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.

Appeal from the United States District Court
For the District of New Mexico
The Honorable David H. Urias
USDC NM No. 22-cr-365

RESPONSE TO UNITED STATES' PETITION FOR REHEARING EN BANC

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En banc review is an "extraordinary" procedure that is "disfavored" by this Court. Tenth Cir. R. 40.1(B). The government relies entirely on arguments the Court considered—and rejected—when it decided *Prentiss* en banc twenty-five years ago. *Prentiss* did not "conflict[] with a decision of the United States Supreme Court or of this court" then, and it does not do so now. *Id.* The government offers no reason why this Court should now take the extraordinary measure of departing from principles of stare decisis to revisit well-settled, well-reasoned precedent.

I. DICTATED BY TEXT, HISTORY, AND PRECEDENT *PRENTISS* WAS CORRECTLY DECIDED.

Section 1152 of title 18 (the General Crimes Act) establishes federal jurisdiction over crimes between Indians and non-Indians committed in Indian Country. The statute provides, in full:

> 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 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.

18 U.S.C. § 1152 (emphasis added). In other words, the status of each party determines whether the federal government may prosecute the crime at issue under § 1152. As the jurisdictional hook, the diversity of status between the defendant and victim is crucial to the power to prosecute a crime at all, making it an essential element—hardly a mere "exception" to prosecution. *See Torres v. Lynch*, 578 U.S. 452, 467 (2016) (explaining that "the substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority" and therefore that "[b]oth kinds of elements must be proved to a jury beyond a reasonable doubt").

The en banc Court in *United States v. Prentiss*, 256 F.3d 971, 974 (10th Cir. 2001), therefore correctly held that the non-Indian status of a defendant accused of committing a crime against an Indian in Indian Country under § 1152 constitutes an element of the offense, which the

government bears the burden of proving beyond a reasonable doubt. Nothing has changed in the intervening years to alter that precept, and the government has offered no compelling reason why this Court should reevaluate its precedent now. As such, this Court should deny the government's petition for rehearing en banc.

The government urges this Court to treat the jurisdictional element as an affirmative defense, invoking a "deep-rooted" principle that "exceptions" to criminal liability do not need to be negated in an indictment. Gov't Pet. at 7. But this Court was aware of this principle when it decided *Prentiss*, explicitly considering and rejecting the notion that it applies to 18 U.S.C. § 1152. *Prentiss*, 256 F.3d at 978-79. In advocating for this approach, the government ignores the even more fundamental principles related to the limitations on federal jurisdiction over crimes committed in Indian country and the government's burden to establish its jurisdiction to prosecute those crimes, which necessitated the conclusion in *Prentiss*. *See Prentiss*, 256 F.3d at 977 (explaining that its holding "comports with the usual practice in criminal prosecution" whereby the government "is required to carry its burden of showing that specific events happened") (cleaned up); *id.* at 976 (explaining that

requiring the government to prove the non-Indian status of defendants arises from the statutory scheme's animating concern for respecting tribal sovereignty and tribal self-government over matters concerning only Indians).

The reason for the General Crimes Act's jurisdictional requirement is clear: it "recognize[s] and preserve[s] tribal sovereignty over matters of central importance to tribal self-government." *United States v. Romero*, 136 F.3d 1268, 1270 n.2 (10th Cir. 1998) (overruled on other grounds). Indeed, in evaluating the contours of federal jurisdiction over crimes in Indian Country under § 1152 and its predecessors, the Supreme Court has long recognized an imperative to permit "self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." *Ex parte Kang-gi-shun-ca*, 109 U.S. 556, 568 (1883); *see also United States v. Kagama*, 118 U.S. 375, 381-82 (1886) (describing the "complex character" of the relationship between the United States and the tribes within its borders up to that point as preserving for the tribes "the power of regulating their internal social relations[.]"). In its attempt to relieve itself of the burden to prove

jurisdiction, the government asks this Court to strip tribes of sovereignty that the General Crimes Act expressly respected. While Congress can extend jurisdiction over crimes committed between Indians in Indian Country, *see e.g.,* 18 U.S.C. § 1153, that exercise of plenary power is not contemplated by § 1152.[1]

Prentiss in no way "conflicts with Supreme Court authority." Gov't Pet. at 9. This Court's holding embodies a straightforward application of the Supreme Court's decision in *United States v. Cook*, 84 U.S. 168 (1872), where it held that "[w]here a statute defining an offence contains an exception . . . which is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and

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[1] The government suggests that the existence § 1153 makes its burden under *Prentiss* "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.'" Gov't. Pet. at 13. But the possibility that a person could, in theory, be charged under an entirely different provision, arising from an entirely different historical context, under alternative facts, does nothing to alter the straight-forward requirements for prosecution under § 1152. Significantly, Congress chose not to amend General Crimes Act to eliminate its jurisdictional requirement when it enacted the Major Crimes Act in 1885 (nearly 70 years after the General Crimes Act), which it could have done. *See United States v. Cowboy*, 694 F.2d 1228, 1235 (1982) ("It is a 'cardinal rule' of statutory construction that 'repeals by implication' are disfavored") (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974)).

clearly described if the exception is omitted," that "exception" constitutes an element that must be alleged in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 173-74. The inquiry comes down to whether it is "impossible to frame the statutory charge with negativing the exception" or whether "one can omit the exception from the statute without doing violence to the definition of the offense." *Nicoli v. Briggs*, 83 F.3d 375, 379 (10th Cir. 1936); *United States v. McArthur*, 108 F.3d 1350, 1353 (11th Cir. 1997). As this Court concluded, because jurisdiction under § 1152 depends on the defendant's status, "the ingredients of the offence cannot be accurately and clearly described if the exception is omitted." *Cook*, 84 U.S. at 173.

The government relies on *McKelvey v. United States*, 260 U.S. 353, 357 (1922) for its holding that "an indictment or other pleading founded on a general provision defining the elements of an offense . . . need not negative the matter of an exception made by proviso or other distinct clause[.]" Gov't Pet. at 7. The government's reliance on *McKelvey* and its progeny is misplaced. As this Court observed in *Prentiss*, "*McKelvey*'s general provision/proviso dichotomy is only one interpretative aid among several that should be applied in parsing statutes that define offenses,"

and, in contrast to the *McKelvey* line of cases, "some 'exceptions' are so closely intertwined with the definition of the offense that the government must allege them in the indictment." *Prentiss*, 256 F.3d at 978 (citing *Cook*, 84 U.S. at 173-74).

This is just the situation when it comes to the government's power to prosecute a crime under § 1152. While the jurisdictional requirement appears in the second paragraph of the provision, *Cook* applies "even when the exception is set forth in a subsequent clause or section of the statute." *Prentiss*, 256 F.3d at 978 (citing *Cook*, 84 U.S. at 174-75). That is because an exception may still define an offense such that "it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause[.]" *Cook*, 84 U.S. at 174-75. Because status is key to the exercise of federal jurisdiction in the first place, it is impossible to prove the offense without proving the facts relevant to status. *See Torres*, 578 U.S. at 467.

The presence of other, non-elemental exceptions in the second clause of the statute does not change the analysis. As this Court pointed

out in *Prentiss*, the three separate exceptions in the second paragraph can and should be treated separately. *Prentiss*, 256 F.3d at 980 n.8 (consideration of the factors for determining whether a provision constitutes an element or an affirmative defense "may lead to different conclusions regarding each of the limitations set forth in the second paragraph of § 1152"). The legislative history of § 1152 confirms this because it "reveals that Congress added, deleted, combined, and separated these jurisdictional limitations on many occasions" so the wording of the statute does not compel parallel construction of the three limitations. *Id.* For this reason, the Eighth Circuit's conclusion that one of the other exceptions constitutes an affirmative defense in *United States v. Webster*, 797 F.3d 531 (2015), has no bearing on the question presented here.

Finally, the circuit split is no reason for this Court to review its decision in *Prentiss*. *Prentiss* represents a well-reasoned decision by an en banc panel of this Court—one that is surely well-versed in the contours of Indian Country jurisdiction. Moreover, *Prentiss* recognized that it conflicted with the law of at least one other circuit. Nor would joining the Fifth and Ninth Circuits resolve the circuit split. In

characterizing the split of authority, the government ignores the Seventh Circuit's decision in *United States v. Torres*, 733 F.2d 449 (7th Cir. 1984). As this Court put it in *Prentiss*, the Seventh Circuit "concluded" in *Torres* that "[f]or purposes of 18 U.S.C. § 1152, the [g]overnment had to prove not only that [the defendants] were Indians but also that the victim . . . was a non-Indian." *Prentiss*, 256 F.3d at 976 (quoting *Torres*, 733 F.3d at 457); *see also Romero*, 136 F.3d at 1271 n.4 (noting that the Seventh Circuit held in *Torres* that "the non-Indian status of the victim is an element of the offense to be proven by the [g]overnment").

In short, the government has not offered any compelling reason for this Court to take the drastic action of granting re-hearing en banc to reevaluate a decision based on the same authority it cites. For all the reasons this Court already set forth in *Prentiss*, the question of Indian status cannot be relegated to an affirmative defense.

II. *PRENTISS* DOES NOT IMPOSE AN ONEROUS BURDEN ON THE GOVERNMENT.

The government complains that the task of proving a negative is too difficult a burden for it to shoulder in § 1152 prosecutions. Gov't Pet. at 11. Because a small handful of cases have been reversed in recent years, it says, this Court must now relieve it of its burden to prove the

crucial jurisdictional element for prosecution. But the three cases the government cites—*Ruiz*, *Hebert*, *Simpkins*—all present scenarios where the government, by oversight or incomplete investigation, simply failed to carry an ordinary burden. In *Simpkins*, the government conceded that it "completely overlooked" the element and neglected to introduce any evidence whatsoever of Mr. Simpkins's non-Indian status. *United States v. Simpkins*, 90 F.4th 1312, 1318 (10th Cir. 2024). In *Hebert*, the government failed to introduce evidence that was sufficiently probative of the defendant's status, eliciting only "equivocal" testimony from Hebert's stepdaughter and testimony from officers indicating one of them asked several Oklahoma tribes (despite the fact that Mr. Hebert was not from Oklahoma) about Mr. Hebert's enrollment, with no indication that he ever heard back from those tribes. *United States v. Hebert*, 159 F.4th 777, 787 (10th Cir. 2025). Although the government was aware of its burden, the evidence was far too tenuous to support conviction.

So too here. The record establishes primarily what the government did *not* do in conducting its investigation into Mr. Ruiz's status. The officers did not contact any tribe about his enrollment and neglected to elicit any testimony from those familiar with Mr. Ruiz about his ancestry

or enrollment. Indeed, the record is rife with unexplored routes by which the government could have proven its case. It could have called Agent Alyson Berry, who was the primary officer investigating jurisdiction in this case, to testify. R5.210-211. It could have asked people familiar with Mr. Ruiz, including family members who testified, whether they knew anything relevant to his status.[2] R5.331-334. It could have queried the tribes most logically connected to the case about Mr. Ruiz's enrollment, or any of the other factors that are probative of recognition. The government had tools at its disposal—it even had opportunities in the courtroom—that it did not utilize. In short, nothing about this case or the two cases before it, suggests that non-Indian status was impossible, or

[2] The government claims that "[b]ecause Ruiz's confession had been suppressed," the "witnesses were not permitted to tell the jury that Ruiz had disclaimed any affiliation with the Jicarilla Apache tribe." Gov't Pet. at 4. The government cites nothing in the record showing that Mr. Ruiz disclaimed affiliation. It cites only its own non-opposition to the suppression of Mr. Ruiz's confession and the court's order of suppression. R1.237-238; 258. It is the government's burden to prove its case at trial with admissible evidence, and "[t]he burden of proving admissibility rests with the [g]overnment." *Taylor v. Alabama*, 457 U.S. 687, 690 (1982). It cannot now rely on suppressed evidence not admitted at trial to illustrate a defect with the pertinent legal standard. If the government knew that Mr. Ruiz disclaimed any affiliation with the tribe, it could have attempted to produce evidence to prove it, such as lack of enrollment with that tribe.

even very difficult, to prove without the defendant's input. All these cases reveal is that the government at times fails to carry its burden of proof.

To reframe its failure in these cases as a defect in the Court's construction of § 1152, the government far overstates the standard of proof under the two-prong test for determining Indian status. The government mischaracterizes *Prentiss* as requiring it "to produce evidence a defendant has no Indian blood or is not a member of any of more than 500 Indian tribes." Gov't Pet. at 2, 12. This Court has made clear that a lack of Indian ancestry can be proven in a variety of ways, including through testimony about family genealogy, *United States v. Diaz*, 679 F.3d 1183, 1188 (10th Cir. 2012), and personal knowledge of a defendant, *United States v. Walker*, 85 F.4th 973, 983-83 (10th Cir. 2023). And under the second prong, the government does not need to disprove membership in every Indian tribe, *Diaz*, 679 at1187, but can prove lack of tribal recognition through a number of probative facts, *Hebert*, 159 F.4th at 780 (noting that "courts have identified several nonexclusive factors" to determine whether a tribe or the federal government recognizes someone as Indian," including "(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.").

The government complains specifically about the task of "proving a negative" when it comes to the defendant's status under § 1152. Gov't Pet. at 11. But the government appears to have just as much trouble proving that a person is an "Indian" under § 1153. *See, e.g., United States v. Hatley*, 153 F.4th 1112 (10th Cir. 2025) (reversed and remanded because the government attempted to prove Indian status through inadmissible hearsay and also failed to ask the testifying defendant relevant questions about his status); *United States v. Harper*, 118 F.4th 1288 (10th Cir. 2024) reversed and remanded because the only evidence the government presented of defendant's Indian status was inadmissible hearsay); *United States v. Wood*, 109 F.4th 1253 (10th Cir. 2024) (reversed and remanded because the government failed to comply with the notice requirements of Rule 902(11) when attempting to certify the authenticity of a tribal enrollment document). Try as it might, the government cannot altogether circumvent Indian status as a feature of its Indian Country prosecutions.

Finally, the government's concern that *Prentiss* has wrought "devastating consequences" because it bound this Court to "free men who sexually abused children" and that its precedent "threatens the safety of Indian victims and the general public" misses the point. Gov't Pet. at 12. Yes, in three cases this Court was bound to vacate convictions because *the government* failed to prove the key jurisdictional element under § 1152. But plenty of individuals are successfully prosecuted and convicted by way of § 1152, with the vast majority pleading guilty. As shown in the table included in the Appendix, the U.S. Sentencing Commission identifies 356 cases in the Tenth Circuit in the five fiscal years between 2020 and 2024 in which § 1152 was recorded as a statute relevant to conviction—a likely undercount given inconsistencies in the way the statute is cited.[3] The *Prentiss* requirement plainly posed no

[3] The data used for this analysis were extracted from the U.S. Sentencing Commission's "Individual Datafiles" spanning fiscal years 2020 to 2024. The Commission's "Individual Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, Commission Datafiles, https://www.ussc.gov/research/datafiles/commission-datafiles.

The number of cases identified is likely an undercount. The dataset appears to contain inconsistencies in how 18 U.S.C. § 1152 is recorded or cited. In some cases, it is listed explicitly; in others, it is omitted even though it seems that it applies. As a result, cases

obstacle to the roughly 332 defendants who pleaded guilty. And it did not lead to acquittal in the 24 trials resulting in conviction.

The three instances here are outliers. They present no occasion to relieve the government of a burden it can obviously meet.

CONCLUSION

For the reasons set forth above, the Court should deny the government's petition.

Respectfully submitted,

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that fall within the scope of this statute may not always be captured in a search limited to citations of the statute number. Accordingly, the count reported here reflects only those cases in which the statute was expressly recorded in the available data and should not be understood as the total number of cases in which the statute was legally relevant.

APPENDIX

Cases citing 18 U.S.C. § 1152 in record of conviction
Tenth Circuit FY 2020-2024

District	Plea	Trial	Total
Colorado	13	0	13
Kansas	0	0	0
New Mexico	16	3	19
Oklahoma East	62	6	68
Oklahoma North	200	15	215
Oklahoma West	37	0	37
Utah	2	0	2
Wyoming	2	0	2

Source: The data used for this analysis were extracted from the U.S. Sentencing Commission's "Individual Datafiles" spanning fiscal years 2020 to 2024. The Commission's "Individual Datafiles" are publicly available for download on its website. U.S. Sent'g Comm'n, Commission Datafiles, https://www.ussc.gov/research/datafiles/commission-datafiles.

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TYPE-VOLUME CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief contains 3,392 words. I relied on my word processor, Word 2016, to obtain this count.

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