IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
***Plaintiff/Appellee*,**	)	
	)	
v.	)	**Case No. 24-7030**
	)	
DENNIS HEBERT,	)	
	)	
***Defendant/Appellant*.**	)	

GOVERNMENT'S REPLY IN SUPPORT OF PETITION FOR REHEARING EN BANC

COMES NOW the Plaintiff/Appellee, Christopher J. Wilson, United States Attorney for the Eastern District of Oklahoma, and Linda A. Epperley, Assistant United States Attorney, and replies in support of its petition for en banc review.

I. THE GOVERNMENT'S CLAIM FOR RELIEF IS NOT MOOT.

The government's petition, in order to "prevent Hebert and other serious offenders from escaping justice," urged this Court to "re-examine *Prentiss*, reallocate the burden of proof consistent with the Supreme Court authority, and join the Fifth and Ninth Circuits in holding the non-Indian status of a defendant under Section 1152 is an affirmative defense." (*Petition*, at 13). Defendant is mistaken in asserting the government has not challenged the panel's decision and is only seeking prospective relief in facing future defendants. (See, *Response to Petition*, at 1).

The government is not simply seeking to "reverse the panel's finding of insufficient evidence." (See, *Response to Petition*, at 1). Should this Court grant relief on en banc review, the original panel decision based on an insufficiency of the evidence would be necessarily vacated.[1] Granting the relief sought by the government would eliminate any government responsibility to have offered any evidence of Mr. Hebert's non-Indian status at his trial.

Should this Court determine Defendant's non-Indian status is not an element under 18 U.S.C. § 1152 and was instead an affirmative defense, Mr. Hebert's conviction should be affirmed. If the defendant's non-Indian status is not an element, neither party had an obligation to raise the issue. Mr. Hebert would have born the burden of production to put his non-Indian status in issue. Here, he offered no such announcement or evidence. Defendant's conviction should not have been set aside on the ground that the United States failed to prove his non-Indian status.

The government recognizes mootness "is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *McClendon v. City of Albuquerque,* 100 F.3d 863, 867 (10th Cir.1996). See also *United States v. Seminole Nation of Okla.,* 321 F.3d 939, 943 (10th Cir.2002) ("The controversy must exist during all stages of the appellate review.").

[1] If the panel decision is vacated, there is no "insufficiency of the evidence" holding and *Burks v. United States*, 437 U.S. 1, 15-16 (1978) is inapplicable here.

As demonstrated above, this controversy is not moot. Additionally, should this Court accept the parameters urged by Defendant's response, the government would never be able to successfully mount an en banc challenge to the *Prentiss* requirement for the government to plead and prove non-Indian status in § 1152 cases. Such a result would arguably transform the issue into a matter which is "capable of repetition, yet evading review." *United States v. Seminole Nation of Okla.*, 321 F.3d 939, 943 (10th Cir. 2002) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 377 (1979)). Such matters are a recognized exception to the mootness doctrine. *Id*.

The claim for relief is not moot.

II. THIS COURT'S TREATMENT OF A DEFENDANT'S NON-INDIAN STATUS IN § 1152 CASES SHOULD BE BROUGHT INTO CONFORMITY WITH THE STATUTORY LANGUAGE AND COMPETING PRECEDENT.

"Under principles of common sense, statutory interpretation, and Indian law, non-Indian status should be an affirmative defense. As a result, Defendant Hebert should have to make a showing of his status as an Indian before the government has to rebut that proposition beyond a reasonable doubt." *United States v. Hebert*, 159 F.4th 777, 790 (10th Cir. 2025) (Hartz, concurring). The Supreme Court has long recognized when 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). See generally, *Cunningham v. Cornell Univ.*, 604 U.S. 693, 707 (2025).

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").

Past failures by the Eastern District of Oklahoma to meet the standard of proof required affirmatively prove a defendant's non-Indian status should not be determinative on whether en banc review is granted. Here, the government explored all available means to disprove Mr. Hebert had Indian blood.[2] The panel noted: "(1) apart from Indian status, no one contests that Mr. Hebert committed the offense; (2) he would be guilty under § 1152 as a non-Indian and under § 1153 as an Indian; (3) making the government prove the negative that he was not an Indian is difficult in this context." *United States v. Hebert*, 159 F.4th 777, 790, n.12 (10th Cir. 2025).

[2] The PSR indicated other family members (except perhaps his estranged wife) would have been difficult or impossible to locate. He said his father was deceased and he knew his mother's name, but had been removed at age eight with his sister and placed in foster care where they were separated when he was nine. Although he knew his sister's name, he has had no contact with her since he was nine. He joined a traveling carnival at age 23, where he met his wife, and considers the carnival his home. He lives in a travel trailer as the carnival traverses the country. (*PSR,* Doc. # 80 at ¶¶ 52-55).

In other words, in any other Circuit, he would be guilty under § 1152. If the government had been able to prove he was an Indian, he could have been conviction under § 1153. By logic, Mr. Hebert must be one or the other – but that does not mean the government, under *Prentiss* and the panel opinion, would be able to successfully prosecute him under either statute. Allowing him to escape justice simply because his personal history is unknowable (beyond that presented at trial) and he was lucky enough to have committed his crime in the Tenth Circuit is untenable.

III. THE GOVERNMENT'S PETITION IS LIMITED.

To grant the review requested in the government's petition, this Court need not disrupt the two-part test currently used to assess Indian v. non-Indian status. Should this Court expand the scope of en banc review in the manner suggested by Defendant, the government would address such arguments in en banc briefing.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that:

- all required privacy redactions have been made;
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/s Benjamin D. Traster

CERTIFICATE OF ECF FILING AND DELIVERY

I hereby certify this Reply was filed via the Court's CM/ECF System on April 13, 2026. I further certify this Motion was sent via the Court's CM/ECF System to counsel for Appellant:

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