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Tenth Circuit

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Christopher M. Wolpert
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 24-7030

DENNIS HEBERT,

Defendant - Appellant.

KEVIN WASHBURN; TENTH CIRCUIT
FEDERAL PUBLIC DEFENDERS,

Amici Curiae.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 24-2128

JOEL RUIZ,

Defendant - Appellant.

KEVIN WASHBURN; TENTH CIRCUIT
FEDERAL PUBLIC DEFENDERS,

Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:22-CR-00106-RAW-1)

and
**Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:22-CR-00365-DHU-1)**

Jared T. Guemmer, Assistant Federal Public Defender, (Julia L. O’Connell, Federal Public Defender and Whitney R. Mauldin, Assistant Federal Public Defender, Office of the Federal Public Defender, Northern District of Oklahoma, Tulsa, Oklahoma, with them on the briefs), and Violet N.D. Edelman, Assistant Federal Public Defender, (Margaret A. Katze, Federal Public Defender, Office of the Federal Public Defender, District of New Mexico, Albuquerque, New Mexico, with them on the briefs), for Defendants-Appellants.

C. Paige Messec, Assistant United States Attorney, Office of the United States Attorney, District of New Mexico, Albuquerque, New Mexico, (Todd Blanche, Attorney General for the United States; Christopher J. Wilson, United States Attorney and Linda A. Epperley, Assistant United States Attorney, Office of the United States Attorney, Eastern District of Oklahoma, Muskogee, Oklahoma; Ryan Ellison, First Assistant United States Attorney and Caitlin L. Dillon, Assistant United States Attorney, Office of the United States Attorney, District of New Mexico, Albuquerque, New Mexico, with them on the briefs), for Plaintiff-Appellee.

Kevin Washburn, UC Berkeley School of Law, Berkeley, California, filed an amicus brief in support of affirmance.

Matthew K. Belcher, Interim Federal Public Defender, District of Colorado, Denver, Colorado, (Tracy Hucke, Federal Public Defender, District of Wyoming, Cheyenne, Wyoming; Scott Graham, Federal Public Defender, Eastern District of Oklahoma, Muskogee, Oklahoma; Jeffrey M. Byers, Federal Public Defender, Western District of Oklahoma, Oklahoma City, Oklahoma; Mitch Biebighauser, Interim Federal Public Defender, District of Kansas, Kansas City, Kansas; and Scott Wilson, Federal Public Defender, District of Utah, Salt Lake City, Utah, with him on the brief), filed an amicus brief in support of Defendants-Appellants.

Before **HOLMES**, Chief Judge, **HARTZ**, **TYMKOVICH**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, **CARSON**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

MATHESON, Circuit Judge.

In *United States v. Prentiss*, 256 F.3d 971, 980 (10th Cir. 2001) (en banc) (“*Prentiss II*”), this court held that when a defendant is charged with an offense under 18 U.S.C. § 1152, and the victim is an Indian, the government must prove the defendant is not an Indian as an element of the offense.¹

In two recent cases brought under § 1152, juries convicted Dennis Hebert and Joel Ruiz of sexual abuse of a minor in Indian country.² In each case, because the victim was an Indian, *Prentiss II* required the prosecution to prove the defendant was a non-Indian. On direct appeal, both defendants argued the evidence was insufficient on only this element. The panels agreed and vacated the convictions. *United States v. Hebert*, 159 F.4th 777 (10th Cir. 2025); *United States v. Ruiz*, 164 F.4th 1223 (10th Cir. 2026).

The government petitioned for en banc review in both cases, asking this court to revisit *Prentiss*’s allocation of the burden to prove the defendant’s Indian status. We voted to do so and consolidated the cases for en banc consideration. We list below the questions we ordered the parties to brief along with our answers:

1. Under the General Crimes Act, [18 U.S.C § 1152,] is a defendant’s non-Indian status an essential element that the

¹ This court has issued three opinions under the caption “*United States v. Prentiss*”: 206 F.3d 960 (10th Cir. 2000) (“*Prentiss I*”); 256 F.3d 971 (10th Cir. 2001) (en banc) (“*Prentiss II*”); and 273 F.3d 1277 (10th Cir. 2001) (“*Prentiss III*”). Our primary focus in this opinion is on the en banc decision in “*Prentiss II*.”

² The indictments charged them with aggravated sexual abuse of a minor in Indian country. Mr. Hebert was charged under 18 U.S.C. §§ 1151, 1152, 2241(c), and 2246(2)(A). Mr. Ruiz was charged under 18 U.S.C. §§ 1152, 2241(c), and 2246(2)(D).

indictment must allege and on which the government must bear the initial burden of production? Or is a defendant's []Indian status an affirmative defense that the defendant must raise and bear the initial burden of production?

In a § 1152 prosecution in which the victim is an Indian, the defendant's Indian status is an affirmative defense on which the defendant bears the burden of production.

2. Does the government or the defendant bear the ultimate burden of persuasion on []Indian status?

The defendant bears the burden of persuasion by a preponderance to establish the affirmative defense of Indian status.

3. How should the "Indian canon" of statutory interpretation affect our analysis?

The Indian canon plays at most a limited role.

4. If the en banc court determines that defendants must raise []Indian status as an affirmative defense and bear the initial burden of production, should we remand Mr. Hebert's and Mr. Ruiz's cases for retrial?

We see no constitutional limits that would prevent retrial, and we remand for the respective panels to determine the next steps in these cases.

For the reasons stated below, we overturn *Prentiss II* in part, holding that in a prosecution under § 1152 where the victim is an Indian, the defendant's Indian status is an affirmative defense that the defendant must prove. We vacate the panel opinions and remand for further proceedings, including possible retrials, consistent with this opinion.

I. BACKGROUND

A. *Federal Criminal Cases in Indian Country*

1. General Crimes Act – 18 U.S.C § 1152

Under the General Crimes Act, “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 . . . shall extend to the Indian country.” 18 U.S.C. § 1152; *see Oklahoma v. Castro-Huerta*, 597 U.S. 629, 639 (2022).³

The statute carves out three exceptions:

This section shall not extend [(1)] to offenses committed by one Indian against the person or property of another Indian, [(2)] nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, [(3)] or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152.

A nineteenth-century predecessor to § 1152, U.S. Rev. Stat. § 2145, similarly “extend[ed] to the Indian country” “the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States.” *See also United States v. Smith*, 178 F.4th 572, 594 (10th Cir. 2026). A separate provision outlined the same exceptions as those in

³ “‘Indian country’ is defined in 18 U.S.C. § 1151 to encompass all land within any Indian reservation under federal jurisdiction, all dependent Indian communities, and all Indian allotments, the Indian titles to which have not been extinguished.” *United States v. Bryant*, 579 U.S. 140, 143 n.1 (2016).

the current version of § 1152. *See* U.S. Rev. Stat. § 2146; *see also Ex parte Crow Dog*, 109 U.S. 556, 558 (1883).

In 1882, the Supreme Court held that states have exclusive jurisdiction to prosecute crimes committed in Indian country by a non-Indian against a non-Indian. *United States v. McBratney*, 104 U.S. 621, 621-24 (1882); *see Draper v. United States*, 164 U.S. 240 (1896). The Court said, “in effect, that the organization and admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the States the control of offenses” between non-Indians. *Donnelly v. United States*, 228 U.S. 243, 271 (1913).

In light of the statutory exception for crimes committed between Indians and the states’ exclusive jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country, § 1152 applies federal enclave criminal law to Indian-country crimes only when the defendant is a non-Indian and the victim is an Indian, or vice versa. *United States v. Walker*, 85 F.4th 973, 979 (10th Cir. 2023).⁴

⁴ As the Fifth Circuit recognized,

The *McBratney* rule is a judicially-created exception that did not turn on the language of § 1152 or its predecessor statutes or treaties As a practical matter, the *McBratney* rule combined with the intra-Indian exception of § 1152 will often determine which sovereign (federal, state, or tribal) may prosecute criminal offenses occurring in Indian country, turning on the respective Indian/non-Indian statuses of the defendant and victim. But while the *McBratney* rule may have the effect of limiting the practical scope of § 1152 (the text of which does not

In 2022, in *Oklahoma v. Castro-Huerta*, the Supreme Court held that “the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.” 597 U.S. at 633. The Court relied on the plain text of § 1152, which it said “simply ‘extend[s]’ federal law to Indian country,” but does not “say that Indian country is equivalent to a federal enclave for jurisdictional purposes,” “that federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted.” *Id.* at 639. The General Crimes Act therefore did not disturb “the background principle of state jurisdiction over crimes committed within the State, including in Indian country.” *Id.*

2. Major Crimes Act – 18 U.S.C § 1153

In 1883, the Supreme Court interpreted the exceptions provision in § 1152 to mean that the federal government could not prosecute the murder of one Indian by another in Indian country. *Crow Dog*, 109 U.S. at 558-59. In 1885, “[i]n response, and ‘in order to curb a perceived lawlessness resulting from the *Crow Dog* decision, Congress passed the . . . Major Crimes Act, 18 U.S.C. § 1153.’” *United States v.*

foreclose the federal prosecution of purely non-Indian offenses in Indian country), it does not bear on our interpretation of the text of § 1152 as a matter of statutory construction.

United States v. Haggerty, 997 F.3d 292, 298 n.7 (5th Cir. 2021) (citations and quotations omitted).

Brice, 167 F.4th 1330, 1336 (11th Cir. 2026) (quoting *United States v. Wadena*, 152 F.3d 831, 840 (8th Cir. 1998)).⁵

Under the Act, “[a]ny Indian who commits against the person or property of another Indian or other person” certain enumerated offenses “shall be subject to the same law and penalties as all other persons committing [the same offense], within the exclusive jurisdiction of the United States.” 18 U.S.C. § 1153(a); see *Castro-Huerta*, 597 U.S. at 641. In *United States v. Kagama*, 118 U.S. 375 (1886), the Supreme Court upheld the Major Crimes Act against a challenge to its validity, locating the constitutional authority to promulgate the Act in the “duty of protection” that the federal government owes to the Indian tribes. *Id.* at 383-85. The Court has often called Congress’s power to legislate on Indian affairs “plenary.” *E.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004).

B. Determining Indian Status

“The one point that emerges with clarity from this otherwise bewildering maze of rules is that the question of who is an Indian bears significant legal consequences.” *United States v. Bruce*, 394 F.3d 1215, 1222 (9th Cir. 2005). Although “Indian” is not defined in the relevant criminal statutes, a generally accepted test for Indian

⁵ See also *United States v. Wheeler*, 435 U.S. 313, 332 n.34 (1978) (“Traditional tribal justice tends to be informal and consensual rather than adjudicative, and often emphasizes restitution rather than punishment.”). Under the Indian Civil Rights Act (“ICRA”), tribal courts may generally impose a maximum of a \$5,000 fine and one year of imprisonment for any crime. 25 U.S.C. § 1302(a)(7)(B).

status derives from the Supreme Court’s opinion in *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846).

To be an Indian under §§ 1152 or 1153, a person must (1) have “some Indian blood” and (2) be “recognized as an Indian by a tribe or by the federal government.” *Prentiss III*, 273 F.3d at 1280 (quotations omitted). “A person satisfies the definition only if both parts are met” *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012).

“A person has ‘some Indian blood’ if he has ‘Indian ancestors.’” *United States v. King*, 172 F.4th 1188, 1193 (10th Cir. 2026) (quoting *Diaz*, 679 F.3d at 1187-88). We have identified several nonexclusive factors to determine whether a tribe or the federal government recognizes someone as an Indian: “(1) enrollment in a tribe, (2) provision of government assistance reserved only for Indians, (3) enjoying the benefits of tribal affiliation, and (4) social recognition as an Indian through living on a reservation and participating in Indian social life.” *Id.* (quotations omitted).

C. United States v. Prentiss

The Tenth Circuit’s current treatment of Indian and non-Indian status in § 1152 prosecutions arose from the 1997 arson prosecution of Ricco Prentiss. He was charged with setting fire to the home of a tribal member on the Tesuque Indian Pueblo in Indian country and was convicted of arson in Indian country under 18 U.S.C. §§ 81 and 1152. *Prentiss I*, 206 F.3d at 962-63. On appeal, Mr. Prentiss argued that the government’s “indictment was insufficient because it failed to allege his Indian or non-Indian status and the Indian or non-Indian status of the victim” and

that “there was insufficient evidence in this case to support his conviction because the government failed to prove the Indian or non-Indian status of the defendant or victim.” *Id.* at 962. A divided panel vacated the conviction, holding the “indictment was insufficient because it failed to allege the Indian or non-Indian status of the defendant and victim, essential elements of a conviction” under § 1152. *Id.*

This court granted rehearing en banc to determine “whether the Indian/non-Indian statuses of the victim and the defendant constitute elements of the crime” in a § 1152 prosecution. *Prentiss II*, 256 F.3d at 972. The en banc court produced two majority opinions written by Judge Henry and Judge Baldock. Judge Henry and Judge Baldock each dissented from the other’s majority opinion.

1. Judge Henry’s Majority Decision

Judge Henry’s majority opinion held that “the Indian/non-Indian statuses of the victim and the defendant are essential elements of [a] crime” under § 1152, which the government must prove beyond a reasonable doubt. *Id.* at 980; *see Walker*, 85 F.4th at 979.

a. Victim’s status

To conclude that a victim’s Indian/non-Indian status is an essential element of the offense, we relied on two Supreme Court decisions. *Prentiss II*, 256 F.3d at 975. We said that in *Lucas v. United States*, 163 U.S. 612 (1896), “the government alleged in the indictment that the victim was a non-Indian and offered evidence at trial to support that allegation.” *Prentiss II*, 256 F.3d at 975. We noted the Court “held that the trial judge erred by instructing the jury that it could presume that the victim was

not an Indian because he was ‘a man who is a negro by blood,’” reasoning “that ‘the status of the deceased [was] a question of fact, to be determined by the evidence’ and that ‘[t]he burden of proof was on the government to sustain the jurisdiction of the court by evidence as to the status of the deceased.’” *Id.* (quoting *Lucas*, 163 U.S. at 616-17).⁶ Turning to *Famous Smith v. United States*, 151 U.S. 50 (1894), a prosecution under § 1152’s predecessor statute, we said “the Court characterized the victim’s status as ‘a fact which the government was bound to establish.’” *Id.* at 975 (quoting *Famous Smith*, 151 U.S. at 55).

Because “[i]n neither *Lucas* nor [*Famous*] *Smith* was there any suggestion that the defendant had the burden of pleading the status of the victim, offering evidence of that status, or persuading the factfinder,” we concluded that “when the decisions refer to the prosecution’s obligation to prove the victim’s status, they cannot reasonably be read as describing the rebuttal of an affirmative defense.” *Id.* at 975-76.⁷

⁶ Reliance on *Lucas* in *Prentiss II* was likely misplaced. *Lucas* did not interpret § 1152 or its predecessor statutes, but rather considered the exclusive jurisdiction granted to tribal courts by the Act of May 2, 1890. 163 U.S. at 614-15.

⁷ We also pointed to Ninth and Seventh Circuit decisions concluding that a victim’s Indian/non-Indian status is an essential element of the offense. In *Hilderbrand v. United States*, 261 F.2d 354 (9th Cir. 1958), the court granted a defendant’s 28 U.S.C. § 2255 motion to vacate a judgment “because the indictment alleged that he committed a murder on an Indian reservation but did not allege the status of either the victim or the defendant.” *Prentiss II*, 256 F.3d at 976 (citing *Hilderbrand*, 261 F.2d at 356). And in *United States v. Torres*, 733 F.2d 449 (7th Cir. 1984), the court said 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.* at 457.

Finally, we said that “the policies of protecting state and tribal sovereignty support the view that the status of the victim is an element” and that “[i]mposing the burden of alleging the status of the victim on the government rather than the defendant . . . comports with the usual practice in criminal prosecution.” *Id.* at 976-77.

b. Defendant’s status

We acknowledged that “[a]llocating the burden of alleging the status of the defendant presents a closer question” and pointed out that because the defendant’s Indian status was not at issue in *Lucas* and *Famous Smith*, “the Supreme Court did not discuss the burden of alleging that issue.” *Id.* at 977. We nevertheless concluded that the defendant’s Indian status should not be treated differently from the victim’s. *Id.* at 978. We said “the status of the defendant may be just as significant in determining whether a federal court has jurisdiction over the crime” under § 1152 “as the status of the victim.” *Id.* And “unlike other instances in which courts have imposed upon the defendant the initial burden of pleading an issue, it is feasible for the government to allege the status of the defendant.” *Id.*

c. Elements versus affirmative defenses

Judge Henry’s majority opinion then further addressed why the victim’s and defendant’s statuses should be elements rather than affirmative defenses “that a defendant must raise in the first instance.” *Id.* (quotations omitted). We noted the dissent’s reliance on the following passage from *McKelvey v. United States*, 260 U.S. 353 (1922), to conclude a defendant’s Indian status is an affirmative defense:

[A]n indictment . . . founded on a general provision defining the elements of an offense, or of a right conferred, need not negative . . . an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it.

Id. at 357.⁸

We said this principle should not apply to Indian status under § 1152 because, in *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872), the Supreme Court said that some “exceptions” are “*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,*” so the government must allege them in the indictment. *Prentiss II*, 256 F.3d at 979 (quoting *Cook*, 84 U.S. (17 Wall.) at 173-74, and adding emphasis). We said that “[t]he interpretive principle set forth in *Cook* applies to” the defendant’s and victim’s statuses under § 1152 because the “majority of [§ 1152] court decisions assess the statuses of the victim and the defendant” and because “[s]cholars agree that consideration of the status of the victim and the defendant is a fundamental part of the jurisdictional inquiry.” *Id.* at 979-80.⁹

⁸ When we decided *Prentiss II*, the Ninth Circuit treated a defendant’s Indian status as an affirmative defense for which the defendant bears the burden of production in § 1152 prosecutions where the victim is an Indian. *United States v. Hester*, 719 F.2d 1041 (9th Cir. 1983). The Ninth Circuit relied on *McKelvey* to hold 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.” *Id.* at 1042-43.

⁹ In 2021, the Fifth Circuit adopted the same approach as *Hester*. In *United States v. Haggerty*, the court considered and rejected the argument that *Cook*’s

We therefore held that “the Indian/non-Indian statuses of the victim and the defendant are essential elements” in a § 1152 prosecution and “[t]he government must allege them in the indictment.” *Id.* at 980.¹⁰

d. Judge Baldock’s dissent

Judge Baldock dissented from the court’s determination that Indian statuses of the defendant and victim are essential elements under § 1152. *Id.* at 985 (Baldock, J., dissenting). He noted that “§ 1152 extends the criminal jurisdiction of the federal courts provided for in 18 U.S.C. § 3231 to federal enclave crimes occurring within Indian country” and that “[n]o one disputes that under § 1152 an element of the crime . . . which the Government must allege is that it occurred in Indian country.” *Id.* at 987. But he asserted that “nothing prohibits Congress from setting forth in the same statute fact-based exceptions to the statute’s criminal element based on notions of Indian sovereignty which . . . a defendant must initially raise as a bar to suit.” *Id.*

Judge Baldock disagreed with the majority that *Lucas* and *Famous Smith* require “that the Government has the burden of proving the Indian/non-Indian statuses of a defendant and victim under § 1152.” *Id.* He said those cases dealt with the burden of persuasion and did not address “the pleading issue before the en banc

exception should supplant *McKelvey*’s general rule. 997 F.3d 292, 299-301 (5th Cir. 2021).

¹⁰ Although, as noted above, § 1152 includes three exceptions, we held that only the first exception for crimes between Indians is “so closely intertwined with the definition of the offense” that its negation is an “essential element[] of the crime.” *Prentiss II*, 256 F.3d at 979-80.

Court.” *Id.* And he suggested that “[n]othing is unusual about requiring the prosecution to disprove a defense, even beyond a reasonable doubt, once a defendant has come forward with some evidence as to the presence of the defense.” *Id.*

Judge Baldock would have relied on *McKelvey* to conclude that under § 1152, the three exceptions outlined in § 1152’s second paragraph should be affirmative defenses for which the defendant should bear the burden of production. *Id.* at 988. He rejected the majority’s “claim[] that the ingredients of the offence cannot be accurately and clearly described if the [intra-Indian] exception is omitted,” contending this “simply begs the question of what ‘ingredients’ constitute the offense.” *Id.* (quotations omitted).¹¹

2. Judge Baldock’s Majority Opinion

Judge Baldock, writing for a different majority, addressed “the issue of whether the indictment’s failure to allege the Indian/non-Indian statuses of” the defendant and victim “deprived the district court of subject matter jurisdiction, or instead, is subject to harmless error review.” *Id.* at 981. We rejected Mr. Prentiss’s argument that diversity of Indian status confers subject matter jurisdiction on the federal court, stating that “[a]n 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.*,

¹¹ Judge Baldock also took issue with the majority’s reliance on *McBratney* to conclude that diversity of Indian status is an essential element under § 1152. *Prentiss II*, 256 F.3d at 988-89 (Baldock, J., dissenting). He said, “The Court in *McBratney* did not even purport to construe the applicable statute and its ruling finds no basis whatsoever in the language of § 1152 or its predecessor acts.” *Id.* at 989.

a court’s constitutional or statutory power to adjudicate a case.” *Id.* at 982 (quoting *United States v. Martin*, 147 F.3d 529, 532 (7th Cir. 1998)). Thus, “the Government’s failure to allege the Indian/non-Indian statuses of Defendant and his victim in the indictment did not deprive the district court of subject matter jurisdiction to hear the case.” *Id.* We therefore concluded that the failure to allege these elements is subject to harmless-error review. *Id.* at 984.¹²

Judge Henry dissented on this point, stating that failure to allege “an essential element of § 1152” is a “jurisdictional defect” and therefore not “subject to harmless error analysis.” *Id.* at 989-91 (quotations omitted).

D. Case Histories

1. *United States v. Hebert*

“After Mr. Hebert argued with his wife in Texas, his stepdaughter, Kara Byers, invited him to live with her on the Choctaw Nation reservation in Oklahoma in a house she occupied with another woman and several young children.” *United States v. Hebert*, 159 F.4th 777, 781 (10th Cir. 2025). “Within two days of Mr. Hebert’s moving in, he sexually assaulted a six-year-old boy inside the home.” *Id.*

The United States charged Mr. Hebert with one count of aggravated sexual abuse in Indian country under 18 U.S.C. §§ 1151, 1152, 2241(c), and 2246(2)(A). *Id.*

¹² On remand, the original *Prentiss* panel concluded that the indictment’s failure to allege the Indian/non-Indian statuses of the victim and the defendant was not harmless and vacated Mr. Prentiss’s conviction. *Prentiss III*, 273 F.3d at 1278.

The government filed a superseding indictment alleging the victim was an Indian and Mr. Hebert was a non-Indian. *Id.*

At trial, the government relied on the testimony of four witnesses to prove Mr. Hebert's non-Indian status: stepdaughter Byers, Choctaw Nation Tribal Police investigator Dakota Grantham, Deputy U.S. Marshal Chad Sensor, and FBI Special Agent Paul Sparke. *Id.* at 781-82. Ms. Byers testified that, to her knowledge, Mr. Hebert was not a member of any Indian tribe, that he never mentioned being Indian, and that he, at "[o]ne time," identified himself as "part Mexican." *Id.*

Investigator Grantham, who interviewed Mr. Hebert the day of the offense, "testified that (1) he did not recall if he asked Mr. Hebert whether he was a member of any Indian tribe and (2) when he asked about race, Mr. Hebert said he was 'Latino, Hispanic.'" *Id.* at 782. He further testified that Mr. Hebert never voluntarily self-identified as Indian or Native American. *Id.* Agent Sensor, who arrested and booked Mr. Hebert, also testified that Mr. Hebert never voluntarily self-identified as Native American. *Id.* Special Agent Sparke, who investigated Mr. Hebert's case, testified that he reached out to the five major Oklahoma Indian tribes and did not receive any information indicating that Mr. Hebert was an Indian. *Id.*

At the close of the government's evidence, Mr. Hebert moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. *Id.* The district court denied the motion. *Id.* Mr. Hebert was found guilty and sentenced to 30 years in prison followed by a lifetime of supervised release. *Id.* at 783.

On appeal, Mr. Hebert argued that the government introduced insufficient evidence to prove he was a non-Indian. *Id.* We agreed, concluding that no reasonable jury could find the government met its burden of proving Mr. Hebert was not an Indian beyond a reasonable doubt. *Id.* at 786. We said “the sparse evidence” showing “(1) Ms. Byers lived with Mr. Hebert only briefly and lacked awareness of his being a member of or affiliated with any tribe; (2) Mr. Hebert did not racially identify as an Indian; and (3) he did not spontaneously incriminate himself to law enforcement by stating whether he was an Indian” was “hardly enough to be ‘firmly convinced’ that Mr. Hebert was not an Indian and far short of ‘substantial.’” *Id.* at 789 (quoting *United States v. Erickson*, 561 F.3d 1150, 1158-59 (10th Cir. 2009)). We therefore vacated Mr. Hebert’s conviction. *Id.* at 790.

In doing so, we recognized “the Government’s potentially difficult task to prove a negative” beyond a reasonable doubt, especially because the information bearing on a defendant’s non-Indian status “is more likely in possession of the defendant.” *Id.* at 786. We further noted that “(1) apart from Indian status, no one contested that Mr. Hebert committed the charged offense; (2) Mr. Hebert would be guilty under § 1152 as a non-Indian and under § 1153 as an Indian; (3) two circuits allocate the burden of production on non-Indian status to the defendant, *see United States v. Haggerty*, 997 F.3d 292, 302 (5th Cir. 2021); *United States v. Hester*, 719 F.2d [1041,] 1043 (9th Cir. 1983); and (4) the leading Indian law treatise favors that approach, Cohen’s Handbook of Federal Indian Law § 11.02[1][b][iii] (Nell Jessup Newton & Kevin K. Washburn eds., 2024).” *Hebert*, 159 F.4th at 790 n.12.

2. *United States v. Ruiz*

Two children, one aged six or seven and the other three or four, reported that Mr. Ruiz lured them into his trailer with candy and abused them. *United States v. Ruiz*, 164 F.4th 1223, 1225 (10th Cir. 2026).

The United States charged Mr. Ruiz with two counts of engaging in a sexual act with a minor under the age of 12 in Indian country under 18 U.S.C. §§ 1151, 1152, 2241(c), and 2246(2)(D). *Id.* The indictment alleged that the victims were Indians and that Mr. Ruiz was a non-Indian. *Id.*

At trial, the government tried to prove that Mr. Ruiz was not recognized as an Indian by a tribe or the federal government. *Id.* at 1226. It relied on the testimony of Jicarilla Apache Investigator Rome Wager and FBI Special Agent Piere Robert Himel. *Id.* at 1227. Investigator Wager testified that he is an enrolled member of the Jicarilla Apache tribe, had lived on the Jicarilla Reservation for 27 years, and that he was familiar with Mr. Ruiz from seeing him on the Reservation where Mr. Ruiz also resided. *Id.* Investigator Wager said he did not contact any tribes to ask about Mr. Ruiz's enrollment status, that he learned that Mr. Ruiz was born in Mexico, and that he did not find any information in a national database indicating that Mr. Ruiz was an Indian. *Id.*

Special Agent Himel testified that his practice to determine whether suspects are non-Indian is to ask them whether they are enrolled and query their name with various tribes, but he did not clearly indicate whether he went through that process to determine Mr. Ruiz's status. *Id.* He concluded Mr. Ruiz is a non-Indian based on

documents, which did not affirmatively indicate Mr. Ruiz’s tribal status, as well as Mr. Ruiz’s appearance and Mexican birthplace. *Id.*

After the government concluded its case, Mr. Ruiz moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 for failure to prove his non-Indian status. *Id.* at 1225. The court denied the motion. *Id.* Mr. Ruiz was found guilty of one count of engaging in a sexual act with a minor under the age of twelve and was sentenced to 30 years in prison, followed by 10 years of supervised release. *Id.* at 1225-26.

On appeal, Mr. Ruiz argued that the government’s trial evidence on non-Indian status was insufficient. *Id.* at 1226. We agreed. First, we said that “the witnesses’ relationship and personal knowledge of [Mr.] Ruiz rest[ed] on a ‘thin foundation,’” noting that “neither witness testified that they knew [Mr.] Ruiz personally, or that they knew that [he] was a non-Indian.” *Id.* at 1227-28 (quoting *Hebert*, 159 F.4th at 787). Second, we noted neither witness testified that Mr. Ruiz “ever mentioned that he was a non-Indian,” that they “attempted to contact a family member to gather [Mr.] Ruiz’s ancestry or recognition evidence,” or that they had contacted tribes to check Mr. Ruiz’s enrollment status. *Id.* at 1228. Third, we pointed out that the national databases that did not indicate Mr. Ruiz’s Indian status would “not have information on whether an individual is an enrolled member of a tribe.” *Id.* Finally, we said the witnesses’ conclusion that Mr. Ruiz was non-Indian because he was born in Mexico was erroneous because race and Indian status are distinct. *Id.*

We therefore concluded that the Government’s evidence was insufficient to prove Mr. Ruiz’s non-Indian status beyond a reasonable doubt and vacated Mr. Ruiz’s conviction. *Id.* We noted the “unrealistic” burden of proving non-Indian status beyond a reasonable doubt but said that the panel was bound by *Prentiss II* “unless and until” the en banc court revisits that case. *Id.* at 1230-31. We suggested that as a matter of statutory interpretation and practicality, non-Indian status in a § 1152 prosecution should be an affirmative defense and called on the court “to reexamine and correct our current caselaw on the issue.” *Id.* at 1229-31.

* * * *

In addition to sufficiency of the evidence, Mr. Hebert and Mr. Ruiz raised other issues on appeal, which the panels did not address.

II. DISCUSSION

The following discussion analyzes the four questions we asked the parties to address in our en banc order.

A. Indian Status as an Affirmative Defense

The main issue before us is whether, in a § 1152 prosecution where the victim is an Indian, (1) a defendant’s non-Indian status an essential element of § 1152 on which the government bears the burden of production, or (2) based on § 1152’s intra-Indian exception, the defendant’s Indian status is an affirmative defense on which the defendant bears the burden of production. *Prentiss II* chose the former. We choose the latter.

The government argues that a defendant’s Indian status is an affirmative defense under *McKelvey* because statutory exceptions to criminal liability—such as § 1152’s intra-Indian exception—generally create affirmative defenses and because information about a defendant’s Indian status is peculiarly within the defendant’s knowledge. U.S. Suppl. Br. at 3-5.

Mr. Ruiz argues that *McKelvey* does not apply because § 1152 does not define a criminal offense; that because victim status is an element, the defendant’s status must also be an element; and that diversity of Indian status is a jurisdictional element for a § 1152 prosecution. Mr. Hebert “adopts by reference . . . in full” these arguments “in Mr. Ruiz’s Supplemental Response Brief” as “additional and alternative grounds” to resolve this appeal. Hebert Suppl. Br. at 2; *see* Fed. R. App. P. 28(i). Mr. Hebert also argues that diversity of Indian status is necessary to establish federal court subject matter jurisdiction.

We agree with the government.

1. Text, Structure, and Statutory Exceptions

a. Text and structure

We start with § 1152’s text and structure.

The first paragraph of § 1152 states that “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.” As the government argues, this provides “an ‘accurate[]’ and ‘clear[]’ definition that establishes a perfectly intelligible general

rule ‘without providing an intra-Indian exception.’” U.S. Suppl. Br. at 8 (quoting *Haggerty*, 997 F.3d at 300). The Supreme Court recently described § 1152 this way: “The text of the [General Crimes Act] simply ‘extend[s]’ federal law to Indian country” *Castro-Huerta*, 597 U.S. at 639.

The second paragraph of § 1152 lists three exceptions to that general rule: (1) “offenses committed by one Indian against the person or property of another Indian”; (2) “any Indian committing any offense in the Indian country who has been punished by the local law of the tribe”; and (3) “any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.”

Nowhere does the statute state that a defendant’s Indian status is an element.

b. McKelvey and Cunningham

The Supreme Court’s *McKelvey* decision counsels in favor of treating these exceptions as affirmative defenses for which the defendant bears the burden of production. The Court said,

By repeated decisions it has come to be a 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 . . . and that it is incumbent on one who relies on such an exception to set it up and establish it.

McKelvey, 260 U.S. at 357. Long before *McKelvey*, the Supreme Court called this “the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes.” *United States v. Dickson*, 40 U.S. (15

Pet.) 141, 165 (1841). In *Dixon v. United States*, 548 U.S. 1 (2006), the Court recognized *McKelvey*’s “settled rule.” *Id.* at 13.

The Court recently reaffirmed this principle in *Cunningham v. Cornell University*, 604 U.S. 693 (2025), stating that exceptions to a statute “ordinarily constitute affirmative defense[s] that are entirely the responsibility of the party raising them.” *Id.* at 701 (quotations omitted). Mr. Hebert and Mr. Ruiz notably “fail to offer a principled basis for treating some, but not all, of the . . . exemptions as elements incorporated into [§ 1152’s] prohibitions.” *Id.* at 704.

As noted above, in *Prentiss II* we opted not to follow *McKelvey*’s general rule to § 1152’s intra-Indian exception and applied an earlier principle from *Cook* that some “exceptions” are “*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*” that the government must allege them in the indictment. *Prentiss II*, 256 F.3d at 979 (quoting *Cook*, 84 U.S. (17 Wall.) at 173-74, and adding emphasis.)¹³

¹³ After the passage quoted above, the *Cook* Court said,

[B]ut if the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defence and must be shown by the accused.

84 U.S. (17 Wall.) at 173-74. This passage more closely matches the two paragraphs of § 1152 and supports that the defendant’s Indian status is an affirmative defense.

But in *Cunningham*, the Court clarified that it has “applied the *Cook* rule narrowly, such as when an exception to a criminal offense is contained within the same sentence of the provision defining the offense.” 604 U.S. at 707. And it said that “[e]ven in the criminal context, it remains a ‘settled rule’ ‘that an indictment or other pleading . . . need not negative the matter of an exception made by a proviso or other distinct clause.’” *Id.* (quoting *Dixon*, 548 U.S. at 13). With the benefit of *Cunningham*, it is now apparent that *Prentiss II* was incorrect to apply the *Cook* exception, rather than *McKelvey*’s general rule, to § 1152. Mr. Hebert and Mr. Ruiz do not argue otherwise.

In sum, the general rule that exceptions to statutory liability are affirmative defenses weighs in favor of holding that a defendant’s Indian status is an affirmative defense in a § 1152 prosecution with an Indian victim.

2. Mr. Ruiz’s and Mr. Hebert’s Arguments

a. Substantive criminal offense

Rather than argue that the *Cook* exception to *McKelvey* applies to § 1152, Mr. Ruiz instead argues that *McKelvey*’s rule does not apply to § 1152 “because § 1152 does not define a criminal offense.” Ruiz Suppl. Br. at 7. He argues that “*McKelvey*’s default rule only applies where a ‘statute states a clear, definite, and general offense, and then excepts certain classes or acts from its scope.’” *Id.*

See United States v. Carey, 929 F.3d 1092, 1099-1103 (9th Cir. 2019) (recognizing an affirmative defense based on this approach).

(quoting *Nicoli v. Briggs*, 83 F.2d 375, 379 (10th Cir. 1936)). This argument is unpersuasive for several reasons.

First, Mr. Ruiz has not offered any authority to support the assertion that *McKelvey* applies only to statutes that set out the substantive elements of an offense. And he ignores that both the majority and the dissent in *Prentiss II* assessed § 1152 under the *McKelvey*/*Cook* paradigm. See *Prentiss II*, 256 F.3d at 978-80.

Second, although § 1152 “asserts federal authority over offenses defined by other federal statutes,” Ruiz Suppl. Br. at 7, it also requires the government to prove an element in addition to the elements of the relevant federal enclave offenses—it must prove that the offense occurred in Indian country. See *Haggerty*, 997 F.3d at 300.

Third, Mr. Ruiz’s argument that *McKelvey*’s rule does not apply because § 1152 does not “define the elements of criminal offenses that can be prosecuted,” Ruiz Suppl. Br. at 7, cannot be squared with his and Mr. Hebert’s insistence that a defendant’s non-Indian status is an essential element of the offense under § 1152.

Fourth, even if, as Mr. Ruiz argues, § 1152 is “categorically different” than other statutes assessed under *McKelvey* because it sets out “exception[s] to the expansion of federal power” rather than “a justification or excuse for breaking the law,” Ruiz Suppl. Br. at 7-8, that alone does not explain why *McKelvey*’s general rule should not guide our statutory interpretation.

b. Victim and defendant status

Mr. Ruiz argues that proper construction of § 1152 necessitates that defendants' and victims' Indian statuses both be elements or both be affirmative defenses, and that the Supreme Court "long ago foreclosed the possibility that" the non-Indian status of a victim is not an element." Ruiz Suppl. Br. at 8-9. For the latter point, he relies on a passage from *Famous Smith* that paraphrased a jury instruction: "that [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. He then describes *Famous Smith* as holding that "the 'government was bound to establish' that the victim was 'not an Indian,'" Ruiz Suppl. Br. at 9 (quoting *Famous Smith*, 151 U.S. at 55), and argues that because victim status must be an element, defendant status cannot be an affirmative defense. *Id.* We are not persuaded.

First, the first sentence in *Famous Smith* states, "This case . . . raises but a single question, namely, whether . . . the undisputed testimony did not . . . show [the victim] to have been an Indian." *Id.* at 53. *Famous Smith* thus concerned the sufficiency of the evidence, not the allocation of the burden of production on the victim's status. And it did not concern the defendant's Indian status at all.

Second, immediately following its description of the jury charge—"that [the victim] was a white man, and not an Indian, was a fact which the government was

bound to establish”—the Court declined to “express[] an opinion as to the correctness of the legal propositions embodied in this charge.” *Id.* at 55.¹⁴

Third, *Famous Smith* concerned proof that the victim was non-Indian. The issue before us is whether the defendant’s Indian status is an element or an affirmative defense in a § 1152 prosecution when the victim is an Indian.

Finally, *McKelvey* and *Cunningham*’s long precedential pathway interpreting a criminal statute’s exception as an affirmative defense further sidelines *Famous Smith*.

Mr. Ruiz is therefore incorrect that *Famous Smith*—an opaquely written sufficiency-of-the-evidence case from 1894¹⁵—compels allocation of the burden of production on victim status to the government, let alone the burden of production on defendant status.

c. Jurisdictional element

Mr. Ruiz argues that diversity of status in a § 1152 prosecution is a jurisdictional element that the government must allege and prove so that application

¹⁴ In a post-oral argument Rule 28(j) letter, Mr. Ruiz persists in insisting that *Famous Smith* decided “the government bears the burden of proving victim status in § 1152 prosecutions,” pointing to a statement in the syllabus prepared by the Reporter of Decisions. See August 24, 2026 letter filed under Federal Rule of Appellate Procedure 28(j). But as the Supreme Court has repeatedly said, the syllabus accompanying a Supreme Court decision “constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.” *E.g.*, *Cunningham*, 604 U.S. at 693 n.*. This disclaimer counsels the reader to discern the Court’s position based on the text of the opinion, not on summaries prepared by a nonjudicial officer.

¹⁵ The Supreme Court has cited *Famous Smith* only once, in 1895. See *Sparf v. United States*, 156 U.S. 51, 100 (1895).

of the statute falls within Congress’s constitutional authority. Ruiz Suppl. Br. at 1-6. We understand him to contend that Indian status in § 1152 serves a function akin to a federal statute’s interstate commerce element to ensure its application on a case-by-case basis falls within Congress’s Commerce Clause power. *See United States v. Lopez*, 514 U.S. 549, 561 (1995) (stating that jurisdictional elements “ensure, through case-by-case inquiry, that the [conduct] in question affects interstate commerce”);¹⁶ *United States v. Chavarria*, 140 F.4th 1257, 1259 (10th Cir. 2025) (“*Federal crimes require some sort of jurisdictional hook to sort the prohibited activity into one of the government’s enumerated and limited powers, such as its power over interstate commerce.*”) Mr. Ruiz does not persuade us for several reasons.

First, “Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country.” *United States v. Antelope*, 430 U.S. 641, 648 (1977); *see Haaland v. Brackeen*, 599 U.S. 255, 272 (2023) (characterizing “Congress’s power to legislate with respect to the Indian tribes as plenary” (quotations omitted)). Thus, regardless of where it places the burden of proving the defendant’s Indian status, § 1152 is a valid exercise of Congress’s powers.

Second, § 1153 further undercuts Mr. Ruiz’s argument. It authorizes prosecutions of Indian-on-Indian crime in Indian country, which the Supreme Court

¹⁶ In *Lopez*, the Supreme Court held the Gun-Free School Zone Act of 1990, which made it a crime for an individual to possess a gun in a school zone, was outside of Congress’s regulatory authority. 514 U.S. at 567-68. The Court said it was relevant to the facial constitutionality of the Act that it “contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” *Lopez*, 514 U.S. at 561.

upheld as within Congress’s power. *Kagama*, 118 U.S. at 379. Congress thus has power to apply federal criminal law in Indian country to crimes that otherwise would be exempted under the intra-Indian exception in § 1152.

Third, Mr. Ruiz’s argument misses the mark. The jurisdictional element in § 1152 is that the crime was committed in Indian country, not the Indian statuses of the parties. *See United States v. Jackson*, 82 F.4th 943, 947 (10th Cir. 2023) (recognizing Indian country as a “jurisdictional element”); *United States v. Tony*, 637 F.3d 1153, 1158-59 (10th Cir. 2011) (same).¹⁷ Indeed, the first paragraph of § 1152 does not mention Indian status, which stands in contrast to the express jurisdictional elements in other criminal statutes. *See, e.g.*, 18 U.S.C. § 922(g) (making unlawful a felon’s possession of a firearm that “has been shipped or transported in interstate or foreign commerce”). Proving the offense occurred in Indian country is the

¹⁷ We note that in *United States v. Reza-Ramos*, 816 F.3d 1110 (9th Cir. 2016), a murder prosecution of a non-Indian under § 1152, the Ninth Circuit held that the government bears the burden of proving the victim was an Indian as a “jurisdictional element.” *Id.* at 1119. The court recognized, citing *Hester* and *McKelvey*, that the burden of proving the defendant’s Indian status under § 1152’s intra-Indian exception “is on the defendant” as “an affirmative defense.” *Id.* at 1120. But the court further said that, under *McBratney*, a non-Indian defendant’s burden of proving the victim was Indian (to avoid falling into the *McBratney* exception for non-Indian against non-Indian crime) “is jurisdictional.” *Id.* at 1120-21.

We are not clear on whether the Ninth Circuit’s reference to “jurisdictional element” aligns with the common usage of that term: a “jurisdictional element . . . ties the substantive offense . . . to one of Congress’s constitutional powers.” *Torres v. Lynch*, 578 U.S. 452, 457 (2016). Nor do we express an opinion on the merits of its holding because we do not need to address the question presented in *Reza-Ramos*. Based on the question presented here, we hold, as did *Hester* and *Haggerty*, that in a § 1152 prosecution where the victim is an Indian, the defendant’s Indian status is an affirmative defense and not a jurisdictional element.

“jurisdictional hook” establishing that “the regulated conduct possesses the requisite connection to” congressional authority. *United States v. Patton*, 451 F.3d 615, 632 (10th Cir. 2006).¹⁸

d. Subject matter jurisdiction

Mr. Hebert argues that diversity of Indian status is necessary to the subject-matter jurisdiction of federal courts to hear Indian country criminal cases, and therefore the government must plead and prove it.¹⁹ Hebert Suppl. Br. at 4-18. He points to language in various Indian law criminal cases to support his interpretation of § 1152. *Id.* at 6-13.²⁰ But his argument is misguided.

¹⁸ Mr. Ruiz also argues the doctrine of constitutional avoidance forecloses treating a defendant’s Indian status as an affirmative defense because doing so “would transform *all* federal enclave offenses committed in Indian country into federal crimes, no matter who committed them” and because “[i]t is highly doubtful that the Constitution authorizes Congress to create federal crimes in Indian country without any other jurisdictional hook.” Ruiz Suppl. Br. at 12-13. But as noted above, “Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country.” *Antelope*, 430 U.S. at 648.

Mr. Ruiz finally argues that the rule of lenity “compels” treating diversity of Indian status as a “jurisdictional element.” Ruiz Suppl. Br. at 16. But there is no “ambiguity concerning the ambit of” Congress’s authority to enact § 1152. *See id.* (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

¹⁹ This position conflicts with Judge Baldock’s majority opinion in *Prentiss II*, which held that “the failure of an indictment to allege an essential element of a crime does *not* deprive a district court of subject matter jurisdiction.” 256 F.3d at 981.

²⁰ *See Crow Dog*, 109 U.S. at 571 (This “is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law.”); *Kagama*, 118 U.S. at 383 (“[S]ection 2146 of the Revised Statutes . . . expressly excludes from [federal court] jurisdiction the case of a crime committed by one Indian against another in the Indian country.”); *Famous Smith*, 151 U.S. at 53 (“If [the victim was Indian], then it is clear the court had no jurisdiction of the offense.”); *McBratney*, 104 U.S. at 624 (“The single question . . . in this case is . . .

“[I]n every federal criminal prosecution [subject-matter jurisdiction] comes from 18 U.S.C. § 3231,” and “[t]hat’s the beginning and the end of the ‘jurisdictional’ inquiry.” *Tony*, 637 F.3d at 1158 (quoting *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003)). Section 3231 grants federal district courts exclusive original jurisdiction “of all offenses against the laws of the United States.”

The Supreme Court has repeatedly cautioned that “[j]urisdiction . . . is a word of many, too many, meanings,” and courts ‘have more than occasionally’ used it to describe rules beyond those governing a court’s adjudicatory authority.” *Santos-Zacaria v. Garland*, 598 U.S. 411, 421 (2023) (quoting *Fort Bend County. v. Davis*, 587 U.S. 541, 547-48, 547 n.4 (2019)). Insofar as the Supreme Court recently said that “Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian,” *United States v. Bryant*, 579 U.S. 140, 147 (2016), it can only have meant that Congress excepted such crimes from those

whether the Circuit Court of the United States for the District of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute Reservation, and within the limits of the State of Colorado”); *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993) (“Criminal jurisdiction over offenses committed in ‘Indian country’ . . . is governed by a complex patchwork of federal, state, and tribal law.” (citations omitted)); *Keeble v. United States*, 412 U.S. 205, 209-10 (1973) (“Although recognizing the power of Congress to confer such jurisdiction on the federal courts, the [*Crow Dog*] Court reasoned that, in the absence of explicit congressional direction, the Indian tribe retained exclusive jurisdiction to punish [intra-Indian offenses].”); *United States v. Bryant*, 579 U.S. 140, 147 (2016) (“Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian.”); *McGirt v. Oklahoma*, 591 U.S. 894, 929 (2020) (“[T]his Court has long ‘require[d] a clear expression of the intention of Congress’ before the state or federal government may try Indians for conduct on their lands.” (quoting *Crow Dog*, 109 U.S. at 572)).

“offenses against the laws of the United States” over which a federal court has jurisdiction, 18 U.S.C. § 3231.

Mr. Hebert nonetheless argues that a series of federal Indian law cases, most significantly *Crow Dog*, compel the conclusion that diversity of Indian status is a “requirement to federal jurisdiction.” Hebert Suppl. Br. at 3. He notes that the *Crow Dog* Court explained that the case involved a “question of jurisdiction” and emphasized the “special and limited jurisdiction” of the court in which *Crow Dog* was convicted. *Id.* at 6-7 (quoting *Crow Dog*, 109 U.S. at 562, 571). He argues that “[t]his language is consistent with the language used today to refer to jurisdiction in a more formal, rather than colloquial sense.” *Id.* at 7.

But the Supreme Court has explained why the “elastic concept of jurisdiction” referred to in *Crow Dog* “is not what the term ‘jurisdiction’ means today, *i.e.*, ‘the courts’ statutory or constitutional *power* to adjudicate the case.” *United States v. Cotton*, 535 U.S. 625, 630 (2002) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998)). *Crow Dog* “is a product of an era in which [the Supreme] Court’s authority to review criminal convictions was greatly circumscribed” because (1) “a defendant could not obtain direct review of his criminal conviction in the Supreme Court” and (2) “[t]he Court’s authority to issue a writ of habeas corpus was limited to cases in which the convicting ‘court had no jurisdiction to render the judgment which it gave.’” *Id.* at 629-30 (quoting *Ex parte Bain*, 121 U.S. 1, 3 (1887)). “The Court’s desire to correct obvious constitutional violations led to a somewhat expansive notion of ‘jurisdiction,’ which was more a fiction than anything

else” *Id.* at 630 (citations and quotations omitted). We therefore decline to read the language in Mr. Hebert’s cited cases as more than “example[s] . . . of how [the Supreme] Court used to apply the term ‘jurisdiction’ in a ‘profligate’ manner.” *Harrow v. Dep’t of Def.*, 601 U.S. 480, 489 n.1 (2024) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006)).

In *Louie v. United States*, 254 U.S. 548 (1921), the Supreme Court clarified that § 1153’s limitation to Indian country was “a question, not of the jurisdiction of [the convicting] court, but of the jurisdiction of the United States.” *Id.* at 550. The defendant in that case was indicted under the Major Crimes Act in federal court and moved to dismiss the indictment for lack of jurisdiction. *Id.* at 549. He appealed the denial of his motion to the Ninth Circuit, which dismissed the writ of error “on the ground that, since the sole question presented was whether the District Court had jurisdiction, its decision could be reviewed only by direct writ of error from [the Supreme Court] to the District Court.” *Id.* The Supreme Court reversed, saying that because the question of whether “an essential element of the crime against the United States”—its occurrence in Indian country—“was lacking . . . went to the merits, there was no basis for a direct writ of error from this court.” *Id.* at 550-51. *Louie* strongly supports that the exceptions in § 1152, like the Indian country locus in § 1153, are not required to establish federal court subject-matter jurisdiction.

Mr. Hebert further argues that “Section 1152 strips federal courts of jurisdiction over Indian-on-Indian criminal offenses.” Hebert Suppl. Br. at 12. But § 1152 does not “use[] jurisdictional language” or “impose[] jurisdictional

consequences” as a jurisdiction-stripping statute would do. *Patchak v. Zinke*, 583 U.S. 244, 251-52 (2018) (plurality) (saying a statute “stat[ing] that an ‘action’ . . . ‘shall not be filed or maintained in a Federal court’” and “‘shall be promptly dismissed’” was “best read as a jurisdiction-stripping statute”). “The text of the [General Crimes Act] simply ‘extend[s]’ federal law to Indian country” *Castro-Huerta*, 597 U.S. at 639 (quoting 18 U.S.C. § 1152). We see no reason to interpret its exceptions as stripping federal courts of jurisdiction to adjudicate offenses against the United States.²¹

* * * *

In sum, the general rule that statutory exceptions are interpreted as affirmative defenses supports the government’s interpretation of § 1152 that a defendant’s Indian status is an affirmative defense. And contrary to the Defendants’ arguments, diversity of Indian status is not a jurisdictional element and is not necessary to the federal courts’ subject-matter jurisdiction over these offenses. We therefore hold, overruling *Prentiss II* in part, that in § 1152 prosecutions where the victim is an

²¹ See also *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013) (“To ward off profligate use of the term ‘jurisdiction,’ we have adopted a readily administrable bright line for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has clearly state[d] that the rule is jurisdictional; absent such a clear statement, we have cautioned, courts should treat the restriction as nonjurisdictional in character.” (citations and quotations omitted)).

Indian, a defendant’s Indian status is an affirmative defense on which the defendant bears the initial burden of production.²²

B. *Burden of Persuasion*

The burden of production on a “recognized defense” is generally “not onerous.” *United States v. Brown*, 128 F.4th 1358, 1366 (10th Cir. 2025). When a defendant satisfies the burden on the affirmative defense of Indian status, requiring the government to disprove Indian status would implicate the concerns expressed in the panel opinions about the difficulty of proving a negative when the relevant evidence is more likely in the defendant’s possession—concerns that animated our grant of en banc review. Because determining who has the burden of production in this context goes hand-in-hand with deciding who has the burden of persuasion, we asked the parties in our en banc order to brief the persuasion issue.²³ Addressing it

²² The *Prentiss II* decision holding that the defendant’s Indian status is an element of § 1152 has not aged well. In *Dixon*, the Supreme Court reaffirmed the *McKelvey* rule of interpretation, and last year it did so again in *Cunningham*, which limited the applicability of *Cook*, on which *Prentiss II* principally relied. In this case, the Defendants do not even cite *Cook* and instead rely on theories to uphold *Prentiss II* that this court did not mention in its opinion.

The Supreme Court has recognized that *stare decisis* is not an “inexorable command” and that reliance interests are at a low ebb “in cases . . . involving procedural and evidentiary rules” that do “not affect the way in which parties order their affairs.” *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (citations and quotations omitted). Whether Indian status is an element or an affirmative defense does not affect how parties may order their affairs under §§ 1152 and 2241(c).

²³ See *Kirkendall v. Dep’t of Army*, 479 F.3d 830, 835 n.2 (Fed. Cir. 2007) (en banc) (“As a general rule, the scope of our *en banc* review is limited to the issues set out in the *en banc* order.”); *United States v. Padilla*, 415 F.3d 211, 217 (1st Cir.

here allows us to state a complete standard for the benefit of litigants and district courts, including any retrial on remand in these cases.²⁴

For the reasons that follow, we hold that the burden of production and persuasion on Indian status should fall on the defendant in a § 1152 prosecution where the victim is an Indian. The case law requires this allocation, and the peculiar knowledge of the defendant supports it.

1. Case Law on Affirmative Defense Burden

a. Legal background

“An affirmative defense may impose various burdens on the defendant: (1) the burden of pleading (the burden of introducing a defense for consideration); (2) the burden of production (the burden of adducing sufficient evidence to support the presence of a defense); or (3) the burden of persuasion (the burden of convincing the tribunal of the existence of the facts supporting the defense).” *Haggerty*, 997 F.3d at 299 n.10 (citations and quotations omitted).

“[T]he common-law rule was that the defendant had the burden of production and persuasion on any affirmative defense.” *Ruan v. United States*, 597 U.S. 450, 475 (2022) (Alito, J., concurring). In *Dixon*, the Supreme Court said, “Similarly, . . .

2005) (en banc) (“The scope of en banc review ordinarily is delimited by the order convening the en banc court.”)

²⁴ As we said in a recent en banc decision about a “purely legal issue” that was likely to recur on remand for retrial, “it [is] proper for us to decide this issue for the guidance of the district court on remand.” *Exby-Stolley v. Bd. of Cnty. Comm’rs*, 979 F.3d 784, 820 (10th Cir. 2020) (en banc).

where Congress has enacted an affirmative defense in the proviso of a statute, the ‘settled rule [is] . . . that it is incumbent on one who relies on such an exception to set it up and establish it.’” 548 U.S. at 13 (quoting *McKelvey*, 260 U.S. at 357).

The Supreme Court has recognized an exception to the general rule grounded in the Due Process Clause: “The [government] is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense . . . negate[s] an element of the crime.” *Smith v. United States*, 568 U.S. 106, 110 (2013) (quotations omitted); see *United States v. Unser*, 165 F.3d 755, 764 (10th Cir. 1999) (“[W]hen evidence has been produced of a defense which, if accepted by the trier of fact, would negate an element of the offense, the government must bear the ultimate burden of persuasion on that element, including disproving the defense.”); *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985).

But when the defense instead “‘excuse[s] conduct that would otherwise be punishable,’ but ‘does not controvert any of the elements of the offense itself,’ the Government has no constitutional duty to overcome the defense beyond a reasonable doubt.” *Smith*, 568 U.S. at 110 (quoting *Dixon*, 548 U.S. at 6); see *Patterson v. New York*, 432 U.S. 197, 210 (1977) (stating the burden of persuasion on an affirmative defense may be on the defendant if the defense does not negate an element of the offense). Here, because Indian status is not an element of the offense under § 1152, the exception does not apply.

We also note that the government has the burden of proving a jurisdictional element. See *United States v. Sturm*, 672 F.3d 891, 901-02 (10th Cir. 2012); Edward

Hagen, *Federal Crimes* § 1:1 (2026 ed.) (stating “jurisdictional elements are part of the government’s burden of proof to the jury”). But as explained above, a defendant’s Indian status is not a jurisdictional element.

b. Application

The government argues that “because Congress has not addressed the burden of persuasion under Section 1152, it is presumed to have intended to apply the common-law rule, under which a defendant asserting an affirmative defense bears both the burdens of production and persuasion.” U.S. Suppl. Br. at 19. Mr. Ruiz argues that “Indian status would be most like statute of limitations defenses, which ‘reflect[] a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution,’ and which “[t]he Supreme Court has made clear that . . . ‘the Government . . . bears the burden of establishing’” it does not apply. Ruiz. Suppl. Br. at 17 (first quoting *Smith*, 568 U.S. at 112; and then quoting *Musacchio v. United States*, 577 U.S. 237, 248 (2016)). Mr. Hebert adopts this argument by reference. Hebert Suppl. Br. at 2. We agree with the government that the burden of persuasion as to Indian status is properly allocated to defendants asserting the defense.

First, the text of § 1152 gives no indication that Congress intended to disturb the general rule under *Dixon* that defendants bear the burden of persuasion on affirmative defenses. *See Smith*, 568 U.S. at 112 (“Because Congress did not address in 21 U.S.C. § 846 or 18 U.S.C. § 1962(d) the burden of proof for withdrawal, we presume that Congress intended to preserve the common-law rule.”).

Second, Mr. Ruiz’s analogy to statute-of-limitations defenses falls short. Although statutes of limitations and § 1152’s exceptions similarly “do[] not call the criminality of the defendant’s conduct into question, but rather reflect[] a policy judgment by the legislature” about the scope of the relevant statute, *Smith*, 568 U.S. at 112, the same could be said about any affirmative defense that does not negate an element of the offense. As the government points out, “[a]ll affirmative defenses narrow the range of situations otherwise covered by an offense’s elements.” U.S. Suppl. Br. at 25.

Mr. Ruiz points out that the Fifth and Ninth Circuits have held that the government bears the ultimate burden of persuasion once a defendant meets the burden of production on Indian status. The Ninth Circuit in *Hester* said that “[o]nce the defendant properly raises the issue of his Indian status, then the ultimate burden of proof remains . . . upon the Government.” 719 F.2d at 1043. And the Fifth Circuit in *Haggerty* held that “the Government retains the ultimate burden of persuasion because a defendant’s Indian/non-Indian status, via the operation of § 1152, affects the applicable scope of the relevant federal enclave law’s jurisdictional situs element.” 997 F.3d at 299.

We agree with the government that the Ninth and Fifth Circuits’ analyses “of the allocation of the burden of persuasion” were too insubstantial to be persuasive, “each devoting just a single sentence to the matter.” U.S. Suppl. Br. at 23-24. Neither considered the general rule on the allocation of the burden of persuasion or the informational asymmetry that counsels that the defendant should bear the burden

of persuasion. The Ninth Circuit offered no reasoning to support its conclusion.²⁵

The Fifth Circuit and Mr. Ruiz both rely on the 1894 *Famous Smith* decision to support the ultimate burden resting with the Government. *Haggerty*, 997 F.3d at 302; Ruiz Suppl. Br. at 17.²⁶ But *Famous Smith*, as noted above, concerned the victim’s non-Indian status and said nothing about the burden of persuasion on a defendant’s Indian status. *See* 151 U.S. at 55 (“That [the victim] was a white man, and not an Indian, was a fact which the government was bound to establish . . .”).

Finally, we reject the Fifth Circuit’s conclusion that “the Government retains the ultimate burden of persuasion because a defendant’s Indian/non-Indian status, via the operation of § 1152, affects the applicable scope of the relevant federal enclave law’s jurisdictional situs element.” *Haggerty*, 997 F.3d at 299. As the government points out, “[t]hat the crime was committed by an Indian against an Indian may limit

²⁵ In *Hester*, the Ninth Circuit cited *United States v. Guess*, 629 F.2d 573 (9th Cir. 1980), to support its conclusion. 719 F.2d at 1043. *Guess* in turn relied on *Davis v. United States*, 160 U.S. 469, 487 (1895), for the proposition that “[t]he general rule is that once a criminal defendant satisfies his burden of production with respect to an affirmative defense, the prosecution must prove the inapplicability of this defense beyond a reasonable doubt.” *Guess*, 629 F.2d at 577 n.4. But the Supreme Court later clarified that “*Davis* relied on the heightened *mens rea* applicable to the particular statute at issue,” and “was not constitutionally mandated.” *Dixon*, 548 U.S. at 12. It said that *Davis* did not overthrow “the old common-law rule” and reaffirmed that in the absence of congressional language to the contrary, we are to assume that the common-law rule applies. *Id.* at 9, 13-14. The Ninth Circuit therefore relied on the wrong default rule in reaching its conclusion.

²⁶ The Fifth Circuit also relied on *Lucas v. United States* to support its conclusion on the burden of persuasion. *Haggerty*, 997 F.3d at 302. But as explained above, *Lucas* did not interpret § 1152 or its predecessor statute, 163 U.S. at 614-15, and therefore has no bearing on our interpretation of § 1152.

the reach of” § 1152’s first paragraph, “but it in no way ‘negates’ the fact that the crime occurred in Indian Country.” U.S. Suppl. Br. at 26.

Thus, under *Dixon* and *Smith*, the defendant bears the burden of production and persuasion to prove the affirmative defense he is an Indian.

2. Peculiar Knowledge

Defendants’ better access to Indian status information also supports allocating the burden of persuasion to them. The Supreme Court has recognized that “where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.” *Dixon*, 548 U.S. 1, 9 (2006) (quoting 2 J. Strong, *McCormick on Evidence* § 337, at 413 (5th ed. 1999)).²⁷

We previously have explained why a defendant’s Indian status is more likely to be known to the defendant than to the government. *See Ruiz*, 164 F.4th at 1229; *see also Hebert*, 159 F.4th at 790 (Hartz, J., concurring) (recognizing the difficulty of proving that a defendant’s “complete family tree contains no Indian blood whatsoever and that he has no ties to a recognized tribe anywhere in this country” but noting that “if there were evidence of Defendant’s Indian status, Defendant could

²⁷ *See also Selma, R. & D.R. Co. v. United States*, 139 U.S. 560, 568 (1891) (“[I]t has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.” (quotations omitted)); *United States v. Hartsock*, 347 F.3d 1, 10 (1st Cir. 2003) (allocating the “burden of proof”—“burdens of production and persuasion”—to the defendant on an affirmative defense because he “is likely to have significantly more knowledge than the federal prosecutor”).

easily point to it and do so without implicating in any way his culpability for the underlying crime”). A defendant’s peculiar knowledge of his own status thus counsels in favor of assigning him not only the initial burden of production on that issue but also the burden of persuasion.

This point further refutes Mr. Ruiz’s argument that the government should bear the burden on the defendant’s Indian status similar to its burden on statutes of limitations. Unlike statutes of limitations, the “informational asymmetry” between the defendant and prosecution on the former’s Indian status “heavily favors” keeping the burden of persuasion with the defendant. *Smith*, 568 U.S. at 112 (“‘[W]here 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.” (quoting *Dixon*, 548 U.S. at 9)). It is far more manageable for the government to prove that an offense occurred within the applicable limitations period than to prove that a defendant is non-Indian beyond a reasonable doubt. *Id.* at 113 (“It would be nearly impossible for the Government to prove the negative that an act of withdrawal never happened.”)

* * * *

In sum, under *Dixon* and *Smith* and the parties’ relative access to pertinent information, we hold that the defendant retains the burden of persuasion if he raises Indian status as a defense to a § 1152 prosecution with an Indian victim.

C. Indian Canon

In our order granting en banc rehearing, we asked the parties to brief how the Indian canon of interpretation may affect our analysis. Under this canon, “federal

statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.” *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (citing *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989)); see *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). We conclude that the Indian canon at most plays a limited role in this matter.

The government argues the Indian canon supports its interpretation of § 1152. It explains that the canon “is ‘rooted in the unique trust relationship between the United States and the Indians’” and that the “trust relationship extends a ‘duty of protection’ to the tribes.” U.S. Suppl. Br. at 13 (first quoting *Oneida County v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985); and then quoting *Kagama*, 118 U.S. at 384). The government contends that treating Indian status as an affirmative defense advances “tribal interest[s] in vindicating the rights of Indian victims” and “in community safety in Indian Country” and “respects tribal sovereignty” because “[t]here is simply no reason to think that Indian defendants will fail to establish their statuses by a preponderance.” *Id.* at 14-15.

Mr. Ruiz argues that because the canon “arises from the ‘unique trust relationship between the federal government and Native Americans,’” it therefore “entails protecting ‘[t]he right of tribal self-government.’” Ruiz Suppl. Br. at 14 (quoting *Ramah Navajo Chapter*, 112 F.3d at 1462). He asserts that “shifting the burden to the defendant does not honor the Indian canon of statutory interpretation, because it subordinates, rather than prioritizes, tribal interests.” *Id.* He argues that “obtaining justice for Indian victims” and “community safety in Indian Country”

have “[no]thing to do with tribal sovereignty” and are instead ““federal interest[s]’ that arise from policies antithetical to sovereign independence.” *Id.* at 15 (quoting *Castro-Huerta*, 597 U.S. at 650).²⁸

As a threshold matter, we are not convinced that § 1152 is ambiguous in a way that would invoke the Indian canon. *See Ramah Navajo Chapter*, 112 F.3d at 1461 (“[F]ederal statutes are to be construed liberally in favor of Native Americans, with *ambiguous provisions* interpreted to their benefit.” (emphasis added)). Section 1152 unambiguously extends federal enclave criminal law to Indian country, with three exceptions. “The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.” *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).²⁹

Even if the Indian canon is in play, the government’s position finds support in *Negonsott v. Samuels*, 507 U.S. 99 (1993), which interpreted the Kansas Act granting “jurisdiction to a State over offenses involving Indians committed in Indian country.”

²⁸ Mr. Hebert argues the Indian canon reinforces that § 1152 “grant[ed] to Indian tribes the right and power to conduct criminal trials over Indians who committed crimes against other Indians within their lands” by “expressly limiting the scope of federal jurisdiction.” Hebert Suppl. Br. at 16-17. He does not explain how this should affect our analysis of whether Indian status is an affirmative defense. And apart from § 1152 not serving as a subject matter jurisdiction statute, § 1152 unambiguously exempts Indian-on-Indian crimes in its exceptions paragraph.

²⁹ *See Cohen’s Handbook of Federal Indian Law* § 3.01[3] (Nell Jessup Newton & Kevin K. Washburn eds., 2024) (stating Indian “canons come into play only when ambiguity exists”).

Id. at 103. The Supreme Court rejected the argument that the Indian canon warranted reading the Act to exclude major crimes from Kansas’s criminal jurisdiction: “We see no reason to equate ‘benefit of dependent Indian tribes,’ . . . with ‘benefit of accused Indian criminals,’ without regard to the interests of the victims of these crimes or of the tribe itself.” *Id.* at 110 (quoting *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)).

Mr. Ruiz and Mr. Hebert have not persuasively explained how treating Indian status as an affirmative defense materially affects tribal sovereignty. Nor could they: Resolution of the issue presented here does not affect whom § 1152 covers, where it may be applied, or the conduct that may be prosecuted and thus does not significantly implicate “structural sovereignty.” See *Cohen’s Handbook on Federal Indian Law* § 3.01[2] (Nell Jessup Newton & Kevin K. Washburn eds., 2024). The Indian canon at most bears minimally on our interpretation of whether Indian status is an affirmative defense under § 1152. We do not rely on it for our holding in this matter.

D. Vacate and Remand

Based on the foregoing, we hold, contrary to *Prentiss II*, that in a prosecution under § 1152 where the victim is an Indian, the defendant’s Indian status is an affirmative defense that the defendant must prove. We therefore vacate the panel opinions because they were premised on *Prentiss II*. See *Exby-Stolley v. Bd. of Cnty. Comm’rs*, 979 F.3d 784, 788 (10th Cir. 2020) (en banc) (vacating “the original [panel] decision” and remanding for new trial); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 819 (10th Cir. 2012) (en banc) (reversing prior precedent and vacating

panel opinion); *United States v. Nacchio*, 555 F.3d 1234, 1259 (10th Cir. 2009) (en banc) (vacating part of panel opinion); *United States v. Perez*, 989 F.2d 1574, 1577 (10th Cir. 1993) (en banc) (vacating part of panel opinion and “replac[ing] it” with a revision to prior precedent).

The final question concerns remand of Mr. Hebert’s and Mr. Ruiz’s cases for retrials consistent with this opinion.

1. Defendants’ Arguments Against Retrial

Although, as discussed below, we leave the decision to remand for retrial to the panels in each case, we reject the Defendants’ arguments that double jeopardy and ex post facto due process limitations preclude remand for retrial.

a. Double jeopardy

Mr. Ruiz points out that double jeopardy “prohibits retrial after an acquittal by a jury as well as after the functional equivalent of an acquittal, to include a determination on appeal that the government did not present sufficient evidence.” Ruiz Suppl. Br. at 20. And Mr. Hebert argues that “[o]nce an acquittal has been entered, no retrial may be had, even if that acquittal is the result of a misconstruction of the statute or an erroneous application of legal principles.” Hebert Suppl. Br. at 1; *see* Ruiz Suppl. Br. at 20 (arguing the same).

These arguments overlook the procedural posture of these cases. This court’s order granting en banc review vacated the panels’ judgments, stayed issuance of the

mandates, and reopened these matters for full court consideration on direct appeal.³⁰ As noted above, based on our en banc decision here, we are vacating the panel opinions. So there is no judicial determination that the evidence was insufficient on Indian status and no entry of acquittal in either case. The Defendants currently stand convicted.

The Defendants' primary reliance on *Burks v. United States*, 437 U.S. 1 (1978), is misplaced. In *Burks*, the Sixth Circuit had reviewed a jury conviction for bank robbery, determined the government's evidence to disprove insanity was insufficient, and remanded to the district court to enter a directed verdict or order a new trial—possibly giving the government another chance to present sufficient additional evidence. *Id.* at 3-4. The Supreme Court held “the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient.” *Id.* at 18. But that is not what has happened here, so double jeopardy does not bar retrial of these Defendants.³¹

³⁰ Under our local rule, “The grant of rehearing en banc vacates the judgment, stays the mandate, and restores the case on the docket as a pending appeal. The panel decision is not vacated unless the court so orders.” 10th Cir. R. 40.2(E).

³¹ The Defendants rely on other cases that are similarly not on point. The Supreme Court held in *United States v. Scott*, 437 U.S. 82, 98 (1978); *Evans v. Michigan*, 568 U.S. 313, 322 (2013); and *Arizona v. Rumsey*, 467 U.S. 203, 210-11 (1984), that even when an appellate court determines that a trial court misconstrued a statute to direct an acquittal, the Double Jeopardy Clause bars retrial. And in *United States v. Jenkins*, 420 U.S. 358 (1975), the Court held that when a defendant's trial ended without a guilty verdict, double jeopardy precluded remand for supplemental findings. Here, in contrast to those cases, juries convicted the Defendants at trial, the district courts denied their motions for judgment of acquittal, and our vacated panel opinions are not acquittals, functional or otherwise.

Our en banc decision today supersedes the panel decisions. Unlike the Sixth Circuit in *Burks*, this court has not determined whether the evidence was insufficient. The trial record before us shows the Defendants presented no evidence to establish the affirmative defense that they are Indians. But we cannot determine whether the “evidence [was] legally insufficient” to support their convictions without the benefit of a trial record developed under the proper allocation of the burden of proof on the Defendants’ Indian status. *Id.* A retrial therefore may be the proper course.

b. Ex post facto due process

Mr. Ruiz argues that a retrial would “contravene constitutional ex post facto principles.” Ruiz Suppl. Br. at 19. He notes that “[a]lthough the Ex Post Facto Clause itself does not govern the retroactive application of [judicial decisions], the Fifth Amendment’s Due Process Clause imposes similar but ‘less extensive’ limitations on the ex post facto application of judicial decision-making.” *Id.* (quoting *United States v. Budder*, 76 F.4th 1007, 1012 (10th Cir. 2023)). He argues that retrial based on our reading of § 1152 would violate these limitations by “applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.” *Id.* (quoting *Budder*, 76 F.4th at 1013). We disagree.

First, nothing in this opinion alters the conduct subject to criminal prosecution under § 1152 and the federal enclave criminal statutes. Our decision today concerns only the allocation of the burdens of production and persuasion on Indian status, not the conduct proscribed by §§ 1152 and 2241(c). Indeed, neither Mr. Ruiz nor

Mr. Hebert contests that the evidence was sufficient to show their conduct violated the statutes criminalizing sexual abuse of a child in Indian country. Under §§ 1152 (or § 1153) and 2241(c), they were on notice that their conduct—sexual abuse of a minor—was prohibited at the time of the offense.³²

Second, even assuming that due-process restrictions on retroactive application of a judicial interpretation of a criminal statute apply to our holding that the defendant’s Indian status is an affirmative defense, *see Budder*, 76 F.4th at 1015 (assuming these principles apply to retroactive application of *McGirt* “because . . . we can easily reject Defendant’s argument”), we reject Mr. Ruiz’s argument that our interpretation of § 1152 is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,” *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001).

Two other circuits—the Ninth in *Hester* and the Fifth in *Haggerty*—already recognize Indian status as an affirmative defense under § 1152, and our decision applies longstanding Supreme Court precedent. Addressing a similar due process argument, we said “the Supreme Court instructs that the existence of a circuit split on the scope of a criminal statute is sufficient to supply defendants with fair notice that

³² In his August 20, 2026 letter to the court submitted under Federal Rule of Appellate Procedure 28(j), Mr. Ruiz writes, “Due process did not require [him] ‘to apprise himself’ of the law in every jurisdiction ‘in order to guarantee that his *actions* will not subject him to punishment in light of a developing trend.’ *Rogers v. Tennessee*, 532 U.S. 451, 464 (2001).” (Emphasis added.) We agree. But the law under §§ 1152 (or 1153) and 2241(c) fully apprised him that his actions—sexual abuse of a minor in Indian country—constituted a federal crime.

the broader construction might ultimately be adopted, even when the defendant’s circuit has adopted the more narrow interpretation.” *United States v. Muskett*, 970 F.3d 1233, 1245 (10th Cir. 2020).

2. Remand

Because Mr. Hebert and Mr. Ruiz were both convicted under the incorrect allocation of proof and without notice of their obligation to put forth evidence of their Indian status as an affirmative defense, and because the panels reviewed an evidentiary record that was developed under the wrong standard for burden of proof on Indian status, further proceedings are necessary.

In both cases, in addition to sufficiency of the evidence on Indian status, the Defendants raised other issues on appeal. Mr. Hebert argued “the district court plainly erred by failing to instruct the jury on what it means to be a non-Indian” and “by allowing the prosecution to elicit testimony and make arguments that penalized him for remaining silent about his Indian status.” *Hebert*, 159 F.4th at 783. Mr. Ruiz argued that “his indictment should have been dismissed for vagueness” and that “the jury was improperly instructed with a modified *Allen* instruction.” *Ruiz*, 164 F.4th at 1225. We remand to the respective panels to determine what bearing these remaining issues may have on possible retrials in these cases in light of our en banc holding.

Depending on the outcome of those proceedings, the panels may remand to the district courts to determine whether each defendant should be retried under the proper allocation of burden on his Indian status.³³

III. CONCLUSION

We hold, contrary to *Prentiss II*, that in a § 1152 prosecution where the victim is an Indian, the defendant's Indian status is an affirmative defense on which the defendant bears the burden of production and persuasion.³⁴ We vacate the panel opinions and remand to the panels for further proceedings consistent with this opinion.

³³ At this stage of remand, the district court may consider the issue of prejudice to the defendant outlined in Judge Hartz's concurrence.

³⁴ The amicus brief submitted by Professor Washburn points out that "a defendant who commits a felony sex offense against an Indian child in Indian country in violation of Chapter 109A of Title 18 of the United States Code" would be criminally liable under § 1152 as a non-Indian or § 1153 as an Indian. Washburn Br. at 1. The panel in *Hebert* made a similar point, stating that Mr. Hebert "would be guilty under § 1152 as a non-Indian and under § 1153 as an Indian." 159 F.4th at 790 n.12.

Professor Washburn proposes the following rule: "If a defendant is prosecuted for violating any of the substantive offenses that are listed in 18 U.S.C. § 1153 (and whether the stated jurisdictional basis is Section 1152 or Section 1153), the government must prove beyond a reasonable doubt that the victim in the case is an Indian, that the case occurred in Indian country, and that the elements of the substantive offense are met." Washburn Br. at 7-8. Under this rule, "Indian or non-Indian status of the defendant is irrelevant, if the victim is an Indian." *Id.* at 9.

However much merit this proposal may have as a matter of statutory interpretation or reform, neither party has proposed or addressed it. And because an amicus is not a party, "we ordinarily decline to consider arguments raised only by an amicus." *Sierra Club v. EPA*, 964 F.3d 882, 897 n.15 (10th Cir. 2020).

24-7030, *United States v. Hebert*; 24-2128, *United States v. Ruiz* (en banc)

HARTZ, J., concurring, joined by **BACHARACH, J.**

For the reasons stated in my panel concurrence in *United States v. Hebert*, 159 F.4th at 790–92, I agree that Defendants had the burden of production of evidence that they were Indians. Therefore, on the record in the district court this affirmative defense failed. I agree with the court opinion that there may be other grounds for reversal in each case and that these cases should be remanded to the panels for further consideration.

Among the grounds for requiring a retrial would be that a defendant was prejudiced by his reasonable reliance on *Prentiss II* in not producing evidence in district court that he was an Indian. The government argues that Defendants must make a showing of prejudice to be entitled to a retrial on this issue; that is, they must show that they could have produced evidence of their Indian status if they knew they had the burden. This makes sense. After all, we do not reverse a judgment in the absence of prejudicial error; and under our present law there was no error in district court on the Indian issue. Even if Defendants were misled by *Prentiss II*, they may well have suffered no prejudice from believing that the government had the burden to produce evidence of their non-Indian status. It would be peculiar for us to reject all other arguments by Defendants for reversal of their convictions but nevertheless send their cases back for retrial despite their having no evidence that they are (or were) Indians. In facing a similar situation, the Third Circuit remanded to the district court to determine whether the defendant could produce evidence to support an entrapment defense after the Supreme

Court held that the defense could be raised by a defendant who refused to admit the elements of the offense. *See United States v. Bay*, 852 F.2d 702, 705 (3d Cir. 1988).

I do, however, have one disagreement with the opinion of the court. I do not think it is prudent for us to resolve at this time whether the government or the defendant has the burden of persuasion regarding the defendant's Indian status when the victim is an Indian. Addressing that issue is not necessary, and I have some concerns about the proper analysis of this issue. It would be nice if this case stimulates further thought and study on the subject, which could enlighten our analysis if the issue arises again.

To begin with, I question whether informational asymmetry favors placing the burden of persuasion on the defendant. Recall that the defendant has the burden of producing evidence of his Indian status. Once the defendant has done so (say, by documenting membership in a tribe), I suspect that often there will be little or nothing more to do on the subject. It would be interesting to know how this has worked out in those circuits that have held that the burden of production is on the defendant but the burden of persuasion is on the government. The fact that those circuits have apparently not reconsidered their allocations of the burdens may suggest that they are workable, or, perhaps, that defendants rarely, if ever, raise the issue. *But cf. United States v. Bruce*, 394 F.3d 1215, 1230 (9th Cir. 2005) (noting that “[i]t is entirely probable that the government may be simultaneously unable either to prove or disprove a claim of Indian status, effectively foreclosing conviction under either [18 U.S.C. § 1152 or § 1153].”).

Also, if the defendant has the burden of establishing that the accused and the victim are both Indians, then it would follow that a defendant who is uncontroversially

Indian would have the burden (of production and persuasion) of showing that the victim is Indian. It is not obvious to me that the defendant would have better information on that issue than would the government.

Further, I would not be too eager to predict that the Supreme Court would necessarily adopt the view that, absent a clear statement by Congress, for all affirmative defenses in criminal cases the defendant bears the burden of production and persuasion. The Court, although with zero analysis, placed the burden of persuasion on the government regarding a pleaded statute-of-limitations defense. *See Grunwald v. United States*, 353 U.S. 391, 396 (1957). And to the extent that the Supreme Court relies on Blackstone for the proposition that “all . . . circumstances of justification, excuse or alleviation” rest on the defendant, *Patterson v. New York*, 432 U.S. 197, 202 (1977) (quoting 4 W. Blackstone, Commentaries 201, but noting that federal courts had frequently imposed on government the burden of disproving various affirmative defenses), it may be relevant to note that the passage quoted from Blackstone appeared in a discussion of only homicide. The same can be said of the other two authorities cited by the Supreme Court in support of that proposition. And, as I read those authorities, they speak in terms of a presumption of malice when one person kills another, which may have some experiential, as opposed to pure doctrinal, support. I do not think it would be irrational to limit the proposition (that defendants have the burden of persuasion) to issues that go to the (moral) culpability of the defendant, leaving room for a different approach to morally neutral matters such as statutes of limitations and Indian status.