**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

# 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.

April 7, 2014

/s/ Paul W. Hughes
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## INTRODUCTION

The government acknowledges that, at trial, it was obligated to prove that Zepeda has ancestry derived from a federally-recognized Indian tribe. Dkt. 79, at 3-4. The government also acknowledges that, at trial, it "did not present any evidence" that the tribes in which Zepeda has heritage "are federally recognized." *Id.* at 4. The issues in this case thus stem entirely from the government's failure at trial to satisfy a necessary element of the offenses charged.

The Indian Major Crimes Act, 18 U.S.C. § 1153, renders certain enumerated felonies, committed by Indians within Indian country, federal offenses. This Court has correctly concluded that a two-part test determines whether one qualifies as an "Indian" for these purposes: the government must prove to the jury, beyond a reasonable doubt, that the defendant has an ancestral (i.e., "blood") tie to a federally-recognized Indian tribe, and further that the defendant has sufficient political affiliation with a recognized tribe. The government does not challenge this controlling law, which the circuits have uniformly adopted.

Against this backdrop, the district court's jury instructions were plain error. At the government's invitation, the trial court informed the jury that it simply needed to find that Zepeda is an "Indian." Notwithstand-

ing well-established law from this Court and a model jury instruction, the court failed to instruct the jury that, to convict Zepeda of a Section 1153 offense, it had to find that he has both ancestral and political ties to a federally-recognized tribe. While this is a sufficient basis to reverse, what happened here was far more insidious: as instructed, the jury was told that Section 1153 turns on a naked racial classification. As it now stands, Zepeda's conviction violates fundamental principles of equal protection.

Additionally, the trial record is insufficient to support a conviction. The government now argues (1) that the Tohono O'Odham Nation of Arizona (Nation of Arizona) is federally recognized and (2) that Zepeda has heritage in that tribe. But the government never contended below that the Nation of Arizona is a federally-recognized tribe, and constitutional and prudential considerations bar the government from using *post-appeal* judicial notice to correct its errors at trial. Additionally, as the Panel concluded, the government offers nothing more than speculation to suggest that Zepeda actually has ancestry from the Tohono O'Odham Nation of Arizona.

During the trial, the government had an opportunity and an obligation to prove that Zepeda satisfies the Indian status element of Section

1153. The government failed to do so. The Court cannot excuse the government's failure to prove its case.

## INTERESTS OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is nonprofit professional bar association that represents the Nation's criminal defense attorneys. Its mission is to promote the proper and fair administration of criminal justice and to ensure justice and due process for those accused of crime or misconduct. The Ninth Circuit Federal Public and Community Defenders provide representation to the indigent accused in each District of the Ninth Circuit pursuant to 18 U.S.C. § 3006A.[1]

All parties have consented to the filing of this brief. Fed. R. App. P. 29(a); 9th Cir. Rule 29-2(a). The brief is filed pursuant to the Court's Order of March 11, 2014, which granted permission for the filing of this *amicus* brief.

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission.

## BACKGROUND

### A. Statutory background.

"Originally enacted in 1885, the Indian Major Crimes Act establishes federal jurisdiction over 13 enumerated felonies committed by '[a]ny Indian ... against the person or property of another Indian or other person ... within the Indian country.'" *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (quoting 18 U.S.C. § 1153(a)). A neighboring provision, "[t]he Indian Country Crimes Act, 18 U.S.C. § 1152, extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country, except for those 'offenses committed by one Indian against the person or property of another Indian.'" *Id.*

Congress has not defined who qualifies as an "Indian" for either Section 1152 or 1153.

### B. Factual background.

Zepeda was charged with offenses pursuant to Section 1153. At trial, the government introduced the following evidence:

- A "Gila River Enrollment/Census Office Certified Degree of Indian Blood" that stated Zepeda (1) was "an enrolled member of the Gila River Indian Community" and (2) had a "Blood Degree" of "1/4 Pima [and] 1/4 Tohono O'Odham." *Zepeda II*, Op. 5.

- Testimony from Detective Sylvia Soliz, who stated that the Certificate confirmed that Zepeda was enrolled in the Gila River Indian Community. *Id*. at 6-7.

- Testimony from Zepeda's brother, who said that Zepeda was half "Native American," with "Pima and Tiho" ancestry. *Id*. at 7.

There was no other evidence regarding Zepeda's Indian status at trial. *Id*. As it acknowledges (Dkt. 79, at 4), the government did not introduce any evidence establishing that "Pima," "Tiho," or "Tohono O'Odham" referred to a federally-recognized Indian tribe. *Zepeda II*, Op. at 7, 22.

The district court instructed the jury as to the elements of each of the charged offenses. With respect to the Indian-status element of the Section 1153 offenses, the instruction was simply:

> [T]he government must prove … [that] the defendant is an Indian.

10/28/09 Tr. 824:23-825:8, 825:18-826:4 (Appendix A). The court did not provide the 9th Circuit's model instruction (Instr. No. 8.113) or some variation of it, nor did the court provide *any* definition whatsoever of the meaning of "Indian" in this context.

The jury convicted Zepeda of multiple Section 1153 offenses, and this appeal followed. After the Panel issued an order requesting the parties to address whether a rational juror could have found Zepeda an Indian pursuant to Section 1153 (Dkt. 58), the government filed a motion for judicial

notice, asking the Court to notice a Bureau of Indian Affairs document that lists the Tohono O'Odham Nation of Arizona (Nation of Arizona) as a federally-recognized Indian tribe. Dkt. 61. In opposition, Zepeda submitted material showing that members of the Nation of Arizona tribe are only a subset of the entire Tohono O'Odham population. Dkt. 69.

## SUMMARY OF ARGUMENT

The Court should reverse defendant-appellant's convictions under 18 U.S.C. § 1153 both because the jury was wrongly instructed and because no rational juror could find beyond a reasonable doubt that the defendant is an Indian for the purposes of that statute.

I. Section 1153 establishes federal jurisdiction over certain enumerated felonies committed by Indians in Indian country. Although the statute does not define who qualifies as Indian, this Court has held that Indian status has two necessary elements: that the accused has an ancestral tie to a federally-recognized Indian tribe (often referred to as "Indian blood") and further that the accused has sufficient political affiliation to a federally-recognized tribe.

The ancestral requirement stems from the Supreme Court's holding in *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846), that Indian status requires, in part, a blood connection to once-sovereign people. The

government must therefore demonstrate that a defendant has a blood relationship with a federally-recognized Indian tribe.

The political affiliation requirement, in turn, stems from an Indian tribe's sovereign right to self-define its membership, as well as an individual's right to determine his or her political affiliations. Thus, to satisfy the political affiliation requirement, the government must show both that the individual is eligible for membership in a federally-recognized tribe *and* that the individual has taken volitional acts indicating that he or she has affiliated with the tribe as a political matter.

II. A defendant's Indian status is an element of the Section 1153 offense. The government, therefore, must allege in the indictment that a defendant qualifies as an Indian and then prove it beyond a reasonable doubt to a jury. Because the Indian status element has both factual and legal aspects, it is a mixed question of fact and law. In these circumstances, while the trial court must properly instruct the jury as to all aspects of law, it is the jury that must render the ultimate conclusion as to whether the government has proven this element. *United States v. Gaudin*, 515 U.S. 506, 511-14 (1995).

III. The Court should reverse Zepeda's Section 1153 convictions. *First*, the jury charge—which instructed the jury, in whole, that it must

find the defendant is an "Indian"—was fatally incomplete, as it provided no explanation of what the government was required to prove. While this is enough to show error, the effect in this case was yet more pernicious. Stripped of the carefully-reticulated standards that determine who is an "Indian" for purposes of Section 1153, the instruction in this case told the jury that Section 1153 turned on a bald racial classification. Accordingly, the conviction as it stands now is plainly at odds with fundamental principles of equal protection.

*Second*, the government did not carry its burden of proving defendant's Indian status because, at trial, it did not introduce any evidence that Zepeda has an ancestral tie to a *federally-recognized* tribe. The government failed to show either (1) that the Tohono O'Odham Nation of Arizona is federally recognized *or* (2) that Zepeda actually has a blood tie to that tribe. The government attempts to correct the first failure by adding to the record on appeal, but constitutional and prudential considerations bar it from doing so. As to its second deficiency, the government can offer nothing more than rank speculation to contend that Zepeda has a blood tie to members of the Nation of Arizona.

## ARGUMENT

### I. The Major Crimes Act Requires The Government To Prove That The Defendant Has Both Ancestral And Political Affiliation With A Federally-Recognized Tribe.

Although Section 1153 does not define who qualifies as an "Indian" for the purposes of the Act, *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), which considered a predecessor statute to Section 1152, largely controls this analysis.[2] The "generally accepted test for Indian status" requires the government to prove that the defendant (1) has a sufficient degree of Indian blood from a federally recognized tribe ("the ancestral" requirement) and (2) has a sufficient political affiliation with a federally recognized Indian tribe ("the political affiliation" requirement). *See United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). At least three other circuits have adopted this same two-part test. *See United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009); *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001); *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984).

[2] Because the term "Indian" appears in neighboring, complementary statutes, "courts and scholars have applied the same definition of Indian status to both" Sections 1152 and 1153. *United States v. Prentiss*, 273 F.3d 1277, 1280 n.2 (10th Cir. 2001).

### A. The ancestral requirement.

To establish a defendant's Indian status, the government must first prove that the defendant has ancestral ties to a federally-recognized Indian tribe. In *Rogers*, the Court held that a defendant's adoption into an Indian tribe as an adult did not establish that he was an "Indian." The term "Indian" "does not speak of members of a tribe, but of the race generally, of the family of Indians." 45 U.S. at 573. In the Court's view, "a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian." *Id*. at 572. This requirement has 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." *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010).

But this "blood element" is subject to "an important overlay": the ancestral tie must be to a tribe that is *recognized by the federal government*. *Maggi*, 598 F.3d at 1078, 1080. This ensures that "[f]ederal regulation of Indian tribes … is governance of once-sovereign political communities; it 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)). A crucial consideration is that

"federal jurisdiction under the Major Crimes Act does not apply to 'many individuals who are racially to be classified as 'Indians.'" *Id.* at 646 n.7 (quoting *Mancari*, 417 U.S. at 553 n.24). Individuals who have Indian ancestry from a tribe that is not federally-recognized are outside the scope of Section 1153, demonstrating that the reach of the statute is not coextensive with a racial classification.

**B. The political affiliation requirement.**

Ancestry in a federally-recognized tribe is not sufficient to show that the individual qualifies as an Indian for purposes of Section 1153; instead, the government must also show that a defendant has a political affiliation with a federally-recognized tribe. This is necessary in order to "filter[] out individuals who may have an Indian ancestral connection, but do not possess sufficient current social and practical connections to a federally recognized tribe." *Maggi*, 598 F.3d at 1081. This Court, along with every other circuit to consider it, has recognized that political affiliation is a necessary component for one to qualify as an Indian. *See Bruce*, 394 F.3d at 1223; *Stymiest*, 581 F.3d at 762; *Prentiss*, 273 F.3d at 1280; *Torres*, 733 F.2d at 456.

To demonstrate that an individual is politically affiliated with a tribe, the government must prove two essential aspects: that a federally-

recognized tribe considers the individual eligible for membership in the political entity *and* that the individual has made the volitional decision to affiliate with the tribe.[3]

The tribe's recognition of one as eligible for membership is crucial because "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political entity." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Because "one of an Indian tribe's most basic powers is the authority to determine questions of its own membership" (Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 3.03[4] (1982)), "[i]t is difficult to fathom what the 'recognition' prong of *Rogers* means if not enrollment or eligibility for enrollment in a tribe, or receipt of tribal or federal benefits to which only Indians are entitled." *Bruce*, 394 F.3d at 1234 (Rymer, J., dissenting). Accordingly, if an individual is neither a member of, nor eligible for membership in, a federally-recognized Indian tribe, the individual is not an Indian for purposes of Section 1153.

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[3] The Court has identified four factors, in declining order of importance, that inform this analysis: (1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life. *See, e.g.*, *Maggi*, 598 F.3d at 1081; *United States v. Cruz*, 554 F.3d 840, 846 (9th Cir. 2009); *Bruce*, 394 F.3d at 1224.

But *eligibility* for membership is not sufficient to show that an individual is politically affiliated with a federally-recognized Indian tribe. Some tribes extend eligibility for tribal membership to all individuals who have a sufficient blood relationship to the tribe. *See*, *e.g.*, Cherokee Nation Tribal Registration, http://perma.cc/VS76-WG5N (individuals who have a sufficient blood connection to a list of enrolled members are eligible for Cherokee tribal membership). If eligibility were sufficient, this would often be coextensive with the ancestral requirement (*see Cruz*, 554 F.3d at 849) and thus would say nothing as to an individual's "current social and practical connections to a federally recognized tribe." *Maggi*, 598 F.3d at 1081. Rather, Indian status "requires an analysis from the perspective of both the tribe *and* the individual." *Cruz*, 554 F.3d at 850.

To qualify as an Indian, an individual must demonstrate volitional conduct indicative of a desire to affiliate with the federally-recognized tribe. Tribal membership, which is a "bilateral relation, depending for its existence not only on the action of the tribe, but also on the action of the individual concerned," turns on consent. Cohen § 3.03[3]. That is, "[t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians *who consent to be tribal members*." *Duro v. Reina*, 495 U.S. 676, 693 (1990) (emphasis added).

An individual, accordingly, cannot qualify as an Indian against his or her will. Some conduct—such as enrollment in the tribe, receipt of tribal benefits, or participation in tribal political or social life (*see Maggi*, 598 F.3d at 1081)—is necessary to demonstrate that he or she has chosen to politically affiliate with an Indian tribe.

In sum, political affiliation with a federally-recognized Indian tribe exists only where a tribe views an individual as a member of, or eligible for membership in, the tribe, and the individual has accepted that affiliation.

## II. Indian Status Is An Element Of The Offense That The Government Must Allege In The Indictment And Prove To A Jury.

A defendant's Indian status is an essential element of a Section 1153 charge that the government must allege in the indictment and prove to a jury beyond a reasonable doubt. This follows from the plain text of the statute: Section 1153 renders criminally liable "[a]ny Indian who commits" one of certain enumerated offenses. 18 U.S.C. § 1153.

The Fifth and Sixth Amendments together "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Of course, "the judge must be permitted to instruct the jury on the law and to insist that

the jury follow his instructions." *Id.* at 513. Once properly instructed, however, "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514.[4]

The obligation of the jury to ultimately resolve *every* aspect of an element of an offense remains true when the element is a "mixed question of law and fact." *Gaudin*, 515 U.S. at 512. A jury, therefore, must decide questions of materiality at issue in 26 U.S.C. § 7206(1). *See United States v. Uchimura*, 125 F.3d 1282, 1286 (9th Cir. 1997). Likewise, in the context of a Hobbs Act prosecution, "[w]hether a robbery affects interstate commerce is a mixed question of fact and law" that "the jury must determine." *United States v. Parkes*, 497 F.3d 220, 227 (2d Cir. 2007).

This approach controls Section 1153: the *jury*—not the court—must resolve the mixed question of law and fact regarding the Indian status element. Indeed, the Court has repeatedly held that, "[u]nder § 1153(a), the

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[4] To the extent that some courts considered so-called "jurisdictional elements" to have legal aspects decided by courts and factual issues decided by juries (*see*, *e.g.*, *United States v. Sohappy*, 770 F.2d 816, 822 & n.6 (9th Cir. 1985)), *Gaudin* has displaced that analysis. *See United States v. Terry*, 257 F.3d 366, 371 (4th Cir. 2001) ("The mandate of *Gaudin* applies even to 'jurisdictional' elements, and specifically to the interstate commerce element of the federal arson statute."); *United States v. Parkes*, 497 F.3d 220, 227 (2d Cir. 2007).

defendant's status as an Indian 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; *see also Bruce*, 394 F.3d at 1218.[5] Other circuits agree that Indian status is "an element of the crime that must be submitted to and decided by the jury." *Stymiest*, 581 F.3d at 763; *see also United States v. Graham*, 572 F.3d 954, 956 (8th Cir. 2009) ("[T]he indictments are deficient because Graham's Indian status is an essential element of [Section] 1153.").

In the analogous context of Section 1152, which turns in part on whether the *victim* of an offense is an Indian, the Supreme Court held that this is a question for a jury. In *Smith v. United States*, 151 U.S. 50, 55 (1894), the Court explained "[t]hat [the victim] was a white man, and not an Indian, was a fact which the government was bound to establish, and if it failed to introduce any evidence upon that point, the defendant was entitled to an instruction to that effect." *See also Lucas v. United States*, 163 U.S. 612, 617 (1896) ("The burden of proof was on the government to sus-

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[5] Previously there was some question as to whether Indian status was a jurisdictional element decided by a court, or an element of an offense resolved by the jury. *See*, *e.g.*, *United States v. Lawrence*, 51 F.3d 150, 154 (8th Cir. 1995). But *United States v. Cotton*, 535 U.S. 625 (2002), "clarified that this type of issue, while essential to federal subject matter jurisdiction, is an element of the crime that must be submitted to and decided by the jury." *Stymiest*, 581 F.3d at 763.

tain the jurisdiction of the court by evidence as to the status of the deceased, and the question should have gone to the jury as one of fact, and not of presumption.").

## III. Zepeda's Conviction Must Be Reversed.

The court below erred in two fundamental ways: first, it provided a jury instruction that is plainly erroneous; second, the government's evidence is insufficient to sustain a conviction. Although the Panel correctly (and, as we will explain, necessarily) concluded that the government failed to present sufficient evidence to convict Zepeda of the Section 1153 offenses, the failure to properly instruct the jury set the stage for the errors that occurred in this case.

### A. The jury instruction was plain error.

The jury instruction in this case (to which Zepeda admittedly did not object) was "error," it was "plain," and it "affected 'substantial rights.'" *United States v. Garrido*, 713 F.3d 985, 994 (9th Cir. 2013). Indeed, the instruction as given makes Section 1153 turn on a naked racial classification.

1. The instruction was error. This point is not contested; in an earlier brief, the government conceded that "there was instructional error in this case." Dkt. 79, at 16.

In light of this Court's longstanding view that Section 1153 requires the government to prove a defendant has an ancestral and political connection to a federally-recognized Indian tribe, a Ninth Circuit model jury instruction provides a correct, detailed statement of law:

> 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; and
>
> Second, there has been tribal or federal government recognition of the defendant as an Indian.
>
> Whether there has been tribal or federal government recognition of the defendant as an Indian is determined by considering four factors, in declining order of importance, as follows:
>
> 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.

Model Instruction 8.113, "Determination of Indian Status For Offenses Committed Within Indian Country (18 U.S.C. § 1153)."

Here, however, the district court charged the jury, without further elaboration or instruction, that it had to find that "the defendant is an In-

dian." 10/28/09 Tr. 825:8, 826:4 (Ex. A). That was the sum total of the court's instruction regarding the Indian status element; it said nothing at all about the separate ancestral and political affiliation requirements.

As the dissenting member of the Panel acknowledged, the jury "effectively received no instructions at all on the Indian status element." *Zepeda I*, Op. 41 (Watford, J., dissenting). And "when a trial judge omits an element of the offense charged from the jury instructions, it deprives the jury of its fact-finding duty and violates the defendant's due process rights." *United States v. Mendoza*, 11 F.3d 126, 128 (9th Cir. 1993); *see also Evanchyk v. Stewart*, 340 F.3d 933, 939 (9th Cir. 2003) ("It is a violation of due process for a jury instruction to omit an element of the crime.").

2. The instructional error, which is sufficiently clear that the government has conceded it, is plain. There can be little disputing that the court's instruction is "clearly inconsistent with established law at the time of appellate consideration." *Garrido*, 713 F.3d at 994-95. The error was also apparent at the time of the trial. *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996). And while this is enough to show that the error is plain, the existence of an on-point model jury instruction provides further confirmation of the plainness of the error. *See United States v. Bear*, 439 F.3d 565, 569 (9th Cir. 2006). Finally, jury instructions are plainly errone-

ous when they "fail to incorporate an element of the crime that has been clearly established by Ninth Circuit precedent." *United States v. Alferahin*, 433 F.3d 1148, 1157 (9th Cir. 2006). For each of these reasons, the error here is decidedly a plain one.

3. Finally, the error affected Zepeda's substantial rights. To begin with, there is "a reasonable probability that the error affected the outcome of the trial." *Garrido,* 713 F.3d at 995 (quotation omitted). At trial, the government utterly failed to demonstrate that Zepeda had ancestry derived from a federally-recognized Indian tribe. But the jury was never instructed that this was an essential aspect of the government's case. Thus, given the complete absence of evidence or argument on this point, there is necessarily a "reasonable probability" that the instructional error affected the outcome. The jury had no idea what the law required it to find.

Additionally, the error is prejudicial because "the government has not produced 'overwhelming' evidence" demonstrating that Zepeda does in fact have ancestry derived from a federally-recognized tribe. *United States v. Moreland*, 622 F.3d 1147, 1167 (9th Cir. 2010). Although we will demonstrate the evidence was insufficient to support a conviction (*see*, *infra*, 22-31), the inquiry for plain error review is distinct; "evidence is not overwhelming simply because it is sufficient to support a guilty verdict." *Bear*,

439 F.3d at 570. Whatever one may conclude as to sufficiency, the evidence here is certainly not "overwhelming."

But this is not all. The instructional error affected Zepeda's rights in a more noxious way. Because the Indian status instruction was devoid of the judicially-grafted legal standards supplying it meaning, a typical juror—applying the plain meaning of the term "Indian"—would think that he or she was instructed to assess Zepeda's race, and nothing more. Indeed, dictionaries define the word "Indian" to mean "American Indian," which in turn means "a member of any … of the aboriginal peoples of the Western hemisphere constituting one of the divisions of the Mongoloid stock." Webster's Third New International Dictionary 68, 1149 (1986).

Because a jury is presumed to follow the plain meaning of an instruction, the conviction here—given the error in instruction—itself violates Zepeda's rights under the Equal Protection Clause. A criminal offense may not apply uniquely to a particular racial group. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). In *Antelope*, the Supreme Court held that Section 1153 is constitutional because it does not "subject[] to federal criminal jurisdiction" individuals "because they are of the Indian race but because they are enrolled members" in a federally-recognized tribe. *Antelope*, 430 U.S. at 646. By removing this critical ingredient, the trial court elimi-

nated the element necessary to preserve the constitutionality of Section 1153.

The instructional error alone requires reversal.

### B. No rational jury could conclude that Zepeda satisfies the ancestral requirement of Section 1153.

The government's complete failure of proof below also requires the Court to reverse the Section 1153 convictions.[6] The ultimate question is "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[A] 'reasonable' inference is one that is supported by a chain of logic, rather than … mere speculation dressed up in the guise of evidence." *Juan H. v. Allen*, 408 F.3d 1262, 1277 (9th Cir. 2005).

The government does not contest that it must prove Zepeda has ancestry derived from a federally-recognized Indian tribe. The government's case at trial thus suffered from two critical evidentiary gaps: *first*, it of-

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[6] Even if the Court agrees that the jury instruction was error, it must follow the "longstanding rule" that it will additionally consider "the insufficiency claim," as "the defendant who successfully challenges a conviction for insufficiency of the evidence is entitled not only to a reversal of his conviction but also to an order directing the district court to enter a judgment of acquittal with respect to that conviction." *United States v. Bishop*, 959 F.2d 820, 828-29 (9th Cir. 1992); *see also United States v. Banks*, 506 F.3d 756, 766 n.5 (9th Cir. 2007).

fered no basis—absolutely none—for a jury to conclude that the Tohono O'Odham Nation of Arizona is a federally-recognized tribe; *second*, it provided no basis for a jury to conclude that Zepeda actually has ancestry that derives from the Tohono O'Odham Nation of Arizona. For these separate reasons, no rational juror could have concluded that Zepeda has ancestry derived from a federally-recognized Indian tribe.[7]

Although the government, in passing, attempts to assert that evidence showing that Zepeda has Indian *racial* heritage could suffice (Dkt. 98 at 8), this does not satisfy the ancestral requirement of Section 1153, as the federal recognition of the tribe is the critical aspect that prevents it from constituting a naked racial classification. *See*, *supra*, 10-11, 21-22.

*1. The government failed to demonstrate at trial that the Tohono O'Odham Nation of Arizona is a federally-recognized tribe.*

The government does not dispute that its Section 1153 theory turns on proving that the Tohono O'Odham Nation of Arizona is a federally-recognized Indian tribe. This is because, as the government acknowledges, it must show that Zepeda has heritage derived from a federally-recognized

[7] As the panel properly recognized (*Zepeda II*, Op. 25), the government's failure of proof with respect to the ancestral prong obviates any need to consider the political affiliation requirement.

tribe, and this is the only tribe that the government suggests could be relevant for these purposes.

At trial, the government did nothing at all to make this showing: it did not introduce evidence that the Tohono O'Odham Nation of Arizona is a federally-recognized tribe, it did not ask the trial court to take judicial notice of this point, and it did not ask the court for a jury instruction. Because this is a necessary aspect to the government's theory regarding Section 1153, no rational jury could have convicted Zepeda.

The government's effort to inject, for the first time *on appeal*, the contention that the Tohono O'Odhman Nation of Arizona is a federally-recognized tribe cannot resurrect its case.[8] Because the government failed to make this argument below, it has waived its ability to do so on appeal. *See*, *e.g.*, *United States v. Trujillo*, 713 F.3d 1003, 1008 (9th Cir. 2013);

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[8] There has been some question as to whether federal recognition of an Indian tribe is a question of adjudicative fact, which must be resolved by a jury, or a question of legislative fact, which may be resolved by a court. *Compare Zepeda I*, Op. 18-26 (issue of fact for the jury) *with Zepeda II*, Op. 18-21 (issue of law for the court). We submit that this is a question of adjudicative fact: whether a tribe was federally recognized at the pertinent time is similar to the question of whether a bank is federally insured. *See United States v. Ali*, 266 F.3d 1242, 1243 (9th Cir. 2001). Both are questions of historical fact, and while "the threshold quantum of proof for [these] element[s] may be easily satisfied," it is nonetheless "an indispensable item of proof of an offense." *Id.* at 1245 (quotation omitted). But, for reasons we explain, the result is the same here either way.

*United States v. Almazan-Becerra*, 482 F.3d 1085, 1090 (9th Cir. 2007). Constitutional and prudential considerations demonstrate why the government may not remedy the errors it made at the trial court.

*First*, the government's effort to modify the record on appeal violates fundamental due process protections. The record must be established at trial because, "unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon." *Garner v. Louisiana*, 368 U.S. 157, 173 (1961).[9]

Indeed, this concern animates the waiver doctrine: waiver is necessary for "fairness and judicial efficiency," as "[i]t would be unfair to surprise litigants on appeal by final decision of an issue on which they had no opportunity to introduce evidence." *United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir. 1991) (quotation omitted). And this case illustrates

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[9] The Sixth Circuit, for example, refused to take judicial notice of whether a bank was FDIC-insured because this "is an element of the offense for the jury to decide." *United States v. Sandles*, 469 F.3d 508, 514 n.4 (6th Cir. 2006). Likewise, the Fourth Circuit held that it "will not take judicial notice on appeal of an unproven essential element of a criminal offense." *United States v. Hawkins*, 76 F.3d 545, 551 (4th Cir. 1996) (quotation omitted).

these concerns in practice: because the government failed to argue at trial that the Tohono O'Odham Nation of Arizona is a federally-recognized tribe, Zepeda had no reason or opportunity to dispute the resulting inference the government now attempts to make—that Zepeda actually has heritage derived from that tribe. *See*, *infra*, 28-31.

*Second*, the government's effort to introduce this new material on appeal violates Zepeda's Sixth Amendment right to a jury trial. Because it is the *jury* that must make the ultimate determination as to whether Zepeda is an Indian (*see*, *supra*, 14-17), the government was required to provide the jury with a sufficient basis for reaching this conclusion; "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Gaudin*, 515 U.S. at 514.

If the status of a tribe as federally-recognized may be established as a matter of law, the government could have sought an instruction on this point, or it could have requested the court take judicial notice at trial.[10]

[10] Waiver likewise applies to the government's failure to request a jury instruction. Where "the government failed to request a jury instruction on point," "[t]he issue is waived." *United States v. Harris*, 942 F.2d 1125, 1134 (7th Cir. 1991); *see also United States v. Landau*, 155 F.3d 93, 104 (2d Cir. 1998) ("[T]he government waived the issue when it failed to object to a jury instruction in the same terms.").

But the government had to put this contention before the jury in order for it to rationally conclude that Zepeda has ancestry in a federally-recognized tribe, and thus qualifies as an Indian for purposes of Section 1153. Just as in *United States v. James*, 987 F.2d 648, 651 (9th Cir. 1993), where the government failed to provide any basis by which a jury could conclude that a bank was FDIC insured, the government has utterly failed to establish a necessary aspect of the Indian status element.

*Third*, significant prudential reasons also demonstrate why this Court should not decide, in the first instance, whether a tribe is federally recognized. Although the government would have the Court believe that whether a tribe is federally-recognized is a matter of simply consulting a list maintained by the Bureau of Indian Affairs (BIA), that submission is incorrect. Pursuant to federal law, not only may tribes be recognized by the BIA, but specific congressional enactments may also recognize (or de-recognize) a particular tribe. *See* Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, tit. I, § 103(3), 108 Stat. 4791; *id.* § 103(4). Likewise, courts may require the government to recognize, or de-recognize, a tribe. *See Cherokee Nation v. Norton*, 389 F.3d 1074, 1087 (10th Cir. 2004) (invalidating BIA's recognition of Delaware Tribe of Indians); *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 489-91

(E.D.N.Y. 2005) (holding that Shinnecock Indian Nation was an Indian tribe despite BIA's non-recognition of tribe).

For these reasons, whether or not a tribe is federally-recognized is a question that will often entail investigation, and which may be subject to dispute. That is why, in demonstrating that a defendant has ancestral and political affiliation with a federally-recognized tribe, the government must establish the record before the trial court. The government's failure to do so qualifies as a waiver.

In sum, at trial, the government had both an opportunity and an obligation to demonstrate that Zepeda has ancestral ties to a federally-recognized Indian tribe. It did not even attempt to satisfy its burden. Given that waiver below, constitutional and prudential considerations bar the government from remedying its errors now.

*2. The government failed to demonstrate that Zepeda's heritage derives from the Tohono O'Odham Nation of Arizona.*

There is a second hole in the government's case: as the Panel concluded, nothing other than speculation shows that Zepeda actually has ancestry from the Tohono O'Odham Nation of Arizona.

This case illustrates perfectly the perils of permitting the government the opportunity to remedy its trial failure during the course of an appeal. While the government now contends that the Tohono O'Odham

Nation of Arizona is a federally-recognized tribe, no evidence at trial indicates that Zepeda actually has ancestry derived from this tribe. Rather, evidence at trial showed he has Tohono O'Odham (or "Tiho") ancestry, which is a broader category of peoples than is the federally-recognized Nation of Arizona tribe. *See* Dkt. 69. In fact, many communities of Tohono O'Odham people are *not* members of the Nation of Arizona. *Id*. at 8-9. One group of Tohono O'Odham people residing in Arizona, the Hia-C'ed O'Odham, are specifically *not* a federally-recognized tribe; likewise, many Tohono O'Odham individuals trace their heritage to peoples residing in Mexico, who are also not affiliated with a federally-recognized tribe. *Id*.

The government, however, asks this Court to infer that Zepeda's Tohono O'Odham ancestry derives from the Nation of Arizona, as opposed to Tohono O'Odham heritage that does not. The government offers nothing but speculation as to why this is so.[11] This is like the situation in *United States v. Bennett*, 621 F.3d 1131, 1139 (9th Cir. 2010): while a parent-subsidiary relationship may be *consistent* with control, it is not *sufficient* to prove it. So too here; "mere suspicion or speculation will not provide suf-

[11] Of course, because the government never made this argument at trial, the jury surely did not infer that Zepeda has Tohono O'Odham heritage derived from the Nation of Arizona.

ficient evidence." *United States v. Andrews*, 75 F.3d 552, 556 (9th Cir. 1996) (quotation omitted).

The government's central response to this argument—that Zepeda did not press this point below (Dkt. 103, at 10-11)—demonstrates amnesia to the record. It was the *government*, not Zepeda, who introduced for the first time on appeal the contention that the Tohono O'Odham Nation of Arizona is a federally-recognized tribe, and that Zepeda has ancestry in that tribe. Thus, while the government is correct that it is "horn book law" that the Court is "limited to the record before the jury" (*id*. at 11), this point shows why the government must lose this case.

What the government seems to imply is inappropriate, illogical, and inequitable. The government appears to suggest that it can, for the first time on appeal, argue that the Tohono O'Odham Nation of Arizona is a federally-recognized tribe, and further argue that the Court should infer that the reference to "Tohono O'Odham" on Zepeda's tribal enrollment card actually means "Tohono O'Odham Nation of Arizona." Dkt. 103 at 9-12. But, in the government's view, this is a one-way ratchet: While it is free to raise new arguments and suggest new inferences, it argues that Zepeda may not introduce argument showing why the government's newly-minted theory is wrong.

This underscores why the government's waiver at trial should control this case: if the government had pressed this argument below, Zepeda would have had an opportunity to rebut it. The government's failure below should not be excused on appeal precisely because it opens new questions about which Zepeda had "no opportunity to introduce evidence." *Flores-Payon*, 942 F.2d at 558. But if the government can craft a new argument now, so too can Zepeda; what is sauce for the goose is sauce for the gander.[12]

## CONCLUSION

The Court should reverse defendant's convictions under Section 1153.

[12] The government's other contentions are insubstantial. Whether some tribes refer to themselves by a name different than that used by the federal government says nothing about *this* tribe. Dkt. 103 at 10 n.2. And the government's assertion that "[t]here is no other Tohono O'odham tribe in existence" lacks any factual support. *Id.* at 11 n.3. Of course, none of this was presented at trial, and thus, to the extent it raises a factual question, it is not one the jury possibly could have resolved in the government's favor.

Respectfully submitted,

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Dated: April 7, 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 6,953 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: April 7, 2014

/s/ Paul W. Hughes
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## CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2014, I served the foregoing 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 as follows:

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# APPENDIX A

## No. 2010-10131, *United States v. Zepeda*

Excerpts from the Trial Court's Jury Instructions

**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

| | | |
|---|---|---|
| **United States of America**, | ) | |
| | ) | |
| Plaintiff, | ) | |
| vs. | ) | |
| | ) | CR-08-01329-PHX-ROS |
| **Damien Miguel Zepeda,** | ) | |
| | ) | |
| Defendant. | ) | October 28, 2009 |
| | ) | 8:39 a.m. |
| _____ | ) | |

**BEFORE: THE HONORABLE ROSLYN O. SILVER, JUDGE**

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

JURY TRIAL - Day 5 (REDACTED)
(Pages 803 - 886)

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**MISCELLANEOUS NOTATIONS**



**RECESSES**

| | Page | Line |
|---|---|---|
| (Recess at 8:47; resumed at 9:16.) | 811 | 25 |
| (Recess at 10:25; resumed at 10:47.) | 851 | 3 |
| (Recess at 11:46; resumed at 2:55.) | 882 | 5 |

could reasonably have been foreseen to be necessary or natural consequence of the unlawful agreement. 09:39:30

Therefore, you may find the defendant guilty of any of all of the following crimes: Assault resulting in serious bodily injury, use of a firearm in a crime of violence, and assault with a dangerous weapon as charged in Counts 2 through 9 of the indictment if the government has proved each of the following elements beyond a reasonable doubt. 09:39:51

As to each count, a co-conspirator committed the crime as alleged in the relevant count. The co-conspirator was a member of the conspiracy charged in Count 1 of the indictment. The co-conspirator committed the relevant crimes set forth in Counts 2 through 9 in furtherance of the conspiracy. The defendant was a member of the same conspiracy at the time the offense charged was committed and the offense charged fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement. 09:40:21 09:40:43

The defendant is charged in Count 2 of the indictment with assault resulting in serious bodily injury in violation of Title 18 of the United States Code, Sections 1153, 113(a)(6) and 2. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: 09:41:08

First, the assault occurred on or about October 25, 09:41:31

2008. 09:41:37

Second, the defendant intentionally or recklessly struck or wounded Dallas Peters or used a display of force that reasonably caused Dallas Peters to fear immediate bodily harm.

Third, as a result, Dallas Peters suffered serious bodily injury. And, fourth, the offense occurred within the confines of the Ak-Chin Indian Community in the District of Arizona and the defendant is an Indian. 09:42:00

Serious bodily injury means -- serious bodily injury means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 09:42:30

The defendant is charged in Counts 4, 6, and 8 of the indictment with assault with a dangerous weapon in violation of Title 18, United States Code, Section 1153 and 113(a)(3). In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: 09:43:00

First, the defendant intentionally assaulted the victim by striking or wounding him or her or using a display of force that reasonably caused the victim to fear immediate bodily harm. 09:43:25

Second, the defendant acted with the specific intent to do bodily harm to the victim. 09:43:42

Third, the defendant used a dangerous weapon, that is a gun. Fourth, the crime occurred on the Ak-Chin and reservation within the District of Arizona. And, fifth, the defendant is an Indian. 09:43:45

A gun is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury. 09:44:02

The defendant is charged in Counts 3, 5, 7, and 9 of the indictment with using, carrying, possessing, brandishing, and discharging a firearm during and in relation to a crime of violence, and possessing a firearm in furtherance of a crime of violence, in violation of Title 18 of the United States Code, Section 924(c)(1)(A) and 2. 09:44:29

In order for the defendant to be found guilty of any of those charges, the government must prove each of the following elements beyond a reasonable doubt. First, the defendant committed the following crimes in relation to each count. 09:44:59

As to Count 3, that he committed assault resulting in serious bodily injury as charged in Count 2.

As to Count 5, that he committed assault with a dangerous weapon as charged in Count 4. As to Count 7, that he committed assault with a dangerous weapon as charged in Count 6. 09:45:23

As to Count 9, that he committed assault with a dangerous weapon as charged in Count 8. 09:45:47

# CERTIFICATE FOR BRIEF IN PAPER FORMAT

9th Circuit Case Number(s): 10-10131

I, Paul W. Hughes , certify that this brief is identical to the version submitted electronically on [date] April 7, 2014 .

Date April 8, 2014

Signature s/ Paul W. Hughes