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*, 35a-59a) 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*, 60a-68a) 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-26a. 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 In-

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

dian General Crimes Act, 18 U.S.C. § 1152. That 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*, 5a-8a.

The United States charged petitioner with nine counts, five of which were either direct or conspiracy violations of Section 1153. App., *infra*, 8a. 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 8a-9a. 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 9a.

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 9a-10a. 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*, 10a. 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*, 35a-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*, 42a (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*, 51a.

(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*, 47a (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 49a. 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 13a (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 54a. 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*, 25a. 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 4a. 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 12a. "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 21a.

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*, 14a. 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 14a-15a. 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 15a.

Based on this construction of "Indian," the court found that there was sufficient evidence in the record to sustain petitioner's conviction. App., *infra*, 23a-24a. 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-26a (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." *Id.* at 26a. 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*, 28a. *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 26a. "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*, 26a (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*, 26a.

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*, 14a-15a. 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*, 15a.

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 27a (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 27a-28a.

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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[*] The representation of respondent by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10-10131
D.C. No. 2:08-cr-01329-ROS-1

Appeal from the United States District Court for the District of Arizona

Roslyn O. Silver, Senior District Judge, Presiding

Argued and Submitted En Banc
June 18, 2014—Seattle, Washington

Filed July 7, 2015

Before: Harry Pregerson, Alex Kozinski, Barry G. Silverman, Kim McLane Wardlaw, William A. Fletcher, Ronald M. Gould, Richard A. Paez, Richard C. Tallman, Consuelo M. Callahan, Sandra S. Ikuta and Morgan Christen, Circuit Judges.

Opinion by Judge W. Fletcher;
Concurrence by Judge Kozinski;
Concurrence by Judge Ikuta

COUNSEL

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OPINION

W. FLETCHER, Circuit Judge:

Damien Zepeda appeals from his convictions and sentence on one count of conspiracy to commit assault with a dangerous weapon and to commit assault resulting in serious bodily injury; one count of assault resulting in serious bodily injury; three counts of assault with a dangerous weapon; and four counts of use of a firearm during a crime of violence. We affirm.

The crimes took place on the Ak-Chin Indian Reservation in Arizona. The government charged Zepeda under the Indian Major Crimes Act ("IMCA"), 18 U.S.C. § 1153, which authorizes federal jurisdiction over certain crimes committed by Indians in Indian country. To sustain a prosecution un-

der the IMCA, the government must establish that the defendant is an Indian within the meaning of that statute. Zepeda argues, among other things, that the evidence at trial was insufficient to support the jury's finding that he was an Indian under the IMCA.

In *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005), we laid out a two-part test for establishing a person's status as an Indian under the IMCA: the defendant must (1) have Indian blood and (2) be recognized by a tribe or the federal government as an Indian. In *United States v. Maggi*, 598 F.3d 1073, 1080–81 (9th Cir. 2010), decided after Zepeda's trial had finished, we added a gloss to both prongs of the *Bruce* test, holding that the government must prove that (1) the defendant has a quantum of Indian blood *traceable to a federally recognized tribe* and (2) the defendant is a member of, or is affiliated with, a federally recognized tribe. In the case now before us, a three-judge panel held that the government had not presented sufficient evidence to satisfy the first prong of the *Bruce* test as modified by *Maggi*. For the reasons we explain below, we overrule *Maggi*. While *Maggi* appropriately clarified the *second* prong of the *Bruce* test to require a relationship with a federally recognized tribe, *Maggi* erred in extending the federal recognition requirement to the *first* prong. We now hold that under the first prong of the *Bruce* test the government need only prove that the defendant has some quantum of Indian blood, whether or not traceable to a federally recognized tribe. We thus hold that in order to prove Indian status under the IMCA, the government must prove that the defendant (1) has some quantum of Indian blood and (2) is a member of, or is affiliated with, a federally recognized tribe. We hold further

that under the IMCA, a defendant must have been an Indian at the time of the charged conduct, and that, under the second *Bruce* prong, a tribe's federally recognized status is a question of law to be determined by the trial judge.

We hold that the evidence at trial was sufficient to support the finding that Zepeda was an Indian within the meaning of the IMCA at the time of his crimes. We reject Zepeda's other challenges to his convictions and sentence.

I. Background

We recount the evidence in the light most favorable to the jury's verdict. *See United States v. Hicks*, 217 F.3d 1038, 1041 (9th Cir. 2000). On October 25, 2008, Zepeda and his brother Matthew were drinking beer and malt liquor at Zepeda's mother's house in Maricopa, Arizona. Zepeda asked Matthew if he wanted to go to a party, and Matthew agreed. Zepeda then called another of his brothers, Jeremy, and asked if he wanted to go to the party. Jeremy also agreed.

An unidentified driver picked up Zepeda, Matthew, and Jeremy. Zepeda told the driver to take them to a house located on the Ak-Chin Reservation. The house belonged to Dallas Peters and his wife, Jennifer Davis. Zepeda wanted to see his ex-girlfriend, Stephanie Aviles, who was at Peters's house with her sixteen-year-old cousin, "C".

In the car, Zepeda and his brothers drank beer and smoked marijuana. Matthew and Jeremy still thought they were going to a party. The driver dropped them off near Peters's house. Matthew testified at trial that Zepeda told Jeremy to "grab something from the seat." Jeremy "wasn't paying atten-

tion," so Matthew reached under the car seat and pulled out a shotgun. Jeremy testified that Zepeda got out of the car holding a handgun and a shotgun, and that Zepeda tried to give the shotgun to Jeremy. When Jeremy refused, Zepeda gave the shotgun to Matthew. Zepeda told Matthew to fire the shotgun if he heard shots.

Matthew and Jeremy walked to the west side of Peters's house, and Zepeda approached the front door. Jeremy testified that he saw Zepeda carrying a handgun. At this point, Jeremy testified, he realized they were not at a party. Jeremy walked away toward the main road because he did not want to "get involved with something that . . . [was] going to jeopardize me and my family." Matthew stayed by the side of the house with the shotgun.

Zepeda knocked on the front door, and Peters answered. Zepeda asked to talk to Aviles, who came outside and walked with Zepeda to the northeast corner of the house. Zepeda asked Aviles to leave with him. When she refused, he grabbed her arms. She tried to push him away and felt what she thought was a gun in his pocket. From inside the house, C heard Zepeda and Aviles "getting louder," and she went outside to check on Aviles. Aviles turned around to return to the house, and Zepeda hit her in the head multiple times with something hard. Aviles fell face-down on the ground.

Zepeda pulled out a handgun and pointed it at C. She ran away down the east side of the house. She heard gunshots. Peters, who was urinating off his back porch at the time, heard the gunshots and walked to the southeast corner of the house. He saw C running toward him. He "grabbed her, pulled her in, like [to] shield her." While holding C, Peters was

shot in the shoulder. He testified, "I didn't feel the round, but I seen blood come out so I knew I had to be shot." C testified that she saw Zepeda shooting from about forty feet away. "[T]he shooting kept going and going," she testified. "I had blood all on my back and I thought I got shot and Dallas said, 'You're okay. Just—I got shot. Just run. Please just run.'" She ran to the back door of the house and went inside.

At about the time Zepeda started shooting, Matthew fired the shotgun toward the backyard. Matthew then walked into the backyard and fired the shotgun in Peters's direction. Matthew testified that he did not see Peters when he fired the shotgun. Peters tried to run toward the front of the house, but he "hear[d] shots going past [his] ears from that way." He saw Matthew "fiddling [with the gun] with it pointed down." Peters ran toward Matthew and tried, unsuccessfully, to disarm him.

Peters returned to the southeast corner of the house, where he saw Zepeda. Zepeda had lowered his gun, either because it had jammed or because he was reloading. Peters "rush[ed]" at Zepeda and "grabbed the gun." Peters pulled the trigger around twelve times to "get rid of the bullets." After the gun was empty, Peters let go. Zepeda ran to the west side of the house. He caught up with Matthew and Jeremy, and the three men fled.

After the shooting started, Aviles stood up and ran into the house. According to C,

> [Aviles] was crying and she asked what happened and where Dallas was and if everybody was in the house and if we were all okay. And we ran to the hall-

> way where Jennifer was, Dallas's wife, and she was crying. And the whole time we were in there we could hear gunshots.
>
> We stood in the hallway for probably around ten minutes until the doorbell kept ringing . . . and Jennifer finally went and opened the door and Dallas came inside and collapsed on the floor and he was covered in blood.

Peters was severely injured in the shooting. He had numerous gunshot wounds, including life-threatening wounds to his wrist and upper thigh. He had many small buckshot wounds in his torso. He spent more than a month in the hospital and underwent more than eight surgeries.

The government charged Zepeda, Matthew, and Jeremy in connection with the shooting. Matthew pled guilty to assault resulting in serious bodily injury and to use of a firearm during a crime of violence. Jeremy pled guilty to misprision of a felony. The government charged Zepeda with nine counts: (1) one count of conspiracy to commit assault with a dangerous weapon and to commit assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 1153, 371, and 2; (2) one count of assault resulting in serious bodily injury against Peters, in violation of 18 U.S.C. §§ 1153, 113(a)(6), and 2; (3) three counts of assault with a dangerous weapon against Peters, Aviles, and C, in violation of 18 U.S.C. §§ 1153, 113(a)(6), and 2; and (4) four counts of use of a firearm during a crime of violence against Peters, Aviles, and C, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. Zepeda went to trial on all nine counts.

To prove that Zepeda was an Indian within the meaning of the IMCA, the government introduced into evidence a document titled "Gila River Enrollment/Census Office Certified Degree of Indian Blood" ("Enrollment Certificate"). Detective Sylvia Soliz, 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." She testified that enrollment certificates may be used to determine whether a person is eligible to receive benefits, such as housing and medical care, from the tribe. The government and Zepeda's attorney stipulated that the Enrollment Certificate "may be presented at trial without objection," and that its "contents are stipulated to as fact."

Zepeda's Enrollment Certificate stated that Zepeda was "an enrolled member of the Gila River Indian Community." It listed Zepeda's "blood degree" as one-fourth Pima and one- fourth Tohono O'Odham, for a total of one-half Indian blood. Matthew also testified about Zepeda's Indian status. He testified that Zepeda is half Indian, with blood from the "Pima and Tiho" tribes. (Matthew may have said "T.O.," for Tohono O'Odham, which was then transcribed as "Tiho.") Matthew testified that Zepeda also is "at least half Native American." He testified that his own Indian heritage comes from his father, and that he and Zepeda have the same father and mother.

At the close of the government's case-in-chief, Zepeda moved for a judgment of acquittal because of insufficient evidence. The district court denied the motion. Zepeda renewed his motion at the close

of evidence, and the district court again denied it. The court instructed the jury that, in order to convict, it needed to find that Zepeda was an Indian. The court did not instruct the jury how to make that finding. Neither the government nor Zepeda's lawyer objected to this instruction or requested that the court provide the jury with more information about making the finding of Indian status.

The jury convicted Zepeda on all counts. The district court sentenced Zepeda to a prison term of ninety years and three months. Zepeda appealed, challenging his convictions and sentence on a number of separate grounds. A three-judge panel of this court affirmed Zepeda's conviction for conspiracy and reversed his convictions on the other eight counts. *United States v. Zepeda*, 738 F.3d 201, 214 (9th Cir. 2013); *United States v. Zepeda*, 506 F. App'x 536, 537–38 (9th Cir. 2013). The panel held that the government introduced insufficient evidence to support the jury's finding that Zepeda was an Indian. *Zepeda*, 738 F.3d at 213. It rejected all of Zepeda's other arguments challenging his convictions. *Id.* at 208; *Zepeda*, 506 F. App'x at 538–39. It did not reach Zepeda's argument that his sentence was unreasonable.

We granted rehearing en banc. *United States v. Zepeda*, 742 F.3d 910 (9th Cir. 2014).

II. Discussion

In this opinion, we address only Zepeda's arguments (1) that the government's evidence was insufficient to support a jury finding that he was an Indian within the meaning of the IMCA, and (2) that his sentence was unreasonable. We agree with the three-judge panel's reasons for rejecting Zepeda's other ar-

guments, and we adopt them as our own. *See Zepeda*, 738 F.3d at 207–08; *Zepeda*, 506 F. App'x at 538–39.

A. Sufficiency of the Evidence to Prove Indian Status

1. Indian Status Under the IMCA

The IMCA is one of several statutes addressing "[t]he exercise of criminal jurisdiction over Indians and Indian country." *Bruce*, 394 F.3d at 1218. In its current form, the IMCA authorizes federal criminal jurisdiction over

> [a]ny 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.

18 U.S.C. § 1153(a). Under the IMCA, "the defendant's Indian status is an essential element . . . which the government must allege in the indictment and prove beyond a reasonable doubt." *Bruce*, 394 F.3d at 1229.

As we noted in *Bruce*, the IMCA does not define "Indian," but "courts have 'judicially explicated' its meaning." *Id.* at 1223 (quoting *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979)). We wrote that "[t]he generally accepted test for Indian status" under the IMCA considers "'(1) the degree of

Indian blood; and (2) tribal or government recognition as an Indian.'" *Id.* (quoting *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996)); *see* William C. Canby, Jr., *American Indian Law in a Nutshell* 9–10 (5th ed. 2009); *see also United States v. Cruz*, 554 F.3d 840, 845–46 (9th Cir. 2009) (quoting the *Bruce* test). We understand *Bruce*'s second prong, "tribal or government recognition as an Indian," to require "membership or affiliation in any federally acknowledged Indian tribe." *LaPier v. McCormick*, 986 F.2d 303, 306 (9th Cir. 1993).

The two-prong *Bruce* test requires that, in addition to affiliation with a federally recognized tribe, as specified in the second prong, a defendant subject to the IMCA must also have some quantum of Indian blood, as specified in the first prong. That is, the defendant must have a blood connection to a "once-sovereign political communit[y]." *United States v. Antelope*, 430 U.S. 641, 646 (1977). "The first prong requires ancestry living in America before the Europeans arrived." *Bruce*, 394 F.3d at 1223. Affiliation with a federally recognized tribe is relevant only to *Bruce*'s second prong. The federally recognized tribe with which a defendant is currently affiliated need not be, and sometimes is not, the same as the tribe or tribes from which his bloodline derives. Indeed, in this very case, Zepeda's Enrollment Certificate states that he is a member of the Gila River Indian Community, but it lists his blood as deriving from the Pima and Tohono O'Odham tribes.

Five years after *Bruce*, and after trial in this case, we added a gloss to the *Bruce* test, based on a broad application of the premise that Indian status requires "a sufficient connection to an Indian tribe that is *recognized by the federal government*." *Maggi*,

598 F.3d at 1078. We held in *Maggi* that the tribal federal-recognition requirement applies in both prongs of the *Bruce* test. *Id.* at 1080–81. Accordingly, we held that the first *Bruce* prong requires that the defendant's "bloodline be derived from a federally recognized tribe," *id.* at 1080, and that the second prong requires "membership or affiliation with a federally recognized tribe," *id.* at 1081 (internal quotation marks omitted). Zepeda argues under *Maggi* that the government's evidence under the first prong was insufficient to prove that his bloodline derives from a federally recognized tribe.

Under *Bruce*, the governing law at the time of Zepeda's trial, there was no requirement that an Indian defendant's blood be traceable to a federally recognized tribe. Relying on *Bruce*, and not anticipating the yet-undecided *Maggi*, the government did not present evidence that Zepeda's Indian blood derived from a member of a federally recognized tribe. However, its undisputed evidence showed conclusively that Zepeda had some quantum of Indian blood. We need not reach the question whether Zepeda is right that the government did not introduce sufficient evidence to satisfy the definition of "Indian" under *Maggi*, for we are convinced that *Maggi* was wrongly decided.

Maggi drew its federal-recognition requirement from our decision in *LaPier v. McCormick*. The defendant in *LaPier* was convicted in state court for crimes that occurred within the Blackfeet Indian Reservation. 986 F.2d at 304. He filed a petition for habeas corpus, arguing that he was an Indian and thus should have been tried in federal court under the IMCA. *Id.* We rejected his argument, but we did not address whether he had "shown a significant de-

gree of blood and sufficient connection to his tribe." *Id.* Instead, we held that he lost under "a simpler threshold question," whether "the Indian group with which [he] claim[ed] affiliation [was] a federally acknowledged Indian tribe." *Id.* at 304–05. Because the tribe in which he was enrolled was not federally recognized, we held that he was not an Indian under the IMCA. *Id.* at 306.

Maggi read *LaPier* to require federal recognition under both prongs of the *Bruce* test. But *LaPier* required federal recognition only under *Bruce*'s second prong. The "dispositive" question in *LaPier* was whether "the Indian group with which LaPier *claims affiliation* [is] a federally acknowledged Indian tribe." *Id.* at 304–05 (emphasis added). We wrote that a "defendant whose only claim of *membership or affiliation* is with an Indian group that is not a federally acknowledged Indian tribe cannot be an Indian for criminal jurisdiction purposes." *Id.* at 305 (emphasis added). *LaPier*'s discussion of federal recognition thus focused exclusively on the particular tribe with which the defendant was currently affiliated. *See id.* at 304–05.

Zepeda contends that *Maggi* was correctly decided. He argues, based on *United States v. Antelope*, 430 U.S. 641 (1977), that if the first prong of the *Bruce* test requires only a quantum of Indian blood, without any connection under this prong to a federally recognized tribe, jurisdiction under the IMCA will depend upon a racial rather than a political classification. We disagree. We see nothing inconsistent between the Court's holding in *Antelope* and our holding here that the first prong of the *Bruce* test does not require that the quantum of blood be derived from a member of a federally recognized tribe. We do

not concede that a requirement of Indian blood standing alone is necessarily a racial rather than a political classification. *See, e.g.*, 25 U.S.C. § 479 (defining the term "Indian" in the Indian Reorganization Act to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "*further includ[ing] all other persons of one-half or more Indian blood*") (emphasis added)); *id.* § 1679(a)(2) (defining "eligible" "Indians" to include members of non-federally recognized tribes so long as the person can demonstrate descent from an Indian resident in California as of 1852); *id.* § 500n (defining "natives of Alaska" as "native Indians, Eskimos, and Aleuts of whole or part blood inhabiting Alaska at the time of the Treaty of Cession of Alaska to the United States and their descendants of whole or part blood"); 25 C.F.R. § 83.7(e) (to be eligible for federal acknowledgment, a tribe must demonstrate, among other things, that its membership "consists of individuals who descend from a historical Indian tribe"). But even if it were, the second prong of the *Bruce* test, as understood in *Maggi* and as we understand it now, is enough to ensure that Indian status is not a racial classification, for the second prong requires, as a condition for the exercise of federal jurisdiction, that the defendant be a member of or be affiliated with a federally recognized tribe. *See Bruce*, 394 F.3d at 1224 (noting that the second prong requires a "non-racial link" to a tribe); *LaPier*, 986 F.2d at 305.

In *Antelope*, the Indian defendants had been convicted of first-degree felony murder under the IMCA. 430 U.S. at 642–43. If they had been tried under

Idaho law, the prosecution would have had to prove additional elements of premeditation and deliberation, because Idaho law lacked an applicable felony-murder provision. *Id.* at 643–44. The Ninth Circuit held that the disadvantage imposed on defendants under the IMCA violated equal protection because "the *sole* basis for the disparate treatment of appellants and non-Indians is that of race." *United States v. Antelope*, 523 F.2d 400, 403 (9th Cir. 1975) (emphasis in original). The Supreme Court reversed. It held that the IMCA was "not based upon impermissible [racial] classifications." *Antelope*, 430 U.S. at 646. "Federal regulation of Indian tribes," the Court wrote, "is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial group consisting of Indians.'" *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (some internal quotation marks omitted)).

Neither the Ninth Circuit nor the Supreme Court in *Antelope* defined "Indian" under the IMCA. However, we know from the Court's analysis that the definition required at least an affiliation with a federally recognized tribe. *Id.* at 646 ("[R]espondents 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."). Neither the Ninth Circuit nor the Court specified whether the definition required, in addition, a quantum of Indian blood. We may infer, however, that such an additional requirement would not have made any difference to the Court's analysis, for the Court premised its analysis on *Mancari*, in which the definition of Indian specifically included a requirement of a quantum of Indian blood.

In *Mancari*, decided just three years before *Antelope*, non- Indian employees of the Bureau of Indian Affairs ("BIA") challenged the employment preference given to Indians under the so-called Indian Preference Statutes. 417 U.S. at 537. The term "Indian" is defined variously in federal and state statutes. Many federal definitions include a requirement of some "quantum" of Indian blood. *See* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. Rev. 1 (2006); Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J.L. Reform 275 (2000–2001). The definition of "Indian," for purposes of the Indian employment preference at issue in *Mancari*, specified that "an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe." 417 U.S. at 553 n.24. The Court upheld the Indian employment preference, with "Indian" so defined, writing:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Id. at 552; *see Antelope*, 430 U.S. at 645 (quoting most of this passage); *see also* Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 Wash. L. Rev. 1041 (2012); Spruhan, *supra*.

It might be objected that the rationale of *Mancari* does not apply to the IMCA, given that *Mancari* deals with disproportionate benefits provided to Indians while the IMCA, at least in some of its applications, deals with disproportionate burdens imposed on Indians. But the Court in *Antelope* specifically responded to this objection. It wrote:

> Both *Mancari* and *Fisher* [*v. District Court*, 424 U.S. 382 (1976),] involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions.

430 U.S. at 646.

The gloss added by *Maggi* to the first prong of *Bruce* would impose an unnecessary and burdensome requirement. Under *Maggi*, the government would have to prove that an ancestor of the defendant—not

merely the defendant himself or herself—was a member of a federally recognized tribe. Such proof is unnecessary, given that the political status necessary to insulate a prosecution under the IMCA from an equal protection challenge is established, under any conception of Indian political status, under the second prong of *Bruce*. Further, such proof may be difficult or even impossible to obtain, even if it is undisputed that the defendant has Indian blood. In some cases, evidence about the defendant's Indian ancestors and their tribal affiliation may be difficult to find or, if found, ambiguous. In other cases, the evidence may be easily available and clear, but show that the Indian ancestors were not members of a federally recognized tribe.

We therefore overrule *Maggi* and restore the basic structure of *Bruce*, though not its precise articulation, as the "generally accepted test for Indian status" under the IMCA. *Bruce*, 394 F.3d at 1223. In doing so, we recognize that *Maggi* was right to restate the second prong of the *Bruce* test and to make clear that the defendant must have a current relationship with a federally recognized tribe. We hold that proof of Indian status under the IMCA requires only two things: (1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe.

In a prosecution under the IMCA, the government must prove that the defendant was an Indian at the time of the offense with which the defendant is charged. If the relevant time for determining Indian status were earlier or later, a defendant could not "predict with certainty" the consequences of his

crime at the time he commits it. *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000). Moreover, the government could never be sure that its jurisdiction, although proper at the time of the crime, would not later vanish because an astute defendant managed to disassociate himself from his tribe. This would, for both the defendant and the government, undermine the "notice function" we expect criminal laws to serve. *United States v. Francisco*, 536 F.2d 1293, 1296 (9th Cir. 1976).

Zepeda and the government agree that the government has the burden of proving to a jury that the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense. However, they dispute whether the judge or the jury should determine whether the tribe in question is federally recognized. Federal recognition "is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." Felix Cohen, *Cohen's Handbook of Federal Indian Law* § 3.02[3], at 134–35 (Nell Jessup Newton ed., 2012); *see* 25 C.F.R. § 83.2. The BIA has the authority to determine which tribes satisfy the criteria for federal recognition. *Zepeda*, 738 F.3d at 211. It maintains and publishes annually a list of federally recognized tribes. *See, e.g.*, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs ("BIA List"), 75 Fed. Reg. 60,810-01 (Oct. 1, 2010). "Absent evidence of its incompleteness, the BIA list appears to be the best source to identify federally acknowledged Indian tribes whose members or affiliates satisfy the threshold criminal jurisdiction inquiry." *LaPier*, 986 F.2d at 305. We previously have treated federal recognition of Indian

tribes as a question of law. In *LaPier*, we held as a matter of law that the defendant's tribe was not federally recognized because it did not appear on the BIA List. *Id.* at 306. Similarly, in *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974), we held as a matter of law that the defendant's tribe was not federally recognized because the federal government had terminated the tribe's recognized status. Consistent with these cases, we hold that federal recognition of a tribe, a political decision made solely by the federal government and expressed in authoritative administrative documents, is a question of law to be decided by the judge.

In seeking to prove federal recognition of a defendant's tribe, the government should present to the judge evidence that the tribe was recognized at the time of the offense. In most cases, the judge will be able to determine federal recognition by consulting the relevant BIA List. If necessary to decide whether the BIA List omits a federally recognized tribe or includes an unrecognized tribe, the court may consult other evidence that is judicially noticeable or otherwise appropriate for consideration.

On the first *Bruce* prong, the court should instruct the jury that it has to find beyond a reasonable doubt that the defendant has some quantum of Indian blood. On the second prong, the court should instruct the jury that it has to find beyond a reasonable doubt that the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense. We described in our opinion in *Bruce* the criteria for such recognition. *Bruce*, 394 F.3d at 1224; *see also Cruz*, 554 F.3d at 846. We restate them here, emphasizing that each of these criteria requires a link to a federally recognized tribe.

The criteria are, in declining order of importance: (1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe. If the court has found that the tribe of which the government claims the defendant is a member, or with which the defendant is affiliated, is federally recognized, it should inform the jury that the tribe is federally recognized as a matter of law.

Here, the trial court erred by instructing the jury to find whether Zepeda was an Indian without telling it how to make that finding. Zepeda did not object to the instruction, so we review for plain error. *United States v. Williams*, 990 F.2d 507, 511 (9th Cir. 1993). "Plain error is '(1) error, (2) that is plain, and (3) that affects substantial rights.'" *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc) (quoting *United States v. Cotton*, 535 U.S. 625, 631 (2002)). The erroneous jury instruction did not affect Zepeda's substantial rights because, as we discuss below, there was clear and undisputed evidence that Zepeda both had Indian blood and was an enrolled member of a federally recognized tribe. *See United States v. Teague*, 722 F.3d 1187, 1192 (9th Cir. 2013) (noting that "failure to instruct on a necessary offense element" does not affect substantial rights where "there is [no] reasonable probability the jury's verdict would have been different had the jury been

properly instructed" (internal quotation marks omitted)).

2. Sufficiency of the Evidence Against Zepeda

Zepeda argues the government failed to present sufficient evidence at trial to prove that he was an Indian. If Zepeda is right, we must reverse eight of his nine convictions. The government charged Zepeda with assault with a dangerous weapon and assault resulting in serious bodily harm under the IMCA. *See* 18 U.S.C. § 1153 (covering "felony assault[s] under section 113"); 18 U.S.C. §§ 113(3), (6). Conspiracy and use of a firearm during a crime of violence are "federal law[s] of general, non-territorial applicability," which do not require the government to satisfy the IMCA's elements. *United States v. Errol D., Jr.*, 292 F.3d 1159, 1165 (9th Cir. 2002) (quoting *United States v. Young*, 936 F.2d 1050, 1055 (9th Cir. 1991)). However, to prove that Zepeda used a firearm during a crime of violence, the government first had to prove that Zepeda committed the predicate assaults, *United States v. Streit*, 962 F.2d 894, 899 (9th Cir. 1992), which were charged under the IMCA. Therefore, conspiracy was the only count for which the government did not have to prove Zepeda's Indian status.

The first prong of the *Bruce* test requires only that the defendant have "some" quantum of Indian blood. Therefore, "evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong." *Bruce*, 394 F.3d at 1223. The Enrollment Certificate stated that Zepeda had one-half Indian blood, with blood from the Pima and Tohono O'Odham tribes. Matthew, Zepeda's brother, testified that their father was an Indian. This evidence was undisputed and

clearly satisfied the first *Bruce* prong. *See id.* at 1223–24. As we held above, it is irrelevant whether the tribes from which Zepeda's bloodline derives are federally recognized.

Zepeda's Enrollment Certificate established that he was an enrolled member of the Gila River Indian Community. The Gila River Indian Community was, as a matter of law, a federally recognized tribe at the time of the charged offenses. *See* BIA List, 74 Fed. Reg. 40,218-02, 40,220 (Aug. 11, 2009); BIA List, 73 Fed. Reg. 18,553-01, 18,554 (Apr. 4, 2008). Zepeda stipulated to the admission of the Enrollment Certificate and did not challenge its attestation that he was a member of the Gila River Indian Community.

We therefore hold that the Enrollment Certificate and Matthew's testimony were sufficient to establish that Zepeda was an Indian at the time of the charged offenses.

B. Zepeda's Sentence

Zepeda argues that his sentence—a prison term of ninety years and three months—was unreasonable because the district court improperly treated the Sentencing Guidelines as mandatory. Zepeda's sentence is indeed long, but his argument is based on a misunderstanding of the law governing his sentence.

Under 18 U.S.C. § 924(c), the district court was required to impose consecutive mandatory minimum sentences on Zepeda's convictions for use of a firearm during a crime of violence. Each of Zepeda's convictions under § 924(c) was tied to a different predicate offense: one count of assault resulting in serious bodily injury against Peters and three counts of assault with a dangerous weapon against Peters, Aviles, and C. The jury found that Zepeda discharged his firearm

in committing each offense. Therefore, Zepeda's first conviction under § 924(c) carried a statutory mandatory minimum sentence of ten years, 18 U.S.C. § 924(c)(1)(A)(iii), and the other three convictions each carried statutory mandatory minimum sentences of twenty-five years, *id.* § 924(c)(1)(C)(i); *see United States v. Beltran-Moreno*, 556 F.3d 913, 915 (9th Cir. 2009). Each mandatory minimum sentence had to be imposed consecutively. 18 U.S.C. § 924(c)(1)(D)(ii); *Beltran-Moreno*, 556 F.3d at 915. Therefore, Zepeda's sentence is the only sentence the district court could impose. *See United States v. Harris*, 154 F.3d 1082, 1085 (9th Cir. 1998). Its length was determined not by the judge but, in effect, by the United States Attorney's charging decision. Zepeda's other arguments challenging his sentence were not properly raised before this court. *See Sandgathe v. Maass*, 314 F.3d 371, 380 & n.8 (9th Cir. 2002); 9th Cir. R. 28-1(b).

Conclusion

We overrule *Maggi* and hold that the government's evidence was sufficient under the *Bruce* test, as recharacterized in this opinion, to prove that Zepeda was an Indian at the time of his crimes. We reject Zepeda's other arguments and affirm his convictions and sentence in full.

AFFIRMED.

KOZINSKI, Circuit Judge, with whom Circuit Judge IKUTA joins, concurring in the judgment:

The 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. Damien Zepeda 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. 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. The racial test articulated in *United States* v. *Bruce*, 394 F.3d 1215 (9th Cir. 2005), amounts to an unwarranted and impermissible "Indian exception" to that bedrock principle.

United States v. *Maggi* at least tethered *Bruce*'s racial component to a political relationship. 598 F.3d 1073, 1080–81 (9th Cir. 2010). By overruling *Maggi*, the majority leaves the IMCA—and a host of other federal statutes governing tribes—shorn of even a colorable non-racial underpinning. I would instead affirm Zepeda's conviction either by applying the IMCA 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 Zepeda's ancestry was from a federally recognized tribe. I concur in the judgment only.

1. The majority holds "that proof of Indian status . . . requires only two things: (1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a

federally recognized tribe." Maj. Op. at 20. The first prong of that test is an overt racial classification. The majority is unconcerned by this because, in its view, "[t]he second prong of the *Bruce* test . . . is enough to ensure that Indian status is not a racial classification, for the second prong requires, as a condition for the exercise of federal jurisdiction, that the defendant be a member of or be affiliated with a federally recognized tribe." Maj. Op. at 16–17.

But the presence of a separate and independent "non-racial prong" cannot save a test that otherwise turns on race. *Bruce*'s 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 *Bruce*'s first requirement, and that requirement turns entirely on race. That ineluctably treats identically situated individuals *within* a tribe differently from one another solely based on their immutable racial characteristics.

To claim that the *Bruce* test is "not a racial classification" because there's a non-racial "condition for the exercise of federal jurisdiction" conflates Congress's Article I power to enact a law with the affirmative restrictions imposed by the Fifth Amendment. The fact that the "defendant [is] a member of or [] affiliated with a federally recognized tribe" explains why Congress is able to criminalize a tribe member's conduct, even absent a nexus to interstate activity. But the fact that Congress is permitted to create laws regulating tribe members doesn't mean that Congress can administer those laws in a discriminatory fashion. That 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.

"[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 224 (1995). Indians are no exception. The Supreme Court has stressed time and again that federal regulation of Indian *tribes* does not equate to federal regulation of the Indian *race*. Federal laws governing tribes do "not derive from [] race . . . but rather from [a tribe's] quasi-sovereign status . . . under federal law." *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976) (per curiam). "[R]egulation is rooted in the unique status of Indians as [a nation] 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)). In fact, the Supreme Court has specifically stated that defendants are "not subjected to federal criminal jurisdiction [under the IMCA] because they are of the Indian race but because they are enrolled members of [a federally recognized] tribe." *Id.* 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.

2. The panel in *Bruce* believed itself bound to apply a racial test because of the Supreme Court's decision in *United States* v. *Rogers*, 45 U.S. (4 How.) 567 (1846). *Rogers* is a nearly 170-year-old case, authored by Chief Justice Taney, in which the Court held that an adopted, non-racially Indian tribe member wasn't subject to an exemption from federal criminal jurisdiction for crimes committed by an "Indian" against another "Indian." *Id.* at 572–73. In defining "Indian" for purposes of the statute, the Court noted that the law "does not speak of members of a tribe, but of the race generally,—of the family of Indians," *id.* at 573, and justified the federal government's exercise of power over "this unfortunate race" in part based on the need "to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices," *id.* at 572.

Reliance on pre-civil war precedent laden with dubious racial undertones seems an odd course for our circuit law to have followed, especially in light of the Supreme Court's much more recent holdings in *Mancari* and *Antelope*. And, even if intervening developments in equal protection law hadn't rendered *Rogers* obsolete, it's clearly distinguishable. *Rogers* stands for the limited proposition that "a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian," 45 U.S. (4 How.) at 572, when the adoption occurs for the purpose of evading prosecution. A case that does no more than prohibit a tribe from making membership exceptions designed to circumvent criminal punishment is a weak reed upon which to rest the federal government's unfettered ability to racially discriminate between tribe members.

The majority's strongest support for *Bruce*'s racial test appears to be an inference from the fact that the racial preference upheld in *Mancari* had a blood quantum requirement similar to the one at issue here. But that portion of the provision 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." I find it remarkable that the majority is able 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.

3. Overruling *Maggi* takes our circuit law in the wrong direction. *Maggi* at least tied the racial component in *Bruce* to a political relationship. Because Congress's plenarypower over Indian tribes is rooted in treaties and other political accommodations between sovereign entities, the validity of federal regulation must turn, not on a tribe's existence in some anthropological sense, but on its political relationship with the United States. A genuine political relationship between sovereigns requires reciprocal recognition. Thus, as we correctly noted in *LaPier* v. *McCormick*, a political relationship between a tribe and the federal government exists only when "the United States recognizes [the] tribe." 986 F.2d 303, 305 (9th Cir. 1993). That's why the Court in *Mancari* specifically noted Congress has the power "to legislate on behalf of *federally recognized* Indian tribes,"

417 U.S. at 551 (emphasis added), not merely "tribes."

Maggi ensured that we tied *Bruce*'s racial component to this political relationship. Regulation was rooted in a racial connection to an established political entity, rather than in an unadorned racial characteristic. *Maggi* was less than perfect, of course. At bottom, a racial distinction still controlled the application of federal law. But at least the racial lineage in question bore some relation to the purported source of federal power. An unrecognized tribe is not a quasi-sovereign political entity for the purposes of federal law, and has no political relationship whatsoever with the United States. To allow a federal statute to turn solely on a racial connection to an unrecognized tribe has no basis in the justification for disparate treatment articulated in *Mancari* and *Antelope*.

* * *

By extending *Bruce* and overruling *Maggi*, the majority creates a disturbing anomaly in the application of our equal protection law. The majority empowers Congress to distribute benefits and burdens within Indian tribes along purely racial lines. It may be that Congress will never use that power to work racial injustice, but the Constitution's commands are inexorable precisely because we aren't prescient enough to predict all the ways in which the government can abuse the power we give to it. Whatever complexities may be inherent in the federal regulation of Indian tribes, the equal protection clause permits no exceptions. Racial classifications must survive the strictest scrutiny. Those that cannot have no place in our law.

IKUTA, Circuit Judge, with whom KOZINSKI, Circuit Judge, joins, concurring in the judgment:

The majority today holds that we must continue to define an Indian by the "degree of Indian blood" as required by *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). Maj. Op. at 13–14. This is a troubling conclusion, and an unnecessary one. The *Bruce* blood quantum requirement serves no purpose, because the second prong of the *Bruce* test adequately defines an Indian based on his "tribal or government recognition as an Indian." *Bruce*, 394 F.3d at 1223 (internal quotation mark omitted). In holding that a person is not an Indian unless a federal court has determined that the person has an acceptable Indian "blood quantum," we disrespect the tribe's sovereignty by refusing to defer to the tribe's own determination of its membership rolls. It's as if we declined to deem a person to be a citizen of France unless that person can prove up a certain quantum of "French blood," and we declared that adoptees whose biological parents are Italian cannot qualify.

Because there is no need to use the blood quantum test in this context, we should avoid perpetuating the sorry history of this method of establishing a race-based distinction. Early in our history, state courts used blood quantum tests to determine who was a slave and who was free. *See Gentry v. McMinnis*, 33 Ky. (3 Dana) 382, 385 (1835) (explaining that "[a]ll persons of blood not less than one-fourth African, are (in Virginia and Kentucky) prima facie deemed slaves; and, e converso, whites and those less than one-fourth African, are, prima facie, free"). Even after slavery was abolished, states used blood quantum tests to define "persons of color" and

to ensure segregation of "persons of color" from white persons. *See, e.g.*, 1 Pope's Digest of Stats. of Ark. § 1200 (1937) (defining persons who "belong to the African race," for the purposes of railroad segregation, as "[p]ersons in whom there is a visible and distinct admixture of African blood"); Ga. Code Ann. § 79-103 (1933) (defining "persons of color" as persons who have "any ascertainable trace" of colored blood); Va. Code Ann. § 67 (Michie 1924) (defining a "colored person" as a person "having one-sixteenth or more of negro blood" and "an Indian" as a non-colored person with one-fourth Indian blood). And the same blood quantum tests determined who could vote. *See People v. Dean*, 14 Mich. 406, 413–15, 425 (1866) (construing state law giving only "white male citizens" the right to vote as excluding persons of African descent unless they had less than one-fourth African blood).

Similarly, states relied on blood quantum tests to prevent white people from marrying persons of color. *See Loving v. Virginia*, 388 U.S. 1, 6 (1967). *Loving* finally invalidated Virginia's miscegenation laws, which prohibited intermarriage between white persons and nonwhites, and explained that the term "white person" applied "only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons." *Id.* at 5 n.4, 12 (quoting Va. Code Ann. § 20–54 (1960)).

Our nation also used blood quantum tests to discriminate against nonwhites who wanted to become citizens. Congress decreed that only a "free white person[]" could be granted the "privilege of naturali-

zation," and courts generally construed this requirement to mean that "men are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test always being that of common understanding." *Morrison v. California*, 291 U.S. 82, 85–86 (1934) (internal citation and quotation marks omitted); *see also* 8 U.S.C. § 703 (1940) (extending the right to be a naturalized citizen only to persons with an approved admixture of blood of specified classes). In ten states, only persons who met the blood quantum requirement for naturalization could own land. *See* Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Calif. L. Rev. 7, 7–9 (1947). And during World War II, the government took into account the quantum of a citizen's Japanese blood in determining who would be held in internment camps. *See* J.L. DeWitt, *Final Report: Japanese Evacuation from the West Coast, 1942*, at 145 (1943) (noting that "[m]ixed-blood (one-half Japanese or less) individuals," among others, were eligible for exemption from evacuation).

The Supreme Court recently reaffirmed opposition to "[a]ncestral tracing of this sort" in laws that serve to enable race-based distinctions. *Rice v. Cayetano*, 528 U.S. 495, 510, 517, 524 (2000) (holding unconstitutional a Hawaiian constitutional provision that limited voting, by statute, to "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778"). Because we have no need to use this metric, and because I doubt it would survive strict scrutiny, I join Judge Kozinski's concurrence in full and concur in the judgment only. It is regrettable that we did not take the opportunity as an en banc panel to remove *Bruce*'s first prong from our jurisprudence.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10-10131
D.C. No. 2:08-cr-01329-ROS-1

Appeal from the United States District Court for the District of Arizona

Roslyn O. Silver, Senior District Judge, Presiding

Argued and Submitted
July 17, 2012—San Francisco, California

Filed September 19, 2013

Before: Ferdinand F. Fernandez, Richard A. Paez, and Paul J. Watford, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Watford

COUNSEL

Michele R. Moretti (argued), Law Office of Michele R. Moretti, Lake Butler, Florida, for Defendant-Appellant.

Joan G. Ruffennach (argued), Assistant United States Attorney, Office of the United States Attorney, Phoenix, Arizona, for Plaintiff-Appellee.

OPINION

PAEZ, Circuit Judge:

On October 25, 2008, Damien Zepeda ("Zepeda") traveled with his brothers Jeremy and Matthew Zepeda ("Matthew") to the home of Dallas Peters ("Peters"), located on the Ak–Chin Reservation of Arizona. Zepeda and Matthew opened fire upon the house's occupants, injuring Peters severely. In a nine-count indictment, the government charged Zepeda with, *inter alia*, conspiracy to commit assault, assault with a deadly weapon, and use of a firearm during a crime of violence.[1] The indictment alleged that Zepeda was an "Indian[]." Following a jury trial, Zepeda was convicted of all counts.

The Major Crimes Act, 18 U.S.C. § 1153, provides for federal jurisdiction for certain crimes committed by Indians in Indian country.[2] The statute

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[1] The nine counts included: (1) conspiracy to commit assault with a dangerous weapon and assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 1153, 371, and 2; (2) assault resulting in serious bodily injury against Dallas Peters, in violation of 18 U.S.C. §§ 1153, 113(a)(6) and 2; (3) use of a firearm during a crime of violence as charged in count 2, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2; (4), (6), (8) assault with a dangerous weapon against Dallas Peters, Stephanie Aviles, and Jane Doe, in violation of 18 U.S.C. §§ 1153, 113(a)(3), and 2; and, (5), (7), (9) use of a firearm during the crimes of violence charged in counts 4, 6, and 8, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. Aviles was Zepeda's ex-girlfriend and Doe was Aviles's cousin. Both were present at the Peters residence on the night of the shooting.

[2] Although we are mindful that the term "Native American" or "American Indian" may be preferable, we use the term "Indian" throughout this opinion since that is the term used in 18 U.S.C. § 1153 and at issue in this appeal.

does not define who is an Indian, and determining the proper boundaries of federal jurisdiction over Indians is a formidable task. It is now well- settled in this circuit that we apply the two-part test articulated in *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) to determine who is an Indian. We consider: (1) the defendant's degree of Indian blood, and (2) the defendant's tribal or government recognition as an Indian. *Id.* at 1223; *United States v. Cruz*, 554 F.3d 840, 845 (9th Cir. 2009). More recently, we clarified that the first of these two prongs requires that the defendant's "bloodline be derived from a federally recognized tribe."[3] *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010).

This appeal calls upon us to decide whether a Certificate of Enrollment in an Indian tribe, entered into evidence through the parties' stipulation, is sufficient evidence for a rational juror to find beyond a reasonable doubt that the defendant is an Indian for the purposes of § 1153 where the government offers no evidence that the defendant's bloodline is derived from a federally recognized tribe. We hold that it is not.

I.

At Zepeda's trial, the government introduced into evidence, as Exhibit 1, a document entitled "Gila River Enrollment/Census Office Certified Degree of Indian Blood."[4] The document bore an "official seal" and stated that Zepeda was "an enrolled member of the Gila River Indian Community," and that "infor-

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[3] In this opinion, we consider the first prong only.

[4] For the purposes of clarity, we refer to this document as the "Tribal Enrollment Certificate" or "Certificate" throughout.

mation [wa]s taken from the official records and membership roll of the Gila River Indian Community." It also stated that Zepeda had a "Blood Degree" of "1/4 Pima [and] 1/4 Tohono O'Odham" for a total of 1/2. The Certificate was signed by "Sheila Flores," an "Enrollment Services Processor." The prosecutor and Zepeda's attorney stipulated to admission of the Certificate into evidence without objection.[5] Their stipulation stated: "The parties have conferred and have agreed that Exhibit 1[, the Tribal Enrollment Certificate,] . . . may be presented at trial without objection and [its] contents are stipulated to as fact."

The Tribal Enrollment Certificate was published to the jury through the testimony of Detective Sylvia Soliz, a detective for the Ak–Chin Police Department, who told the jury that she obtained the Certificate from the Gila River Indian Community in advance of trial, "confirming" that Zepeda was an enrolled member. The colloquy between Soliz and the prosecutor proceeded as follows:

> Q: [W]e've talked a little bit about Native Americans and Indian blood and that sort of thing. Is this a jurisdictional requirement that you have? Explain that for the jury.
>
> A: Yes, it is. I am only able to investigate if the witness would come to a federal status and the victim was an enrolled member of a tribe or – and if it occurred on the reservation boundaries.
>
> . . .

[5] The stipulation, which was signed by counsel, was admitted into evidence as Exhibit 48.

> Q: You talked about a certification of Indian blood. What is that?
>
> A: It's a piece of paper confirming through the tribe that you obtained from the enrollment office that confirms that this person is an enrolled member of their tribe and he[,] and they[,] do meet the blood quantum.
>
> Q: And is that sometimes used in determining whether that person might be able to receive tribal benefits from the tribe?
>
> A: Yes, it does.

Zepeda's brother Matthew also testified regarding Zepeda's Indian status. Matthew testified that he was half "Native American," from the "Pima and Tiho" tribes, and that his Indian heritage came from his father. He also testified that he and Zepeda shared the same father, as well as the same mother, who was "Mexican."

No further evidence regarding Zepeda's Indian status was admitted. At the close of the government's case in chief, Zepeda moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, arguing that insufficient evidence supported his convictions.[6] The court denied his motion. Zepeda renewed

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[6] We note that although Zepeda did not present argument to the district court regarding the sufficiency of the evidence of his Indian status, "Rule 29 motions for acquittal do not need to state the grounds upon which they are based because 'the very nature of such motions is to question the sufficiency of the evidence to support a conviction.'" *United States v. Viayra*, 365 F.3d 790, 793 (9th Cir. 2004) (quoting *United States v. Gjurashaj*, 706 F.2d 395, 399 (2d Cir. 1983)); *see also Cruz*, 554

his motion at the close of the evidence, and again, his motion was denied.

On appeal, Zepeda argues, *inter alia*, that the government failed to prove beyond a reasonable doubt that he was an Indian under § 1153. We agree.

II.

Indian "tribes generally have exclusive jurisdiction over crimes committed by Indians against Indians in Indian country."[7] *United States v. LaBuff*, 658 F.3d 873, 876 (9th Cir. 2011). As we explained in *United States v. Begay*, 42 F.3d 486 (9th Cir. 1994):

> Indian tribes are recognized as quasi-sovereign entities that may regulate their own affairs except where Congress has modified or abrogated that power by treaty or statute. Courts have also recognized, however, that regulation of criminal activity in Indian country is

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F.3d at 844 n.4; *United States v. South*, 28 F.3d 619, 627 (7th Cir. 1994) (concluding that "Rule 29 does not require anything more" than "to put the government on notice that [a defendant] was contesting the sufficiency of the evidence in support" of a conviction); 8A Moore's Federal Practice ¶ 29.03(1), at 29–8 (2d ed. 1989); 2 Charles A. Wright, Federal Rules of Criminal Procedure § 466, at 653 (2d ed. 1982) ("Specificity is not required by Rule 29.").

[7] "[T]he term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151.

> one area where competing federal interests may override tribal interests.

Id. at 498.

To balance the sovereignty interest of Indian tribes and the United States's interest in punishing offenses committed in Indian country, Congress enacted two statutes, 18 U.S.C. §§ 1152 and 1153. *Id.* Section 1152, the General Crimes Act,[8] grants federal jurisdiction over certain crimes committed in Indian country by non-Indians against Indians and vice versa, but excludes crimes committed by one Indian against another. *Id.*; *LaBuff*, 658 F.3d at 876. Section 1153, the Major Crimes Act,[9] creates federal jurisdic-

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[8] Section 1152 provides that:

> 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.

18 U.S.C. § 1152.

[9] Section 1153(a) provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to

tion for cases in which an Indian commits one of a list of thirteen enumerated crimes in Indian country. *Id.* The government charged Zepeda and prosecuted him under the latter statute.

The question of Indian status operates as a jurisdictional element under § 1153. *Cruz*, 554 F.3d at 843; *Bruce*, 394 F.3d at 1228. Nonetheless, we have held that Indian status "is an element of the offense that must be alleged in the indictment and proved beyond a reasonable doubt." *Maggi*, 598 F.3d at 1077 (citing *Cruz*, 554 F.3d at 845; *Bruce*, 394 F.3d at 1229). We have also held that whether a defendant is an Indian is a mixed question of fact and law that must be determined by the jury.[10] *See Bruce*, 394 F.3d at 1218, 1223, 1229; *see also Maggi*, 598 F.3d at 1077; *Cruz*, 554 F.3d at 845. Indeed, it is the special province of the jury to resolve any factual disputes arising under the two prongs of the *Bruce* test. *See*

> commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), 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.

18 U.S.C. § 1153(a).

[10] As we explained in *Bruce*, "[m]ixed questions of law and fact are those in which 'the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard.'" 394 F.3d at 1218 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982)).

Bruce, 394 F.3d at 1223; *Maggi*, 598 F.3d 1082-83; *Cruz*, 554 F.3d at 846-47.

"Although jurisdictional questions are ordinarilyreviewed de novo, when a defendant brings a motion for acquittal in order to challenge the sufficiency of the *evidence* underlying a jurisdictional element, we owe deference to the jury's ultimate factual finding." *Cruz*, 554 F.3d at 843–44 (emphasis in original). "Accordingly . . . we review the district court's decision under the standard applied to sufficiency-of-the-evidence challenges: 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* at 844 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted)); *see also United States v. Nevils*, 598 F.3d 1158, 1163–67 (9th Cir. 2010) (en banc).

III.

A.

We first must determine whether the Tribal Enrollment Certificate was properly admitted into evidence, or rather, as Zepeda urges, whether its admission violated his rights under the Confrontation Clause. Because Zepeda did not object at trial to the district court's admission of the Certificate pursuant to the parties' stipulation, we review for plain error. *United States v. Wright*, 625 F.3d 583, 607 (9th Cir. 2010).

"The test regarding the validity of a stipulation is voluntariness." *United States v. Molina*, 596 F.3d 1166, 1168–69 (9th Cir. 2010). We have previously held that "'[s]tipulations freely and voluntarily entered into in criminal trials are as binding and en-

forceable as those entered into in civil actions.'" *Id.* at 1169 (quoting *United States v. Technic Servs.*, 314 F.3d 1031, 1045 (9th Cir. 2002) (alteration in original)). "'[S]tipulations serve both judicial economy and the convenience of the parties, [and] courts will enforce them absent indications of involuntary or uninformed consent.'" *Id.* (quoting *CDN Inc. v. Kapes*, 197 F.3d 1256, 1258 (9th Cir. 1999) (alterations in original)). "A 'defendant who has stipulated to the admission of evidence cannot later complain about its admissibility' unless he can show that the stipulation was involuntary." *Id.* (quoting *Technic Servs.*, 314 F.3d at 1045).

Zepeda points to no record evidence that he entered into the stipulation at issue involuntarily. Rather, he points to a lack of record evidence that his attorney informed him of the contents of the stipulation and its legal effect, and asserts that his counsel's waiver of his Confrontation Clause rights was invalid. While his first contention is plausible, Soliz testified extensively regarding the Tribal Enrollment Certificate's contents, referring both to Zepeda's bloodline and to his eligibility for benefits from the Gila River Indian Community. This testimony at least put Zepeda on notice regarding the contents of the stipulation. Regardless, Zepeda bears the burden on appeal of pointing to record evidence showing that his consent was involuntary, and he has not done so here. *See Molina*, 596 F.3d at 1169.

Moreover, our case law recognizes that "defense counsel may waive an accused's constitutional rights as a part of trial strategy." *United States v. Gamba*, 541 F.3d 895, 900 (9th Cir. 2008). Counsel's authority extends to waivers of the accused's Sixth Amendment right to cross-examination and confrontation as

a matter of trial tactics or strategy. *Wilson v. Gray*, 345 F.2d 282, 287–88 (9th Cir. 1965).

Zepeda argues that waiver of a fundamental constitutional right cannot *ever* constitute a sound trial strategy, particularly where, as here, the Tribal Enrollment Certificate purported to establish an essential jurisdictional element. It appears from the record, however, that Zepeda's attorney strategically focused Zepeda's defense on the implausibility of government witnesses' testimony, as compared to Zepeda's markedly different version of the relevant events. He chose not to direct the jury's attention to Zepeda's Indian status, and informed the jury during his opening statement: "I will stipulate and concede things that ought to be conceded in terms of my client, Mr. Zepeda." Although ultimately not a winning strategy, it was clearly "deliberately made as a matter of trial tactics," and did not involve a "basic trial right[]" such as the decision "whether to plead guilty, waive a jury, testify in his . . . own behalf, or take an appeal." *Gamba*, 541 F.3d at 901 (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (internal quotation marks omitted)). Nor, as we discuss at length below, was the Tribal Enrollment Certificate sufficient to carry the government's burden of proof of Zepeda's Indian status. Thus, Zepeda's attorney did not violate Zepeda's Confrontation Clause rights when he stipulated to admission of the Certificate. *See Gamba*, 541 F.3d at 900; *Wilson*, 345 F.2d at 287.

Accordingly, we conclude that the district court did not plainly err in admitting the Tribal Enrollment Certificate into evidence pursuant to the parties' stipulation.

B.

Having determined that the Tribal Enrollment Certificate was properly admitted into evidence, we turn to whether, viewing all evidence in the light most favorable to the government, any rational juror could have found beyond a reasonable doubt that Zepeda was an Indian, on the basis of the slim evidence as to both prongs of the *Bruce* test. We begin by explaining that the *Bruce* test contains an "important overlay." *Maggi*, 598 F.3d at 1078.

As noted, "[t]he *Bruce* test requires that the Government prove two things: that the defendant has a sufficient 'degree of Indian blood,' and has 'tribal or federal government recognition as an Indian.'" *Cruz*, 554 F.3d at 845 (quoting *Bruce*, 394 F.3d at 1223, 1224). "The first prong requires 'some' Indian blood." *United States v. Ramirez*, 537 F.3d 1075, 1082 (9th Cir. 2008) (quoting *Bruce*, 394 F.3d at 1223). "Thus, 'evidence of a parent, grandparent, or great- grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong.'" *Id.* (quoting *Bruce*, 394 F.3d at 1223).

"The second prong requires evidence that 'the Native American has a sufficient non-racial link to a formerly sovereign people.'" *Id.* (quoting *Bruce*, 394 F.3d at 1224). "Courts analyzing this prong have considered evidence of: '1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life.'" *Id.* (quoting *Bruce*, 394 F.3d at 1224). These four factors "are to be considered 'in declining order of importance.'" *Cruz*, 554 F.3d at 846 n. 6 (quoting *Bruce*,

394 F.3d at 1224). "[T]ribal enrollment is 'the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative' . . . . [E]nrollment, and indeed, even eligibility therefor, is not dispositive of Indian status." *Id.* (quoting *Bruce*, 394 F.3d at 1224-25 (some alterations in original)).

Our recent decision in *United States v. Maggi* made clear that "[t]here is an important overlay to the *Bruce* test: To be considered an Indian under . . . [§] 1153, the individual must have a sufficient connection to an Indian tribe that is *recognized by the federal government*. Affiliation with a tribe that does not have federal recognition does not suffice." 598 F.3d at 1078 (emphasis in original).

In *Maggi*, we addressed the consolidated appeals of two defendants, Gordan Mann and Shane Maggi, both tried and convicted pursuant to § 1153. Mann was an enrolled member of the Little Shell Tribe of the Chippewa Cree, a tribe that was not recognized by the federal government, despite a longstanding petition for federal recognition. *Id.* at 1076. We noted that tribal enrollment records often include identification of an individual's percentage of Indian blood, and that this information is used to establish eligibility for enrollment. *Id.* Mann's enrollment record reflected his degree of Indian blood as 10/64 Chippewa and 11/64 other Indian blood. *Id.* Maggi's degree of Indian blood was 1/64 Blackfeet tribe, a tribe recognized by the federal government, and 1/32 Cree tribe. *Id.* at 1076, 1080–81. The record did not reflect whether Maggi was descended from a federally recognized group of the Cree tribe, such as the Rocky Boy Reservation Chippewa Cree, or a non-recognized group, such as the Little Shell Tribe Chippewa Cree.

Id. Maggi was not an enrolled member of any tribe, though his mother's enrollment in the Blackfeet tribe entitled him to the receipt of certain limited benefits. *Id.* at 1076–77. Both Mann and Maggi argued in the district court that they were not subject to prosecution under § 1153 because they were not Indians. *Id.*

In *Maggi*, we commented that we had previously addressed the issue of whether prosecution under § 1153 requires membership in a federally recognized tribe in *LaPier v. McCormick*, 986 F.2d 303, 304–06 (9th Cir. 1993). In a federal habeas petition under 28 U.S.C. § 2254, LaPier challenged his Montana state court conviction, maintaining that he should have been tried for his alleged crime in federal court under § 1153 because he was an Indian. LaPier, like Mann, was a member of the Little Shell Tribe of Chippewa Cree. *Id.* at 306. We reasoned that it did not need to examine whether LaPier had shown a sufficient degree of Indian blood or whether he had a sufficient connection to a tribe because he had failed to satisfy an *antecedent* requirement of affiliation with a federally recognized tribe:

> We need not address . . . the question whether LaPier has shown a significant degree of blood and sufficient connection to his tribe to be regarded as one of its members for criminal jurisdiction purposes. There is a simpler threshold question that must be answered first, and in this case it is dispositive: Is the Indian group with which LaPier claims affiliation a federally acknowledged Indian tribe? If the answer is no, the inquiry ends. A defendant whose only claim of membership or affiliation is

> with an Indian group that is not a federally acknowledged Indian tribe cannot be an Indian for criminal jurisdiction purposes.

Id. at 304–05 (internal quotation marks and citations omitted). We therefore concluded that LaPier was not entitled to habeas relief.

Maggi recognized that *LaPier*'s threshold requirement of affiliation with a federally recognized tribe stemmed from judicial and legislative acknowledgment 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. 598 F.3d at 1078–79 (discussing *LaPier*, 986 F.2d at 305 ("Federal legislation treating Indians distinctively is rooted in the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a guardian-ward status, to legislate on behalf of federally recognized Indian tribes."), *United States v. Antelope*, 430 U.S. 641, 646 (1977) ("[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions. . . . [I]t is not to be viewed as legislation of a 'racial' group consisting of 'Indians' . . . .") (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n. 24 (1974)), and *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005)).

Accordingly, *Maggi* concluded that *LaPier*'s requirement of affiliation with a federally recognized tribe was not altered or superseded by the test announced in *Bruce*, "which presupposes that 'tribal or government recognition as an Indian' means as an

Indian from a federally recognized tribe." *Maggi*, 598 F.3d at 1079 (quoting *Bruce*, 394 F.3d at 1223). It followed from this analysis that the first prong of the *Bruce* test requires "that the bloodline be derived from a federally recognized tribe." *Id.* at 1080; *see also* Ninth Cir. Model Jury Instr. No. 8.113 ("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 descendant status as an Indian, such as being a blood relative to a parent, grandparent, or great-grandparent who is clearly identified as an Indian from a *federally recognized tribe* . . . .") (emphasis added); *id.* cmt. ("The question of Indian status operates as a jurisdictional element under 18 U.S.C. § 1153. 'Some blood' evidence must be from a federally recognized tribe.") (citations omitted).

C.

We turn to the substance of our sufficiency of the evidence inquiry. *Bruce* and its progeny make clear that Indian status is an element of any § 1153 offense, and as such, that it must be alleged in the indictment and proven beyond a reasonable doubt. 394 F.3d at 1229; *Maggi*, 598 F.3d at 1077; *Cruz*, 554 F.3d at 845. We must therefore determine whether the evidence presented at trial was sufficient, drawing all inferences in the government's favor, to satisfy the threshold question identified in *LaPier* and *Maggi*, namely, whether Zepeda's bloodline is derived from a federally recognized tribe. *See Cruz*, 554 F.3d at 843–44.

Our inquiry contains a legal component and a factual component. The question of whether a given tribe is federally recognized is a matter of law. The question of whether the government has proven that

a defendant's bloodline derives from such a tribe is a question of fact for the jury to resolve.

1.

Federal recognition of an Indian tribe is a formal political act that "permanently establishes a government-to- government relationship between the United States and the recognized tribe as a 'domestic dependent nation.'" H.R. Rep. 103-781, at 2 (1994) (footnote omitted). With this understanding, we conclude that the question of whether a tribe is federally recognized is best characterized as a question of law.

Our prior cases provide guidance. In *LaPier*, having determined that "[i]t is . . . the existence of the special relationship between the federal government and the tribe in question that determines whether to subject the individual Indians affiliated with that tribe to exclusive federal jurisdiction for crimes committed in Indian country," we stated that, "[t]o determine whether that special relationship exists—whether the United States recognizes a particular tribe—we defer 'to the political departments.'" 986 F.2d at 305 (quoting *Baker v. Carr*, 369 U.S. 186, 215 (1962)) (additional citations omitted). To that end, we recognized that the Bureau of Indian Affairs had compiled and published a list of federally recognized tribes in the Federal Register pursuant to 25 C.F.R. pt. 83, which we stated "appears to be the best source to identify federally acknowledged Indian tribes whose members or affiliates satisfy the threshold criminal jurisdiction inquiry." *Id.* Consulting this list, we determined that LaPier was not an Indian because the tribe with which he claimed affiliation was not among the listed tribes. *Id.* at 306.

In *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974), we considered the effect of the Klamath Termination Act, 25 U.S.C. § 564 *et seq.*, on the defendant's criminal conviction under § 1153, and found that federal criminal jurisdiction over the defendant was lacking because the Act terminated federal supervision over the Klamath Tribe. *Id.* at 19. In so holding, we explained that "[t]he Klamath Termination Act . . . was intended to end the special relationship that had historically existed between the Federal Government and the Klamath Tribe. While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists." *Id.* We therefore concluded that "18 U.S.C. § 1153 cannot serve to confer Federal jurisdiction with respect to crimes committed by terminated Klamath Indians." *Id.* Finally, in *Maggi*, discussed at length above, we found that the threshold requirement of a bloodline from a federally recognized tribe was lacking for one defendant because there was an "absence of evidence" that his bloodline derived from a recognized tribe. 598 F.3d at 1080.

This precedent, considered as a whole, reflects our recognition that there is a legal element embedded in the first prong of the *Bruce* test: Federal recognition is a legal status afforded to "American Indian groups indigenous to the continental United States . . . that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." 25 C.F.R. § 83.3. The Bureau of Indian Affairs, in accordance with the governing regulations, affords the legal designation of federal recognition to those tribes that meet its criteria. *See id.* §§ 83.1–83.13 (noting procedures for establishing that an

American Indian group exists as an Indian tribe). As we said in *LaPier*, "absent evidence of its incompleteness, the BIA list appears to be the best source to identify federally acknowledged Indian tribes whose members or affiliates satisfy the threshold criminal jurisdiction inquiry." 986 F.2d at 305.[11]

The district court did not determine whether the tribes at issue here are recognized by the federal government. On appeal, the government argues that both the "Gila River Indian Community of the Gila River Indian Reservation, Arizona" and the "Tohono O'odham Nation of Arizona" are federally-recognized

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[11] We note that consulting the BIA's list will not always end the federal recognition inquiry. *See* Felix S. Cohen, *Handbook of Federal Indian Law* § 3.02[5] at 143 (2005 ed.) ("Tribes not included on the list may be able to establish their status as federally recognized through other means, however."). Congress retains the authority to recognize new tribes by statute and to restore the status of previously terminated tribes without any action by the BIA, a power it has exercised a number of times since 1979. *See, e.g.*, 25 U.S.C. §§ 566, 712a, 1300j-1, 1300b-11; *see also* Cohen § 3.02[5] at 144 & n.57; *id.* § 3.02[8][c], p. 168 & n.225. In addition, Congress has declared that it alone has the authority to terminate a tribe's federally recognized status. *See* Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 103(4), 108 Stat. 4791, 4791 (1994); Cohen § 3.02[8][a] at 164. That means the BIA's failure to include a recognized tribe on the list, whether deliberately or through oversight, would not strip a tribe of its federally recognized status unless Congress had spoken through express legislative action. *See* Cohen § 3.02[8][a] at 164 & n.196. Even today, then, circumstances remain in which determining a tribe's federally recognized status might entail interpreting the meaning and effect of congressional enactments.

Indian tribes. We agree. We recognize, as a matter of law, that both tribes appear on the BIA's list of federally recognized tribes. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (April 4, 2008); 74 Fed. Reg. 40,218 (Aug. 11, 2009); 75 Fed. Reg. 60,810 (Oct. 1, 2010).

2.

Having made the legal determination that the "Tohono O'odham Nation of Arizona" is a federally recognized tribe, we must decide whether the government presented sufficient evidence to prove that Zepeda's blood derived from that tribe.[12] The Tribal Enrollment Certificate identifies Zepeda's bloodline as 1/4 Pima and 1/4 Tohono O'Odham; and Matthew's testimony described his ancestral bloodline as "Pima and Tiho." The government introduced *no* evidence that any of these Indian groups are a federally recognized tribe.

In essence then, the government asks us to fill in the evidentiary gap in its case. There is no evidence in the record that the "Tohono O'Odham" referenced in Zepeda's Tribal Enrollment Certificate refers to the federally recognized "Tohono O'odham Nation of Arizona." Zepeda argues correctly that the name "Tohono O'Odham" is *not* on the BIA list. Further, he vigorously argues that:

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[12] We note that because we are concerned only with the first prong of the *Bruce* test, the status of the Gila River tribe is not actually relevant to our decision. The government points to the Tohono O'odham Nation of Arizona as the only federally recognized tribe from which Zepeda's bloodline may derive.

> [The] appellation "Tohono O'Odham" describes the *collective* Tohono O'Odham population, a substantial portion of which has always resided in the Sonoran Desert of northwest Mexico. The BIA specifically lists as federally recognized *only* the "Tohono O'odham Nation of Arizona," and *not* members of the collective "Tohono O'Odham" tribe, "wherever residing" that Zepeda's certificate apparently describes.

Zepeda's Resp. to Gov't's Mot. to Take Judicial Notice 2–3, ECF No. 69.

"Determination of who is an Indian under [18 U.S.C. § 1153] is not as easy as it might seem." *Maggi*, 598 F.3d at 1075. Even under our deferential standard of review, we have vacated jury convictions for insufficient evidence of a defendant's Indian status. *See, e.g.*, *id.* at 1081, 1083 (vacating two convictions); *Cruz*, 554 F.3d at 851 (applying an even more deferential standard of review).

In *Maggi*, the government introduced evidence showing that defendant Mann had the following percentages of Indian blood: "10/64 Chippewa and 11/64 'other Indian blood.'" 598 F.3d at 1076. Although we recognized that some Chippewa tribes were federally recognized, e.g. the Rocky Boy Reservation Chippewa Cree, *id.*, we nonetheless concluded that no rational juror could have found that the Chippewa referenced in Mann's certificate of enrollment could have derived from that tribe. Nor did we think it possible that the jury could have inferred that "other Indian blood" could have referenced a federally recognized tribe. Rather, we concluded that the only rational finding a juror could make was that the Chippewa

blood derived entirely from the Little Shell Tribe of the Chippewa Cree, a non- recognized tribe in which Mann was an enrolled member. *Id*. at 1080. Thus, we concluded that "[g]iven the absence of evidence of any blood from a federally recognized tribe, Mann cannot meet the first prong of *Bruce*, and his conviction must be vacated." *Id*.

We confront an analogous situation here. We are not free to speculate that Zepeda's Tohono O'Odham blood is derived from the Tohono O'odham Nation of Arizona. *See United States v. Andrews*, 75 F.3d 552, 556 (9th Cir. 1996) (noting that "[w]hile '[c]ircumstantial evidence can be used to prove any fact, . . . mere suspicion or speculation' will not provide sufficient evidence" (citation omitted)); *see also United States v. Bennett*, 621 F.3d 1131, 1138–39 (9th Cir. 2010) (finding insufficient evidence to support a conviction); *Walters v. Maass*, 45 F.3d 1355, 1358–60 (9th Cir. 1995) (same); *United States v. Dinkane*, 17 F.3d 1192, 1195–98 (9th Cir. 1994) (same). Zepeda is not an enrolled member of the Tohono O'odham Nation of Arizona and the government submitted no evidence whatsoever to connect the appellation "Tohono O'Odham" to the federally recognized Nation of Arizona. We are not free to surmise that they are one in the same, just as we were not free to speculate that some of Mann's Chippewa blood could have derived from the federally recognized Rocky Boy Reservation Chippewa Cree. *Maggi*, 598 F.3d at 1076, 1080; *see also United States v. Ramirez*, 714 F.3d 1134, 1136, 1140 (9th Cir. 2013) (reversing a conspiracy charge and concluding that there was insufficient evidence to show that the defendant made an agreement to distribute meth despite the "ample proof that the defendant possessed

and sold drugs" to his associate four times in one month in "escalating amounts").

Nor are we free to rely on facts outside of the record concerning the scope of the Nation of Arizona, because this evidence was not presented to the jury and could not have been relied upon by it. It is horn book law that we, as an appellate court, are limited to the record before the jury when assessing the sufficiency of the evidence. *See Jackson*, 443 U.S. at 317–18 (reciting that the sufficiency of evidence "constitutional standard must also require that the factfinder will rationally apply that standard to *the facts in evidence*" and that "the critical inquiry on review of the sufficiency of the evidence . . . [must be] to determine whether *the record evidence* could reasonably support a finding of guilt beyond a reasonable doubt" (emphasis added)).

The jury found that Zepeda was an Indian pursuant to § 1153 in the absence of any proof that Zepeda's bloodline derived from a federally recognized tribe. Because "there is no evidence that [Zepeda] has any blood from a federally recognized Indian tribe," *Maggi*, 598 F.3d at 1075, we conclude that no rational juror could have found Zepeda guilty beyond a reasonable doubt of counts 2 through 9 of the indictment, the offenses predicated on § 1153, and his convictions must be vacated.

IV.

In sum, we hold that the Tribal Enrollment Certificate was insufficient to establish that Zepeda is an Indian for the purposes of federal jurisdiction under § 1153 because the government introduced no evidence that Zepeda's bloodline is derived from a federally recognized tribe. We do not suggest, in so hold-

ing, that a Tribal Enrollment Certificate may *never* be sufficient to meet the government's burden under the first prong of the *Bruce* test. Of course, future cases may present circumstances in which the Certificate itself reflects this information. But that is not the case here.

Because we hold that the government introduced insufficient evidence under the first prong of the *Bruce* test, we need not consider whether the Tribal Enrollment Certificate alone was sufficient to carry the government's burden as to the second prong. As to that issue, we express no opinion.

For the above reasons, Zepeda's convictions under § 1153, in counts 2 through 9 of the indictment, are REVERSED. Zepeda's conviction for conspiracy in violation of 18 U.S.C. § 371 is unaffected by this disposition.[13] *See Begay*, 42 F.3d at 499 ("Section 371 is a federal criminal statute of nationwide applicability, and therefore applies equally to everyone everywhere within the United States, including Indians in Indian country.").

REVERSED in part and **REMANDED** for resentencing.

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[13] Zepeda raises numerous additional issues on appeal that are relevant to his conspiracy conviction. We addressed those issues in a separate memorandum disposition previously filed on January 18, 2013. *See United States v. Zepeda*, 506 F. App'x 536 (9th Cir. 2013).

WATFORD, Circuit Judge, dissenting:

I agree with much of the majority's analysis, particularly its conclusion that whether a tribe has been recognized by the federal government is a question of law. But I disagree with the majority's ultimate determination that the government failed to present sufficient evidence from which a rational jury could infer that Zepeda has a blood connection to a federally recognized tribe. Under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), 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.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JUDGMENT IN A CRIMINAL CASE

United States of America

v.

Damien Miguel Zepeda

No. CR 08-01329-001-PHX-ROS

Tyrone Mitchell (Appointed)
Attorney for Defendant

USM#: 89360-008 ICE#: A95771761

THERE WAS A verdict of guilty on 10/29/2009 as to Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §§ 1153, 371 and 2, Conspiracy and Aid and Abet, a Class D Felony offense, as charged in Count 1 of the Indictment; Title 18, U.S.C. §§ 1153, 113(a)(6), and 2, CIR-Assault Resulting in Serious Bodily Injury, Aid and Abet, a Class C Felony offense, as charged in Count 2 of the Indictment; Title

18, U.S.C. § 924(c)(1)(A) and 2, Use of Firearm During Crime of Violence, Aid and Abet, a Class A Felony offense, as charged in Count 3 of the Indictment; Title 18, U.S.C. §§ 1153, 113(a)(3) and 2, CIR-Assault with a Dangerous Weapon, Aid and Abet, a Class C Felony offense, as charged in Counts 4, 6, and 8 of the Indictment; Title 18, U.S.C. § 924(c)(1)(A) and 2, Use of Firearm During Crime of Violence, Aid and Abet, a Class A Felony offense, as charged in Counts 5, 7, and 9 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **ONE THOUSAND EIGHTY THREE (1,083) MONTHS**. The term of imprisonment consists of a term of 60 months for Count 1; 63 months for each of Counts 2, 4, 6, and 8; 120 months for Count 3, and 300 months for each of Counts 5, 7, and 9. Counts 1, 2, 4, 6, and 8 are ordered to run concurrently to one another; Count 3 consecutive to Counts 1, 2, 4, 6, and 8, and to any other sentence imposed; and Counts 5, 7, and 9 consecutive to each other and to any other sentence imposed. Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS**. The term consists of 3 years for Counts 1, 2, 4, 6, and 8 and 5 years for Counts 3, 5, 7, and 9, all concurrent. The Court recommends that the defendant participate in the Bureau of Prisons Residential Drug Abuse Treatment Program. The Court further recommends that the defendant be placed in an institution in the Southwestern United States, preferably in the District of Arizona, to be near family.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: $900.00

FINE: Waived

RESTITUTION: $45,252.21

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay a total of $ 46,152.21 in criminal monetary penalties, due immediately. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows: Balance is due in equal monthly installments of $ 100 over a period of 59 months to commence 30 days after the release from imprisonment to a term of supervised release.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than $25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of $900.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

The defendant shall pay restitution in the total amount of $45,252.21 to the following victims: Recovery Management Systems Inc. In the amount of $30,952.16, and University Physicians, Inc. in the amount of $14,300.05. The defendant's restitution obligation shall be paid jointly and severally with other defendants in this case until full restitution is paid.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **FIVE (5) YEARS**. The term consists of 3 years for Counts 1, 2, 4, 6, and 8 and 5 years for Counts 3, 5, 7, and 9, all concurrent.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that, pursuant to General Order 05-36, which incorporates the requirements of USSG §§5B1.3 and 5D1.2, you shall comply with the following conditions:

1. You shall not commit another federal, state, or local crime during the term of supervision.

2. You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.

3. You shall report to the Probation Office as directed by the Court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.

4. You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

5. You shall support your dependents and meet other family responsibilities.

6. You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

7. You shall notify the probation officer at least ten days prior to any change of residence or employment.

8. You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.

9. You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. Possession of controlled substances will result in mandatory revocation of your term of supervision.

10. You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.

11. You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

12. You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

13. You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.

14. You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

15. As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.

16. If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.

17. Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and thereafter at least two, but no more than two periodic substance abuse tests per year of supervision, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);

18. If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.

19. You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

20. If you have ever been convicted of any qualifying federal or military offense (including any federal felony) listed under 42 U.S.C. § 14135a(d)(1) or 10 U.S.C. § 1565(d), you shall cooperate in the collection of DNA as directed by the probation officer pursuant to 42 U.S.C. § 14135a(a)(2).

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. You shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. You shall contribute to the cost of treatment in an amount to be determined by the probation officer.

2. You shall submit your person, property (including but not limited to computer, electronic devices, and storage media), residence, office, or vehicle to a

search conducted by a probation officer, at a reasonable time and in a reasonable manner.

3. You shall provide the probation officer access to any requested financial information.

4. You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer.

5. You shall not contact the victims in this case and the probation officer will verify compliance.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the Clerk of the Court deliver two certified copies of this judgment to the United States Marshal of this district.

The Court orders commitment to the custody of the Bureau of Prisons and recommends that the defendant participate in the Bureau of Prisons Residential Drug Abuse Treatment Program. The Court further recommends that the defendant be placed in an institution in the Southwestern United States, preferably in the District of Arizona, to be near family.

The defendant is remanded to the custody of the United States Marshal.

Date of Imposition of Sentence: **Monday, March 22, 2010**

DATED this 22nd day of March, 2010.

/s/ Roslyn O. Silver
Roslyn O. Silver
U.S. District Judge