No. 24-2128

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JOEL RUIZ,
Defendant-Appellant

On Appeal from the United States District Court
for the District of New Mexico
D.C. No. 22-CR-365 (The Hon. David Herrera Urias)

UNITED STATES' PETITION FOR REHEARING EN BANC

February 2026

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RULE 40(B)(2) STATEMENT

Rehearing en banc is appropriate to resolve a panel decision that "conflicts with a decision of the United States Supreme Court," "conflicts with an authoritative decision of another United States court of appeals," or involves "a question of exceptional importance." Fed. R. App. P. 40(b)(2)(B)–(D). The panel's decision here, which vacated the conviction of a man who sexually assaulted a young girl based on a direct application of *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001) (per curiam) (en banc), satisfies all three criteria.

In *Prentiss*, a divided Tenth Circuit held that a defendant's non-Indian status is an essential element of any crime prosecuted under the General Crimes Act, 18 U.S.C. § 1152—one that must be alleged in the indictment, rather than an affirmative defense that the defendant bears the burden of raising. 256 F.3d 977–80. From the beginning, *Prentiss* conflicted with the Supreme Court's instruction that when a statute establishes an "exception" to criminal liability, the indictment need not negate that exception. *McKelvey v. United States,* 260 U.S. 353, 357 (1922). Instead, "it is incumbent on one who relies on such an exception to set it up and establish it." *Id.* This "settled rule" was affirmed just last year. *Cunningham v. Cornell Univ.*, 604 U.S. 693, 707 (2025) (citation omitted).

Aside from flouting Supreme Court precedent, *Prentiss* conflicts with the positions of the other courts of appeals to have addressed it. The Fifth and the Ninth Circuits have both squarely held that a defendant's non-Indian status is an affirmative defense. *See United States v. Hester*, 719 F.2d 1041, 1043 (9th Cir. 1983); *United States v. Haggerty*, 997 F.3d 292, 298–302 (5th Cir. 2021), cert. denied, 142 S. Ct. 759 (2022). And the Eighth Circuit has interpreted an adjacent enumerated exception to Section 1152 as an affirmative defense, not an element. *United States v. Webster*, 797 F.3d 531, 536 (8th Cir. 2015) (considering "the absence of a tribal prosecution"). *Prentiss* thus creates a needless disparity in the application of federal law across Indian Country.

Lastly, *Prentiss*'s error is one of exceptional importance. In recent years, *Prentiss* has led this Court to vacate the convictions of three child molesters—not because there was any doubt about the crimes they had committed, but because the government merely presented inadequate evidence of their non-Indian status. *United States v. Simpkins,* 90 F.4th 1312 (10th Cir. 2024); *United States v. Hebert*, 159 F.4th 777 (10th Cir. 2025); *United States v. Ruiz*, 164 F.4th 1223 (10th Cir. 2026). The defendants' status as Indians or non-Indians has nothing to do with their culpability; indeed, had these defendants in fact been Indians, they could each have been prosecuted under the Major Crimes Act, 18 U.S.C. § 1153. And the dangers

posed by *Prentiss*, particularly in Oklahoma, have increased exponentially since *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *Prentiss*'s treatment of non-Indian status in Section 1152 cases thus threatens the safety of Indian victims and the general public.

This Court should therefore grant rehearing en banc to bring this circuit into alignment with the Supreme Court and the other courts of appeals that have addressed this issue, and to prevent dangerous offenders in Indian Country from escaping justice.

ISSUE PRESENTED

Is 18 U.S.C. § 1152's exception for offenses committed by one Indian against another an affirmative defense that the defendant bears the burden of raising?

STATEMENT OF THE CASE

I. Proceedings below

After a pair of cousins, Jane Doe 1 and Jane Doe 2, reported that Joel Ruiz lured them into his trailer on the Jicarilla Apache reservation with candy and sexually abused them when they were six or seven, and three or four, respectively, Ruiz was charged with aggravated sexual abuse of both girls under 18 U.S.C. §§ 1152, 2241(c), and 2246(2)(D). 1R.22.

At trial, the jury heard from two law-enforcement witnesses—Criminal Investigator (CI) Rome Wager, and FBI Special Agent Piere Himel—who both

testified that they had concluded that Ruiz was not Indian. Because Ruiz's confession had been suppressed, 1R.237–38, 257, these witnesses were not permitted to tell the jury that Ruiz had disclaimed any affiliation with the Jicarilla Apache tribe.

CI Wager works for the Jicarilla Apache Nation and holds a federal commission from the Bureau of Indian Affairs, one that requires training in federal law in Indian Country. 5R.170. As part of his duties investigating crime on the reservation, CI Wager has to determine whether any victims or suspects are Indian or not. *Id*. at 170, 189. In making this determination, CI Wager reaches out to the Jicarilla Apache enrollment office, *id*. at 190, and if the person is not enrolled there, he will speak with those involved in the alleged crime to find out what tribe they may be enrolled with, *id*. In this case, CI Wager reached out only to the Caddo Nation of Oklahoma, where Jane Does 1 and 2 were enrolled. *Id*.

CI Wager also "review[ed]" "databases to determine whether Joel Ruiz was a member of any federally recognized tribe." 5R.191. From this inquiry, he learned that Ruiz had been born in Mexico. *Id*. at 193. In addition, CI Wager also spoke to an agent from the Department of Homeland Security, after which he reported that he was able to determine Ruiz's Indian status. *Id*. at 194. His investigation did not uncover any information that indicated Ruiz was Indian. *Id*. He thus determined that the matter was

subject to federal jurisdiction. *Id*. at 196.

As for Agent Himel, he had worked as a police and correctional officer with the Bureau of Indian Affairs. 5R.367. He attended the Indian Police Academy, *id*. at 367, where "a large portion" of the curriculum involved "Indian Country criminal jurisdiction training," *id*. at 368. He also holds a Master of Legal Studies in Indigenous People's law, *id*., which included the study of Indian Country criminal jurisdiction, *id*. Agent Himel explained that federal criminal jurisdiction in Indian Country depends on the Indian or non-Indian status of the suspect and victim. 3R.370-71. To determine someone's status, he will ask them "whether they're enrolled members of a tribe," *id*. at 375, and then "follow up" with the enrollment office, *id*., if any. If that process does not reveal a tribal affiliation, "they wouldn't be considered a member of a federally-recognized tribe." *Id*. In investigating Ruiz's status, he also received information from a government agency, which contained Ruiz's identifiers. *Id*. at 385. Furthermore, he reviewed documents that Ruiz signed under penalty of perjury. *Id*. at 390. Based on his review of those documents, he was able to determine that Ruiz was a non-Indian. *Id*. His determination was based partly, but not entirely, on Ruiz's Mexican birth. *Id*. at 392.

At the conclusion of the government's evidence, Ruiz moved for acquittal for lack of sufficient evidence on his status as non-Indian. The

district court denied the motion. The jury convicted Ruiz of abusing Jane Doe 1.

II. Panel opinion

On appeal, Ruiz argued that the evidence of his non-Indian status was insufficient, and the panel agreed.

"To begin," the panel wrote, "the witnesses' relationship and personal knowledge of Ruiz rest on a "'thin foundation.'" *Ruiz*, 164 F.4th at 1227. "Importantly, neither witness testified that they knew Ruiz personally, or that they knew that Ruiz was a non-Indian." *Id.* at 1228. "Nor did they testify that Ruiz ever mentioned that he was a non-Indian. And there is no showing that the government attempted to contact a family member to gather Ruiz's ancestry or recognition evidence." *Id.* Further, the government had evidently not asked any tribe whether Ruiz was an enrolled member. *Id.* And Agent Himel's review of government databases was little help because those databases "do not have information on whether an individual is an enrolled member of a tribe." *Id.* And finally, the Court discounted the evidence about Ruiz's Mexican birth because "the definition of a recognized Indian—tribal or federal government recognition—does not turn on race." *Id.* (cleaned up). Accordingly, "even in the light most favorable to the government, a rational jury would need to speculate to conclude that Ruiz is a non-Indian based on the evidence the government provided." *Id.*

The full panel, however, agreed that the Tenth Circuit should revisit its precedent requiring the government to prove a defendant's non-Indian status under § 1152. *Ruiz*, 164 F.4th at 1229–31. Echoing Judge Hartz's concurrence in *Hebert*, 159 F.4th at 790–92, the panel remarked that the *Prentiss* rule is "nonsensical" and "perverse[.]" In contrast, treating the matter as an affirmative defense is "logical" and is supported by the text of § 1152, by Supreme Court precedent on statutory exceptions to criminal liability, and by the decisions of other circuits. *Id*.

ARGUMENT

I. *Prentiss* conflicts with Supreme Court authority holding that statutory exceptions to liability are affirmative defenses.

The Supreme Court has long recognized that where a statute identifies an "exception" to criminal liability, the indictment need not negate that exception. *McKelvey v. United States,* 260 U.S. 353, 357 (1922). The rule applies where "the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception[.]" *United States v. Cook,* 84 U.S. 168, 173 (1872). In that instance, the "settled rule" is that "the matter contained in the exception is matter of defence and must be shown by the accused." *Id.* at 173–74; *McKelvey*, 260 U.S. at 357 ("[I]t is incumbent on one who relies on such an exception to set it

up and establish it.").

This deep-rooted principle has been recently reaffirmed. Just last year, in *Cunningham*, the Court reiterated that exemptions to a statute "ordinarily constitute affirmative defenses that are entirely the responsibility of the party raising them." *Cunningham*, 604 U.S. at 701. This rule of construction applies "[e]ven in the criminal context." *Id*. at 707. Only in "narrow[]" situations as the Court has declined to apply it, "such as when an exception to a criminal offense is contained within the same sentence of the provision defining the offense." *Id*.

Section 1152 is "the exact type of statute contemplated by the Supreme Court." *Haggerty*, 997 F.3d at 300. The statute's first sentence sets forth the rule that federal criminal laws governing "offenses committed in any place within the sole and exclusive jurisdiction of the United States…shall extend to the Indian country." 18 U.S.C. § 1152. It is an "accurate[] and clear[]" definition that establishes a perfectly intelligible general rule "without providing an intra-Indian exception." *Haggerty*, 997 F.3d at 300; *Cook*, 84 U.S. at 173. The next sentence carves out three exceptions: "offenses committed by one Indian against the person or property of another Indian"; offenses committed by an Indian "who has been punished by the local law of the tribe"; and offenses over which a tribe has, by treaty, been given exclusive jurisdiction. *Id*. A straightforward application of *Cook*, *McKelvey,* and

Cunningham makes clear that the government need not "negate" these exceptions; rather, it is incumbent on the defendant to "set [] up and establish" them. *See McKelvey*, 260 U.S. at 357. Where, as here, a defendant does not raise the defense at all, the government should have no obligation to present such evidence.

Because *Prentiss's* allocation of the burden of proof conflicts with this Supreme Court authority, this Court should revisit its 2001 holding.

II. *Prentiss* conflicts with the authoritative decisions of other courts of appeals.

In contrast to *Prentiss*, the other circuits to have addressed this issue have heeded the Supreme Court's guidance. When *Prentiss* was decided, it created a circuit split with the Ninth Circuit's *Hester* decision, in which the Ninth Circuit relied upon *McKelvey* to conclude that "the Government need not allege the non-Indian status of the defendant in an indictment under section 1152, nor does it have the burden of going forward on that issue." 719 F.2d at 1043. Two decades after *Prentiss*, the Fifth Circuit deepened that split by joining the Ninth Circuit, again by applying "settled and reconcilable Supreme Court doctrine, as well as principles of statutory construction." *Haggerty*, 997 F.3d at 298–302.

Since *Prentiss*, the Eighth Circuit has offered additional support for the notion that "exceptions" in Section 1152's second paragraph should be treated

as affirmative defenses rather than elements. *Webster,* 797 F.3d at 536. Citing *McKelvey, Webster* concluded that Section 1152's second exception—that a defendant was previously punished by a tribe for the same offense—is not an element of Section 1152. The Eighth Circuit observed that its interpretation "squares with [Section] 1152's plain language and construction," as the first sentence of Section 1152 extends federal enclave law to Indian country, and the second sentence "contains three exceptions to the general extension of federal enclave laws to Indian country." *Id.* at 536–537 (citation and internal quotation marks omitted). Although the fact that *Webster* addressed a different exemption means that *Webster* avoids a *direct* conflict with *Prentiss*, *Webster*'s analysis further undermines the reasoning adopted by this Court two decades ago.

The Court should grant rehearing and align itself with the Fifth, Eighth, and Ninth Circuits. "Although…it is rarely appropriate to overrule circuit precedent just to move from one side of a conflict to another, reconsideration is more appropriate when this circuit can eliminate the conflict by overruling a decision that lacks support elsewhere." *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010). This is precisely that situation.

III. Correcting *Prentiss's* misallocation of the burden of proving non-Indian status is a matter of exceptional importance.

Finally, the Court should grant rehearing en banc because the error committed by *Prentiss* is one of exceptional importance. Correctly allocating the burden of raising non-Indian status can make or break a Section 1152 prosecution, determining whether a serious offender is held responsible and whether victims receive justice.

Proving that a defendant is not Indian requires a showing that the defendant "(1)…has no Indian blood or (2) that neither a tribe nor the federal government recognizes him as an Indian." *Hebert*, 159 F.4th at 785. Proving a negative is a task that "courts have called… impossible or near impossible." *Hebert*, 159 F.4th at 786 n.6. Establishing the lack of *any* Indian blood is difficult in the best of cases, and even more so where a defendant's paternity is disputed, or where a defendant (or any of his ancestors) is adopted or has no knowledge of his or her birth parents' identities. And proving a lack of tribal or federal recognition is no easier. As a leading Indian Law treatise recognizes, "In a nation with well over 570 federally recognized Indian tribal nations," it is "difficult to require the government to prove that the defendant is not a member of any of them, absent some evidence that the question is contested by the defendant." 1 Cohen's Handbook of Federal Indian Law § 11.02[1][b][iii] (2025). Without any input from a defendant, forcing the

government to produce evidence a defendant has *no* Indian blood or is not a member of any of more than 500 Indian tribes imposes an unjust, unreasonable, and unnecessary burden on an overburdened court system.

In contrast, asking a defendant to put forth evidence of his Indian status—the facts of which are uniquely within his grasp—presents no such concerns. As Judge Hartz observed in his *Hebert* concurrence, if a defendant is Indian, he can "easily point to [this evidence] and do so without implicating in any way his culpability for the underlying crime." *Hebert*, 159 F.4th at 790. *See also Hester*, 719 F.2d at 1043 ("It is far more manageable for the defendant to shoulder the burden of producing evidence that he is a member of a federally recognized tribe than it is for the [g]overnment to produce evidence that he is not a member of any one of the hundreds of such tribes.").

Subjecting the government to this "unrealistic" burden, *Ruiz*, 164 F.4th at 1231, has wrought devastating consequences in recent prosecutions. In *Simpkins*, *Hebert*, and *Ruiz*, the Court was bound by *Prentiss* to free men who sexually abused children. As the panel in *Ruiz* put it, "It is nonsensical to have convictions vacated and overturned because, despite putting forth convincing evidence of a defendant's offense conduct, the government did not have ample evidence in its arsenal 'to prove a negative.'" 164 F.4th at 1229. The "perverse[]" rule of *Prentiss* "turns the table on victims when the defendant most likely holds the evidence that proves his status." *Id*. And this

result is even more difficult to stomach because if the defendants in these cases *had* been Indian, they could instead have been held responsible for these same crimes under the Major Crimes Act, 18 U.S.C. § 1153, which applies to "any Indian."

Prentiss, in short, generates unjust results in high-stakes cases. The Court should seize this opportunity to overrule it.

Respectfully submitted,

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TYPE-VOLUME CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this petition contains 2819 words. I relied on my word processor to obtain the count. My word processing software is Word for Microsoft 365.

s/ C. Paige Messec
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CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing petition was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on February 17. 2026.

I ALSO CERTIFY that Violet N.D. Edelman, attorney for Defendant-Appellant Joel Ruiz, is a registered CM/ECF user, and that service will be accomplished by the appellate CM/ECF system.

s/ C. Paige Messec
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