NO. 21-1193

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

ROBERT ERIC WADKINS,

Respondent.

On Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals

REPLY BRIEF OF PETITIONER

JOHN M. O'CONNOR
ATTORNEY GENERAL
MITHUN MANSINGHANI
COUNSEL OF RECORD
BRYAN CLEVELAND
DEPUTY SOLICITOR GENERAL
COURTNEY JORDAN
AUDREY WEAVER
ASSISTANT SOLICITORS GENERAL
CAROLINE HUNT
JENNIFER CRABB
ASSISTANT ATTORNEYS GENERAL
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 N.E. TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 521-3921
MITHUN.MANSINGHANI@OAG.OK.GOV

MAY 25, 2022 *COUNSEL FOR PETITIONER*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

NO. 21-1193

In the Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

V.

ROBERT ERIC WADKINS,

Respondent.

On Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals

REPLY BRIEF OF PETITIONER

This case squarely presents the question concerning who qualifies as an "Indian" expressly left open in *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977). With millions more now subject to the laws governing Indian country, having an answer to that question has never been more important.

Respondent attempts to harmonize the various lower court answers to *Antelope*'s question, but the disparate analyses scattered throughout those cases cannot be reconciled. Moreover, respondent does not even try to explain why any of those assorted multi-factor tests are correct as a matter of statutory text, history, and precedent. Nor can any of these lower court tests for when a person who is ethnically Native American, but not a tribal member, counts as "Indian" be squared with the equal protection principles set

forth in *Morton v. Mancari*, 417 U.S. 535 (1974) and its progeny.

Certiorari should be granted to answer the question left open in *Antelope* and to empower law enforcement and courts with a bright-line test to determine Indian status for purposes of allocating criminal justice authority in Indian country.

A. Review Is Warranted on the Question That This Court Left Open in *Antelope* and That Has Fractured Lower Courts.

Respondent largely sidesteps the fact that this Court explicitly left unanswered the question whether a person not enrolled in any tribe can nonetheless be an "Indian" for purposes of federal criminal statutes. *See Antelope*, 430 U.S. at 646 n.7. Because "[t]his case presents that question," certiorari is warranted. *Hall v. Hall*, 138 S.Ct. 1118, 1122 (2018).

Review is also necessary because of the fractured answers to *Antelope*'s question attempted by lower courts. Respondent's simplistic tale claiming that the District of South Dakota's test provides the only correct answer, adopted without variation by all courts, grievously misapprehends the state of the law. Opp.1 (citing *St. Cloud v. United States*, 702 F.Supp. 1456 (D.S.D. 1988)). But the Court need not take the State's word on it: Courts and scholars alike all agree that cases are divided on the issue. *See, e.g.*, App.7a n.4; *Parker v. State*, 495 P.3d 653, 667 n.15 (Okla. Crim. App. 2021); *State v. Nobles*, 838 S.E.2d 373, 378 (N.C. 2020); *State v. Salazar*, 461 P.3d 946, 949-50 (N.M. Ct. App. 2020); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[4]. Respondent is thus alone in believing no conflict among lower courts exists.

1. Although most lower courts reference the four *St. Cloud* factors to determine when a nonenrolled ethnic Native American is an "Indian," those courts vary widely in deciding the exclusivity, weight, and application of those factors. Pet.14-18. Respondent relies heavily on his claim that the Ninth Circuit does not view the four factors as exclusive. Opp.14. But he mistakenly relies on a decision, *United States v. Maggi*, 598 F.3d 1073, 1081 (9th Cir. 2010), which the Ninth Circuit overruled in 2015. *See United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc). *Zepeda* reinstated the test from *United States v. Bruce*, 394 F.3d 1215, 1224 (2005), which never contemplated use of additional considerations beyond the four factors, modifying it only to the extent that *Maggi* "appropriately clarified the *second* prong of the *Bruce* test to require a relationship with a federally recognized tribe," as opposed to a tribe not recognized by the federal government. *Zepeda*, 792 F.3d at 1106 (underline added); *see also id.* at 1113. Tellingly, respondent's quotations of *Zepeda* omit the underlined clause.

Respondent mistakenly argues that *Bruce* is not an exclusive test because it considered prior tribal court convictions, which respondent claims is not part of the four *St. Cloud* factors. Opp.14. But *Bruce* itself says that tribal criminal jurisdiction is evidence of tribal recognition—the third *St. Cloud* factor. *See Bruce*, 394 F.3d at 1227; *accord, e.g.*, *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009); *State v. Perank*, 858 P.2d 927, 933 (Utah 1992).

Nor does respondent meaningfully contest that courts are divided on whether the four *St. Cloud* factors are in declining order of importance or are equally weighted. Pet.16. Similarly, respondent cannot dispute a split exists with respect to how much Indian

ancestry is necessary to show Indian status. He falsely states that all lower courts require only "some" blood, Opp.1, 5, but that is self-evidently not true, Pet.13-15. Respondent's main argument is that the State did not contest he met the Oklahoma courts' incredibly low blood threshold. *See* Opp.12. But if certiorari is granted to set forth a test for Indian status—including whether a person, like respondent, who was not a member of any tribe qualifies as an Indian—it should articulate that test in full and thereby also resolve the division among courts on blood quantum.

2. Thus, contrary to respondent's assertion, there is no jurisdictional barrier to review. Under the test advocated by the State—requiring defendants to prove Indian status by showing a significant quantum of Indian blood and membership in a federally-recognized tribe at the time of the offense—respondent does not qualify as "Indian," and the judgment below must be reversed.

Even among the various four-factor tests used by the lower courts, whether respondent is an Indian depends on if those factors are considered exclusively and hierarchically. Under the Ninth Circuit's test, Pet.17, respondent lacks any evidence on the first two factors to support his Indian status. The first—and most important—factor examines enrollment at the time of the crime, rather than the subsequent enrollment relied upon by the court below (creating yet another split on Indian status). *See Zepeda*, 792 F.3d at 1113. It is undisputed that respondent was not enrolled at the time of his crime. App.24a. While respondent repeatedly emphasizes his current membership with the tribe due to his enrollment *after* his conviction, the Ninth Circuit rightly rejects reliance on such subsequent facts, which would create consti-

tutional notice issues and allow defendants to sandbag courts and prosecutors by, like respondent, enrolling only after a state conviction. *Id.*

The second factor examines assistance that is "available *only* to" members or those eligible for membership. *Zepeda*, 792 F.3d at 1114 (emphasis added). But the health care respondent received was available to all with Indian blood, regardless of membership or eligibility. *See United States v. Loera*, 190 F.Supp.3d 873, 882 (D. Ariz. 2016); *see also Stymiest*, 581 F.3d at 765-66. Respondent's evidence on the remaining factors is weak. The feather in his pocket at his arrest is hardly persuasive, and his sparse social participation in tribal events is unsupported testimony about "evidence from a long-time past." *See Loera*, 190 F.Supp.3d at 882-83 (citing *Zepeda*). Indeed, the district court found his evidence on this score lacked credibility. App.24a. This evidence is also dubious because he admitted to being a member of the Aryan Brotherhood. His excuses for doing so fail to explain why he also chose to get swastika and Schutzstaffel bolt tattoos. Tr. 40, 70-74, 114-18; State's Exs. 4, 5.2, 5.5, 5.7. In short, respondent would not meet the Ninth Circuit's Indian status test, much less the test advocated by the State here, but the court below held he was "Indian" enough under a looser test.

This case thus presents an excellent vehicle for resolving the division among courts on Indian status. Because so much of the criminal law in Indian country turns on the fundamental—but as of now, uncertain—inquiry of whether a defendant is an Indian, certiorari is warranted.

B. THE COURT BELOW ERRED IN HOLDING THAT PERSONS NOT MEMBERS OF AN INDIAN TRIBE CAN QUALIFY AS AN INDIAN, COLLAPSING INDIAN STATUS INTO A PURELY RACIAL INQUIRY.

Antelope did not decide and "intimate[d] no views" on "whether nonenrolled Indians are subject to" federal Indian country criminal laws like the Major Crimes Act and General Crimes Act. 430 U.S. at 646 n.7. The correct answer is that they are not. By answering that they may be depending on the outcome of an unbounded multi-factor test focused on racial considerations, the court below ran afoul of this Court's equal protection jurisprudence. Pet.21-26. In arguing otherwise, respondent primarily relies on racially-focused precedent and on the dissents of Justices who disagreed with this Court's opinions setting the boundaries of when Indian law violates equal protection.

First, respondent claims that *United States v. Rogers*, 45 U.S. 567 (1846), holds that tribal membership is not necessary for Indian status. But as a threshold matter, if *Rogers* had settled the question presented, why would this Court over a hundred years later explicitly leave open that question in *Antelope*? To justify his incongruous claim, respondent (again) leaves out key context: *Rogers* stated that the General Crimes Act "does not speak of members of a tribe, <u>but of the race generally</u>." *Rogers*, 45 U.S. at 573 (underlining added). Respondent repeatedly omits the underlined portion. *See* Opp.1, 3, 5, 23. The reason is obvious: including the full quote would reveal that respondent's position is a purely race-based one. *See also* Opp.22 (endorsing *Webster*'s racial definition). This is contrary to *Mancari*, which holds that Indian-specific laws survive equal protection only when they refer to

"Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." 417 U.S. at 554. The most rational resolution *Rogers* and *Mancari* is that both Indian race and tribal membership are necessary for Indian status. Pet.4-5.

Second, respondent's reliance on more modern cases adopts the view of the *dissents* in those cases. For example, respondent cites *Duro v. Reina*, for the proposition that federal criminal statutes reach persons who are not members of Indian tribes. Opp.23 (citing 495 U.S. 676, 703 (1990)). But he is citing Justice Brennan's dissent while mistakenly claiming it was "the Court" that espoused this view. Instead, the *Duro* majority emphasized federal authority over "*enrolled* Indians as a class." 495 U.S. at 692 (emphasis added).

Similarly, respondent's interpretation of *Mancari*, Opp.24-25, merely parrots the dissent in *Rice v. Cayetano*, 528 U.S. 495, 532-35 (2000) (Stevens, J., dissenting); *cf. also id.* at 519-520 (majority op.). And his view that the test employed below is not racial because it may exclude some who are racially Indian has already been rejected by this Court. *Compare* Opp.24 *with* Pet.22. Instead, this Court's cases hold that an Indian-status test is consistent with equal protection scrutiny when it is restricted to membership in, as opposed to only a racial connection with, federally recognized tribes. *Rice*, 528 U.S. at 519-520. In response, respondent merely espouses the dissenting view in those cases. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 244-45 & n.3 (1995) (Stevens, J., dissenting).

Respondent's insistence that the various factors employed below have "nothing to do with ancestry or race," Opp.24, are belied by their application in his own case, Pet.24-26. He concedes that the decision

below ultimately rested on three facts: subsequent enrollment (sandbagging), possession of a "Certificate of Degree of Indian Blood" card (race), and receipt of Indian health services based on having Indian blood (race). Opp.15. Setting aside his problematic subsequent enrollment, *see supra* at 4-5, the decision below all boils down to race. Pet.25.

Indeed, when the *St. Cloud* factors first emerged, the federal government criticized using ethnological or cultural characteristics (the third and fourth *St. Cloud* factors) as inevitably leading to inappropriate racial stereotyping. *See* Appellant's Reply Br., *United States v. Lawrence*, No. 94-2274, at 5 (8th Cir. July 27, 1994). Sure enough, courts are now focusing on factors like attendance at pow-wows or possession of feathers, App.12a-13a; Pet.27.

Third, respondent criticizes the State's emphasis on enrollment. Opp.21-23. Although "enrollment" is a convenient shorthand, the Petition is clear that what *Mancari* requires is a bilateral voluntary political relationship between quasi-sovereign and citizen, which can take the form of enrollment, membership, citizenship, or other such formal manifestation. Pet.18-19, 22-23. It ensures that respondent is treated differently because he is a part of a distinct political community.

Membership or citizenship is not a new concept for Indian tribes, nor does looking to it require an ahistorical reading of federal criminal Indian country statutes. After all, citizenship in tribes was recognized decades before the Major Crimes Act was enacted, at least as early as 1846, if not earlier. *See Rogers*, 45 U.S. at 568 (referring to "a citizen of the Cherokee nation"). In contrast, respondent believes tribes were amorphous entities with no sense of citizenship or membership in their political communities. Such a view has never

been adopted by this Court. *See Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (stating tribes' historic retained sovereignty includes power "to determine tribal membership").

Meanwhile, respondent points to no historical evidence that his multi-factor test was what Congress had in mind when it enacted the General Crimes Act and Major Crimes Act—long before the existence of CDIBs and free Indian health services. Indeed, respondent emphasizes his subsequent enrollment to show he is an "Indian," which effectively concedes that enrollment is a historically proper consideration for Indian status.

The text of the federal criminal statutes say nothing contrary. *Contra* Opp.21-22. Respondent notes that "Indian" is defined as solely tribal members in civil statutes enacted a half-century to a century later, but no negative inference can be drawn from that fact because the criminal statutes provide no definition at all. Pet.4, 11. Moreover, nothing in the text or history of these laws comes close to contemplating the four *St. Cloud* factors and their many variations, which appear to have emerged out of thin air. *See* Pet.12-13, 19-20.

If a lower court's answer to the question reserved in *Antelope* can only be defended with racial tests or this Court's dissents, then the lower court's answer is wrong. This Court should grant the petition to bring the test for Indian status into compliance with this Court's equal protection precedent.

C. Review Is Warranted Because Who Qualifies as an "Indian" Is an Important Question of Federal Law.

The lack of a clear, consistent, and easily applied definition for Indian status under federal criminal law hamstrings law enforcement, prosecutors, and courts. Pet.29. "The confusion over definitions and terms makes *stare decisis* a minefield, even for federal Indian law practitioners." Weston Meyring, *"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status*, 67 MONT. L. REV. 177, 182 (2006). This, in turn, gives criminal defendants the upper hand by exploiting prosecutorial uncertainty, whether through easy plea deals or retrials.

Absent a bright-line and easily verifiable test like enrollment at the time of offense, defendants can wait to enroll or to disclose past participation in tribal cultural events only after they learn whether their trial in state court results in conviction. Respondent cannot reasonably deny that criminals use the very tactic he is using in his own case, where he claimed to be an Indian in court and enrolled with a tribe, despite decades of failing to enroll, only after he learned he could escape his state court conviction.

Nor does respondent dispute that the evidentiary burden is different in state and federal court. *Compare* Pet.28, *with* Opp.19. He also does not disagree that case outcomes have not formed a consistent pattern under the various tests employed by lower courts. Pet.27. And criminals have already used the prosecutorial uncertainty over Indian status to both have their

state conviction vacated *and* gain dismissal of later federal charges.[1]

At best, respondent tries to argue that criminal defendants might be estopped from changing their status between court proceedings. Opp.20. He cites no case on point, and his argument is speculative because offensive collateral estoppel, especially when non-mutual, is discretionary. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

Nor is this issue uncommon. Respondent makes conflicting claims asserting both that contested Indian status does not arise often, and that clarifying the definition of "Indian" would affect numerous existing convictions. *Compare* Opp.19, *with id.* 4, 20. The truth is that many cases are implicated, but that no past conviction need be affected by a bright-line test if adopted by this Court. To the extent the Court has addressed changes in law about the appropriate prosecutorial forum, it has declined to apply those changes retroactively. *See Gosa v. Mayden*, 413 U.S. 665, 677 (1973).

"Law enforcement officers also have" trouble applying the mercurial Indian-status test used below. Cross-deputization agreements are only a limited solution, *contra* Opp.19, because they do not cover all jurisdictions and because those agreements are difficult to reach and becoming increasingly strained. *See United States v. Cooley*, 141 S.Ct. 1638, 1646 (2021); Brief of Okla. Dist. Att'ys Ass'n et al., *Oklahoma v.*

---

[1] *See* James Beaty, *Federal Prosecutors Dismiss Murder Indictment*, MCALESTER NEWS-CAPITAL (Dec. 7, 2021), https://www.mcalesternews.com/news/local_news/federal-prosecutors-dismiss-murder-indictment/article_6922d019-4581-545f-9bb8-123bfa16682c.html.

Castro-Huerta, No. 21-429 (U.S. Mar. 7, 2022), at 14-15. Even if an officer is cross-deputized, they still have to know what prosecutor to call to handle the arrestee. A multi-factor inquiry into the life history of the accused is ripe for error, especially when it relies heavily on whatever the arrestee tells law enforcement. *See* Pet.27-29. Such an inquiry, after all, produces an obvious "incentive to lie." *Cooley*, 141 S.Ct. at 1645. Officers must make on-the-spot judgments on Indian status, which absent a clear enrollment test risks racial stereotyping or sacrificing much-needed patrol time to ensure that defendants are not shuttled between federal, state, and tribal prosecutors.

The problems with saturating law enforcement and courts with a multi-factor test have magnified after *McGirt*, which vastly expanded the number of people in the United States affected by federal criminal law for Indian country. Crime in Indian country cannot be effectively prosecuted without a clear answer from this Court to the question of who is an Indian.

* * * * *

The Court should grant the petition for certiorari.

Respectfully submitted,

JOHN M. O'CONNOR
ATTORNEY GENERAL
MITHUN MANSINGHANI
COUNSEL OF RECORD
BRYAN CLEVELAND
DEPUTY SOLICITOR GENERAL
COURTNEY JORDAN
AUDREY WEAVER
ASSISTANT SOLICITORS GENERAL
CAROLINE HUNT
JENNIFER CRABB
ASSISTANT ATTORNEYS GENERAL
OFFICE OF THE OKLAHOMA ATTORNEY GENERAL
313 N.E. TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 521-3921
MITHUN.MANSINGHANI@OAG.OK.GOV

COUNSEL FOR PETITIONER

MAY 25, 2022