No.

IN THE SUPREME COURT OF THE UNITED STATES

TEOFIL BRANK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a 2-1 memorandum disposition, the court of appeals resolved an important issue of first impression: whether threats to reputational harm fall within the ambit of the Hobbs Act, 18 U.S.C. § 1951. Petitioner contended that a specific statute, 18 U.S.C. § 875(d), proscribes extortionate threats to reputation, and contains a maximum penalty of two-years imprisonment. He further contended that, in contrast, the harsher and more general Hobbs Act, 18 U.S.C. § 1951, which prescribes a penalty of up to 20 years imprisonment, did not extend to threats to reputational harm.

The panel majority rejected Petitioner's claim. In so ruling, it neither applied the statutory canon "that a specific statute controls over a general one[,]" *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961), nor addressed this Court's recent cases restricting the breadth of the Hobbs Act. *See Scheidler v. Nat'l Org. for Women, Inc.* (*NOW II*), 537 U.S. 393, 409 (2003); *Scheidler v. Nat'l Org. for Women, Inc. (NOW III)*, 547 U.S. 9, 11 (2006). It instead relied on a different statute—the Travel Act—to find that the Hobbs Act did not contain a narrower definition of extortion. Importantly, this Court *distinguished* extortion under the Hobbs Act from extortion under the Travel Act in *United States v. Nardello*, 393 U.S. 286, 296 (1969).

Judge Reinhardt "strongly disagree[d] with the majority disposition regarding the scope of Hobbs Act extortion." His separate opinion presented the better of the arguments, including his determination that the conduct at issue here should be cabined by the specific statute, and that the rule of lenity compelled the narrow construction of the Hobbs Act as urged by Brank.

Or as Judge Kozinski noted at oral argument:[1]

> 1951, it makes perfect sense that it wouldn't include reputation because 'force, violence, fear, or under color of official right.' These are all things seeming to deal with physical kinds of threats. Why, if you look at the two statutes say, well they discussed here, things, threats in the real world, rather than things having to do with mental distress. . . Or explaining why one includes reputation and one doesn't. Because 875 talks about transmitting communications. And that, you can harm reputation with. It is much harder to beat up somebody's reputation. It's much more difficult, impossible to use force against somebody's reputation.

The question presented is:

> Does Hobbs Act extortion encompass threats to reputation, as opposed to threats of physical injury or economic harm, as suggested strongly by the statute's text and in comparison to 18 U.S.C. § 875(d)?

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[1]https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011754 at 20:53-21:25 & 21:35-22:09. Following submission of this case, Judge Kozinski retired and Judge Hurwitz replaced him on the court of appeals' panel.

TABLE OF CONTENTS

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Factual background. 3

B. The trial court proceedings. 5

C. The Ninth Circuit's opinion. 5

REASONS FOR GRANTING THE PETITION 6

A. This petition presents the important federal question of whether Hobbs Act extortion encompasses threats of reputational harm, which remains unsettled by this Court. 6

B. The Ninth Circuit's holding that Hobbs Act extortion encompasses threats of reputational harm overlooks this Court's recent decisions restricting the scope of the Hobbs Act. 11

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Bulova Watch Co. v. United States,
365 U.S. 753 (1961) 8

McNally v. United States,
483 U.S. 350 (1987) 10

Nat'l Org. for Women, Inc. v. Scheidler,
510 U.S. 249 (1994) 11

Scheidler v. Nat'l Org. for Women, Inc. (NOW II),
537 U.S. 393 (2003) ..... *passim*

Scheidler v. Nat'l Org. for Women, Inc. (NOW III),
547 U.S. 9 (2006) 2, 12, 15

United States v. Enmons,
410 U.S. 396 (1973) 2, 10

United States v. Nardello,
393 U.S. 286 (1969) 13, 14, 15

United States v. Teamsters,
315 U.S. 521 (1942) 12

Statutes

18 U.S.C. § 1951 ..... *passim*

18 U.S.C. § 1952 ..... 3, 6, 13

18 U.S.C. § 875 ..... 2, 3, 5, 7

18 U.S.C. § 880 3

28 U.S.C. § 1254 1

Other Authorities

Department of Justice Manual § 9-2403 9

Pub. L. 99-646, § 63 7

Rules

Sup. Ct. R. 10 ..... 6, 11

OPINION BELOW

The court of appeals issued a memorandum disposition. *See* Pet. App. 1.

JURISDICTION

The memorandum disposition of the court of appeals was filed on February 6, 2018, and the court denied rehearing on April 13, 2018. Pet. App. 1, 9. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

This case involves the following statutory provisions, which are reproduced in the Appendix to this petition:

18 U.S.C. § 875;

18 U.S.C. § 1951; and

18 U.S.C. § 1952

INTRODUCTION

Petitioner Teofil Brank was convicted of Hobbs Act extortion under 18 U.S.C. § 1951(a), after threatening to injure the reputation of another in an effort to obtain property. One fundamental flaw underlies Mr. Brank's Hobbs Act convictions: section 1951(a) proscribes threats of physical injury or economic harm, and does not extend to threats to reputational harm. This case presents an excellent vehicle for the Court to set forth and clarify the scope of Hobbs Act extortion.

Congress enacted section 1951, a statute carrying a 20-year maximum penalty, in parallel with 18 U.S.C. § 875(d), which prescribes a two-year maximum penalty. Section 875(d) expressly proscribes the sort of conduct at issue here: extortionate threats to injure another's reputation. While section 875(d) expressly proscribes extortionate threats to injure another's reputation, the Hobbs Act does not. Instead, the anti-racketeering-focused Hobbs Act addresses threats of physical and economic injury only.

The Court has adopted restrictive readings of the Hobbs Act. First in *Scheidler v. Nat'l Org. for Women, Inc.* (*NOW II*), 537 U.S. 393 (2003), and again in *Scheidler v. Nat'l Org. for Women, Inc. (NOW III)*, 547 U.S. 9 (2006), this Court, relying on the statute's history, made clear that Congress recognized the statute's limited focus on racketeering activities and threats of physical violence. So too here, Congress did not intend Hobbs Act extortion to encompass threats of reputational harm.

While the texts of these statutes demonstrate the lower court's error in this case, any ambiguity in the reach of the Hobbs Act should be resolved in petitioner's favor pursuant to the rule of lenity. *See NOW II*, 537 U.S. at 409; *United States v. Enmons*, 410 U.S. 396, 411 (1973).

This Court should grant certiorari to address this federal question of exceptional importance, provide clarification to the nation's courts as to the scope

of Hobbs Act extortion, and bring the Ninth Circuit in line with this Court's precedent restricting the reach of the Hobbs Act.

STATEMENT OF THE CASE

Petitioner was convicted by jury in the Central District of California of one count of extortion and one count of attempted extortion affecting interstate commerce, in violation of 18 U.S.C. § 1951(a), one count of transmitting threatening communications with intent to extort, in violation of 18 U.S.C. § 875(d), two counts of receiving proceeds of extortion under 18 U.S.C. § 880, and one count of using an interstate facility to facilitate an unlawful activity under 18 U.S.C. § 1952(a)(3). CR 344.[2] The district court sentenced him to 70 months imprisonment. CR 344.

A. Factual background.

Donald "Don" Burns and Teofil Brank maintained personal and business relationships; those relationships overlapped, as one of Burns's interests in Brank—a pornographic film actor—was paying for sex with Brank and his friends. ER 372-73. The heart of their connection was meretricious: they engaged in a pay-for-sex relationship at between $1,500 to $2,500 per night. ER 373. That relationship blossomed into a referral business by which Burns paid Brank $2,000

[2] "CR" refers to the district court clerk's record of proceedings; "ER", "AOB" and "ARB" refer respectively to Appellant's Excerpts of Record, Opening Brief, and Reply Brief filed in the Ninth Circuit, and "Dkt." to the Ninth Circuit's docket sheet. For a more detailed factual recitation, *see* AOB 5-19.

for each sexual encounter Brank arranged with other young models and porn actors willing to prostitute for Burns. ER 373, 413-14. For the year before Brank's arrest, Burns paid for multiple sex parties for which he flew two-to-four young men to his Nantucket and Palm Beach mansions to engage in orgies. ER 208-09, 215-18, 410-11.

Brank's and Burns's relationships soured because of a dispute over a $2,000 referral fee Burns paid Brank to arrange for sex with Brank's friend in Boston; the friend backed out, but Brank kept the money. ER 103, 107-08. After some weeks of discontent, Brank told Burns that he was upset with him. ER 373-84, 496-97. When Burns pushed back, Brank posted Burns's first name on his Twitter page, which Brank maintained under his stage name (Jarec Wentworth), and invited feedback about Burns from the porn actor community. ER 390.

Burns offered Brank money to take down the post, and Brank agreed. ER 390-403, 495. He ultimately accepted an Audi R8 sports car and $500,000 to remove the post. ER 390-405, 493-95. Burns and Brank then discussed additional payments for deleting Brank's Twitter account and Burns offered to buy back the car. ER 154-63, 488-91.

With the assistance of counsel, Burns then flipped the script and engineered a federal extortion prosecution. In short, after Burns agreed to purchase Brank's

Twitter account for $1 million cash, federal agents arrested Brank at the scheduled meet. ER 165, 320-40.

B. The trial court proceedings.

Upon Brank's arrest, the Government filed a one-count complaint alleging the transmission of threatening communications with intent to extort, in violation of 18 U.S.C. § 875(d). CR 1; ER 544. Two weeks later, a federal grand jury in Los Angeles issued a one-count indictment alleging the same violation. CR 10; ER 540. Brank faced two years in prison. 18 U.S.C. § 875(d).

After Brank filed motions and refused to waive his speedy trial rights, *see* CR 50, 58, 59, the Government filed a superseding indictment charging six additional counts, including (as relevant to this petition) Hobbs Act extortion and attempted Hobbs Act extortion, in violation of 18 U.S.C. § 1951(a) (Counts Two and Five). ER 527-34. Brank proceeded to a three-day jury trial, was convicted on the six counts that went to trial, and received a sentence of 70 months incarceration. CR 1-3, 58-60, 299, 348, 349, 301.

C. The Ninth Circuit's opinion.

Petitioner's principal claim on appeal was that the Government failed to present sufficient evidence on Counts Two and Five because fear of reputational harm is insufficient to establish Hobbs Act extortion. *See* AOB 3 ("Whether the Government presented sufficient evidence to support Hobbs Act extortion as

alleged in Counts to Two and Five"); *see also* Pet. App. 2, ("Brank first argues that extortion as defined in the Hobbs Act does not include threats causing fear of injury to reputation.").

The panel majority, relying on this Court's opinion in *Nardello*, which interpreted "extortion" under the Travel Act, 18 U.S.C. § 1952, concluded that the Hobbs Act encompassed threats of reputational harm. Pet. App. 2-3.

Judge Reinhardt dissented. He opined that the conduct at issue here should be cabined by the specific statute, section 875(d), and that the rule of lenity compelled the narrow construction of the Hobbs Act as urged by Brank. Pet. App. 6-8.

REASONS FOR GRANTING THE PETITION

A. This petition presents the important federal question of whether Hobbs Act extortion encompasses threats of reputational harm, which remains unsettled by this Court.

This case involves an "important question of federal law that has not been, but should be, settled by this Court[.]" Sup. Ct. R. 10(c). Apart from the unpublished memorandum decision below, no court has ever held that the Hobbs Act proscribes extortionate threats to injure the reputation of another. This Court should grant certiorari to establish that it is a different statute—18 U.S.C. §

875(d)—that proscribes such threats, and clarify that such threats do not fall within the ambit of the much broader, harsher, and more general Hobbs Act statute.[3]

Put simply, extortionate threats to reputation are proscribed by section 875 (d), and not the Hobbs Act. Indeed, there is no doubt that in section 875(d), Congress expressly proscribed extortion that threatened reputational harm. 18 U.S.C. § 875(d). Enacted on June 25, 1948, *see* Pub. L. 99-646, § 63, section 875(d) provides:

> Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property *or reputation* of the addressee or of another *or the reputation* of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 875(d) (emphasis added).

On the same day Congress enacted section 875(d), it also amended the Anti-Racketeering of 1934, and enacted the Hobbs Act.[4] Section 1951(a) (Hobbs Act extortion), in contrast to section 875(d), provides:

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[3] Section 875(d) carries a maximum penalty of two years. 18 U.S.C. § 875(d). In contrast, the Hobbs Act carries a maximum penalty of 20 years. 18 U.S.C. § 1951(a).

[4] The Anti-Racketeering Act of 1934 was the predecessor to the Hobbs Act. *NOW II*, 537 U.S. at 406.

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or *commits or threatens physical violence to any person or property* in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added).

Petitioner was convicted of Hobbs Act extortion (and attempt) under section 1951(a). The Ninth Circuit, in holding that threats of reputational harm fall within the ambit of the Hobbs Act, failed to consider fundamental canons of statutory construction to compel a different result.

The first canon to apply here is that the specific governs over the general. Or as this Court has explained, "a specific statute controls over a general one[.]" *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). Here, the same Congress enacted sections 875(d) and 1951 on the very same day, and provided extraordinarily different penalties for each. But there would have been no need to enact section 875(d), and provide a far lesser penalty for threats to reputation, had such conduct fell within the scope of the Hobbs Act. Rather, section 875(d) would essentially be a nullity under that interpretation. Congress would not act so irrationally, and without purpose.

The exclusion of reputational harm from the ambit of the Hobbs Act is even clearer when considering that statute as a whole. Even putting aside that Title 18,

Chapter 95 is entitled "Racketeering" and proscribes a host of racketeering activities, and even putting aside Congress's clear intent to address racketeering activities in its passage of the Act, the specific language of the Hobbs Act supports the conclusion that "threats to reputation" do not fall within the ambit of the Act.

First on this point is the statutory language of the actual proscription, quoted above. As is plain, Congress's focus was on "threat[s] [of] physical violence to any person or property." 18 U.S.C. § 1951(a). That language not only confirms Congress's focus on racketeering activities when enacting the Hobbs Act, it identifies the type of harm—physical harm to person or property—the Act proscribes. For this reason, Congress specified "fear of injury" to person and property when defining robbery, and there is no good reason to conclude that Congress envisioned any other type of "fear" when defining extortion. *See* 18 U.S.C. § 1951(b)(1). Rather, when defining "extortion", the statute's recitation of "threatened force, violence, or fear," should be interpreted in the same manner.[5]

The second applicable canon is the rule of lenity. The rule of lenity instructs "[w]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and

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[5] Of note, the Department of Justice interprets the Hobbs Act in the same manner as urged by Petitioner: fear under the Hobbs Act means "the victim's reasonable fear of physical injury or economic harm." Department of Justice Manual § 9-2403. Put another way, even the United States understands the limits, and agrees that the Hobbs Act does not contemplate threats to reputation.

definite language." *NOW II*, 537 U.S. at 409 (quoting *McNally v. United States*, 483 U.S. 350, 359–360 (1987) (parallel citations omitted). The Hobbs Act is a criminal statute, and as such it "must be strictly construed, and any ambiguity must be resolved in favor of lenity." *Enmons*, 410 U.S. at 411 (internal citations omitted). This Court has previously been faced with the cases urging an expansive reading of the Hobbs Act; and this Court has acknowledged that the rule of lenity must be applied to the Hobbs Act. *See NOW II*, 537 U.S. at 408. And as Judge Reinhardt recognized in his dissent below, "oftimes drastic consequences [of criminal conviction] require a special vigilance on the part of courts to ensure that only clearly prohibited conduct results in criminal sanctions." Pet. App. 8.

Petitioner contends that the Hobbs Act clearly does not encompass threats of reputational harm; at a minimum, the scope of conduct proscribed under the statute is ambiguous, and the statute should thus be strictly construed in Petitioner's favor. Congress "has [not] spoken in clear and definite language[,]" *NOW II*, 537 U.S. at 409, establishing that the Hobbs Act proscribes threats to reputational harm. This Court should strictly construe the definition of Hobbs Act extortion in conjunction with the rest of the statute and in favor of lenity.

B. The Ninth Circuit's holding that Hobbs Act extortion encompasses threats of reputational harm overlooks this Court's recent decisions restricting the scope of the Hobbs Act.

Certiorari is also appropriate because the Ninth Circuit's opinion "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

This Court has adopted restrictive readings of the Hobbs Act. In *NOW II*, 537 U.S. at 397, the Court considered whether the petitioners' actions constituted "extortion within the meaning of the Hobbs Act[.]" The petitioners there were a coalition of anti-abortion groups that had, *inter alia*, threatened or used force, violence, or fear to induce abortion clinic employees, doctors, and patients to give up their jobs, their right to practice medicine, and their right to obtain clinic services. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252-53 (1994).

The Court held that the petitioners' actions "did not constitute extortion because petitioners did not obtain respondents' property." *NOW II*, 537 U.S. at 404-05 (internal quotations omitted). The Court reasoned that the statute required acquisition of property, and that omitting that requirement when interpreting the statute "would also eliminate the recognized distinction between extortion and the separate crime of coercion[,]" which Congress expressly omitted from the statute. *Id.* at 405. Congress's omission of coercion from the Hobbs Act, but inclusion of extortion, was "significant [in the] . . . interpretation of the breadth of the extortion provision." *Id.* at 406. As the Court explained, the Anti-Racketeering Act of 1934

"targeted, as its name suggests, racketeering activities that affected interstate commerce, including both extortion and coercion[.]" *Id.*

The Court then explained that *United States v. Teamsters*, 315 U.S. 521 (1942), construed an exception provided by the 1934 Act as not encompassing "actions of union truck drivers who exacted money by threats or violence from out-of-town drivers in return for undesired and often unutilized services." *Id.* at 407 (internal quotations and citations omitted). In response, Congress enacted the Hobbs Act "to supersede the Anti-Racketeering Act and reverse the result in *Teamsters*." *Id.* (internal citations omitted). The newly enacted Hobbs Act prohibited "robbery or extortion," but did not mention coercion. *Id.*

In sum, this Court recognized that Congress had specific intentions when enacting the Hobbs Act: addressing racketeering activities, and focusing on "physical violence to any person or property" as the gravamen of the offense.

Following *NOW II,* this Court again narrowly interpreted the Hobbs Act in *NOW III*, 547 U.S. at 16-22. *NOW III* interpreted the statute's language of "threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" to require proof of robbery or extortion rather than permitting a freestanding claim based on violence alone. *Id.* In so doing, this Court, citing to *NOW II*, held "Congress did not intend the Hobbs Act to have so broad a reach." *Id.* at 11.

The same reasoning applies here: Congress did not intend the Hobbs Act "have so broad a reach" as to encompass threats of reputational harm. And this point is all the more salient when considering Congress enacted section 875(d), which expressly proscribes such conduct and carries a much lesser penalty, on the same day as the Hobbs Act.

The Ninth Circuit, in reaching its contrary reading of the Hobbs Act, relied on this Court's decision in *Nardello*. Pet. App. 2-3. That reliance was misplaced. *Nardello* addressed the Travel Act, which then proscribed interstate and foreign travel, or the use of a facility in interstate or foreign commerce, "to distribute the proceeds of any unlawful activity[,] to commit any crime of violence to further any unlawful activity[,] or to otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." 18 U.S.C. § 1952 (a) (1964 Ed. and Supp. III.); *see also Nardello*, 393 U.S. at 287 n.1.

Nardello and a co-defendant were charged with violations of the Travel Act based on "the unlawful activity of blackmail, in violation of the laws of the Commonwealth of Pennsylvania." *Id.* at 287-88. After the district court dismissed the indictments, finding that Pennsylvania's statute defining extortion "required that the accused be a public official[,]" the Government appealed directly to this Court. *Id.* at 288-89.

The Court then *distinguished* the Travel Act from the Hobbs Act. It noted that "[a]lthough Congress directed that content should be given to the term 'extortion' in § 1952 by resort to state law, it otherwise left that undefined."[6] *Nardello* then surveyed the underlying purpose of the Travel Act—to aid local law enforcement in combating organized crime, *id.* at 290-93—to assess Congress's intent. The Court resolved the question by finding that the States' labeling of crimes was not dispositive, "but whether the particular State involved prohibits the extortionate activity charged." *Id.* at 295. Thus, because Pennsylvania proscribed the charged activity as blackmail rather than extortion, the proscribed "activity" fit, in the Court's view, unlawful activity within the meaning of the Travel Act. *Id.* at 295-96.

This Court's mode of decision in *Nardello* demonstrates that the correct interpretation of extortion under the Hobbs Act must be based on Congress's intentions when forming the Hobbs Act: combating labor rackets. Thus, the Ninth Circuit's reliance on *Nardello* to reach its ultimate conclusion—that fear to reputational harm suffices to state an extortion charge under the Hobbs Act—is misplaced, and inconsistent with this Court's mode of decision in *Nardello*. Nor does *Nardello* support the Ninth Circuit's expansive "generic" definition when

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[6]In contrast, the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

Congress provided a narrower definition, linked to the purpose of the Hobbs Act (combating labor rackets, and their use of force and violence, and threatened injury to persons and property by force and violence) when interpreting "fear" within the context of the statute.

As Judge Reinhardt noted in dissent below:

> all other violations of the [Hobbs] Act require harm or threats of harm to person or property—indicating that the scope of harm for Hobbs Act extortion is similarly limited. By contrast, the Travel Act—which includes the generic "extortion" definition on which the majority relies—displays no such limitation. It instead encompasses a wide variety of "unlawful activit[ies]," ranging from failure to pay federal excises taxes on liquor to prostitution to bribery.

Pet. App. 6.

In sum, in *NOW II* and *NOW III*, this Court recently adopted restrictive readings of the Hobbs Act, consistent with Petitioner's position that the statute does not encompass threats of reputational harm, and must be assessed under the rule of lenity. And this Court's mode of decision in *Nardello* further demonstrates that the Hobbs Act must be construed to conform with Congress's intentions of combating labor rackets when enacting the statute. The Ninth Circuit's decision conflicts with this precedent.

CONCLUSION

As this Court recently observed in *McDonnell v. United States*, —U.S.—, 136 S. Ct. 2355, 2375 (2016):

> There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of [a] federal . . . statute.

So too this case.

For the reasons set forth above, Petitioner Teofil Brank respectfully asks the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

Dated: July 6, 2018

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