preference was brought by individuals who had *no* Indian affiliation or heritage, so the question was whether *any* preference for Indian status was permissible. *Id.* at 537. The constitutionality of *that* differentiation was upheld because the preference was based on individuals belonging to "federally recognized tribes," not to a "racial group." 417 U.S. at 553 n.24. As Judge Kozinski explained, the specific content of the ancestry requirement at issue in *Mancari*

> wasn't challenged by plaintiffs, nor was there any assertion that the hiring preference in that case discriminated *among* tribe members. Rather, the grievance in *Mancari* was that non-tribe members were discriminated against by the preferential hiring of tribe members. The constitutionality of *that* distinction was upheld because the preference was given to "tribal entities," not to a "racial group."

Pet. App. 30a. As Judge Kozinski added, it is "remarkable * * * to read a case that upholds tribal

preferences only so long as they are non-racial as a broad endorsement of the government's power to racially distinguish between those within a tribe." *Ibid.* This Court in *Mancari* thus did not consider the issue that would be relevant by analogy here: whether it would have been constitutional for the BIA to deny a hiring preference to an individual who was *politically* affiliated with a federally-recognized Indian tribe, but lacked certain racial characteristics.

Neither *Antelope* nor *Mancari*, in sum, considered "the same argument" as that presented here by petitioner. Cf. Opp. 11. And to the extent that those decisions address *similar* claims, they emphatically support the *Maggi* standard; both decisions require that a statute based on a blood tie be grounded in a political affiliation to a federally recognized tribe, rather than racial identity. As Judge Kozinski concluded:

> Taken together, *Antelope* and *Mancari* stand for the proposition that Congress can enact laws that treat members of federally recognized tribes differently from non-members so long as that disparate treatment occurs along political rather than racial lines. That holding cannot be reconciled with the holding here, which leaves Congress free to enact any law that racially discriminates between individuals within a tribe.

Pet. App. 28a. The government makes no response to this point.

At bottom, we do not disagree with the government's broad contention that "[t]his Court has consistently rejected equal protection challenges to Acts of Congress that treat tribally-affiliated Indians dif-

ferently from other persons." Opp. 9. This Court has done so because Indian status in these cases has always been viewed as a *political* classification. The decision below by the en banc court of appeals turns that law on its head, reframing an essential element of the statute as a naked racial classification. No decision of this Court has ever approved such a drastic exception to the Constitution's guarantee of equal protection.

2. Against this background, we do not understand the government to contend that a test looking solely to racial characteristics would be constitutional. The government's defense of the decision below therefore must turn on the proposition that, so long as the test through its second prong requires a tie to a federally recognized tribe, it may *separately* require in its first prong that there be proof of unadorned Indian racial ancestry. But this attempt to launder the test's racial element must fail. As the Court made clear in *Antelope*, a determination of Indian status must be "based neither in whole nor *in part* upon impermissible racial classifications." *Antelope*, 430 U.S. at 647 (emphasis added). That standard is clearly violated here.

Judge Kozinski made this point as well:

> [T]he presence of a separate and independent "non-racial prong" cannot save a test that otherwise turns on race. [The] political affiliation prong may provide a non-racial basis for limiting the IMCA only to tribe members. But not all tribe members are subject to the IMCA. Separating those who are from those who are not is the function of [the test's] first requirement, and that requirement turns entirely on race. That ineluctably treats identi-

> cally situated individuals *within* a tribe differently from one another solely based on their immutable racial characteristics.

Pet. App. 27a. And here, too, the government makes no response.[1]

To prevent precisely this sort of unadorned racial classification, the *Maggi* standard recognized that *each* prong of a test for Indian status requires a showing of a connection to a *federally-recognized* Indian tribe. By rooting an individual's blood tie in a political affiliation, *Maggi* ensured that individuals *within* a tribe were distinguished based on a non-racial classification. And by overruling *Maggi*, the Ninth Circuit reduced the first prong of the test to a "an unadorned racial characteristic." Pet. App. 31a (Kozinski, J., concurring in the judgment).

3. Finally, the government quibbles with the *Maggi* test, querying whether it requires a connection to a tribe "that is currently recognized by the federal government, or [instead to] members of a tribe that was recognized during the ancestors' lives, even if the tribal community no longer has formal recognition as such." Opp. 13.

We note that, the government's confusion notwithstanding, there is nothing anomalous about fed-

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[1] The government's response to Judge Kozinski's hypothetical (Opp. 12 n.2) wholly fails to engage this point. It is of course true that "the Constitution expressly recognizes the distinct status of 'Indian Tribes[.]'" *Ibid.* But the first prong of the government's test is not directed at "Indian Tribes"; it is directed at "Indians" as a *race*. As applied by the Ninth Circuit, this element adds a bald racial component to the political-affiliation requirement separately required by the second prong of the test.

eral jurisdiction turning on the current status of a tribe to which the defendant has a connection. "[M]embers of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act." *Antelope*, 430 U.S. at 646 n.7. And in any event, the government's uncertainty is no reason to deny certiorari. That there may be some play in the joints as to the standard that the Court *should* adopt says nothing about our fundamental submission here: the result reached below, in light of its naked racial classification, *must* be the wrong one.

Nor does the answer to this question affect the resolution of this case. As we explain in more detail below, the panel majority concluded that the government failed to prove at trial that petitioner has a blood tie to *any* federally recognized Indian tribe, past or present. See, *infra*, 9-11. Accordingly, the decision below is wrong under the governing test—whatever that test's precise contours.

B. The decision below conflicts with a holding of the Supreme Court of Utah.

The government's separate attempt to diminish the conflict between the decision below and the Supreme Court of Utah's decision in *Reber* rests on improper parsing of that court's opinion. Opp. 16-18. As the government recognizes (Opp. 17), *Reber* inquired whether the defendants had, in light of the *Rogers* test, "Indian blood for purposes of being recognized by an Indian tribe or the federal government." *State* v. *Reber*, 171 P.3d 406, 410 (Utah 2007). The Supreme Court of Utah understood that *Rogers*' Indian blood requirement turned on *political* affiliation—not racial heritage. The defendants in *Reber* undoubtedly

were racially Indian; that is, they descended from pre-Columbian peoples. *Ibid.* But the Ute Termination Act had caused their ancestors to "los[e] their legal status as Indians," so their heritage lacked a *political* connection. *Ibid.* For this reason—and this reason alone—the defendants "fail[ed] the first element of the *Rogers* test." *Ibid.*

The government is simply wrong to suggest that "the court appeared to find that termination significant because it prevented the *defendants* from being members of a federally recognized tribe." Opp. 17. The court's reasoning could hardly be more clear: it was tied to the "*first* element of the *Rogers* test" (171 P.3d at 410 (emphasis added)), which requires an individual to have "'a significant degree of Indian blood.'" *Ibid.*

Reber, it is true, recognized that the defendants *separately* failed the second prong of the *Rogers* test, as they lacked a present political connection to a federally-recognized Indian tribe. 171 P.3d at 410. But that *Reber* identified two independent grounds for its decision does nothing to obviate the clear conflict as to the meaning of the first *Rogers* requirement—that is, whether the requisite blood tie is of race or political heritage.

C. This case is a suitable vehicle with which to resolve the question presented.

Finally, the government contends that petitioner would lose even under our test because "[t]he evidence introduced at trial concerning petitioner's status satisfies" the *Maggi* standard. Opp. 19. Tellingly, however, the government relies for this assertion on the *dissent* to the panel decision. *Ibid.* The panel *ma-*

jority squarely rejected that conclusion. Pet. App. 53a-55a.

The panel majority acknowledged the reference in petitioner's tribal enrollment card to his "1/4 Tohono O'Odham" ancestry. See Opp. 19. But the panel explained that "[t]here is no evidence in the record that the 'Tohono O'Odham' referenced in [petitioner's] Tribal Enrollment Certificate refers to the federally recognized 'Tohono O'odham Nation of Arizona.'" Pet. App. 54a. Indeed, the court observed, the federally recognized Tohono O'Odham Nation of Arizona is a distinct *subset* of the broader Tohono O'Odham community—many of whom are *not* ancestors of a federally recognized tribe. Pet. App. 54a-56a. As the panel put it, "the government asks [the court] to fill in the evidentiary gap in its case" (*id.* at 54a), which would be an exercise in speculation.

In light of this omission in the government's case, if the *Maggi* test applies, petitioner would at the very least be entitled to a new trial in light of the erroneous jury instruction. The district court instructed the jury that, to convict the petitioner, it simply had to find that he is "an Indian." Pet. App. 10a. The jury instructions did not explain who qualifies as "an Indian," and "[t]he court did not instruct the jury how to make that finding." *Ibid.* In short, if the *Maggi* test is correct, it will have very substantial bearing on the outcome of this case.

Alternatively, the government posits that, if Section 1153 is interpreted to rest solely on tribal membership—and not to require any blood tie—petitioner would satisfy this element. Opp. 19-20. But such an outcome would be permissible only if *Rogers* is overruled. And the assertion that petitioner could ultimately lose if this Court were to grant certiorari and

overturn a 170-year-old precedent is no reason to decline review.

In fact, this case offers a particularly compelling vehicle with which to review the question presented. As the government acknowledges (Opp. 19 n.5), members of federally recognized tribes often have a blood tie to that tribe, meaning that they will satisfy the appropriate test: *Maggi*'s requirement of a blood tie to a federally recognized tribe. Thus, in many Section 1153 cases, the government will be able to argue, correctly, that the defendant would have been convicted *even if* the *Maggi* test governs. This case is different: because the government failed to prove (according to the panel majority) that petitioner has a blood tie to a federally recognized tribe, the outcome here turns on whether the en banc Ninth Circuit's test is constitutional. Given the importance of that question, further review is warranted.

That is especially so because, absent this Court's intervention, *every* Section 1153 prosecution in the Ninth Circuit will require a jury to pass on the defendant's *race*. As we described in the petition (at 23-24), the new model jury instruction adopted by that court requires juries to evaluate whether "the defendant has some quantum of Indian blood, whether or not that blood is traceable to a member of a federally recognized tribe." Ninth Circuit Manual of Model Criminal Jury Instructions § 8.113, http://goo.gl/irB7WP. As Judge Kozinski explained, in the Ninth Circuit, Section 1153 is now "a criminal statute whose application turns on whether a defendant is of a particular race." Pet. App. 26a. It is hard to imagine a rule more troubling to constitutional sensibilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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