No. 21-

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

PETITION FOR A WRIT OF CERTIORARI

XIAO WANG
NAOMI A. IGRA
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

DAVID GERGER *
BRENT NEWTON
GERGER HENNESSY & McFARLANE
1001 Fannin Street #2450
Houston, TX 77002
(713) 224-4400
dgerger@ghmfirm.com

JEFFERY T. GREEN
JACQUELYN E. FRADETTE
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005

Counsel for Petitioner

* Counsel of Record

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QUESTIONS PRESENTED

I. Whether the "interracial" nature of a minor offense in Indian Country is an element of 18 U.S.C. § 1152, rather than an affirmative defense, and thus must be both pled and proved by the prosecution.

II. Whether the government must plead and prove the "interracial" nature of a minor offense in Indian Country to establish federal subject matter jurisdiction under 18 U.S.C. § 1152.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Justin Haggerty. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Western District of Texas, and the United States Court of Appeals for the Fifth Circuit:

United States v. *Haggerty,* No. 20-50203 (5th Cir. May 7, 2021)

United States v. *Haggerty,* No. 3:10-CR-630-1 (W.D. Tex. March 6, 2020)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Justin Haggerty respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is published at 997 F.3d 292 and is reproduced in the appendix to this petition at Pet. App. 1a-32a. The opinion of the district court is unpublished and is reproduced at Pet. App. 33a-45a.

JURISDICTION

The Fifth Circuit entered judgment on May 7, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Country Crimes Act, 18 U.S.C. § 1152, provides that:

> 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 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.

18 U.S.C. § 1363 provides that:

> Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously destroys or injures any structure, conveyance, or other real or personal property, or attempts or conspires to do such an act, shall be fined under this title or imprisoned not more than five years, or both, and if the building be a dwelling, or the life of any person be placed in jeopardy, shall be fined under this title or imprisoned not more than twenty years, or both..

STATEMENT OF THE CASE

Congress has carefully allocated jurisdiction over crimes in Indian country among federal, state, and tribal courts to balance important interests of the three respective sovereigns. See *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020); *Negonsott* v. *Samuels*, 507 U.S. 99 (1993).[1] With the exception of certain "major" crimes, such as murder, intra-Indian crimes are exclusively within the jurisdiction of tribal courts. 18 U.S.C. §§ 1152–53; see also *Negonsott*, 507 U.S. at 102. The Fifth Circuit, joining the Ninth Circuit and splitting from the en banc Tenth Circuit, has upset this balance by allowing defendants to raise Indian status only as

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[1] This Court has compared tribal sovereignty to state sovereignty for jurisdictional purposes. *See United States* v. *Wheeler*, 435 U.S. 313, 332 (1978) ("Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests.").

an affirmative defense and thereby relieving the government of its burden to establish federal subject matter jurisdiction from the start.

To promote uniform application of the law, and to ensure federal prosecutors and federal courts do not encroach on the "complex patchwork of federal, state, and tribal law" governing criminal jurisdiction in Indian country, *Negonsott*, 507 U.S. at 102 (1993, the Court should resolve the questions presented on the merits).

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; see also *Lucas* v. *United States*, 163 U.S. 612, 614–15 (1896) ("[T]he judicial tribunals of the Indian Nation shall retain exclusive jurisdiction in all . . . criminal cases arising in the country in which members of the Nation by nativity or by adoption shall be the only parties . . . ."). Under § 1152 and its nearly identical predecessor dating back to 1834, federal courts gained authority over certain crimes committed in Indian country—but not "to offenses committed by one Indian against the person or property of another Indian." 18 U.S.C. § 1152 (corresponds to the Act of June 30, 1834, Ch. 4, § 25, 4 Stat. 733).

"[I]t was not until 1885 that federal legislation was enacted granting federal courts jurisdiction over certain *major* crimes committed by an Indian against another Indian." U.S. Dep't of Just., *Justice Manual* § 679 (2020) (emphasis added); Indian Major Crimes Act, 18 U.S.C. § 1153. Yet the original tenet of §1152 remains in effect: "Except for the 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.2 (1977) (citing 18 U.S.C. § 1152); see also *United States* v. *Quiver*, 241 U.S. 602, 606 (1916) (noting that the Major Crimes Act, by enumerating specific offenses, "carries with it some implication of a purpose to exclude others").

The Tenth Circuit has held that "§ 1152 establishes federal jurisdiction over interracial crimes only (i.e., when the defendant is an Indian and the victim is a non-Indian, or vice versa)." *United States* v. *Prentiss*, 256 F.3d 971, 974 (10th Cir. 2001). Accordingly, "the Indian statuses of the defendant and victim are essential elements under 18 U.S.C. § 1152, which must be alleged in the indictment and established by the government at trial." *Id.* at 973. Failure to do so entitles a defendant to acquittal. *Id.* at 982.

In contrast, the Ninth Circuit and, in the instant case, the Fifth Circuit, characterize the intra-Indian exception of § 1152 as an "affirmative defense" and require criminal defendants to meet—at trial—a "burden of production" in order to raise the defense. *United States* v. *Hester*, 719 F.2d 1041, 1043 (9th Cir. 1983); Pet. App. 1a—32a. For federal jurisdiction and conviction, these courts require only that the victim is Indian, without regard for the status of the defendant or the law's requirement of inter-racial statuses.

This split implicates important issues of federal court authority to adjudicate criminal cases on Indian land. This Court has previously addressed the limits of tribal authority over non-Indian matters. See, *e.g.*, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and punish non-Indians."); *United States* v. *Cooley*, 141 S. Ct. 1638, 1641 (2021) (holding that tribal authorities do possess sovereign authority to address "conduct [that] threatens or has some direct

effect . . . on the health or welfare of the tribe"). This case presents the other side of the coin: the limits of federal court authority over Indian matters. And given the nearly 14,000 federal cases involving criminal matters in Indian country brought in the last decade alone, review from this Court would provide much needed guidance on a recurring issue.

I. STATUTORY SCHEME

Congress has limited the exercise of federal criminal authority over American Indian tribe members. Cf. *Palmore* v. *United States*, 411 U.S. 389, 396 (1973) (holding that "[j]urisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes" (cleaned up)). Jurisdiction over crimes between non-Indians is generally reserved to the states, *United States* v. *McBratney*, 104 U.S. 621, 624 (1881). Jurisdiction over crimes between Indians is generally with the tribes: the tribes possess the "inherent power . . . to exercise criminal jurisdiction over all Indians," 25 U.S.C. § 1301(2); 18 U.S.C. § 1152 (federal criminal authority "shall not extend to [minor] offenses committed by one Indian against the person or property of another Indian." Certain "major" crimes listed in 18 U.S.C. § 1153 can be tried in federal court. But for intra-Indian crimes in Indian country where the offense is "not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive." U.S. Dep't of Just., *Justice Manual* § 689 (2020).

II. BACKGROUND OF THE CASE

A. Factual Background

On October 9, 2017, Petitioner Justin Haggerty, a Marine veteran, entered the Tigua Indian Reservation in El Paso, Texas, and placed a cross before, and poured paint upon, a statute belonging to the tribe. The paint was removed and the sculpture restored at

a cost of $1,200. Police later linked Haggerty to purchases of wood and paint and arrested him. Prosecutors then indicted him under 18 U.S.C. § 1152 and § 1363 (pertaining to assaults on property within "special maritime and territorial jurisdiction"). Throwing paint on a sculpture– malicious destruction of property is a "minor" crime within the meaning of § 1152. Neither the indictment nor any stipulation described whether Haggerty himself was Indian or non-Indian.

B. Proceedings Below

Mr. Haggerty pleaded not guilty, and moved to dismiss the indictment challenging the constitutionality of § 1363. When the district court denied that motion, Mr. Haggerty waived his right to a jury trial, thereby preserving his sufficiency-of-the-evidence challenge for de novo review under the Fifth Circuit's decision in *Hall* v. *United States*, 286 F.2d 676 (5th Cir. 1960); and signed a stipulation of facts, which constituted the evidence in the case.

The stipulation was silent about whether Mr. Haggerty was Indian or non-Indian. The district court convicted Mr. Haggerty on the stipulation that he threw paint on an Indian Country statue.

At sentencing, the district court found that the statue was a cultural heritage resource, and applied an enhancement pursuant to U.S.S.G. § 2B1.5. Furthermore, the district court determined the guidelines based on a loss of $92,000—the value of the statue itself, not the cost to restore it. The court found a Guideline range of 12 to 18 months imprisonment—and imposed a sentence of 12 months and one day in prison, followed by three years of supervised release.

Mr. Haggerty timely appealed to the Fifth Circuit, arguing that because § 1152 applies only to "interracial" crimes—not to offenses committed by Indian

defendants against Indian victims—the Indian/non-Indian statuses of the defendant and victims are essential elements of any offense under § 1152 and must be proven by the Prosecution to establish the "jurisdiction" of the court under 18 U.S.C. § 1152. Pet. App. 4a—5a. He also contended that, because the indictment did not allege petitioner's status as a non-Indian and the prosecution offered no evidence at trial proving such non-Indian status, there was insufficient evidence to support his conviction and he was entitled to an acquittal. [2] *Id.* The government maintained that it need not plead or prove "non-Indian" status because the defendant's status is an "affirmative defense" that the defendant must raise, not an "element" of the crime.[3] *Id.*

All parties agreed that Mr. Haggerty preserved a "general sufficiency-of-the-evidence challenge by pleading not guilty in advance of his bench trial" under the Fifth Circuit's *Hall* rule. Pet. App. 4a ("[W]hen a defendant pleads not guilty *before a bench trial*, '[t]he plea of not guilty asks the court for a judgment of acquittal, and a motion to the same end is not necessary.'" (quoting *Hall*, 286 F.2d at 677)).

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[2] Indeed, the factual stipulation merely "described Haggerty as physically appearing to be a white male based on surveillance footage." Pet. App. 2a; *cf. Lucas* v. *United States*, 163 U.S. 612, 615 (1896) ("[I]t follows that the averment in the indictment in the present case that Levy Kemp, the murdered man, was a negro, and not an Indian, was the averment of a jurisdictional fact, which it was necessary for the prosecution to sustain by competent evidence.").

[3] In the present case, the prosecution conceded that, if jurisdiction is an element, the evidence was likely insufficient as a matter of law. Oral Argument at 24:15, *United States* v. *Haggerty*, 997 F.3d 292 (5th Cir. 2021) (No. 20-50203), https://www.ca5.uscourts.gov/OralArgRecordings/20/20-50203_1-6-2021.mp3.

The Fifth Circuit reaffirmed *Hall* when considering Mr. Haggerty's challenge. Although the panel expressed concern over the proper standard of review, the court passed upon the issue on the merits, framing the inquiry by asking: "when the victim *is* Indian (both charged and also proven), whether the intra-Indian carve-out in § 1152 operates to make the non-Indian status of the defendant an 'essential element' of any offense prosecuted via § 1152, or whether the defendant's Indian status is instead an affirmative defense that must be asserted as a defense to prosecution." *Id.* at 10a. After acknowledging "a circuit split exists on this issue," the court rejected the Tenth Circuit's reasoning and joined the Ninth Circuit, holding that the intra-Indian exception is an affirmative defense and not an essential nor jurisdictional element. *Id.* As such, "because Haggerty did not raise the issue of Indian status at trial as an affirmative defense, the Government met its burden to prove the jurisdictional element of § 1363 (as extended by § 1152) by introducing evidence sufficient to establish that the offense occurred in Indian country," despite never alleging Mr. Haggerty's status. *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

I. AN ENTRENCHED SPLIT OF AUTHORITY EXISTS IN THE CIRCUIT COURTS.

The Tenth Circuit has held, for two decades, that "consideration of the status of [both] the victim and the defendant is a fundamental part of the jurisdictional inquiry" under § 1152, and therefore a defendant's Indian or non-Indian status is an essential element of the offense the Government must allege and prove. *Prentiss*, 256 F.3d at 980.

In reaching this conclusion in *United States* v. *Prentiss*, the Tenth Circuit first acknowledged that,

"[r]ead in conjunction with the Supreme Court's decision in *McBratney*, § 1152 establishes federal jurisdiction over interracial crimes only (i.e., when the defendant is an Indian and the victim is a non-Indian, or vice versa)." *Id.* at 974. Were Indian/non-Indian status an affirmative defense, the government's "mere allegation that [a federal crime] occurred in Indian country [would] suffice[]" to allege a crime under § 1152. *Id.* at 975.

But the Tenth Circuit was "unable to find a single case that ends the jurisdictional inquiry . . . merely because the crime occurred in Indian country," indicating that this allegation alone "is *not* sufficient to establish federal jurisdiction under § 1152." *Prentiss*, 256 F.3d at 976, 980 (emphasis added). Accordingly, the court deemed the status of both victim and defendant to be "constituent part[s] of the crime that the government must raise in the indictment, submit to the jury, and prove at trial." *Id.* at 976; see also Pet. App. 11a (acknowledging that "the Tenth Circuit held that the entire burden is on the Government: it must allege the defendant's (and victim's) Indian/non-Indian status and bear the burden of production and persuasion at trial").

The Tenth Circuit reinforced its conclusion using principles of statutory construction that this Court articulated in *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922) and *United States* v. *Cook*, 84 U.S. 168, 175 (1872). Although an indictment generally "need not negative . . . an exception" and "it is incumbent on one who relies on such an exception to set it up and establish it," *McKelvey*, 260 U.S. at 357, this is not the case where a statutory exception is "so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly

described if the exception is omitted." *Cook*, 84 U.S. at 173.

In the intervening two decades, the Tenth Circuit has repeatedly reaffirmed *Prentiss*. See*, e.g.*, *United States* v. *Langford*, 641 F.3d 1195, 1197 (10th Cir. 2011) (citing *Prentiss* ten years later and holding that "federal jurisdiction over crimes in Indian country is contingent upon the existence of either an Indian victim or perpetrator"); *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan and Trust* v. *Alerius Fin., N.A.*, 858 F.3d 1324, 1336 (10th Cir. 2017) (affirming the same statutory interpretation maxim used in *Prentiss*: "Whether something constitutes an element, as opposed to an affirmative defense or exception, turns on whether 'one can omit the exception from the statute without doing violence to the definition of the offense.'" (quoting *United States* v. *McArthur*, 108 F.3d 1350, 1353 (11th Cir. 1997)); see also *United States* v. *Van Keuren*, No. CR 03-2573 MCA, 2004 WL 7337632 (D.N.M. 2004) (following *Prentiss* rule that Section 1152 extends to interracial crimes only and that both victim and defendant status are essential elements of the offense); *United States* v. *Diaz*, No. 09-1578 LH, 2010 WL 11618891 (D.N.M. 2010) (same).

The Tenth Circuit's interpretation of § 1152 also finds support in the Seventh Circuit, which has similarly held that "[i]n order to prosecute under 18 U.S.C. § 1152, the Government must prove, as a jurisdictional requisite . . . that the crime occurred between an Indian and a non-Indian within Indian country." *United States* v. *Torres*, 733 F.2d 449, 454 (7th Cir. 1984). In *United States* v. *Torres*, the Seventh Circuit unequivocally held that § 1152 required the prosecution to prove the interracial nature of the offense charged, and the prosecution did in fact provide abundant evidence to do so. *Id.* at 457 ("For purposes of 18 U.S.C. § 1152, the

government had to prove not only that [the defendants] were Indians but also that the victim, Peterson, was a non-Indian."(emphasis added)); *id.* at 458 ("[T]he record contained ample evidence . . . to find that Peterson was a non-Indian.").

Before the Fifth Circuit's decision in this case, "the Ninth Circuit's holding in *Hester* that the Indian status of the defendant is an exception to federal jurisdiction and need not be pleaded or proved appear[ed] to be a minority view." *State* v. *Hill*, 373 P.3d 162, 173 n.6 (Or. Ct. App. 2016), *denying review*, 385 P.3d 82 (Or. 2016); see also *id.* ("In *United States* v. *Prentiss*, the court rejected the rule in *Hester* and adopted the Seventh Circuit's approach in *United States* v. *Torres*." (cleaned up)).

The circuit split is stark. In *United States* v. *Hester*, the Ninth Circuit held 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." *Hester*, 719 F.2d at 1043. In *Hester*, the prosecution's indictment alleged that the victim was Indian, but Hester was tried and convicted in a federal court without any proof that he was non-Indian. *Hester*, *id.* at 1042. The Ninth Circuit held that the defendant's Indian status was not "an essential jurisdictional fact," but rather an exception that the government "need not negative" until it has been raised by the defendant himself at trial. *Id.* at 1042 (quoting *McKelvey*, 260 U.S. at 357). The court relied not on any criminal rule but instead upon a general civil rule[4] that "[i]t is far more manageable for the

[4] "[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." 2 J. Strong, McCormick on Evidence § 337, at 413 (5th ed. 1999).

defendant to shoulder the burden of producing evidence that he is a member of a federally recognized tribe than it is for the Government." *Id.* at 1043.

The Ninth Circuit has repeatedly reaffirmed *Hester*. See, *e.g.*, *United States* v. *Bruce*, 394 F.3d 1215, 1222 (9th Cir. 2005) ("Section 1152 thus requires that [the defendant] not only raise her Indian status but also that she carry the burden of production for that issue."); *United States* v. *Cruz*, 554 F.3d 840, 850 (9th Cir. 2009) ("[U]nder § 1152, the question of Indian status is an *affirmative defense*."); *United States* v. *Reza-Ramos*, 816 F.3d 1110, 1120 (9th Cir. 2016) ("The burden of proving the applicability of the statutory exception in § 1152 is on the defendant.").

Here, the Fifth Circuit rejected the Tenth Circuit's approach and adopted the Ninth's, holding that "the defendant's status as Indian is an affirmative defense for which the defendant bears the burden of pleading and production, with the ultimate burden of proof remaining with the Government." Pet. App. 18a.

As a practical matter, "the split concerns who must raise and prove, and with what convincing force, the issue of Indian/non-Indian status." *Id.* at 11a. The Court should resolve this split to ensure that the burden of establishing or challenging a jurisdictional requisite under § 1152 is allocated in a manner that respects congressional intent, federal authority, and tribal sovereignty. The split shows no signs of resolving and is ripe for this Court's review.

II. THE FIFTH CIRCUIT'S DECISION THAT FEDERAL JURISDICTION EXISTS OVER PETITIONER UNDER 18 U.S.C. § 1152 CONFLICTS WITH DECISIONS OF THIS COURT.

Mr. Haggerty raised a fundamental issue below: that the district court lacked "jurisdiction" over him because the government neither pled nor proved that he was a non-Indian, citing this Court's decision in *Duro* v. *Reina*, 495 U.S. 676, 697 (1990), and the Fifth Circuit's own decision in *United States* v. *John*, 587 F.2d 683, 686—87 (5th Cir. 1977).[5] The Fifth Circuit cited neither *Duro* nor *John* in its opinion but wrongly stated that subject matter jurisdiction existed under 18 U.S.C. § 3231. See Pet. App. 8a.[6] The Ninth and Tenth Circuits have also held or assumed that § 1152 does not limit subject matter jurisdiction.

Under § 1152, a federal court lacks jurisdiction over "minor" offenses such as destruction of property committed in Indian Country—unless the government establishes an "interracial" offense. See *Duro*, 495 U.S. at 697 ("[F]ederal authority over minor crime [including malicious destruction of property], otherwise provided by the Indian Country Crimes Act, 18 U.S.C. §

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[5] *See, e.g.*, Fifth Circuit Oral Argument Recording, available at https://www.ca5.uscourts.gov/OralArgRecordings/20/20-50203_1-6-2021.mp3, at 9:54-10:15 & 38:55-39:55; *See, e.g.*, Opening Brief for Appellant, at 9 (citing John); Appellant's Rule 28(j) Letter (citing *Duro*; filed with the Fifth Circuit on December 14, 2020).

[6] Section 3231 provides that: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." The Fifth Circuit failed to recognize that § 3231 exists apart from § 1152 regarding "minor" offenses committed in Indian Country. As discussed below, federal jurisdiction over "minor" offenses in Indian Country *also* must satisfy § 1152.

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.'"); see also *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) (in intra-Indian offense committed in Indian country, "It results that the first district court of Dakota was without jurisdiction to find or try the indictment against the prisoner; that the conviction and sentence are void, and that his imprisonment is illegal.") (interpreting a predecessor of § 1152); *John*, 587 F.2d at 686–87 (the "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").

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen* v. *Guardian Life Ins. Co. Of America*, 511 U.S. 375, 377 (1994). For minor offenses in Indian Country, the statuses of the defendant and victim are matters of jurisdiction under § 1152: a federal court lacks "power" to adjudicate an Indian-on-Indian crime. In other words, whether the offense was inter- or intra-racial is not a mere "merits" issue under § 1152. See *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515–16 (2006) (contrasting "jurisdictional" from "merits" issues); see also *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (the term "[J]urisdiction means . . . 'the courts' statutory or constitutional *power* to adjudicate the case'"). As this Court in *Duro* recognized, § 1152 restricts federal criminal jurisdiction in Indian Country. *Duro*, 495 U.S. at 697 ("[Section] 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.'"); see also *Arbaugh*, 546 U.S. at 515 (stating that a rule is jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional . . . ").

Section 1152 is analogous to the federal diversity jurisdiction statute, 28 U.S.C. § 1332. Both require parties with different statuses: Indian versus non-Indian in the case of § 1152; resident of one state versus resident of a different state in the case of diversity jurisdiction. It is well established that a civil plaintiff's failure to allege and prove diversity can be raised as a jurisdictional defect at any point, including for the first time on appeal to this Court. See *Capron* v. *Van Noorden*, 6 U.S. 126, 127 (1804) (remanding for dismissal for lack of jurisdiction appellant raising lack of diversity for the first time on appeal because "it was the duty of the Court to see that they had jurisdiction"); see also *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 571 (2004) ("[W]hether the challenge be brought shortly after filing, after the trial, or even for the first time on appeal[,] [c]hallenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment." (citing *Capron*, 6 U.S. 126 (1804)); see also *Kokkonen*, 511 U.S. at 377 (1994) ("It is to be presumed that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (citation omitted); see also *Basso* v. *Utah Power & Light Co.*, 495 F.2d 906, 910 (10th Cir. 1974) ("On its face then, plaintiff's complaint manifests a lack of diversity jurisdiction. Although defendant did not present evidence to support dismissal for lack of jurisdiction, the burden rested with the plaintiffs to prove affirmatively that jurisdiction did exist. The defendant's failure to raise the issue before final judgment did not amount

to a waiver, since a court may dismiss a case for lack of jurisdiction at any stage of the proceeding.") (citation omitted); see also *Naartex Consulting Corp*. v. *Watt*, 722 F.2d 779, 792 (D.C. Cir. 1983) ("In its amended complaint, . . . Naartex neither alleged that 28 U.S.C. § 1332 extended jurisdiction to the district court over this case, nor did it plead the requisite facts to establish complete diversity. Because federal courts are of limited jurisdiction, there is a presumption against the existence of diversity jurisdiction. Accordingly, the party seeking the exercise of diversity jurisdiction bears the burden of pleading the citizenship of each and every party to the action.") (citation omitted).

For the same reason, in order to vest a federal court with jurisdiction under 18 U.S.C. § 1152, an indictment must allege the Indian or non-Indian statuses of the defendant and victim. The indictment in Mr. Haggerty's case did not allege his non-Indian status, and the proof at trial did not establish it, as the government admitted at oral argument below. This Court should vacate Mr. Haggerty's conviction for lack of jurisdiction and remand with instructions to dismiss the indictment.

III. THE QUESTIONS PRESENTED RAISE IMPORTANT AND RECURRING ISSUES OF STATE, TRIBAL, AND FEDERAL SOVEREIGNTY.

Section 1152 is part of a carefully constructed congressional scheme delineating the limited authority of the federal courts over Indian tribes. Resolving the present division of authority will ensure that federal authority is exercised as Congress intended.

Federal criminal cases in Indian country are necessarily "case[s] involving the judgment of a court of special and limited jurisdiction, not to be assumed

without clear warrant of law." *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883) (interpreting identical predecessor to § 1152). As such, the Court has repeatedly affirmed the jurisdictional significance of the Indian or non-Indian statuses of victims and defendants in these types of cases. See*, e.g.*, *McBratney*, 104 U.S. at 624 (holding that federal courts do not have jurisdiction over crimes between non-Indians in Indian country); *Smith* v. *United States*, 151 U.S. 50, 53 (1894) (stating that "nothing . . . indicates that the circuit courts of the United States have jurisdiction of crimes committed by one Indian person against the person or property of another."); *Lucas*, 163 U.S. at 617 ("The burden of proof was on the government to sustain the jurisdiction of the court by evidence as to the status of the deceased, and the question should have gone to the jury as one of fact, and not of presumption."); *Antelope*, 430 U.S. at 643 n.2 ("Except for the 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."); *Duro*, 495 U.S. at 697 ("[F]ederal authority over minor crime, 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 . . . "); see also *United States* v. *Wheeler*, 435 U.S. 313, 327 n.24 (1978) ("This Court has referred to treaties made with the Indians as 'not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.'" (quoting *United States* v. *Winans*, 198 U.S. 371, 381 (1905)).

The split in the Circuits—and the position of the Ninth and Fifth Circuits in particular—not only upsets the balance of federal and tribal sovereignty by expanding federal court jurisdiction beyond where

§ 1152 allows, but will produce different results in identical prosecutions, depending on the location.

In the Fifth and Ninth Circuits, a defendant must raise the intra-Indian exception at trial as an affirmative defense to avoid conviction. "American jurisdictions commonly impose upon the defense, rather than the prosecution, the burden of initially introducing evidence of 'affirmative defenses.'" Wayne R. LaFave et al., *Criminal Procedure*, § 1.8(d) (5th ed. 2009). A defendant can raise an affirmative defense before trial if it "can be decided solely on issues of law." 9 Fed. Proc., L. Ed. § 22:1026 (2021). But "where the merits of an affirmative defense require an assessment of the evidence adduced at trial, such an affirmative defense is not properly raised prior to trial." *Id.* If a defendant's Indian status under § 1152 falls into the latter category. it is "a mixed question of law and fact," meaning the question of whether the intra-Indian exception applies would go to a jury. *Bruce*, 394 F.3d at 1218.

By contrast, an otherwise identical case in the Tenth Circuit may be dismissed by pretrial motion because a defendant's Indian/non-Indian status is an essential element of § 1152. If the prosecution fails to include an essential element in its indictment, a defendant can move to dismiss for "failure to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). Alternatively, treating the intra-Indian exception as a jurisdictional element would similarly end the court's inquiry before trial. See Fed. R. Crim. P. 12(b)(2) ("A motion that the court lacks jurisdiction may be made at any time while the case is pending.").

Even more troubling, identical defendants charged with identical crimes—say, on the facts of this case—would face different outcomes. That is, Mr. Haggerty was convicted in the Fifth Circuit. He assuredly would

have been acquitted if he were on trial in the Tenth Circuit.

Furthermore, the Fifth, Ninth, and Tenth Circuits are among the most prolific in terms of Indian population and cases. Between 2010 and 2019, more than 13,800 criminal cases were brought in federal courts concerning offenses committed on tribal lands.[7] Over half of all "Indian country Matters," were resolved in these three circuits, and over half of all Native Americans reside within them. This split will continue to affect hundreds of defendants each year.[8]

The Eighth Circuit is the only remaining circuit with a substantial Native American population, but it has avoided deciding on the split due to the "complementary nature of § 1152 and § 1153." *United States* v. *White Horse*, 316 F.3d 769, 772–73 (8th Cir. 2003) (holding that "[e]ven if a defendant's Indian status is an element of the offense under § 1152," the offense charged fell under § 1153 which effectively "render[ed] ethnic or racial status altogether irrelevant"); see also *United States* v. *Webster*, 797 F.3d 531, 535 (8th Cir. 2015) (acknowledging *Prentiss* but holding that "even if the victim's status is an element of § 1152 . . . that status is irrelevant" because the offense also fell under § 1153).

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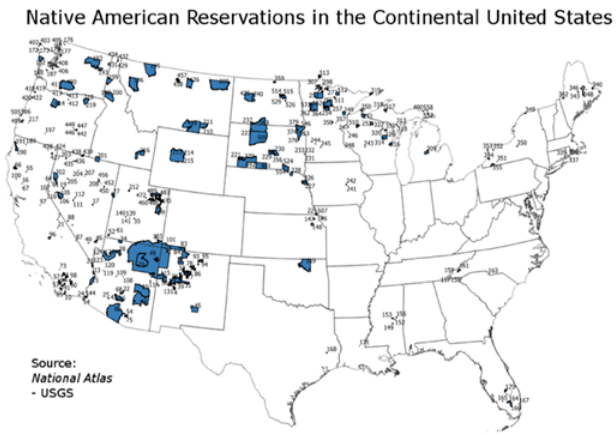
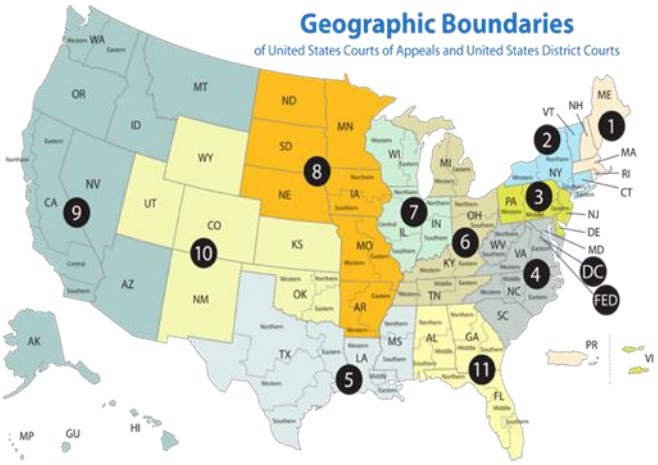
[7] U.S. Dep't of Just., Bureau of Just. Stats., *Indian Country Investigations and Prosecutions Report*, at 21 (2020), https://www.justice.gov/otj/page/file/1405001/download (reporting 1,592 to 1,990 cases each year).

[8] *Id.* at 35; *see also*, World Population Review, *Native American Population 2021*, https://worldpopulationreview.com/state-rankings/native-american-population.





The Court need not wait for other circuit courts to weigh in on this split. As a matter of simple geography, three of the only four circuits principally affecting the Indian population and territories have already staked out their positions. Thus, this issue is as entrenched as it reasonably can be and urgently requires this Court's review.

IV. THE FIFTH CIRCUIT'S OPINION IS WRONG ON THE MERITS.

The Fifth Circuit's interpretation of § 1152 cannot be reconciled with this Court's interpretation of the same statute.

To begin, the Fifth Circuit disregarded two Supreme Court cases establishing the jurisdictional significance of the intra-Indian exception. In *Lucas* v. *United States*, where the defendant was undisputedly Indian, "the averment in the indictment . . . that [the victim] was a negro, and not an Indian, was the averment of a jurisdictional fact, which it was necessary for the prosecution to sustain by competent evidence." 163 U.S. at 615. In *Smith* v. *United States*, the Court affirmed that the assertion the victim "was a white man, and not an Indian, was a fact which the government was bound to establish . . . " 151 U.S. at 55.

Although the Fifth Circuit acknowledged that "[if] victim Indian/non-Indian status is an essential element under § 1152, that would strongly imply that defendant Indian/non-Indian status is also an essential element," it felt that "nothing in *Lucas* [nor Smith] is inconsistent with [the] decision to treat the intra-Indian exception as an affirmative defense." Pet. App. 17a. The Fifth Circuit is incorrect: "[Smith and Lucas] cannot reasonably be read as describing the rebuttal of an affirmative defense." *Prentiss*, 256 F.3d at 976.

Further, by paradoxically acknowledging the "jurisdictional" nature of the *McBratney* intra-non-Indian exception, the Fifth and Ninth Circuits have created a system of bifurcated burdens of production entirely dependent upon complex permutations of victim–defendant racial makeups. This effectively places the burden of proving a jurisdictional element on a defendant, dramatically expanding federal reach into tribal

sovereignty. The Fifth Circuit changed what Lucas and Smith deemed a jurisdictional element into a defense without regard for the statutory text. Pet. App. 15a (Conceding that "we agree with Haggerty insofar as the two scenarios [victim and defendant Indian and non-Indian status] appear to be corollaries as a matter of pure statutory construction").

To justify its departure from this Court's precedents, the Fifth Circuit resorted to the interpretive principle described in *McKelvey* v. *United States*: "[for] an exception made by a proviso or other distinct clause . . . it is incumbent on one who relies on such an exception to set it up and establish it." 260 U.S. at 357. In effect, the Fifth Circuit held that all elements to a crime must be grouped in a single paragraph or clause. That is not what *McKelvey* means.

Where a statute defining an offense contains an exception that "is so incorporated with the language defining the offence that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted," then the indictment "must allege enough to show that the accused is not within the exception . . . " *Cook*, 84 U.S. at 173. However, the Fifth Circuit dismissed *Cook* as "not determinative." Pet. App. 14a. To demonstrate its argument, it claimed that removing references to Indian status, leaving "[w]hoever maliciously destroys property in Indian country is guilty of an offense," still accurately described the statute. *Id.*

In fact, the Fifth Circuit's revision does violence to the statute. See *McArthur*, 108 F.3d at 1353 (positing that "where one can omit the exception from the statute without doing violence to the definition of the offense, the exception is more likely an affirmative defense"). The court in which one may be tried, and the nature and identity of the sovereign governing that

trial, are inherently intertwined with any criminal offense. In this matter, the statuses of the defendant and victim determine whether a crime is state, federal, or tribal. Removing the intra-Indian exception thus alters a jurisdictional requirement and, by extension, the scope and nature of one's rights depending upon the court in which one is tried; removing the exception therefore categorically precludes an accurate restatement of the offense.

Moreover, without the limitation of interracial statuses, federal jurisdiction would extend to all offenses within Indian territory, rendering § 1153 mere surplusage. Rather than respecting the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians," federal jurisdiction would become intrusive, all-encompassing, and in conflict with Congressional intent and this Court's precedent. 25 U.S.C. § 1301; see also *Smith*, 151 U.S. at 53 (1894); *Quiver*, 241 U.S. at 606 (1916); cf. *Bond* v. *United States* 572 U.S. 844, 857 (2014) ("[W]e avoid reading statutes to have such reach [and "dramatically intrude upon traditional state criminal jurisdiction"] in the absence of a clear indication that they do"). Put simply, the exception cannot be removed without doing violence to the statute and the statutory scheme protecting Indian sovereignty.

At bottom, the Fifth Circuit's ruling is incorrect; whatever one prefers to call the intra-Indian exception within § 1152, it is fundamentally not a defense.

V. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE SPLIT.

Mr. Haggerty's case is an ideal vehicle for the Court to consider these questions. The evidence (stipulation) showed that Mr. Haggerty "physically appear[ed] to be

a 'white male' based on surveillance footage." Pet. App. 2a, but said nothing about being a non-Indian or an Indian. At oral argument before the Fifth Circuit, the government unambiguously conceded that its evidence did not show "non-Indian" status. See supra note 3. Thus, if status is an element, Mr. Haggerty's prosecutors failed to prove it.

As a result, this case turns on the question of whether non-Indian status is an essential element, even assuming it is not a more fundamental matter of jurisdiction. If the prosecution cannot show that Mr. Haggerty is not an Indian, the court is "without jurisdiction to try or find the indictment." *Ex Parte Crow Dog*, 109 U.S. at 572. As a result, the question presented is dispositive.

This case is unencumbered by procedural anomalies and presents a situation that is typical for cases arising under § 1152. While the Fifth Circuit expressed skepticism about whether this issue was preserved, its skepticism was misplaced. Mr. Haggerty preserved his sufficiency-of-the-evidence challenge under Fifth Circuit precedent by pleading not guilty in advance of his bench trial. Pet. App. 4a (noting that when a "defendant pleads not guilty *before a bench trial*, '[t]he plea of not guilty asks the court for a judgment of acquittal, and a motion to the same end is not necessary.'" (quoting *Hall* v. *United States*, 286 F.2d at 677)). Haggerty's preserved sufficiency-of-the-evidence objection necessarily encompasses his challenge that his prosecutors did not adduce any evidence to prove that he is a non-Indian. And, because Mr. Haggerty's challenge ultimately goes to subject matter jurisdiction, it cannot be waived or forfeited, *Cotton*, 535 U.S. at 630, and even can be properly raised for the first time in this Court. Cf. *Capron*, 6 U.S. 126 (1804). Both sides stipulated to the facts, leaving no factual disputes, and the Fifth

Circuit ultimately passed on the questions presented here.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

XIAO WANG
NAOMI A. IGRA
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(202) 736-8000

DAVID GERGER*
BRENT NEWTON
GERGER HENNESSY & McFARLANE
1001 Fannin Street #2450
Houston, TX 77002
(713) 224-4400
dgerger@ghmfirm.com

JEFFERY T. GREEN
JACQUELYN E. FRADETTE
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005

Counsel for Petitioner

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* Counsel of Record