No. 21-516

In the Supreme Court of the United States

JUSTIN HAGGERTY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to appellate relief based on the contention, raised for the first time on appeal, that 18 U.S.C. 1152 requires the government to prove a defendant's status as a non-Indian even when the defendant has not put his status at issue.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 997 F.3d 292.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2021. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on October 4, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Texas, Judgment 1, petitioner was convicted of maliciously destroying property located in Indian country, in violation of 18 U.S.C. 1363 and 1152, Pet. App. 33a. The district court sen-

tenced him to 12 months and one day of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-32a.

1. On Columbus Day in 2017, petitioner entered the reservation of the Ysleta Del Sur Pueblo Indian Tribe in El Paso County, Texas and defaced a public statue of Nestora Piarote, an Indigenous woman. Pet. App. 2a. The Tribe had erected the statue to honor the women of their tribe and unveiled it just three months earlier. *Ibid.* Petitioner poured red paint on the statue and placed a wooden cross in front of it. *Ibid.*

A police officer found a paint can containing paint similar in color to the paint used to deface the statue in a nearby canal. D. Ct. Doc. 34-1, at 2 (Dec. 17, 2019). Using information on the paint-can labels, officers determined that the paint was purchased at Home Depot in Las Cruces, New Mexico. *Ibid.* Home Depot located a receipt for the paint can, which showed that the customer received a military discount. *Ibid.* Home Depot also provided surveillance video of the transaction and the customer's departure from the store in a black Chevrolet Equinox. *Ibid.*

Using the credit card information from the transaction, police identified petitioner, who owned a black Chevrolet Equinox, as the purchaser of the paint. D. Ct. Doc. 34-1, at 3. A review of petitioner's social media accounts showed that in the days and weeks leading up to the vandalism of the Nestora Piarote statue, petitioner had liked or reposted social media posts expressing concern that a statue of Christopher Columbus would be removed from Columbus Circle in New York City and urging Catholics to unite to keep Columbus Day from being replaced by Indigenous Peoples' Day.

Pet. App. 2a; D. Ct. Doc. 34-1, at 3. Officers arrested petitioner and he confessed to defacing the statue. *Ibid.*

2. A federal grand jury in the Western District of Texas returned an indictment charging petitioner with maliciously destroying property located in Indian country, in violation of 18 U.S.C. 1363 and 1152. Indictment 1-2. Section 1363 prohibits the willful and malicious destruction or injury of "any structure, conveyance, or other real or personal property" within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. 363. Section 1152, in turn, "extend[s] to the Indian country" those federal criminal laws governing "offenses committed in any place within the sole and exclusive jurisdiction of the United States." 18 U.S.C. 1152. In a separate sentence, Section 1152 additionally specifies that the "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." *Ibid.*

The indictment alleged that the crime took place "on Indian country belonging to the Ysleta Del Sur Pueblo Indian Tribe." Indictment 2. Petitioner pleaded not guilty and moved to dismiss the indictment solely on the theory that Section 1363 is unconstitutionally vague because it allegedly punishes an overly broad array of conduct. Pet. App. 2a-3a; D. Ct. Doc. 23 (Oct. 17, 2019). The district court denied the motion, and petitioner made no other challenges to the sufficiency of the indictment. Pet. App. 3a.

Petitioner proceeded to a bench trial on stipulated facts agreed upon by the parties. Pet. App. 3a; see D. Ct. Doc. 34-1. In the stipulated facts, both parties agreed that the statue was located on "land reserved to the Ysleta Del Sur Indian Tribe" and was "thus * * * in the Special Maritime and Territorial jurisdiction of the United States." D. Ct. Doc. 34-1 ¶ 2. The parties also agreed that, on the Home Depot surveillance video, "[a] clean shaven, white male * * * could be seen purchasing" the materials used in the crime and that the individual in the video "appeared to be a match to [petitioner]." *Id.* ¶¶ 8-9. The district court convicted petitioner and sentenced him to twelve months and one day of imprisonment, to be followed by three years of supervised release. Pet. App. 3a; 33a, 35-36a.

3. Petitioner appealed, raising for the first time an argument that, because the statue he defaced belonged to the Tribe, and because Section 1152 contains an exception for offenses "committed by one Indian against the person or property of another," the government was required "to prove that [petitioner] is 'non-Indian.'" Pet. C.A. Br. 3 (quoting 18 U.S.C. 1152). Petitioner did not assert that he is in fact a member of an Indian tribe, contending only that the government had been required to plead and prove the fact's nonexistence in order for the evidence to be sufficient. *Id.* at 4.

The court of appeals affirmed petitioner's conviction. Pet. App. 1a-32a. It first considered the standard of review that applied to petitioner's claim. *Id.* at 4a-7a. The court acknowledged that under circuit precedent, petitioner had "preserved a general sufficiency-of-the-evidence challenge by pleading not guilty in advance of his bench trial." *Id.* at 4a (citing *Hall* v. *United States*, 286 F.2d 676 (5th Cir. 1960), cert. denied, 366 U.S. 910

(1961)). But the court found "serious reasons to think that [petitioner] has *not* preserved the underlying legal argument that a defendant's Indian or non-Indian status is an essential element of any offense prosecuted pursuant to [Section] 1152" because petitioner had raised that argument for the first time on appeal. *Ibid.*

The court of appeals cited circuit precedent indicating that a defendant who preserves a general sufficiency challenge must "independently preserve the legal 'subissue' of whether an offense contains an additional element that has yet to be recognized in th[e] circuit." Pet. App. 5a; see *id.* at 4a-5a (citing *United States* v. *Brace*, 145 F.3d 247, 255-258 n.2 (5th Cir. 1998) (en banc), cert. denied, 525 U.S. 973 (1998)). It also observed that under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) and (4)(c)(3), a motion to dismiss an indictment on the theory that it lacks an essential element of the charged offense must be brought before trial. Pet. App. 5a-6a. And it observed that here, petitioner had moved to dismiss the indictment before trial on the theory that Section 1363 is unconstitutionally vague, but had not attacked the indictment on the theory that it failed to state an offense under Section 1152. *Id.* at 6a. The court was accordingly "skeptical that [it could] apply anything but plain error review to a legal argument that is being made for the first time on appeal." *Ibid.* But the court "pretermit[ted] a full discussion of the appropriate standard of review" because it concluded that petitioner's argument "fails even under de novo review." *Id.* at 7a.

On the merits, the court of appeals explained that Section 1363 has two elements: it prohibits (1) willfully and maliciously destroying property (2) while located "within the special maritime and territorial jurisdiction

of the United States." Pet. App. 7a (citing 18 U.S.C. 1363). The court observed that the first element is generally referred to as "substantive," while the second is often called "jurisdictional." *Ibid.* But the court noted that, in this context, the term "jurisdictional" does not mean that the element must be satisfied in order to establish "a district court's subject matter jurisdiction." *Id.* at 8a n.5. The court explained that in the criminal context, subject matter jurisdiction is "straightforward" because it exists whenever a defendant is charged with a federal crime. *Ibid.* (citation omitted). Accordingly, the court observed that referring to the situs element as "jurisdictional" appears to be a "colloquialism—or perhaps a demonstration that the word jurisdiction has so many different uses that confusion ensues." *Ibid.* (citation and internal quotation marks omitted).

Turning to Section 1152, the court of appeals explained that the provision extends the "jurisdictional situs element of federal enclave laws to encompass Indian country," but "carves out three scenarios" to which that extension does not apply: (1) offenses committed by one Indian against another Indian; (2) offenses committed by an Indian who has already been punished by the Tribe; and (3) cases where a treaty secures exclusive jurisdiction over the offense to the Tribe. Pet. App. 9a. The court stated that the Ninth and Tenth Circuits disagree as to whether Section 1152 makes the Indian or non-Indian status of the defendant and victim an "essential element" of the offense or an affirmative defense. *Id.* at 10a-11a (citing *United States* v. *Hester*, 719 F.2d 1041, 1043 (9th Cir. 1983); *United States* v. *Prentiss*, 256 F.3d 971, 980 (10th Cir. 2001) (per curiam) (en banc)). The court noted, however, that both the Ninth and Tenth Circuit cases involved a challenge to

an indictment, rather than the sufficiency of the evidence. *Id.* at 11a n.9. And the court emphasized that the only real "practical difference" between the two circuits' positions "concerns who must raise and prove" a defendant's non-Indian status, "and with what convincing force," because both circuits agree that "the ultimate burden of proof remains, of course, upon the Government." *Id.* at 11a (quoting *Hester*, 719 F.2d at 1043).

The court of appeals "agree[d] with both circuits" that "the [g]overnment retains the ultimate burden of persuasion" once the issue of a defendant's Indian or non-Indian status is raised, Pet. App. 12a, and it further determined that the defendant has the burden to raise the issue, *id.* at 12a-13a. In making that determination, the court relied on the "well-established rule of criminal statutory construction" under which "an exception set forth in a distinct clause or provision should be construed as an affirmative defense and not an essential element of the crime." *Id.* at 12a (quoting *United States* v. *Santos-Riviera*, 183 F.3d 367, 370-371 (5th Cir.), cert. denied, 528 U.S. 1054 (1999)). The court of appeals observed that this Court held in *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922), that an indictment "defining the elements of an offense * * * need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere" because it is "incumbent on one who relies on such an exception to set it up and establish it." *Id.* at 12a-13a (quoting *McKelvey*, 260 U.S. at 357).

The court of appeals explained that Section 1152 "appears to be the exact type of statute contemplated by the Supreme Court" because Section 1152 has two distinct clauses, the first of which generally extends the scope of all federal enclave laws to include Indian

country, and the second of which describes three exceptions. Pet. App. 13a. And the court found petitioner's reliance on *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 173-174 (1872)—which states that an indictment must allege that the defendant does not fall within a statutory exception where that exception is so tied up with the ingredients of the crime that the offense cannot be described without it—to be misplaced. Pet. App. 13a. The court explained that *Cook* does not apply because a defendant's status as a non-Indian is not inextricably intertwined with the ingredients of an offense covered by Section 1152. *Id.* at 14a.

The court of appeals also rejected petitioner's contention that *Lucas* v. *United States*, 163 U.S. 612 (1896), and *Smith* v. *United States*, 151 U.S. 50 (1894), two cases decided by this Court under a "predecessor statute to [Section] 1152," compelled his reading of Section 1152. Pet. App. 15a. The court of appeals observed that in both cases the victim's status was disputed in the district court, and this Court required the government to prove that the victim was non-Indian. *Id.* at 16a-17a. But the court of appeals observed that neither case is instructive as to who "bears the *initial* burdens of pleading and production" because, while both cases involved indictments alleging the non-Indian status of the victim, neither case said anything about whether the indictments were required to include such allegations. *Id.* at 17a; see *id.* at 17a-18a. The court accordingly adhered to its interpretation of the text of Section 1152 as demarcating a "defendant's status as [an] Indian" as "an affirmative defense for which the defendant bears the burden of pleading and production, with the ultimate burden of proof remaining with the Government." *Id.* at 18a. And because petitioner had not raised the

affirmative defense in this case, his challenge to the sufficiency of the evidence failed. *Ibid.*

Judge Oldham concurred. Pet. 24a-32a. He wrote separately to explain that petitioner had failed to preserve any challenge to his non-Indian status and that his claim therefore should be reviewed only for plain error. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 13-23) that the government was required specifically to plead and prove his status as a non-Indian, even where he did not put it at issue, either because it is an essential element of the offense or because it is a necessary element for the district court's subject matter jurisdiction over his case. The court of appeals' decision is correct, and any narrow disagreement among the courts of appeals regarding which party should place a defendant's non-Indian status at issue does not warrant this Court's review, particularly in this case where petitioner failed to raise his claim in the district court, and failed to properly present his meritless jurisdictional argument in either of the courts below. The petition for a writ of certiorari should be denied.

1. As an initial matter, this case presents a poor vehicle to address petitioner's claim because he failed to raise any legal or factual issue in the district court regarding his non-Indian status. Instead, he pleaded not guilty, moved to dismiss the indictment on the ground that 18 U.S.C. 1363 is unconstitutionally vague (but not on the ground that the indictment failed to state an offense), proceeded to a bench trial, and was convicted without ever disputing that he was a non-Indian or referencing 18 U.S.C. 1152's exceptions in any way. Pet. App. 2a-3a. He even argued for and received an

acceptance of responsibility credit because he sought a bench trial to "preserve issues that do not relate to factual guilt." *Id.* at 6a (internal quotation marks omitted). Then, on appeal, after jeopardy had attached and when it was too late for the district court to address the issue or for the government to present evidence on it, he argued for the first time that the government had failed to introduce sufficient evidence of his non-Indian status. *Ibid.*

Petitioner was nonetheless able to obtain review of his claim based on Fifth Circuit precedent stating that a defendant who pleads not guilty before a bench trial preserves a general sufficiency of the evidence challenge and need not file a motion for judgment of acquittal. Pet. App. 4a (citing *Hall* v. *United States*, 286 F.2d 676 (5th Cir. 1960)). But the court indicated that it was "skeptical" that a general sufficiency of the evidence challenge was enough to preserve the legal argument that petitioner's status as a non-Indian was an essential element of the offense. *Id.* at 6a. The court observed that its precedent "strongly suggests that even when a defendant preserves a general challenge to the sufficiency of the evidence, he must still independently preserve the legal 'subissue' of whether an offense contains an additional element that has yet to be recognized." *Id.* at 5a. And it observed that under the Federal Rules of Criminal Procedure, a defendant who believes that an indictment is defective because it omits an "essential element[]" must generally move for the dismissal of the indictment on that ground before trial—which petitioner did not do. *Ibid.*; see *id.* at 5a-6a.

The court of appeals ultimately put aside these "serious reasons" for thinking that petitioner had "*not* preserved" his legal argument only because it found peti-

tioner's argument meritless under any standard. Pet. App. 4a; see *id.* at 7a. But the standard of review remains a potential procedural obstacle to further relief, and Judge Oldham wrote a separate concurrence explaining why petitioner's forfeited claim should be reviewed only for plain error under Fed R. Crim. P. 52. Pet. App. 24a-32a. As a result, if this Court granted certiorari, its review would, at a minimum, be complicated by the need to address the proper standard of review. If plain error applies, petitioner would need to demonstrate that (1) there was error; (2) the error is plain or obvious; (3) the error affected substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States* v. *Olano*, 507 U.S. 725, 732-736 (1993). Even if petitioner could show error, he could not meet any of the other requirements of the analysis because petitioner asserts that the law is unsettled on this issue, see p. 16, *infra*, and because he provides no reason to believe that the outcome of this case would have been any different had the government been required to plead and prove his non-Indian status—he still avoids stating that he *is* an Indian or pointing to any evidence that might support such a contention.

Accordingly, if the Court wishes to address the issue, it should do so in a case where the defendant has plainly preserved his claim. Review is not warranted here, where petitioner elected a bench trial, failed to alert the district court to any issues with the government's proof, and then raised his challenge in the court of appeals only after the government and the district court had lost their opportunity to remedy the alleged omission and jeopardy had attached. Cf. *Puckett* v. *United States*, 556 U.S. 129, 134 (2009) (recognizing that the

contemporaneous-objection rule prevents a litigant from "'sandbagging' the court" by "remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor").

2. In any event, petitioner's argument fails on the merits because the court of appeals correctly determined that Section 1152 demarcates a defendant's status as a non-Indian as an exception that the defendant must affirmatively put at issue.

a. This 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). In *McKelvey*, the defendants were prosecuted under a federal statute that provided, in pertinent part that "no person, by force, threats, intimidation * * * or any other unlawful means * * * shall prevent or obstruct free passage or transit over or through the public lands" of the United States, with a proviso that "[t]his section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith." *Id.* at 356. The defendants contended that the indictment was defective because it "contain[ed] no showing that the accused were not within the exception made in the proviso." *Id.* at 356-357. The Court rejected that argument, relying on the "settled rule" that "an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere." *Id.* at 357. The Court emphasized that "it is incumbent on one who relies on such an exception to set it up and establish it."

Ibid.; accord *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 173-174 (1872).

As the court of appeals correctly recognized, Section 1152 "appears to be the exact type of statute contemplated by" this Court in *McKelvey*. Pet. App. 13a. 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. The next sentence then 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. *Ibid.* A straightforward application of *McKelvey* makes clear that the government does not need to "negative" these exceptions in its indictment; rather, "it is incumbent" on the defendant to "establish" that one of the exceptions applies to his case. 260 U.S. at 357.

The government in this case therefore sufficiently alleged and proved the crime by alleging and proving—by stipulation—that the crime occurred in the Indian country to which Section 1152 applies See pp. 3-4, *supra*. And viewing the exceptions listed in Section 1152 as essential elements of every offense charged under Section 1152 would make little sense. As a practical matter, it will generally be much easier for a defendant to demonstrate that one of the exceptions applies than for the government to negate all possibility that any of them might. For example, to meet his initial burden in this case, petitioner would simply have had to assert that he is a member of a tribe and offer some modicum of evidence indicating that tribal membership. But, if

petitioner's position were accepted, every time the government charges an offense under Section 1152, it would be required to establish that the defendant is *not* a member of any one of the hundreds of federal tribes, that he has *not* been punished by the local laws of the tribe, and that *no* existing treaty confers exclusive jurisdiction on any of the tribes. Cf. *Smith* v. *United States*, 568 U.S. 106, 112 (2013) ("Where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof.") (brackets, citation, and internal quotation marks omitted).

Petitioner nonetheless contends (Pet. 22) that the court of appeals' decision is inconsistent with *United States* v. *Cook*, which states that where an offense contains an exception that is so incorporated with the offense that the elements of the offense cannot be accurately and clearly described if the exception is omitted, then the indictment must allege enough information to show that the exception does not apply, 84 U.S. (17 Wall) at 173-174. As the court of appeals observed, however, that argument is circular. See Pet. App. 13a. It "only works if its conclusion is also its premise: that because the intra-Indian exception is an essential element of the offense, the offense cannot be described if the exception is omitted." *Ibid.* And petitioner provides no sound baseline reason to think that the exceptions in Section 1152 are "so incorporated" in "the offense" that they must be explicitly negated by the government in every case. *Cook*, 84 U.S. (17 Wall) at 173.

Petitioner also errs in asserting (Pet. 21) that the court of appeals "disregard[ed]" this Court's decisions in *Lucas* v. *United States*, 163 U.S. 612 (1896), and *Smith* v. *United States*, 151 U.S. 50 (1894). In those

cases, the defendants were Indian and contested the government's evidence of the non-Indian status of the victims. Pet. App. 15a-18a. The court of appeals directly addressed this Court's decisions; explained that they impose on the government the *ultimate* burden to prove the Indian or non-Indian status of the victim and the defendant in cases where it is disputed; and correctly observed that nothing in those decisions establishes which party has the initial responsibility to put it in dispute. *Id.* at 16a-18a. *McKelvey*, however, does address the issue and makes clear that, where a statute contains exceptions like those in Section 1152, the initial burden of pleading and production is on the defendant.

b. The courts of appeals have accordingly recognized that Section 1152's exceptions are not elements of every offense charged under that statute. In *United States* v. *Hester*, 719 F.2d 1041 (1983), the Ninth Circuit denominated a defendant's non-Indian status as an affirmative defense, finding "good reason to apply" the *McKelvey* rule to Section 1152. *Id.* at 1043. And it observed that "[i]t 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 government to produce evidence that he is not a member of any one of the hundreds of such tribes." *Ibid.*; see *United States* v. *Reza-Ramos*, 816 F.3d 1110, 1120 (9th Cir.), cert. denied, 137 S. Ct. 414 (2016).

Similarly, the Eighth Circuit has explained, citing *McKelvey*, that Section 1152's second exception—which applies where a defendant was previously punished by a tribe for the same offense—is not an element of Section 1152. *United States* v. *Webster*, 797 F.3d 531, 536 (2015); see *ibid.* ("It is far more manageable for [the defendant] to initially show he was punished by the local

law of the tribe than it is for the government to initially show the negative—that [defendant] has not been punished.") (citation, emphasis, and internal quotation marks omitted). The court 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).

As petitioner notes, in *United States* v. *Prentiss*, 256 F.3d 971 (2001) (en banc), the Tenth Circuit relied on *Cook* and took the view that the exceptions in Section 1152 are so closely intertwined with all of the offenses charged under the statute that those offenses cannot be described without reference to Section 1152's exceptions. *Id.* at 979.[*] But limited disagreement on the issue

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[*] Petitioner errs in contending (Pet. 10-11) that the Seventh Circuit adopted his proposed approach in *United States* v. *Torres*, 733 F.2d 449, 454, cert. denied, 469 U.S. 864 (1984). In *Torres*, the government had introduced evidence regarding both the Indian status of the defendants and the non-Indian status of the victim, *id.* at 455-458, and the defendants were arguing only that the evidence of their Indian status was insufficient and that the district court should have instructed the jury that it needed to decide whether the victim was a non-Indian. *Id.* at 454. In that context, the court stated that, "[f]or purposes of 18 U.S.C. § 1152, the [g]overnment had to prove not only that [defendants] were Indians but also that the victim[] was a non-Indian." *Id.* at 457. But because the government had produced evidence on both issues, the court did not need to consider the question presented here—whether the government or the defendant has the initial burden of pleading and production. And, while the court referred to the Indian or non-Indian status of the defendants and the victim as "jurisdictional requisite[s]" under Section 1152, *id.* at 454,

does not warrant this Court's review. Regardless of which party must raise the issue and produce evidence, the circuits are all in agreement that the government bears the burden of proof beyond a reasonable doubt on the defendant's Indian or non-Indian status. The court of appeals in this case "agree[d] with both [the Ninth and Tenth Circuits]" that the question in this case was solely the narrow one of which party had the burden to alert the court to the issue of the defendant's Indian status and produce evidence. Pet. App. 12a. "[E]ither way, the Government retains the ultimate burden of persuasion because a defendant's Indian/non-Indian status, via the operation of [Section] 1152, affects the applicable scope of the relevant federal enclave law's jurisdictional situs element." *Ibid.*

Moreover, notwithstanding petitioner's attempt (Pet. 16-20) to portray this issue as one urgently requiring this Court's attention, the Fifth Circuit is only the second court of appeals to address the question presented since the Ninth Circuit's 1983 decision in *Hester*, which demonstrates the infrequency with which this issue arises. In most cases, the Indian status of the victim and defendant is not in dispute. Indeed, it is not even clear that it is properly in dispute in this case. See pp. 9-11, *supra* (noting that petitioner has never asserted that he is an Indian and that he failed to raise the issue at all in the district court).

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the Seventh Circuit has subsequently clarified that its use of the term "jurisdiction" in such contexts does not connote subject matter jurisdiction, which is governed exclusively by 18 U.S.C. 3231, see *Hugi* v. *United States*, 164 F.3d 378, 380 (1999) ("Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231. * * * That's the beginning and the end of the 'jurisdictional' inquiry."). See pp. 18-19, *infra*.

c. In addition to the "essential elements" theory that he asserted below, petitioner now contends (Pet. 13-16) that the district court lacked subject matter jurisdiction because the indictment did not properly charge him with a federal offense because it did not allege his non-Indian status. That newly surfaced theory lacks merit, finds no support from any circuit court, and provides no reason for further review.

As the court of appeals explained, the subject matter jurisdiction of the federal courts in criminal cases is established by 18 U.S.C. 3231, which gives federal courts subject matter jurisdiction over "all offenses against the laws of the United States." See Pet. App. 8a n.5. And this Court has repeatedly "rejected the claim that [a] court had no jurisdiction because the indictment d[id] not charge a crime against the United States." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (citation and internal quotation marks omitted). Over a century ago, Justice Holmes explained that an "objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Lamar* v. *United States*, 240 U.S. 60, 65 (1916).

Petitioner nonetheless argues that Section 1152 must set out requirements for subject matter jurisdiction because courts have sometimes described the statute as establishing the federal government's "jurisdiction" over minor crimes in Indian country. See Pet. 13-14 (citing *Duro* v. *Reina*, 495 U.S. 676, 697 (1990); *United States* v. *John*, 587 F.2d 683, 686-687 (5th Cir. 1977), cert. denied, 441 U.S. 925 (1979)). But, as the court of appeals explained, the use of the term "jurisdiction" in this context appears to be a "colloquialism—or perhaps a demonstration that the word jurisdiction has so many different uses that confusion ensues." Pet.

App. 8a n.5 (citation and internal quotation marks omitted); see *Fort Bend Cnty.* v. *Davis*, 139 S. Ct. 1843, 1848 (2019) ("Jurisdiction * * * is a word of many, too many, meanings.") (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004) (internal quotation marks omitted)). Section 1152 establishes federal "jurisdiction" over minor crimes in Indian country only in the sense that it extends the applicability of certain federal criminal laws into Indian country. The statute is not aimed at the courts, nor does it define the "class[] of cases a court may entertain," as is necessary for statutes governing subject matter jurisdiction. *Fort Bend Cnty.*, 139 S. Ct. at 1848.

Accordingly, as petitioner acknowledges (Pet. 13), the argument that the government must establish a defendant's Indian or non-Indian status in order to demonstrate subject matter jurisdiction has been repeatedly rejected by the courts of appeals. See *Prentiss*, 256 F.3d at 982 ("An indictment's failure to allege an element of a crime 'is not jurisdictional in the sense that it affects a court's subject matter jurisdiction, *i.e.*, a court's constitutional or statutory power to adjudicate a case.") (citation omitted); *United States* v. *White Horse*, 316 F.3d 769, 772 (8th Cir.) ("Mr. White Horse's assertion that he is an Indian is relevant to the matter of proof but irrelevant on the matter of jurisdiction."), cert. denied, 540 U.S. 844 (2003); see also *Hugi*, 164 F.3d at 380 (recognizing that 18 U.S.C. 3231 is the"beginning and end of the 'jurisdictional' inquiry"). And here, petitioner's briefing before the court of appeals did not challenge the district court's subject matter jurisdiction at all.

Petitioner nonetheless contends (Pet. 13 n.5) that he adequately preserved the jurisdictional argument

through a single citation to *John*, *supra*, in his opening brief, a short discussion at oral argument, and a Rule 28(j) letter regarding the thirty-year old decision in *Duro*. But those are inadequate means of presenting an argument in the court of appeals. Furthermore, petitioner's request for review on his jurisdictional theory includes no claim that the district court might actually have lacked subject matter jurisdiction, because he has never asserted that he is, in fact, a member of an Indian tribe. And petitioner's suggestion (Pet. 16-17) that certiorari is warranted to vindicate tribal sovereignty is particularly misplaced in a context in which he appears to be trying to avoid any liability for defacing a tribal statue in furtherance of his belief that Indigenous Peoples Day is inappropriately overtaking the Columbus Day holiday. Pet. App. 2a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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