No. 10-10131

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– v. –

DAMIEN MIGUEL ZEPEDA,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
in Case No. 2:08-cr-01329-ROS-1
The Honorable Roslyn O. Silver

SUPPLEMENTAL BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") submits the following corporate disclosure statement, as required by Fed. R. App. P. 26.1 and 29(c): NACDL is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

January 19, 2015

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SUMMARY OF ARGUMENT[1]

There is no dispute that the Supreme Court's definition of "Indian" in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), controls the meaning of the term as it is used in 18 U.S.C. § 1153. The government concedes the point, and every court—four courts of appeals and four state courts of last resort—agree. Thus, for a defendant to qualify as an "Indian," the government must prove that he or she has (1) a blood tie to an Indian tribe and (2) a current political affiliation with an Indian tribe.

As a panel of this Court correctly held in *United States v. Maggi*, 598 F.3d 1073, 1077 (9th Cir. 2010), in this context the blood tie (as well as the political tie) must be to a federally-recognized Indian tribe. That kind of ancestral tie may permissibly be taken into account as a basis for government action because it functions as a permissible *political* classification. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Antelope*, 430 U.S. 641, 646 (1977). The government's contrary rule—that it must simply prove that the defendant is *racially* Indian—violates equal protection principles. Its approach, accordingly, would render Section 1153

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[1] This brief is filed pursuant to the Court's Order of September 5, 2014, which granted permission for the filing of *amicus* briefs in this matter. Pursuant to Fed. R. App. P. 29(c)(5), *amici* affirm that no counsel for a party authored this brief and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

patently unconstitutional. No court has ever embraced such a radical understanding of Section 1153; in fact, in addition to *Maggi*, the Supreme Court of Utah has expressly held that the blood tie at issue must be to a federally-recognized tribe.

The practical implications of the question posed here are quite limited. The second prong of the test, as the government admits, requires proof of a current political affiliation with a federally-recognized Indian tribe. Many tribes require, as a precondition to affiliation, a blood tie to *that* tribe. *See* 1-3 Cohen's Handbook of Federal Indian Law § 3.03[3] (2012); Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 Cal. L. Rev. Circuit 23, 28 (2013) ("virtually all tribes require some measure of tribal descent to enroll"). In those circumstances, the first prong of the definition of "Indian," as understood by *Maggi*, will generally be satisfied.

The holding of *Maggi*—compared against the rule favored by the government—excludes from Section 1153's coverage a very narrow range of individuals: it excludes only those individuals who are currently affiliated with a federally-recognized Indian tribe, but have a blood tie to a different, *non*-recognized Indian tribe. Apart from Zepeda himself, the government identifies no other person this narrow issue would affect.

ARGUMENT

I. *Rogers* Requires The Government To Prove That A Section 1153(a) Defendant Has A Blood Tie To An Indian Tribe.

As the government concedes, for a defendant to qualify as an "Indian" for purposes of Section 1153, the government must prove that the defendant has "some 'Indian blood.'" U.S. Suppl. Br. 1; *see also id.* at 11.[2] This "blood" requirement is compelled by the Supreme Court's holding in *Rogers*.

1. In *Rogers*, the Supreme Court "interpret[ed] the meaning of 'Indian' under the Trade and Intercourse Act of 1834, the precursor of the Major Crimes Act." *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). The Court considered whether an individual qualified as an "Indian" for purposes of a federal criminal statute when he was "adopted in an Indian tribe" and, as a result, "bec[a]me entitled to certain privileges in the tribe, and ma[d]e himself amenable to their laws and usages." *Rogers*, 45 U.S. at 572-73. The Supreme Court unequivocally held that this individual's political affiliation with a tribe was insufficient: he was "not an Indian" because he did not belong to "the family of Indians." *Id.* at 573. In-

[2] The government asserts neither that *Rogers* is inapplicable nor that it is bad law. Rather, the government accepts that decision's holding that "evidence of Indian blood is required." U.S. Supp. Br. 11.

stead, to qualify as an "Indian" one must also have an ancestral (i.e., "blood") tie. *Id*.

2. Although *Rogers* considered a predecessor statute, its definition of "Indian" applies to Section 1153. Because courts must "presume[] that Congress expects its statutes to be read in conformity with the [Supreme] Court's precedents" (*Porter v. Nussle*, 534 U.S. 516, 528 (2002)), Congress must be understood to have adopted the *Rogers* definition of "Indian" in Section 1153. *See also United States v. Merriam*, 263 U.S. 179, 187 (1923) (Congress presumed to intend judicially settled meaning of terms).

Every court to consider the issue agrees that *Rogers* controls with respect to Section 1153 and thus requires the government to prove, in part, that a defendant has "Indian blood." Panels of this Court have consistently so held for decades. *See*, *e.g.*, *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979); *Maggi*, 598 F.3d at 1077; *Bruce*, 394 F.3d at 1223 (Section 1152).

The Seventh, Eighth, and Tenth Circuits also hold that the government must prove that a defendant "has some Indian blood." *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009); *see also 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. Dodge*, 538 F.2d 770, 787 (8th Cir. 1976).

So, too, do the courts of last resort in Arizona (*State v. Attebery*, 519 P.2d 53, 54 (Ariz. 1974)), Montana (*State v. LaPier*, 790 P.2d 983, 986 (Mont. 1990)), Oklahoma (*Goforth v. State*, 644 P.2d 114, 116 (Okla. Crim. App. 1982)), and Utah (*State v. Reber*, 171 P.3d 406, 409 (Utah 2007); *State v. Perank*, 858 P.2d 927, 932 (Utah 1992)).

Courts thus unanimously hold that the *Rogers* blood tie requirement controls prosecutions pursuant to Section 1153. Any contrary result would open a substantial rift in authority.

3. Not only is *Rogers* controlling, it is also correct. The leading Indian law treatise explains that an aspect of the legal definition of "Indian" is generally that "some of the individual's ancestors lived in what is now the United States before its discovery by Europeans." 1-3 Cohen's Handbook of Federal Indian Law § 3.03[1].

As the panel in *Maggi* explained, the ancestral requirement serves an important function: it "excludes individuals, like the defendant in *Rogers*, who may have developed social and practical connections to an Indian tribe, but cannot claim any ancestral connection to a formerly-sovereign community." *Maggi*, 598 F.3d at 1080. This limitation is essential to feder-

al authority, as the power of Congress to legislate with respect to Indians stems from the "history of treaties and the assumption of a 'guardian-ward' status." *Mancari*, 417 U.S. at 551. It is the historical "dealing of the federal government" with Indian tribes that established the government's "duty of protection" and "with it the power" to enact criminal laws regarding Indians. *United States v. Kagama*, 118 U.S. 375, 384 (1886). Through this history, "the Federal Government has assumed special responsibilities" over those who qualify as Indians, which "is the foundation for federal criminal jurisdiction over Indians in Indian Country." *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993) (quotation omitted).

The government has not assumed responsibility for an individual who lacks an ancestral tie to a tribe that, as a historical matter, had a political relationship with the U.S. government. The *Rogers* definition of an Indian is a federal limitation—essential to assertion of federal authority—that serves as an overlay to any tribal membership criteria. *Cf. Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011) (holding, in the context of the Indian Child Welfare Act, that a "tribe cannot expand the reach of a federal statute by a tribal provision" by more expansively defining who qualifies as an Indian).

II. Equal Protection Demands That The Blood Tie Be To A Federally-Recognized Tribe—Not To A Racial Group.

While *Rogers* establishes that, to prove a defendant is an Indian within the meaning of Section 1153, the government must show that a defendant has a blood-tie, *Mancari* and *Antelope* establish that the nature of this tie must be *political*, not *racial*. A defendant's ancestral tie, accordingly, must be to a federally-recognized Indian tribe. The government's contrary suggestion—that Section 1153 requires a jury to determine whether or not a defendant is *racially* Indian—violates equal protection principles.

A. A naked "blood" tie requirement would violate equal protection principles.

The government concedes that, in its view of Section 1153, "evidence of Indian blood is required," which may be proven by showing "that the defendant had ancestors who were indigenous Indians." U.S. Supp. Br. 11. There is no doubting the implications of the government's position: in its view, a defendant's *race* is an element of a Section 1153 offense.

But the Equal Protection Clause of the Fourteenth Amendment prohibits states from denying "any person . . . equal protection under the laws." U.S. Const. amend. XIV, § 1. And the Fifth Amendment likewise prohibits the federal government from denying any person equal protection. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

It is elementary that a criminal statute may not incorporate, as an element of the offense, a finding as to the defendant's race. Any such statute would be unambiguously unconstitutional.

Yet that is just how the government would interpret Section 1153—that it requires, among other elements, the government to prove that a defendant descends from ethnic Indians, *i.e.*, that a defendant is racially Indian. This definition of "Indian" as used in Section 1153 cannot be reconciled with equal protection limitations.[3]

B. An ancestral tie to a federally-recognized tribe is a political affiliation.

The blood-tie aspect of the *Rogers* definition of an "Indian" does, however, comport with equal protection if it is understood to require an ancestral connection to a *federally-recognized* tribe. 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 553 n.24. It shows, instead, that such individuals are associated with "once-sovereign political communities." *Antelope*, 430 U.S. at 646.

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[3] Indeed, in the trial below, the court instructed the jury, without more, that it had to consider whether "the defendant is an Indian." *See* NACDL Amicus Br. 17-22, Dkt. No. 150. The government does not dispute that, used in this way, "Indian" refers to a race.

The constitutional avoidance canon compels the Court to interpret the term "Indian" in a manner that avoids the significant constitutional concern that would be posed by the government's construction. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005). The Court should not "unnecessarily resolve" "grave" "constitutional questions" raised by laws regarding Indians "when a less constitutionally troubling construction is readily available." *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997). Understanding the required blood tie as a political—not racial—affiliation is the far less troubling construction.

C. The government's two responses are wrong.

The government appears to offer two responses to the equal protection problem inherent in its interpretation of Section 1153. Both are wrong.

First, the government makes the conclusory assertion that "*all* ethnic Indians descend from ancestors who are acknowledged to have been members of sovereign communities." U.S. Supp. Br. 9. The government's argument appears to be that Indian racial heritage is necessarily coextensive with a political classification. If that were so, a distinction based on Indian ancestry could *never* implicate equal protection. But the Supreme Court has squarely rejected that argument. In both *Mancari* and *Antelope*,

the Supreme Court held that Indian-as-race differs markedly as a constitutional matter from Indian-as-political-affiliation. Quoting *Mancari*, the *Antelope* Court held that Section 1153 is constitutional *because* it does not apply to "many individuals who are racially to be classified as 'Indians.'" *Antelope*, 430 U.S. at 646 n.7.

Second, the government asserts that the second prong of the *Rogers* test—that Section 1153 is limited to only defendants "who are enrolled members of, or otherwise sufficiently affiliated with, tribes that are currently federally recognized"—"eliminates equal protection concerns." U.S. Supp. 10. But the government fails to demonstrate how that is so. As the government concedes (*id.* at 11), its interpretation of the statute would require a jury to make a determination about a defendant's *race*; establishing that a defendant is racially Indian would be a *necessary* aspect of a Section 1153 offense. Although that showing is plainly not *sufficient* to make out a Section 1153 offense, placing other requirements on top of a naked racial classification does not obviate the equal protection violation.

No matter how many other elements a criminal offense contains, equal protection forbids an offense from turning, in part, on the defend-

ant's race. The government can neither demonstrate this premise incorrect nor dispute that this is the effect of its interpretation of Section 1153.[4]

III. Overruling *Maggi* Would Create A Conflict In Authority.

No court has considered the question posed here—whether the "blood" tie should be political or racial—and concluded, as the government urges, that a mere racial tie is sufficient.[5]

Overruling *Maggi*, however, would create a conflict with the Supreme Court of Utah. In *State v. Reber*, 171 P.3d 406, 410 (Utah 2007), defendants claimed that they were Indians in an effort to strip the State of criminal jurisdiction. In applying the two-part *Rogers* test, the court considered the blood ties of the parties, who were related to individuals listed on the "Ute Partition Act final termination roll." *Id*. Because these ancestors were on the termination roll, they "lost their legal status as Indians,"

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[4] The government argues that when a defendant is enrolled in a federally-recognized tribe, "proof of such enrollment should ordinarily be sufficient evidence of Indian status." U.S. Suppl. Br. 1. Although such enrollment *may* show a blood tie to a federally-recognized tribe, it does not, as here, *always* do so, when the Indian has a blood tie only to a different tribe.

[5] This specific issue was not presented in the cases the government cites. *See* U.S. Supp. Br. 11-12. In *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001), for example, the court found that the defendant had no Indian blood at all. In *Stymiest*, 581 F.3d at 762, the defendant's grandfather was a Leech Lake Band Indian, a federally-recognized tribe. And in *Torres*, 733 F.2d at 455, the defendant had a blood tie to the federally-recognized Menominee Tribe.

and thus "[d]efendants have no Indian blood for purposes of being recognized by an Indian tribe or the federal government." *Id*. Although the individuals undoubtedly had Indian *racial* heritage, they nonetheless "fail[ed] the first element of the *Rogers* test." *Id*.

CONCLUSION

The Court should confirm *Maggi*: Section 1153 requires the government to prove, in part, that a defendant has an ancestral tie to a federally-recognized Indian tribe.

Respectfully submitted,

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Dated: January 19, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the word-limitation of Rule 29(d) because it contains 2,497 words; and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: January 19, 2014

/s/ Paul W. Hughes
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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2014, I served the foregoing Supplemental Brief for the National Association of Criminal Defense Lawyers and the Ninth Circuit Federal Public and Community Defenders as *Amici Curiae* In Support of Defendant-Appellant on each party separately represented via the Court's electronic Pacer/ECF system.

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