No. 15-675

In the Supreme Court of the United States

DAMIEN ZEPEDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' definition of "Indian" for purposes of exercising federal criminal jurisdiction under 18 U.S.C. 1153 violates equal protection.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-33a) is reported at 792 F.3d 1103. The amended panel opinion (Pet. App. 34a-58a) is reported at 738 F.3d 201. That amended opinion replaced an earlier panel opinion reported at 705 F.3d 1052.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2015. On September 28, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 19, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was con-

victed of conspiracy to commit assault, in violation of 18 U.S.C. 2, 371, and 1153; assault resulting in serious bodily injury, in violation of 18 U.S.C. 2, 113(a)(6), and 1153; three counts of assault with a dangerous weapon, in violation of 18 U.S.C. 2, 113(a)(3), and 1153; and four counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 2 and 924(c)(1)(A). Pet. App. 59a-60a. Petitioner was sentenced to a total of 1083 months of imprisonment. *Id.* at 60a. The court of appeals affirmed. *Id.* at 24a.

1. Petitioner is an enrolled member of the Gila River Indian Community, a federally recognized tribe whose members have Pima (Akimel O'odham) and Maricopa (Pee-Posh) ancestry. Pet. App. 8a; Gila River Indian Community, *About*, http://www.gilariver.org/index.php/about (last visited Mar. 18, 2016); see 73 Fed. Reg. 18,553, 18,554 (Apr. 4, 2008) (listing tribes that were federally recognized at the time of petitioner's trial). According to his tribal enrollment certificate, petitioner's Indian ancestry is one-fourth Pima and one-fourth Tohono O'odham. See Pet. App. 8a.

On October 25, 2008, petitioner and his two brothers, Matthew and Jeremy, drove to a home on the Ak-Chin Indian Reservation that belonged to Dallas Peters and Jennifer Davis. Pet. App. 4a. Petitioner's ex-girlfriend, Stephanie Aviles, was present at the home with her 16-year-old cousin, C. *Ibid.* When Aviles refused to leave with petitioner, he hit her several times in the head with a hard object and she fell to the ground. *Id.* at 5a. Petitioner then fired several shots at C. with a handgun. *Ibid.* When Peters attempted to shield C., petitioner shot him. *Id.* at 5a-6a. Petitioner's brother Matthew also shot Peters with a shotgun. *Id.* at 6a. After repeatedly shooting at Peters,

petitioner and his brothers fled the scene. *Ibid.* Peters sustained severe injuries, including life-threatening gunshot wounds to his wrist and upper thigh. *Id.* at 7a. He was hospitalized for more than one month and underwent more than eight surgeries. *Ibid.*

2. Petitioner was charged with various offenses under the Indian Major Crimes Act, 18 U.S.C. 1153, which authorizes federal jurisdiction over enumerated offenses committed by an "Indian" in Indian country. Specifically, petitioner was charged with conspiracy to commit assault, assault resulting in serious bodily injury, multiple counts of assault with a dangerous weapon, and various firearms offenses. Pet. App. 7a.

To prove petitioner's Indian status for purposes of establishing jurisdiction under Section 1153, the government relied on petitioner's tribal enrollment certificate, which is titled "Gila River Enrollment/Census Office Certified Degree of Indian Blood." Pet. App. 8a. A detective for the Ak-Chin Police Department testified that an enrollment certificate is "a piece of paper confirming through the tribe that . . . this person is an enrolled member of their tribe and . . . meet[s] the blood quantum." *Ibid.* (brackets in original). The enrollment certificate stated that petitioner was "an enrolled member of the Gila River Indian Community" and listed his Indian ancestry as "one-fourth Pima and one-fourth Tohono O'Odham." *Ibid.* The government and petitioner's attorney stipulated that the enrollment certificate "may be presented at trial without objection" and that its "contents are stipulated to as fact." *Ibid.* Petitioner's brother Matthew also testified at trial that petitioner is "at least half Native American," with ancestry from the Pima

and "T.O." (transcribed as "Tiho," and presumably standing for Tohono O'odham) tribes. *Ibid.*

The district court instructed the jury that it needed to find that petitioner was an Indian in order to convict, but the court did not explain how that finding should be made. Pet. App. 9a. Neither the government nor petitioner's counsel objected to the instruction or requested a further instruction on how the jury should determine Indian status. *Ibid.*

The jury subsequently convicted petitioner on all counts. Pet. App. 9a. Petitioner was sentenced to 1083 months of imprisonment. *Id.* at 60a.

3. a. A three-judge panel of the court of appeals reversed all but one of petitioner's convictions, finding insufficient evidence that petitioner is an Indian within the meaning of Section 1153. Pet. App. 35a-59a.[1] The panel observed that, under the Ninth Circuit's decision in *United States* v. *Maggi*, 598 F.3d 1073 (2010), the government must prove two things to establish a defendant's Indian status: (1) that the defendant has tribal or governmental recognition as an Indian; and (2) that the defendant's bloodline is derived from a federally recognized tribe. Pet. App. 36a.

The panel observed that the Gila River Indian Community—in which petitioner is an enrolled member—is a federally recognized tribe. Pet. App. 52a-53a. The panel further observed that the "Tohono O'odham Nation of Arizona" is a federally recognized tribe and that petitioner's tribal enrollment certificate lists his Indian bloodline as one-quarter "Tohono O'Odham." *Id.* at 53a. But the panel considered itself

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[1] The panel's opinion replaced an earlier panel opinion reported at 705 F.3d 1052, with amendments that are not relevant to the question presented here.

"not free to speculate that [petitioner's] Tohono O'Odham blood is derived from the Tohono O'odham Nation of Arizona." *Id.* at 55a. The panel accordingly found insufficient evidence that petitioner's "bloodline is derived from a federally recognized tribe," *id.* at 56a, and it reversed all of petitioner's convictions except the conspiracy conviction, which did not rely on Section 1153 to establish federal jurisdiction. *Id.* at 57a.

Judge Watford dissented from the panel's decision. Pet. App. 58a. In his view, "a rational jury could certainly infer that the reference in [petitioner's] tribal enrollment certificate to '1/4 Tohono O'Odham' is a reference to the federally recognized Tohono O'odham Nation of Arizona." *Ibid.*

b. The court of appeals granted rehearing en banc and subsequently affirmed petitioner's convictions. Pet. App. 1a-24a.

As relevant here, the en banc court of appeals overruled *Maggi* and held that, to establish that a defendant is an Indian within the meaning of 18 U.S.C. 1153, the government must prove that he "is a member of, or is affiliated with, a federally recognized tribe" and that he "has some quantum of Indian blood." Pet. App. 3a. *Maggi* had erred, the court explained, in adopting an additional requirement that the government prove that the defendant's bloodline be derived from a specific tribe that is federally recognized. *Id.* at 11a-12a. Instead, the court held that the ancestry requirement is satisfied so long as the defendant "ha[s] a blood connection to a 'once-sovereign political community,'" in the form of "ancestry living in America before the Europeans arrived."

Id. at 11a (brackets and citation omitted) (quoting *United States* v. *Antelope*, 430 U.S. 641, 646 (1977)).

The court of appeals "disagree[d]" with petitioner's contention that jurisdiction under Section 1153 "will depend upon a racial rather than a political classification" if the ancestry requirement can be satisfied by showing "only a quantum of Indian blood, without any connection under this prong to a federally recognized tribe." Pet. App. 13a. The court observed that several federal statutes and a regulation deem individuals to be Indians if they descend from persons historically considered to be Indians. *Id.* at 14a. And the court further emphasized that the separate requirement of current affiliation with a federally recognized tribe "is enough to ensure that Indian status [under Section 1153] is not a racial classification." *Ibid.*

The court of appeals drew support for its analysis from *United States* v. *Antelope*, *supra*, and *Morton* v. *Mancari*, 417 U.S. 535 (1974). Pet. App. 14a-17a. The court observed that *Antelope* had rejected the argument that Section 1153 impermissibly relies on a racial classification. *Id.* at 15a. *Antelope*, the court noted, had reasoned that "[f]ederal regulation of Indian tribes * * * is governance of once-sovereign political communities" and "is not to be viewed as legislation of a racial group consisting of Indians." 430 U.S. at 646 (citation and internal quotation marks omitted); see Pet. App. 15a. Similarly, the court explained that *Mancari* had rejected the argument that an Indian employment preference constituted discrimination on the basis of race, even though it "specified that 'an individual must be one-fourth or more degree Indian blood and be a member of a Federally-

recognized tribe" to qualify as an "Indian." Pet. App. 16a (quoting *Mancari*, 417 U.S. at 553 n.24).

The court of appeals additionally noted that it would be a "burdensome requirement" to "prove that an ancestor of the defendant—not merely the defendant himself or herself—was a member of a federally recognized tribe." Pet. App. 17a-18a. Evidence about whether a defendant's ancestors belonged to a federally recognized tribe, the court noted, "may be difficult to find or, if found, ambiguous." *Id.* at 18a. The court observed that requiring such a showing could accordingly exclude many individuals from prosecution under Section 1153, even if the defendant is a member of a federally recognized tribe and "it is undisputed that the defendant has Indian blood." *Ibid.*

Applying its analysis to the facts of this case, the court of appeals found that petitioner's tribal enrollment certificate and his brother Matthew's testimony sufficed to show that he was a member of a federally recognized tribe and that he had Indian ancestors. Pet. App. 22a-23a. Because petitioner therefore qualified as an Indian within the meaning of Section 1153, the court affirmed his convictions. *Id.* at 24a.

Judge Kozinski concurred in the judgment. Pet. App. 25a-30a. He believed that the majority's definition of "Indian" established a racial classification triggering strict scrutiny. *Id.* at 25a-26a. To avoid that result, he would have affirmed the judgment "either by applying [Section 1153] to all members of federally recognized tribes irrespective of their race, or by holding, consistent with *Maggi*, that the jury had sufficient evidence to infer [petitioner's] ancestry was from a federally recognized tribe." *Id.* at 25a.

Judge Ikuta also concurred in the judgment. Pet. App. 31a-33a. She would have interpreted Section 1153 to require only a showing that an individual has tribal or governmental recognition as an Indian. *Id.* at 31a.

ARGUMENT

Petitioner contends (Pet. 11-22) that the Ninth Circuit's definition of an "Indian" for purposes of 18 U.S.C. 1153 violates equal protection. Petitioner further asserts (Pet. 22-23) that the Ninth Circuit's decision conflicts with a decision from the Utah Supreme Court. Those claims lack merit. The court of appeals' decision—which follows this Court's precedent—is fully consistent with the Constitution, and no conflict exists on the question presented. Moreover, this case would be a poor vehicle to consider the meaning of "Indian" in Section 1153 because petitioner qualifies under any conceivable definition, including the one he proposes. Further review is not warranted.

1. Although 18 U.S.C. 1153 authorizes federal jurisdiction over enumerated offenses committed by Indians in Indian country, it does not define the term "Indian." "The common test that has evolved" to give meaning to that statutory term "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], at 177 (Nell Jessup Newton et al. eds., 2012 ed.) (*Cohen*). The court of appeals adopted that test here, requiring the government to prove that the defendant is affiliated with a federally recognized tribe and that he had "ancestry living in America before the Europeans arrived." Pet. App. 12a (citation omitted). Petitioner argues (Pet. 11-13)

that the court's definition constitutes an impermissible racial classification. That contention lacks merit.

This Court has consistently rejected equal protection challenges to Acts of Congress that treat tribally-affiliated Indians differently from other persons. See, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641 (1977); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Fisher* v. *District Court*, 424 U.S. 382 (1976) (per curiam); *Morton* v. *Mancari*, 417 U.S. 535 (1974). The Court has explained that such laws are based not on "impermissible racial classifications," *Antelope*, 430 U.S. at 647, but on "the unique status of Indians as 'a separate people' with their own political institutions," *id.* at 646. Accordingly, the Court has held that laws that treat tribally-affiliated Indians differently from others withstand equal protection scrutiny "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

Of particular relevance here, the Court in *Antelope* specifically rejected an equal protection challenge to Section 1153. The defendants in *Antelope* were enrolled members of the Coeur d'Alene Indian Tribe who were convicted of felony murder under Section 1153 and challenged the exercise of federal jurisdiction on equal protection grounds. 430 U.S. at 642-644. The defendants argued that the statute had been interpreted to require a quantum of Indian blood, which they claimed created an impermissible racial classification. See Resp. Br. for Gabriel Francis Antelope at 4-15, *Antelope*, *supra*; Resp. Br. for William Andrew Davison and Leonard Francis Davison at 13-18, *Antelope*, *supra*.

The *Antelope* Court rejected that equal protection challenge. "The decisions of this Court," *Antelope* explained, "leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." 430 U.S. at 645. The Court observed that "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." *Ibid.* (footnote omitted). Because "federal regulation of Indian affairs" is "rooted in the unique status of Indians as 'a separate people' with their own political institutions," the Court reasoned that such regulation "is governance of once-sovereign political communities" and "is not to be viewed as legislation of a 'racial group consisting of Indians.'" *Id.* at 646 (quoting *Mancari*, 417 U.S. at 553 n.24) (internal quotation marks omitted). The defendants were subject to federal prosecution under Section 1153, the Court emphasized, not "because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." *Ibid.* Thus, the exercise of federal jurisdiction was "based neither in whole nor in part upon impermissible racial classifications." *Id.* at 647.

Similarly, this Court in *Mancari* rejected an equal protection challenge to a statute granting Indians an employment preference in the Bureau of Indian Affairs. See 417 U.S. at 537, 551-555. The Court observed that an individual was eligible for the preference only if he was "one-fourth or more degree Indian blood and [was] a member of a Federally-recognized tribe." *Id.* at 553 n.24 (citation omitted). Such a preference, the Court stated, "is political rather than

racial in nature" because it "is not directed towards a 'racial' group consisting of 'Indians'" but instead "applies only to members of 'federally recognized' tribes." *Ibid.* The Court reasoned that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 554. And the Court noted that a contrary ruling would "effectively eras[e]" an "entire Title of the United States Code (25 U.S.C.)" because "[l]iterally every piece of legislation dealing with Indian tribes and reservations * * * single out for special treatment a constituency of tribal Indians." *Id.* at 552.

Petitioner argues (Pet. 12) that the court of appeals' definition of "Indian" creates a racial classification even though it requires "current political affiliation with a federally recognized tribe" because it also requires a showing of Indian ancestry. But the same argument was made in *Antelope* and *Mancari*, and this Court was not persuaded. The defendants in *Antelope* argued that Section 1153 was unconstitutional because "[o]nly people who have the requisite percentage of Indian blood can be reached by the criminal jurisdiction of the federal government." Resp. Br. for Gabriel Francis Antelope at 2, *Antelope*, *supra*. This Court determined, however, that the separate tribal-affiliation requirement demonstrated that the defendants were "not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of [a federally recognized tribe]," *Antelope*, 430 U.S. at 646, such that jurisdiction under Section 1153 was "based neither in whole nor in part upon impermissible racial classifications," *id.* at 647. The plaintiffs in *Mancari*

similarly emphasized that the Indian employment preference statute had been interpreted to require "a one-quarter Indian blood criterion," and they contended that the statute was "unconstitutional in that it applies a criterion for hiring and promotions * * * based upon race." Appellee's Br. at 9, 13, *Mancari*, *supra*. But this Court concluded that "the preference is political rather than racial in nature" because it applies "only to members of 'federally recognized' tribes." 417 U.S. at 553 n.24.[2]

The court of appeals' definition of "Indian" in this case, like the definitions at issue in *Antelope* and *Mancari*, "does not apply to 'many individuals who are racially to be classified as 'Indians'" but who are not members of or affiliated with a federally recognized tribe. *Antelope*, 430 U.S. at 646 n.7 (quoting *Mancari*, 417 U.S. at 553 n.24). And as in *Antelope*, any individual who has Indian ancestry may exempt himself from "Indian" status for purposes of Section 1153 if he elects not to maintain a voluntary association with a federally recognized tribe. The court of appeals accordingly correctly found that defining "Indian" under Section 1153 to require affiliation with a federally

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[2] Petitioner invokes (Pet. 13) Judge Kozinski's hypothetical federal law penalizing only persons with "African blood" for committing an unspecified action while engaged in interstate commerce. The analogy is inapt because the Constitution expressly recognizes the distinct status of "Indian Tribes," U.S. Const. Art. I, § 8, Cl. 3, but there is no constitutional basis for persons of African descent to form separate sovereign governments within the United States. There accordingly would be no ground to conclude that such a classification would be political.

recognized tribe suffices "to ensure that Indian status is not a racial classification." Pet. App. 14a.[3]

Notably, petitioner does not dispute that the term "Indian" in Section 1153 is properly interpreted to include an ancestry requirement, but he contends (Pet. 13-22) that such a requirement can be satisfied only by showing a blood connection to a federally recognized tribe. It is not clear whether, under petitioner's interpretation of the statute, a defendant's ancestors must have been members of a tribe that is currently recognized by the federal government, or members of a tribe that was recognized during the ancestors' lives, even if the tribal community no longer has formal recognition as such. In any event, nei-

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[3] Petitioner's reliance (Pet. 12) on *Rice* v. *Cayetano*, 528 U.S. 495 (2000), is misplaced. In that case, the Court held that the State of Hawaii violated the Fifteenth Amendment when it limited the right to vote in an election for state office to persons of Native Hawaiian ancestry. The Court found that while the classification itself was based on Native Hawaiian ancestry, the classification must be regarded as based on race for purposes of the Fifteenth Amendment's application to elections for office in a state government. *Id.* at 516-517, 519-522. In contrast, the definition of Indian status in Section 1153 has both a political purpose and a political effect because of its requirement of membership in or affiliation with a federally recognized Indian tribe. Indeed, the *Rice* Court expressly distinguished *Antelope*, explaining that "exclusive federal jurisdiction over crimes committed by Indians in Indian country" is an appropriate exercise of Congress's authority to "fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Id.* at 519. And the Court also distinguished *Mancari*, reiterating that decision's holding that although the employment preference required both one-fourth or more Indian blood and affiliation with a federally recognized tribe, the preference was not directed toward Indians as a racial group but was rather "political * * * in nature." *Id.* at 520 (quoting *Mancari*, 417 U.S. at 553 n.24).

ther limitation makes sense from a historical perspective.

To the extent that petitioner focuses on current federal recognition, he offers no explanation why Congress would have wanted to exclude from the definition of an "Indian" those individuals whose ancestors lived in tribal communities previously recognized as sovereign simply because the government does not currently maintain a government-to-government relationship with that community today.[4] If, instead, petitioner means to focus on historical recognition, then all ethnic Indians should qualify under his test because they all descend from ancestors affiliated with Indian communities that at some time in the past were sovereigns. See *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978) ("Before the coming of the Europeans, the tribes were self-governing sovereign political communities."); see

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[4] Neither the composition of Indian communities nor the manner in which the federal government has interacted with those communities has been static through time. The establishment of reservations and reorganization of Indian tribes under federal statutes divided some historical Indian communities into smaller groups and consolidated others for purposes of current governance. For example, the Pima were settled on three reservations, and Indians with Pima ancestry today reside on and are members of three different federally recognized tribes: the Gila River Indian Community of the Gila River Indian Reservation, the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, and the Salt River Pima-Maricopa Indian Community of the Salt River Reservation. See 73 Fed. Reg. at 18,553-18,555. The nature of federal recognition has also varied through time, with recognition "aris[ing] from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity." *Kahawaiolaa* v. *Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004) (citation omitted), cert. denied, 545 U.S. 1114 (2005).

generally *Cohen* § 4.01[1][a], at 206-211. As the court of appeals observed, so long as a defendant has "ancestry living in America before the Europeans arrived," he has "a blood connection to a 'once-sovereign political communit[y].'" Pet. App. 11a (quoting *Antelope*, 430 U.S. at 646) (citation omitted). Petitioner's effort to limit Section 1153 by requiring extensive proof about the particular tribe with which a defendant's ancestors were affiliated and its current or former status as federally recognized therefore lacks merit.

2. Petitioner contends (Pet. 10, 22-23) that the court of appeals' decision creates a division in the lower courts on the definition of "Indian" under Section 1153. But no conflict exists on the equal protection question presented, and lower court decisions raise no other issue that would warrant this Court's review.

The court of appeals' interpretation of Indian status for purposes of Section 1153 is consistent with the approach of the other federal courts of appeals that have addressed that issue or the analogous question of Indian status under 18 U.S.C. 1152. See *United States* v. *Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (observing that "the generally accepted test * * * asks whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both"), cert. denied, 559 U.S. 1055 (2010); *United States* v. *Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001) (stating that "the court must make factual findings that the defendant (1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government") (internal quotations marks omitted); *United States* v. *Torres*, 733

F.2d 449, 455 (7th Cir.) (stating that "uncontradicted evidence of tribal enrollment and a degree of Indian blood constitutes adequate proof that one is an Indian for purposes of 18 U.S.C. § 1153"), cert. denied, 469 U.S. 864 (1984); *United States* v. *Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976) (tribal enrollment certificate documenting that defendant was an enrolled member of the Eastern Band of Cherokee Indians and possessed "three-fourths degree of Eastern Cherokee blood" was adequate proof that defendant was an Indian); see generally *Cohen* § 3.03[4], at 177-179.

State courts have followed a similar approach of defining Indian status to require both affiliation with a federally recognized tribe and an ancestry component. See *Lewis* v. *State*, 55 P.3d 875, 878 (Idaho Ct. App. 2002); *State* v. *Daniels*, 16 P.3d 650, 653 (Wash. Ct. App. 2001); *State* v. *Sebastian*, 701 A.2d 13, 23-27 (Conn. 1997), cert. denied, 522 U.S. 1077 (1998); *State* v. *LaPier*, 790 P.2d 983, 986 (Mont. 1990); *State* v. *Attebery*, 519 P.2d 53, 54 (Ariz. 1974).

Petitioner asserts (Pet. 22-23) that a single state high court has interpreted the term "Indian" to require a showing that a defendant's ancestors were members of a federally recognized tribe. In *State* v. *Reber*, 171 P.3d 406 (Utah 2007), the court held that the State had properly exercised jurisdiction over defendants who killed deer on the Ute Indian Reservation in violation of Utah law because the tribe was not a victim of the offense and because the defendants were not Indians. *Id.* at 408-411. With respect to Indian status, the court observed that the defendants' ancestors' membership in the federally recognized Ute Tribe had been terminated by the Ute Partition Act, which meant that the defendants could not "claim

membership in the tribe through [their] parent[s]." *Id.* at 410 (quoting *United States* v. *Von Murdock*, 132 F.3d 534, 536 (10th Cir. 1997), cert. denied, 525 U.S. 810 (1998)). "Because [the] [d]efendants' ancestors lost their legal status as Indians," the court stated, the "[d]efendants ha[d] no Indian blood for purposes of being recognized by an Indian tribe or the federal government." *Ibid.* The court further observed that the defendants' claimed membership in the Uintah Band, which had been consolidated with other Ute bands into the modern Ute Tribe, "d[id] not help establish their Indian status under federal law" because the Uintah Band "is not recognized as a tribe by the federal government." *Ibid.*

Petitioner maintains (Pet. 22) that *Reber* adopted a requirement that a defendant cannot qualify as an Indian unless his ancestors were members of a federally recognized tribe, but such a requirement is not clear from the court's opinion. Although the court discussed the ancestors' termination of tribal-membership status in the context of analyzing an Indian-blood requirement, the court appeared to find that termination significant because it prevented the *defendants* from being members of a federally recognized tribe. 171 P.3d at 410. The court emphasized that the Ute Partition Act prevented children of terminated parents from claiming membership in the federally recognized Ute Tribe. *Ibid.* Thus, because the defendants' "ancestors lost their legal status as Indians," the defendants had "no Indian blood *for purposes of being recognized by an Indian tribe or the federal government.*" *Ibid.* (emphasis added). The court's discussion of the term "Indian" in the unique context of the Ute Tribe, see *Affiliated Ute Citizens* v.

United States, 406 U.S. 128 (1972), in which the ancestors' legal status as Indians was affirmatively *terminated* by Act of Congress, has no application here. *Reber* did not confront the situation of a defendant with Indian ancestry who *is* a member of a federally recognized tribe, and it is not evident that the Utah Supreme Court would exclude such an individual from qualifying as an Indian simply because his immediate ancestors were not themselves members of a federally recognized tribe. That issue has not arisen; indeed, no court in Utah has had occasion to apply *Reber*'s discussion of the ancestry requirement in a subsequent case.

In any event, the fact that the defendants in *Reber* were not members of a federally recognized tribe independently supported the court's conclusion that they did not qualify as Indians, see 171 P.3d at 410, and the result in *Reber* is therefore consistent with the court of appeals' decision in this case, which likewise requires that a defendant be affiliated with a federally recognized tribe to meet the definition of an Indian under Section 1153. Moreover, *Reber* did not discuss equal protection principles and petitioner has not identified any conflict on the question presented here. There is accordingly no division on that issue that warrants this Court's review.

3. This case would be a poor vehicle to consider the meaning of "Indian" under Section 1153 because petitioner qualifies as an Indian under any possible interpretation, including the definition he proposes.

Petitioner contends (Pet. 13-22) that an individual is an Indian for purposes of Section 1153 only if he is affiliated with a federally recognized tribe and has ancestors who were affiliated with a federally recog-

nized tribe. The evidence introduced at trial concerning petitioner's status satisfies that standard. Petitioner's tribal enrollment certificate, which he stipulated is factually accurate, stated that he is an enrolled member of the Gila River Indian Community, which is a federally recognized tribe. Pet. App. 8a, 52a-53a. The certificate further stated that petitioner's Indian ancestry is "1/4 Pima [and] 1/4 Tohono O'Odham." *Id.* at 37a.[5] Because the Tohono O'odham Nation of Arizona is federally recognized, "the jury had sufficient evidence to infer [that petitioner's] ancestry was from a federally recognized tribe." *Id.* at 25a (Kozinski, J., concurring in the judgment); see *id.* at 58a (Watford, J., dissenting from prior panel opinion) (observing that "a rational jury could certainly 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").

If, instead, Section 1153 were interpreted to apply to all members of federally recognized tribes irrespective of their Indian ancestry, then petitioner would also qualify as an Indian in light of his status as an enrolled member of the Gila River Indian Community.

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[5] Federally recognized tribes, including the Gila River Indian Community, generally limit eligibility for membership in the tribe to those with Indian ancestry. See Const. and Bylaws of the Gila River Indian Community, Art. III, § 1 (approved 1960) (listing "Indian blood" as a requirement for membership); see also Gila River Indian Community, *About*, http://www.gilariver.org/index.php/about (last visited Mar. 18, 2016) (describing how "[t]he community is home for members of both the Akimel O'odham (Pima) and the Pee-Posh (Maricopa) tribes"). Thus, proof of an individual's tribal enrollment will usually be sufficient to prove that he has Indian ancestry.

See Pet. App. 25a (Kozinski, J., concurring in the judgment) (suggesting this interpretation of Section 1153); *id.* at 31a (Ikuta, J., concurring in the judgment) (same). Because the evidence establishes federal jurisdiction under any interpretation of Section 1153, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
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