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In the Supreme Court of the United States

ADAM JOSEPH KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the Tenth Circuit, prosecutions brought in Indian country under 18 U.S.C. § 1152 have a special requirement. The United States must prove, as an element of the offense, that the defendant and alleged victim have differing statuses; one must be an Indian person, and the other must be a non-Indian person. Under Tenth Circuit law, a person is an Indian if two requirements are met. First, they must have some degree of Indian blood. Second, they must be recognized as an Indian by either the federal government or a federally-recognized Indian tribe.

Mr. King was convicted after a jury determined he was a non-Indian person and his alleged victim, M.V., was an Indian person. However, M.V. was not an enrolled member of a tribe at the time of the offense. In concluding that the evidence was sufficient to prove M.V. was recognized as an Indian at the time of the offense, the Tenth Circuit relied upon events that occurred after the conclusion of the conduct serving as the basis of the charge. Specifically, the Tenth Circuit considered the Cherokee Nation's after-the-fact holding of guardianship proceedings for M.V., her after-the-fact tribal enrollment, and that M.V. held herself out to be an Indian while testifying at trial.

The questions presented are:

1. Whether an element of a crime, which concerns the victim's status at the time of the offense, may be satisfied by events occurring separately after the charged conduct concluded.
2. Whether the test for Indian status should be resolved solely by determining if an individual is an enrolled member of a federally-recognized tribe.
3. Whether a multiplicitous indictment prejudices a defendant, and requires an election of charges, when the multiplicitous nature of the indictment prevents the defendant from raising a defense as to a particular element.

PARTIES TO THE PROCEEDINGS

Petitioner is Adam Joseph King, and he was the defendant and appellant in the proceedings below. Respondent is the United States of America, and it was the plaintiff and appellee in the proceedings below.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

District Court (*United States v. King*, Case No. 24-CR-081-JDR):

On January 23, 2025, the United States District Court for the Northern District of Oklahoma entered its Judgment and Commitment sentencing Mr. King for violations of 18 U.S.C. §§ 1151, 1152, 2241(c), and 2244(a)(5). (*See* Pet. App., a031–a039).

United States Court of Appeals for the Tenth Circuit (Case No. 25-5014):

Mr. King appealed his convictions, challenging the sufficiency of the evidence to sustain his convictions and the denial of his motion to dismiss for multiplicity. On April 21, 2026, the United States Court of Appeals for the Tenth Circuit affirmed the District Court’s ruling. The Tenth Circuit’s published opinion may be accessed at 172 F.4th 1188 (10th Cir. 2026). (*See* a002–a028). Mr. King filed a petition for rehearing, which was denied June 26, 2026. (*See* a029–a030).

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PETITION FOR WRIT OF CERTIORARI

Adam Joseph King respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Tenth Circuit’s published opinion may be accessed at 172 F.4th 1188 (10th Cir. 2026).
(*See* a002–a028).

JURISDICTION

The Tenth Circuit entered judgment on April 21, 2026. Petitioner sought rehearing, and his petition for rehearing and rehearing en banc was denied on June 26, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1152:

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.

Fed. R. Crim. P. 12(b)(3)(B)(ii):

(b) Pretrial Motions.

(3) *Motions That Must Be Made Before Trial.* The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(B) a defect in the indictment or information; including;

(ii) charging the same offense in more than one count (multiplicity).

U.S. Const. amend. V – Due Process and Double Jeopardy Clauses

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; **nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb**; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

STATEMENT

A. Pretrial Litigation

On March 18, 2024, in Northern District of Oklahoma Case Number 24-CR-081-JDR, the United States charged Adam Joseph King by Indictment with violations of 18 U.S.C. §§ 1151, 1152, 1153, 2241(c), and 2244(a)(5). Specifically, the Indictment alleged that Mr. King engaged in a sexual act on M.V., who had not attained the age of 12 years, and that Mr. King had engaged in and caused sexual contact with M.V. in the period from November 2017 to August 23, 2021. The Indictment was split into four counts: Counts One and Two charged Mr. King under 18 U.S.C. § 1152 with being a non-Indian person who committed his offenses against M.V., who was alleged to be an Indian person. Counts Three and Four concerned the exact same conduct, but they charged Mr. King under 18 U.S.C. § 1153 with being an Indian who committed an enumerated major crime against M.V.

Mr. King filed a motion to dismiss the Indictment under Federal Rule of Criminal Procedure 12(b)(3)(B)(ii) for multiplicity. Mr. King specifically argued that the multiplicity of charges in this case prejudiced him because they prevented him from raising a defense as to the only element that materially differentiated the charges—his own status as either an Indian or a non-Indian person. In the District Court (and on appeal), the United States conceded the charges were multiplicitous; it could obtain convictions on Counts One and Two, or on Counts Three and Four, but not on both sets of counts. However, it opposed being ordered to elect between charges prior to trial. The District Court ultimately denied Mr. King's motion after concluding that a jury instruction could cure any prejudice that might arise.

B. Trial

Mr. King was convicted of Counts One and Two following a jury trial, and he was acquitted of Counts Three and Four. (Pet. App., at a031–a041). During the trial, the Indian status disputes focused on M.V.’s status as an Indian person because the United States had focused its presentation of evidence on obtaining convictions to Counts One and Two.

During the trial, Derrick Vann, the Tribal Registrar for the Cherokee Nation testified concerning M.V.’s tribal enrollment. Of particular note, it came to light that M.V. had attempted to enroll in the Cherokee Nation in 2017, but her enrollment application was denied. (Pet. App., at a042–a046). While Mr. Vann explained that the denial was for a lack of proper paperwork, he did not know what paperwork was missing. (Pet. App., at a045). Further, Mr. Vann explicitly stated that, prior to December 2022, when M.V. successfully enrolled in the Cherokee Nation, M.V. was not recognized as an Indian. (Pet. App., at a046).

M.V. also testified during the trial. (Pet. App., at a047–a050). Specifically, M.V. testified that she currently considers herself to be an Indian (Pet. App., at a048), and that she is will, in the future, be attending a school that only Indian children are allowed to attend. (Pet. App., at a049–050). Notably, M.V. never testified that she always considered herself to be an Indian, even prior to the charged conduct, nor that she ever attended a school specifically for Indian children prior to the charged conduct. (*See* Pet. App., at a047–a050).

The United States further presented evidence that M.V. had received healthcare services through the Cherokee Nation, but that evidence also made it clear that she received that healthcare specifically through her mother’s tribal enrollment. As the Tenth Circuit explained, “[T]he evidence showed that M.V. received health care as a tribal member’s minor child, not because she was a tribal member.” (Pet. App., at 16). Therefore, the Tenth Circuit determined, “we cannot

assume M.V.'s treatment was based on her own Indian status rather than her mother's." (Pet. App., at 16).

The last key piece of evidence that came out at trial (and was in some fashion relied upon by the Tenth Circuit), is that M.V. is the biological child of a tribal member and the biological granddaughter of another tribal member. (Pet. App., at 18).

C. The Tenth Circuit's Ruling

On appeal, Mr. King challenged the sufficiency of the evidence to support the determination of his non-Indian status, the sufficiency of the evidence to support the determination of M.V.'s Indian status, and the denial of his motion to dismiss for multiplicity.

As to M.V.'s Indian status, no one contested that M.V. lacked Indian blood; therefore, the only question was whether M.V. met the second prong of Indian status, which is recognition. (Pet. App., at 13). The Tenth Circuit concluded that three categories of evidence supported the jury's finding that M.V. had been recognized as an Indian: (1) M.V. received tribal healthcare benefits due to her mother's enrollment as a member of the Cherokee Nation; (2) the Cherokee Nation conducted guardianship proceedings as to M.V., and; (3) M.V. enrolled in the Cherokee Nation and holds herself out to be an Indian. (Pet. App., at a013). "From these findings, a rational jury could find that M.V. was an Indian at the time of the abuse." (Pet. App., at a013). However, as noted above and further explained below, the second and third categories involved evidence of events occurring after the charged conduct had already concluded. And as to the first category, the Tenth Circuit itself acknowledged that M.V.'s receipt of healthcare services was not as strong an indicator of Indian recognition as the United States argued it was, and the Tenth Circuit admitted that it could not "assume M.V.'s treatment was based on her own Indian status rather than her mother's." (Pet. App., at 16).

On the matter of multiplicity, the Tenth Circuit’s opinion was quite short; the Tenth Circuit simply rejected Mr. King’s claim that he was prejudiced by the multiplicitous charges in the indictment and concluded that jury instructions could resolve any potential confusion. (Pet. App., at a027).

After the Tenth Circuit affirmed Mr. King’s convictions, Mr. King filed a petition for rehearing and rehearing *en banc*, specifically challenging the Tenth Circuit’s reliance on after-the-fact evidence to determine M.V.’s Indian status and also challenging the test for Indian status. Mr. King asserted that the test for Indian status should adhere more closely to this Court’s discussion in *United States v. Antelope*, 430 U.S. 641, 645–46 (1977), and the test should simply ask whether the individual is an enrolled member of a federally-recognized tribe. The Tenth Circuit denied Mr. King’s petition on June 26, 2026. (Pet. App., at a029–a030).

REASONS FOR GRANTING THE PETITION

Mr. King asks this Court to grant his petition for writ of certiorari, vacate the decision of the Tenth Circuit, and remand for further proceedings.

I. The Tenth Circuit improperly relied upon evidence of events occurring separately and after the conclusion of the alleged criminal conduct to determine that an element of the offense was met.

a. Indian Status in the Tenth Circuit

In the Tenth Circuit, when a defendant is charged with an offense under 18 U.S.C. § 1152, the United States bears the burden to prove that the defendant and victim have diverse statuses—one must be an Indian person, and the other must be a non-Indian person. *United States v. Prentiss (Prentiss I)*, 256 F.3d 971, 980 (10th Cir. 2001) (en banc) (per curiam). These opposing statuses are elements of the crime itself in the Tenth Circuit; absent these elements being satisfied, there is no federal crime. *Id.* at 980 & 982. In this case, as to the charges of conviction, the Indictment alleged Mr. King was a non-Indian person and M.V. was an Indian person.

The Tenth Circuit has previously concluded that a defendant must hold their alleged status at the time of the charged offense—i.e., an indictment may not charge a person based upon a status that they attained only after the charged conduct occurred. *United States v. Hatley*, 153 F.4th 1112, 1123 (10th Cir. 2025). The Tenth Circuit’s opinion below demonstrates that the victim must also hold their status at the time of the offense’s alleged commission.¹ (Pet. App., at a07 n.5).

In the Tenth Circuit, Indian status has two elements: Blood Quantum and Recognition. *United States v. Prentiss (Prentiss II)*, 273 F.3d 1277, 1280 (10th Cir. 2001). To be an Indian, a person must have some degree of Indian blood *and* be recognized as an Indian by either the federal

¹ The Tenth Circuit declined to formally rule that the victim must hold a particular status at the time of the crime’s commission, but it chose to assume this requirement applies to 18 U.S.C. § 1152 and the statuses that must be held by a defendant and victim.

government or a federally-recognized tribe. *Id.* Thus, in order for M.V. to have been “an Indian at the time of the abuse,” (Pet. App., at a013), she must have been recognized as an Indian prior to the conduct constituting the charged abuse.

The recognition prong is typically resolved by looking to non-exclusive factors that include: (1) enrollment in a tribe, (2) provision of government assistance reserved only for Indians, (3) enjoying the benefits of tribal affiliation, and (4) social recognition as an Indian through living on a reservation and participating in Indian social life. *See United States v. Hebert*, 159 F.4th 777, 780 (10th Cir. 2025), *vacated on other grounds for rehearing en banc* by *United States v. Ruiz*, 174 F.4th 1253 (Mem.) (10th Cir. 2026).

- b. The decision below was wrong to rely upon separate events that occurred after the conclusion of the alleged criminal conduct to resolve whether the United States presented sufficient evidence of M.V.’s Indian status.

The crimes for which Mr. King was convicted are not continuing offenses; they are discrete criminal acts that end when the conduct constituting the crime ends. Mr. King was charged with sexually abusing M.V.; for Mr. King to be convicted under Section 1152, all elements of the crime must have been fulfilled when the sexual abuse occurred. In this case, that means M.V. must have been an Indian at the time of the alleged sexual abuse, which further means she must have been recognized as an Indian prior to the charged sexual abuse.² By way of example, when a defendant is charged with assaulting a police officer, they cannot be convicted of that crime unless the victim has already holds the status of police officer at the moment of the crime. A defendant who punches

² By this, Mr. King means that the facts/events demonstrating M.V.’s recognition as an Indian must have occurred prior to the sexual abuse for which Mr. King was ultimately convicted. It would require a strange set of circumstances for M.V.’s recognition as an Indian to have occurred simultaneously to the sexual abuse giving rise to the conviction.

his victim cannot be charged with assaulting a police officer if that victim is sworn in as a police officer the following day (or even the following hour).

In Mr. King's case, it was undisputed that M.V. had some degree of Indian blood. Thus, the only question was whether she was recognized as an Indian at the time of the offense. (Pet. App., at a013). In the decision below, the Tenth Circuit concluded that a rational jury could find the following to be true: (1) M.V. received tribal healthcare benefits due to her mother's enrollment as a member of the Cherokee Nation; (2) the Cherokee Nation conducted guardianship proceedings as to M.V., and; (3) M.V. enrolled in the Cherokee Nation and holds herself out to be an Indian. (Pet. App., at a013). "From these findings, a rational jury could find that M.V. was an Indian at the time of the abuse." (Pet. App., at a013).

Per the indictment, Mr. King's charged conduct ended on August 23, 2021. (Pet. App., at a005). According to the testimony of Derrick Vann, the Tribal Registrar for the Cherokee Nation, M.V. was an enrolled member as of December 7, 2022. (Pet. App., at a046). The Tenth Circuit's opinion recognizes that guardianship proceedings took place "days [after] the abuse." (Pet. App., at a018 n.10). Further, while "M.V. testified that she is an Indian," she was not asked whether she always considered herself an Indian or held herself out to be an Indian prior to the charged abuse. (Pet. App., at a047–a050). For example, M.V. testified that she was currently attending a school that only allows Indian persons to attend, but she never claimed that she had been attending that school at the time of (or prior to) the alleged abuse. (Pet. App., at a049–a050).

Based on the Tenth Circuit's own description of the evidence: (1) the guardianship proceedings occurred *after* the charged conduct concluded; (2) M.V. enrolled in the Cherokee Nation *after* the charged conduct concluded, and; (3) M.V. *currently* holds herself out to be an Indian and will be attending a school for Indian children in the future, years after the charged

conduct concluded. Therefore, the only pre-charged-conduct evidence supporting M.V.'s recognition as an Indian is M.V.'s receipt of healthcare through her mother's tribal enrollment. But the Tenth Circuit recognized this was not as strong an indicator of Indian tribal recognition as the United States argued it was. (Pet. App., at a016).

The Tenth Circuit premised its reliance upon post-conduct evidence on an older case: *United States v. Drewry*, 365 F.3d 957, 961 (10th Cir. 2004), *reinstated on remand by* 133 Fed. App'x 543, 546 (10th Cir. 2005). (Pet. App., at a017–a018). In *Drewry*, the Tenth Circuit considered evidence that children were taken into tribal custody, rather than state custody, after the offense as evidence that the children were recognized as Indians. *Id.* at 961. Mr. King discouraged the Tenth Circuit from relying upon *Drewry* for this premise, but it did so anyway without meaningfully explaining why post-conduct events may satisfy elements that must be fulfilled prior to (or at the moment of) the crime's commission. (Pet. App., at a018).

c. This case is a strong vehicle for this issue.

The Tenth Circuit was wrong to rely upon events occurring after the charged conduct's conclusion to hold the evidence proved, beyond a reasonable doubt, that M.V. was recognized as an Indian at the time of the offense. Mr. King raised all of these issues with the Tenth Circuit in a petition for rehearing and for rehearing en banc, but the Tenth Circuit declined to take the opportunity to correct its mistake. (Pet. App., at a029–a030).

This case gives this Court an opportunity to correct a serious error of law that the Tenth Circuit has committed not only in this case, but in past cases, and which it will continue to commit without this Court's intervention. Moreover, Mr. King received a life sentence as a result of his convictions. (Pet. App., at a033). Thus, this Court can correct a major legal error that has put a

man in prison for the rest of his life. Further, this issue is thoroughly preserved. There are no major impediments to this issue that make this case unworthy of consideration by this Court.

II. The test to determine whether a person is an Indian should be based solely upon whether they are an enrolled member of a federally-recognized tribe. The current test, which considers blood quantum and recognition, is inconsistent with this Court’s explanation of what makes a person an Indian in *United States v. Antelope*.

- a. In *Antelope*, this Court explained what makes a person an Indian and why they may be treated differently from non-Indian persons under the law.

In *United States v. Antelope*, the defendants challenged the constitutionality—under the Due Process Clause of the Fifth Amendment—of federal law applying different criminal laws to them because they were Indians who allegedly committed their crimes within Indian country as compared to the state laws that would be applied to non-Indian persons committing the same crimes. 430 U.S. 641, 642–44 (1977). Specifically, they claimed the application of different laws based upon one’s status as an Indian was racially discriminatory. *Id.* at 643–44.

“The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications.” *Id.* at 645. This is because “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations.” *Id.* (internal citations and quotation marks and ellipses omitted). Indians are treated differently “not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.” *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 554 (1974)). The regulation of certain Indian affairs, such as crimes committed by or against Indians in Indian country, by the federal government “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.” *Id.* at 646.

Thus, the *Antelope* Court concluded: “[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.” *Id.* In a footnote, this Court followed that conclusion by explaining, “enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction.” *Id.* at 646 n.7. However, that issue was explicitly left open by the *Antelope* Court: “Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to [federal criminal jurisdiction], and we therefore intimate no views on the matter.” *Id.* Mr. King now asks this Court to engage with that question: What makes a person an Indian for purposes of federal criminal jurisdiction under 18 U.S.C. §§ 1152 and 1153?

b. The current test for Indian status fails to achieve the goals expressed by *Antelope*.

The current test for Indian status, as used in the Tenth Circuit, has two elements: Blood Quantum and Recognition. *Prentiss II*, 273 F.3d at 1280. To be an Indian, a person must have some degree of Indian blood *and* be recognized as an Indian by either the federal government or a federally-recognized tribe. *Id.* The recognition prong is typically resolved by looking to non-exclusive factors that include: (1) enrollment in a tribe, (2) provision of government assistance reserved only for Indians, (3) enjoying the benefits of tribal affiliation, and (4) social recognition as an Indian through living on a reservation and participating in Indian social life. *See Hebert*, 159 F.4th at 780. This two-part test is deeply flawed.

First, this test infringes upon the sovereignty of tribes to determine who among them are members of their political institutions and therefore subject to the treatment reserved for those who are members of quasi-sovereign tribal entities.

Second, the test is highly subjective and capable of conflicting and inconsistent outcomes depending on the jury and the nature of the evidence presented. The wishy-washy nature of the

test creates the possibility of strange outcomes divorced from the fundamental legal objectives that lead to Indians being regulated separately from non-Indians.

And third, the test traces its origins to an opinion written by the same man who authored the decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). The racial animus that drove the decision in *Dred Scott* is apparent in the rationale of the opinion that gives rise to our modern test for Indian status.

The test for Indian status should instead be reduced to one factual inquiry: Was the individual an enrolled member of a federally-recognized Native American tribe at the time of the charged offense conduct?

1. The current test does not respect tribal sovereignty to decide who is an Indian.

If the different treatment of Indians is “rooted in [their] unique status . . . as ‘a separate people’ with their own political institutions,” *Antelope*, 430 U.S. at 646, then any rule defining who is an Indian should respect the right of those sovereign tribal entities to decide who is among their “separate people.” The current test fails to do that. Where a person is enrolled in a federally-recognized tribe, that fact is determinative of recognition, but it is not determinative of Indian status because of the blood quantum requirement. So even those individuals that tribes have actively declared members of their sovereign political institutions, under the current test, may be declared by federal courts to not be Indians for purposes of federal criminal cases. This is particularly pronounced with respect to the Freedmen of various Oklahoma tribes, who became tribal citizens but did not necessarily have blood relation to the tribe. *See Freedmen History*, The Oklahoma Historical Society (September 23, 2026), <https://www.okhistory.org/learn/freedmen>.

Alternatively, where a person is not enrolled, and a tribe has perhaps rejected their application for enrollment, that person may still be declared an Indian by the courts if a jury decides

that a person has been recognized as an Indian through other mechanisms, some as vague as attending powwows and living on a reservation.³ In this case, Derrick Vann, the Cherokee Nation Tribal Registrar, explained that M.V.’s application for enrollment had been denied in 2017 and she was only granted enrollment in December 2022. (Pet. App., at a042–a046). Mr. Vann specifically explained that, prior to her enrollment, the Cherokee Nation did not recognize M.V. as an Indian. (Pet. App., at a046). Thus, the jury effectively overruled the Cherokee Nation’s determination as to M.V.’s Indian status by concluding that it recognized her as an Indian prior to the sexual abuse, even though the Cherokee Nation’s own registrar asserted she was not so recognized. A ruling of this nature inherently subverts a tribe’s sovereign authority to decide who are members of their tribal and political community.

Many forms of recognition, as set forth in the current test, do not rely on the intentional decision of a tribe and person to affiliate with one another in a formal sense; instead, they often derive from nothing more than the fact that a parent or grandparent is a tribal member. Such as here, where M.V.’s recognition was at least partially premised upon her receipt of tribal healthcare due solely to the fact that her mother was a member of the Cherokee Nation. (Pet. App., at a016). Where recognition is rooted in mere genealogical relation to a tribal member, recognition begins to look a lot like a racial classification rather than treating individuals differently “as members of quasi-sovereign tribal entities.” *Id.* at 645 (quoting *Morton*, 417 U.S. at 554). This is especially true when a tribal official has testified that the tribe did not recognize M.V. as an Indian prior to her enrollment in December 2022.

³ It should be noted that many tribal events are open to the public, and those not affiliated with the tribe may nonetheless be welcome to participate in the ceremonies or festivities.

Moreover, the current test rejects the right of individuals to choose whether to affiliate with the sovereign in a formal manner, and it essentially forces Indian status, at the discretion of the jury, upon someone who has previously benefitted from their tribal ancestry even if they have consciously rejected membership with a tribe. Similarly, parents who have made the decision to not enroll their child with the tribe may have the status of Indian forced upon their child just because they, as parents, chose to utilize services available to them.

By making the test focused solely on enrollment, the test will respect the rights of sovereign Native American tribes to decide for themselves whom they have formally affiliated with and welcomed into their political institutions.

2. The current test creates confusion, risks inconsistent outcomes, and is inconsistent with a standard of evidence requiring proof beyond a reasonable doubt.

This Court has explained that “probable cause deals with probabilities and depends on the totality of the circumstances,” and that “it is a fluid concept that is not readily or even usefully, reduced to a neat set of legal rules.” *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (internal quotation marks omitted).

Under the current test for Indian status, the test for recognition as an Indian relies upon a multi-factor, “totality-of-the-evidence” approach that typically considers enrollment, receipt of federal benefits, receipt of tribal benefits, and social recognition. *See United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). At the outset, this sounds more like a probability test than a beyond a reasonable doubt test.

The recognition test is inherently fluid. Problematically, the jury is not merely asked to find facts, but to attach legal weight to the facts it finds. What significance should a jury attribute to its determination that an individual went to Indian hospitals as a child, but that person is now in their

thirties, forties, or fifties? What significance should a jury attach to someone going to tribal hospitals as a child solely because of their parent's tribal membership? Should attendance at powwows and participation in tribal ceremonies count toward recognition just as strongly as receipt of federal benefits? What weight should a jury give to the benefits someone receives solely because their parent is an enrolled tribal member, and then as an adult that person chooses to not enroll in the tribe? What if parents have chosen to not enroll their child in a tribe, but they have sought tribal benefits available to them as parents? Does this force Indian status upon the child, seemingly against the wishes of the parents? Does a person's recognition, and therefore their Indian status, wax and wane over time? The answer to these questions is left to the jury's inscrutable discretion.

Additionally, two different juries could hear the exact same evidence, and reach the exact same conclusions as to the facts that the evidence proves, yet each jury could still reach different conclusions about the legal status of an individual because they have prescribed different degrees of significance to the factors. The current test does not ask the jury to decide if a person did receive benefits or attend tribal ceremonies; it asks the jury to weigh the legal significance of the benefits received or of attendance at tribal ceremonies.

The ultimate question to be resolved is one of legal status. The best way to achieve this is to reduce the analysis to one simple question that may be answered by resolution of a factual question: Is the individual an enrolled member of a federally-recognized Native American tribe?

3. The current test is infected by racial animus and leans heavily on the racial ancestry of an individual rather than their affiliation with tribal entities.

The modern test for Indian status traces its origins to an opinion, *see Prentiss II*, 273 F.3d at 1280, written by the same man who authored the judicial opinion representing one of the greatest

failures in this Nation’s judicial history: Chief Justice Roger Taney. In *United States v. Rogers*, Chief Justice Taney said:

And we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians. . . .

45 U.S. 567, 572–73 (1946). Chief Justice Taney concluded by stating: “Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.” *Id.* at 573.

It would not at all be appropriate to say that every opinion authored by Chief Justice Taney is suspect simply because he authored the decision in *Dred Scott v. Sandford*. But it would be fair to say that any opinion authored by him that was supported by his racial views is inherently flawed precisely because of his role in *Dred Scott*. Continuing to adopt the *Rogers* analysis as the foundation of our modern Indian country jurisprudence gives credence to the racist views that created the *Dred Scott* decision, and it allows that same hand to influence this Nation’s continued relationships with the people it drove from their ancestral lands and placed on reservations.

Moreover, Chief Justice Taney’s rationales have been effectively overridden by this Court through its decision in *Antelope*; it is not race that decides whether a person is an Indian, it is their membership with the tribal entity that sets Indian persons apart from everyone else. 430 U.S. at 645–46. This Court should grant the petition for certiorari so that it may erase the racial taint that hangs over the modern test for Indian status.

- c. This case is a very strong vehicle for this issue. Neither Mr. King nor M.V. were enrolled members of a federally-recognized tribe at the time of the offense.

Mr. King's case demonstrates the problem with the current test. The United States charged that Mr. King was a non-Indian person and that M.V. was an Indian person. Neither were enrolled members of a tribe at the time of the charged conduct. The questions surrounding M.V.'s status demonstrate the fluidity and imprecision of a test that is intended to provide a concrete determination of whether a person was, or was not, an Indian when the crime was committed.

Further, the Tenth Circuit relied upon three categories of evidence to conclude that M.V. was an Indian: (1) Evidence that M.V. received tribal healthcare benefits through her mother's tribal affiliation (Pet. App., at a016–a017); (2) Evidence of events occurring after the charged conduct already ended (Pet. App., at a017–018), and; (3) Evidence that M.V. was the biological descendant of tribal members (Pet. App., at a018–a019). One of those three categories was improper, as outlined above, because it relied upon events occurring after the charged conduct ended to prove an element of the offense. The other two categories effectively reduce what is supposed to be a test of political affiliation with tribal entities into a test of ancestry and racial background. It treats M.V. differently based upon her race, not her affiliation with a tribe.

And it should be noted that the Tenth Circuit feeling it was necessary to resort to these categories of evidence demonstrates both the weakness of the evidence in this case and the importance of a test that creates a brightline rule for Indian status. The jury was asked to weigh the significance of evidence that M.V. received tribal healthcare purely because of her mother's tribal affiliation, to weigh the significance of events that happened *after* the charged conduct had already concluded, and to weigh the significance of M.V.'s ancestral connection the Cherokee Nation. It was not asked to resolve a simple factual question, but to weigh the legal importance of facts it found to determine the legal consequences of those facts. This Court should adopt a test that creates

a brightline rule for Indian status. In doing so, it would simplify the analysis, respect tribal sovereignty to decide who is a member of their tribal community, reduce the risk of confusion for parties, attorneys, juries, and courts, and avoid treating Indian status as little more than a racial classification.

III. A multiplicitous indictment that, because of its multiplicitous nature, prevents a defendant from asserting a particular defense to the charges against him necessarily prejudices him and should require an election of charges. Allowing a multiplicitous indictment like this to stand permits the United States to do in a single case what the Constitution’s Double Jeopardy prohibition would prevent it from doing in successive cases.

The Indictment alleged that Mr. King engaged in a sexual act on M.V., who had not attained the age of 12 years, and that Mr. King had engaged in and caused sexual contact with M.V. in the period from November 2017 to August 23, 2021. The Indictment was split into four counts: Counts One and Two charged Mr. King under 18 U.S.C. § 1152 with being a non-Indian person who committed his offenses against M.V., who was alleged to be an Indian person. Counts Three and Four concerned the exact same conduct, but they charged Mr. King under 18 U.S.C. § 1153 with being an Indian who committed an enumerated major crime against M.V. In other words, the only element that distinguished these two charges was whether Mr. King was, or was not, an Indian at the time of the charged conduct. In both the District Court and in the Tenth Circuit, the United States conceded the multiplicitous nature of these charges. The only question was whether the multiplicitous charges prejudiced Mr. King and required an election of charges prior to trial.

a. “Heads I Win, Tails You Lose.”

Trial courts have discretion to determine if an election of charges should be ordered to address a multiplicitous indictment. *United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997). Broadly speaking, the risk inherent to multiplicitous indictments is that the numerous charges “may falsely suggest to a jury that a defendant has committed not one but several crimes.”

Id. (internal quotation marks omitted). While that was of concern in this case, that was not the primary problem. The Indictment in Mr. King's case created a much more insidious challenge.

The only element distinguishing the charges in Counts One and Two from the charges in Counts Three and Four was Mr. King's status as an Indian or non-Indian person. Thus, if Mr. King wanted to challenge Counts One and Two by asserting he was an Indian person (in addition to any other evidentiary bases he might raise for an acquittal), he would be admitting the element of the charges in Counts Three and Four. If he chose to challenge his Indian status as to Counts Three and Four, he would be admitting his non-Indian status as to Counts One and Two. In short, defending against the sole differentiating element in one set of charges admitted the sole differentiating element in the other set of charges.

This means the United States could accomplish in a single trial, using a multiplicitous indictment, what it could not do in successive trials because the Double Jeopardy Clause would prohibit it. If the United States charged Mr. King under Section 1152, and then Mr. King was acquitted after presenting evidence of his Indian status at the time of the offense, the United States would not be able to prosecute him in a successive trial under Section 1153. The charges were multiplicitous, as admitted by the United States. And multiplicity is essentially a species of double jeopardy because multiplicitous charges purport to punish a defendant twice for the same criminal conduct. *See Johnson*, 130 F.3d at 1424.

By obtaining a multiplicitous indictment, the United States bypassed the Constitution's protection against double jeopardy and ensured that if Mr. King challenged his status as to one set of charges, he would be admitting his status as to the other set of charges. This should not be permitted.

b. This case is a strong vehicle for this issue.

First, Mr. King has preserved his claims concerning this issue at every step of the process, filing pretrial motions, litigating them in a motions hearing, and raising the issue on appeal to the Tenth Circuit.

Second, the United States conceded the multiplicitous nature of the indictment, and therefore that is not in question. The only question before this Court would be whether Mr. King was prejudiced by the multiplicity and, if so, whether ordering an election of charges was the appropriate remedy.

Third, the fact that the Tenth Circuit's decision below was published means the Tenth Circuit is tacitly approving this charging methodology anytime the United States is concerned that a defendant might challenge their status at trial. Any future challenges to indictments that do the same thing will likely be defeated with a citation to the decision below. It is better to nip this issue in the bud now, with a case in which the issues are clearly preserved, before the United States tries to turn this kind of indictment into a common charging methodology.

CONCLUSION

For the reasons stated herein, this Court should grant the Petition for Writ of Certiorari and set a schedule for merits briefing in this matter.

Respectfully submitted,

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