No. 21-516

IN THE
Supreme Court of the United States

JUSTIN HAGGERTY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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The Opposition does not deny that a circuit split exists. Instead, it asserts that Mr. Haggerty did not adequately preserve his claim, and then proceeds to the merits. But both questions in the petition were clearly "pressed" and "passed upon" below, *Verizon Commc'ns, Inc.* v. *F.C.C.*, 535 U.S. 467, 473, (2002), and the Fifth Circuit's holdings on the questions presented deepens the consequential split over the application of § 1152.

1. The government acknowledges, as it must, that Mr. Haggerty was "able to obtain review of his claim" related to the first question in the Fifth Circuit. BIO at 10. And it does not dispute the three instances in which Mr. Haggerty specifically raised his related subject matter jurisdiction argument, relevant to the second question, below.[1] BIO at 20 (noting references in Petitioner's opening brief, discussion at oral argument, and a Rule 28(j) letter). Yet the government suggests the Court can wait for "a case where the defendant has plainly preserved his claim," BIO at 11, before resolving the questions presented. That argument not only ignores that subject matter jurisdiction may be raised at any time, *Freytag* v. *CIR*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in judgment, joined by O'Connor, Kennedy & O'Connor, JJ.) (an error as to subject matter jurisdiction "may be raised by a party, and indeed must be noticed *sua sponte* by a court, at all points in the litigation"), but also willfully neglects this Court's long-held view that an issue is preserved for purposes of certiorari if it was "pressed or passed upon

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[1] The Fifth Circuit also "passed upon" the subject-matter jurisdictional issue. *United States* v. *Haggerty*, 997 F.3d 292, 297 n.5 (5th Cir. 2021).

by a federal court." *Verizon*, 535 U.S. at 473. Plainly, the government's characterization of the proceedings below establishes that Mr. Haggerty's claims meet that standard. BIO at 10 (describing the Fifth Circuit's "review" of Mr. Haggerty's claim); BIO at 20 (citing examples of when Mr. Haggerty raised his subject matter jurisdiction argument).

The government's odd contention that Mr. Haggerty "newly surfaced" his challenge to subject matter jurisdiction, BIO at 18, plainly cannot be squared with the record. See Opening Brief for Appellant at 9, *United States* v. *Haggerty*, 997 F.3d 292 (5th Cir. 2021). ("[T]he 'statutory framework' set forth in 18 U.S.C. §§ 1152 and 1153 'makes jurisdiction over crimes committed in Indian country depend upon whether the offender and the victim are Indian or non-Indian.' *United States v. John*, 587 F.2d 683, 686–87 (5th Cir. 1977), *cert. denied*, 441 U.S. 925 (1979)."); Reply Brief for Appellant at 2, *Haggerty*, 997 F.3d ("[T]he government must prove that a defendant like Haggerty is 'non-Indian,' not that he is 'white'"— citing *John*, *supra*) . . . Even the Justice Manual recognizes that federal jurisdiction depends on 'non-Indian' on 'Indian' crime, or the reverse.")); Rule 28(j) letter, *Haggerty*, 997 F.3d (before oral argument)("We recently found and wish to advise the panel of *Duro v. Reina*, states: 'federal jurisdiction over Indian country crime [under § 1152] shall not extend to offenses committed by one Indian against the person or property of another Indian'" (emphasis added); Recording of Oral Argument (Petitioner's argument that the lack of allegation in the indictment and proof of Haggerty's non-Indian status deprived the federal courts of

"jurisdiction," and specifically "subject matter jurisdiction" (at 10:06).[2]

In all events, "[s]ubject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 671, (2009) (citing *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514, (2006).

Finally, the government suggests that even if Mr. Haggerty preserved his claim, this case is poor vehicle because Mr. Haggerty "still avoids stating that he *is* an Indian." BIO at 11 (emphasis in original). That suggestion wholly begs the question. The question here who bears the burden of proof and at what stage. The Tenth Circuit holds that the government must plead and prove non-Indian status, while the Fifth and Ninth say it is the defendant's burden at trial. The government's assertion that Mr. Haggerty "has not stated his *is* an Indian" does not reflect a vehicle problem but rather the government's view that the Circuits placing the burden on the defendant are correct. The absence of a statement by Mr. Haggerty is irrelevant to whether the government met its burden and has no bearing on resolution of the questions presented.

2. The government's remaining arguments evade the essence of the petition, and instead seek to show that "petitioner's argument fails on the merits." BIO at 12. Certainly, if the government wishes to move to the merits, Mr. Haggerty is as well – but we are not yet at that stage. The government's extensive attack on the merits is simply tacit confirmation the petition is worthy of review.

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[2] *See* Fifth Circuit Oral Argument Recording, available at https://www.ca5.uscourts.gov/OralArgRecordings/20/20-50203_1-6-2021.mp3 at 9:50-10:15, 38:50-39:55.

In the government's view, the Fifth Circuit correctly relied on *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922) to conclude that that § 1152 carves out "exceptions" to a general rule of criminal liability, and it is therefore the defendant's burden to establish that an exception applies. BIO at 12–13. This superficial analysis ignores both the statutory scheme and decisions of this Court addressing tribal sovereignty, which was not an issue in *McKelvey*.

Indian tribes "possess[] powers of self-government" which "includes the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301. Under § 1152 and its nearly-identical predecessor, federal courts gained jurisdiction authority over only certain crimes committed in Indian country but not those "committed by one Indian against the person or property of another Indian." 18 U.S.C. § 1152. The offenses enumerated in the Major Crimes Act are therefore exceptions and not the rule: "Except for offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts." *United States* v. *Antelope*, 430 U.S. 641, 643 n.1 (1997) (citing 18 U.S.C. § 1152); see also U.S. Dep't of Just., Justice Manual § 689 (2020) (instructing that where the offense is "not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive.").

Unlike the statutory "exceptions" in *McKelvey*, the statutory line drawing in § 1152 reflects a careful balancing of sovereign rights that directly implicate the authority of federal courts. See *Duro* v. *Reina*, 495 U.S. 676, 697 (1990). "[F]ederal authority over minor crime[s], otherwise provided by the Indian Country Crimes Act, 18 U.S.C. § 1152, may be lacking altogether in the case of crime committed by a nonmember Indian against another Indian, since § 1152 states that

general federal jurisdiction over Indian country crime 'shall not extend to offenses committed by one Indian against the person or property of another Indian.'" *Duro*, 495 U.S. at 697; see also *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883) (intra-Indian offense in Indian country meant that "the first district court of Dakota was without jurisdiction to find or try the indictment . . . .") (interpreting predecessor of § 1152). Against the backdrop of this Court's decisions on tribal sovereignty, and the careful congressional balancing of sovereign interests reflected in § 1152, this Court's references to the separate "jurisdiction" of tribal and federal courts cannot be dismissed as mere "colloquialism." BIO at 18 (citing Pet. App. 8a n.5).

Instead, § 1152 draws jurisdictional lines based on the status of the parties in a way that is analogous to the federal diversity statute. 28 U.S.C. § 1332. Pet. at 15–16. As the petition explains, it is well-established that the party pressing a case based on § 1332 must allege and prove the requisite jurisdictional facts—that the case involves a resident of one state raising a claim against the resident of another state. *Id.* Indeed, it has been established for over two centuries that a civil plaintiff's failure to do so in the district court is a defect in subject matter jurisdiction that must be addressed, even if raised for the first time in this Court. *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 126 (1804). Similarly, it is the government's burden to allege and prove the requisite jurisdictional facts under § 1152, including that the defendant is non-Indian. *Id.* The government's argument based on *McKelvey* offers no response to this point. And the government's failure to acknowledge the clear analogy between § 1152 and the diversity statute, as well as *Capron*, is telling.

Indeed, the government's argument does little more than track the Fifth Circuit decision below

without engaging with the essence of the circuit split. It is true that the Fifth Circuit, like the Ninth Circuit, reads *McKelvey* to mean that the defendant's Indian status is an exception that the government "need not negative," Pet. at 11–12; *United States* v. *Hester*, 719 F.2d 1041, 1042 (9th Cir. 1983), but the Tenth Circuit has reached the opposite conclusion. Reading *McKelvey* in the context of *United States* v. *Cook*, 84 U.S. 168 (1872), and this Court's decisions on tribal authority, the Tenth Circuit holds that the "interpretive principle set forth in *Cook* applies to § 1152: 'the ingredients of the offence cannot be accurately and clearly described if the exception is omitted." *United States* v. *Prentiss*, 256 F.3d 971, 978–80 (10th Cir. 2001) (quoting *Cook*, 84 U.S. at 173) see also *Lucas* v. *United States* 163 U.S. 612, 614–15 (1896). In the Tenth Circuit's view, "Supreme Court authority, decisions of other circuits, policies underlying § 1152, practicalities of criminal prosecution, and established principles of statutory construction" determine that the status of the defendant is an "essential element[]" of the crime that the government "must allege" in the indictment. *Prentiss*, 256 F.3d at 980.

In an extensive footnote, the government suggests the Seventh Circuit has not sided with the Tenth. BIO at 16–17. But *United States* v. *Torres*, 733 F.2d 449, 457 (7th Cir. 1984) stated unequivocally that "[f]or purposes of 18 U.S.C. § 1152, *the government had to prove* not only that [the defendants] were Indians but also that the victim [] was a non-Indian." *Id.* The government's assertion that the Seventh Circuit does not view the issue as "jurisdictional" does not diminish the split on the first question presented; the Seventh

Circuit has neither retracted its statements in *Torres* nor adopted the affirmative defense view.[3]

The government believes the Eighth Circuit falls on the side of the Fifth and Ninth, BIO at 15–16, which extends this split to five circuits spanning 82% of tribal land. This contention belies the government's portrayal of this entrenched split as a "limited disagreement." BIO at 16–17. The split stretches across circuits that include the vast majority of tribal land. Pet. at 8–12, 16–20.

Finally, the government suggests that the question presented is not an urgent one because the Fifth Circuit is "only the second court of appeals to address the question presented since the Ninth Circuit's 1983 decision in *Hester*." BIO at 17. But just three circuits—the Fifth, Ninth, and Tenth—reach more than half of all "Indian country matters," Additionally, over half of all Native Americans reside within those circuits. Pet. at 19–20. Including the Seventh and Eighth Circuits increases the scope of the split to over 90% of all Indian country matters.[4] And the fact that the split among the

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[3] The Seventh Circuit's various rulings illustrate deep confusion about how to understand the limits on federal authority codified in § 1152. The government asserts that *Hugi* v. *United States*, 164 F.3d 378, 380 (7th Cir. 1999) treats 18 U.S.C. § 3231 as the "beginning and the end of the 'jurisdictional' inquiry," but *United States* v. *Brisk*, 171 F.3d 514, 519-20 (7th Cir. 1999) notes this Court's treatment of an "intra-Indian exception" as implicating "subject matter jurisdiction." *Id.* ("In *Ex Parte Crow Dog*, the Supreme Court ruled that this intra-Indian exception precluded a district court from exercising subject matter jurisdiction over a murder case in which the Indian defendant had been charged under a federal enclave law. 109 U.S. 556, 562, 3 S.Ct. 396, 400, 27 L.Ed. 1030 (1883).").

[4] U.S. Dep't of Just., Bureau of Just. Stats., Indian Country Investigations and Prosecutions Report, at 35 (2020), https://www.justice.gov/otj/page/file/1405001/download.

Seventh, Tenth, and Ninth Circuits stretches back decades before the Fifth Circuit decision only illustrates the need for the Court to take up the issue now. The split will not resolve without the Court's intervention and is ripe for review. Granting the petition is warranted not only to restore the balance of federal and tribal sovereignty but also because defendants charged with identical crimes continue to face different outcomes in the very jurisdictions that hear the vast majority of cases involving § 1152. Pet. at 18–20.

CONCLUSION

For the reasons stated above, the Court should grant the petition.

Respectfully submitted,

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