No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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ERIC BANKS,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Several federal criminal statutes only apply within the United States's "special maritime and territorial jurisdiction," including the assault statute at 18 U.S.C. §113(a). That limited jurisdiction includes land acquired by the United States from a state. *See* 18 U.S.C. §7(3). Section 3112(b) of Title 40 sets out requirements for a state to grant, and the federal government to accept, jurisdiction over such land, and §3112(c) says "[i]t is conclusively presumed that jurisdiction has not been accepted until the [federal] government accepts jurisdiction over land as provided in this section."

The question presented is whether the prosecution may establish territorial jurisdiction under 18 U.S.C. §7(3) merely by showing an offense occurred in a federal prison, as held in *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), or must the prosecution show the facts required under 40 U.S.C. §3112(b), as held by the Second Circuit in *United States v. Davis*, 726 F.3d 357 (2d Cir. 2013), the Eighth Circuit in *United States v. Love*, 20 F.4th 407 (8th Cir. 2021), and every other circuit court to have addressed the issue?

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INTRODUCTION

Eric Banks was convicted of aggravated assault on a fellow inmate at the United States Penitentiary (USP) in Victorville, California. The government was required to prove the assault occurred "within the special maritime and territorial jurisdiction of the United States . . . ." 18 U.S.C. §113(a). That jurisdiction includes land acquired by the United States from a state. *See* 18 U.S.C. §7(3).

For land acquired by the federal government from a state after 1940, the requirements for a jurisdictional transfer are set out in 40 U.S.C. §3112. That statute says that an authorized federal officer "may accept or secure" federal jurisdiction over land located within a state, and that officer "shall indicate acceptance of jurisdiction on behalf of the government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated." 40 U.S.C. §3112(b). "It is conclusively presumed that jurisdiction has not been accepted until the [federal] government accepts jurisdiction over land as provided in this section." 40 U.S.C. §3112(c). These statutory requirements were enacted to "creat[e] a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction." *Adams v. United States*, 319 U.S. 312, 314 (1943) (quotation omitted).

During Banks's trial, the government introduced evidence that the charged assault occurred in a federal prison, but there was no evidence to establish jurisdiction under 40 U.S.C. §3112(b). *See, e.g.,* 6/20/19 RT at 59 (CR 218) (prosecutor arguing in closing that jurisdiction was established solely based on evidence that assault occurred at USP Victorville).[1] As the Second Circuit held in

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[1] CR refers to the district court clerk's record in the underlying case, C.D. Cal. No. 5:17-cr-0103-DMG.

United States v. Davis, 726 F.3d 357, 364-65 (2d Cir. 2013), "the mere fact that [an] assault took place in a federal prison on federal land . . . does not mean that the federal government had jurisdiction over the location of the assault." Accordingly, on appeal Banks challenged the sufficiency of the trial evidence on the jurisdictional element.

Banks's appeal was the third time a Ninth Circuit panel addressed whether the government had established special territorial jurisdiction at USP Victorville. The first time, in *United States v. Redmond*, 748 Fed. App'x 760 (9th Cir. 2018) (unpublished) (*Redmond I*), the government, consistent with *Davis*, acknowledged that it had erroneously failed to make the showings required under 40 U.S.C. §3112(b). Thus, to defeat the sufficiency claim in *Redmond I* the government submitted new documents on appeal and, based on those documents, asked the panel to find the jurisdictional element itself. The panel did so, taking judicial notice of the jurisdictional element under Federal Rule of Evidence 201(b)(2). Judge Ikuta dissented because she concluded that the documents submitted by the government didn't establish that the United States accepted jurisdiction over the land underlying USP Victorville, as required under 40 U.S.C. §3112(b).

In *Redmond v. United States*, 2022 WL 1658445 (9th Cir. 2022) (unpublished) (*Redmond II*), the jurisdictional issue was raised again, in the guise of an ineffective assistance of counsel claim. The panel in that case acknowledged that the evidence submitted by the government in *Redmond I* to establish jurisdiction was insufficient under §3112(b), but nonetheless denied relief because it concluded that Redmond's counsel's failure to press the issue during the initial district court proceedings was not sufficiently negligent to establish ineffective assistance of counsel.

In Banks's subsequent appeal, a Ninth Circuit panel was again faced with a sufficiency claim (as in *Redmond I*), not an ineffectiveness claim (as in *Redmond II*). The government responded to Banks's claim by asking the Ninth Circuit to rely on the documents it submitted in *Redmond I* and

again take judicial notice of the jurisdictional element under Federal Rule of Evidence 201(b)(2). That Rule states that a "court may judicially notice a fact that is *not subject to reasonable dispute* because it . . . can be *accurately and readily determined* from sources whose accuracy cannot reasonably be questioned." (Emphasis added.) By the time the Ninth Circuit panel in Banks's case addressed the government's judicial notice request, four of the six Ninth Circuit judges to have addressed the sufficiency issue (Judge Ikuta in *Redmond I* and the three-judge panel in *Redmond II*) had determined that the documents on which the government based its judicial notice request don't establish the jurisdictional element. That made it hard for the Ninth Circuit in Banks's case to agree that the existence of federal jurisdiction at USP Victorville is a "fact" that can be "accurately and readily determined," and is not "subject to reasonable dispute."

The panel in Banks's case avoided that problem and instead held that it was bound to reject Banks's sufficiency claim based on *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), which dealt with whether there was federal jurisdiction at FCI Phoenix. *See United States v. Banks*, 2022 WL 3278942 (9th Cir. 2022) (unpublished) (attached in Appendix). But the panel in *Read* ignored the critical showings required by 40 U.S.C. §3112(b), and the presumption against finding jurisdiction in subsection (c). As a result, *Read* was wrongly decided, as persuasively explained by Judge Koh in her concurring opinion in this case. *See Banks*, 2022 WL 3278942, at *2 (Koh, J., concurring). Furthermore, the analysis and holding in *Read* conflicts with the Second Circuit's opinion in *Davis*, the Eighth Circuit's opinion in *United States v. Love*, 20 F.4th 407 (8th Cir. 2021), and every other circuit to have addressed this issue – all of those courts have held that to establish territorial jurisdiction under 18 U.S.C. §7(3), the government must make the showings required under 40 U.S.C. §3112(b).

Accordingly, Banks request that this Court grant this petition because there is a circuit split on the question presented, which is also an "important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(a) & (c).

OPINION BELOW

On August 11, 2022, a Ninth Circuit panel filed an unpublished opinion affirming Banks's convictions for assault within the special territorial jurisdiction of the United States. *See United States v. Banks*, 2022 WL 3278942 (9th Cir. 2022) (unpublished). Ninth Circuit Judge Koh filed a concurring opinion in which she agreed with the majority that the outcome with respect to the jurisdiction issue was dictated by *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), but she persuasively explained why *Read* was wrongly decided, and conflicts with every other circuit court to have addressed the issue presented.

JURISDICTION

On October 19, 2022, the Ninth Circuit denied Banks's petition for panel rehearing and rehearing *en banc*. *See* 10/19/22 Order (attached in Appendix). Accordingly, this petition is timely under Supreme Court Rule 13, and this Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Section 113(a) of Title 18 of the United States Code states, "Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished" based on a range of listed factors.

Section 7(3) of Title 18 of the United States Code states:

> The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes . . . [a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of

the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Subsections 3112(b) and (c) of Title 40 of the United States Code state:

> **(b) Acquisition and acceptance of jurisdiction.** When the head of a department, agency, or independent establishment of the Government, or other authorized officer of the department, agency, or independent establishment, considers it desirable, that individual may accept or secure, from the State in which land or an interest in land that is under the immediate jurisdiction, custody, or control of the individual is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual shall indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.
>
> **(c) Presumption.** It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section.

STATEMENT OF THE CASE

I. Introduction

Below, Banks first addresses what must be shown to establish the jurisdictional element in 18 U.S.C. §113(a), as exemplified by the Second Circuit's opinion in *Davis*. He then traces the Ninth Circuit's evolving treatment of that issue, leading to its erroneous conclusion, in *Read* and this case, that the jurisdictional element may be shown without establishing what is required by 40 U.S.C. §3112(b).

II. The Appropriate Analysis For Evaluating Whether The Jurisdictional Element Has Been Shown, Exemplified By The Second Circuit's Opinion In *Davis*

"The existence of federal jurisdiction over the place in which the offense occurred is an element of the offenses defined at 18 U.S.C. § 113(a), and it must be proved to the jury beyond a reasonable doubt." *Read*, 918 F.3d at 718. That jurisdiction includes land acquired by the United States from a state. *See* 18 U.S.C. §7(3). But to establish federal jurisdiction over such land, the federal government must prove two things.

First, it must show the state agreed to transfer jurisdiction over the land, usually through consent or cession.[2] *See Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976).

Second, and key to this case, the federal government must show that it accepted jurisdiction from the state. *See Atkinson v. Tax Comm'n*, 303 U.S. 20, 23 (1938). For lands acquired before 1940, the federal government's acceptance of jurisdiction is presumed. *See id.* However, for lands acquired after 1940, "[i]t is conclusively presumed that jurisdiction has not been accepted until the government accepts jurisdiction over land as provided in" §3112(b). 40 U.S.C. §3112(c). That means that an authorized federal officer must "indicate acceptance of jurisdiction on behalf of the government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated." 40 U.S.C. §3112(b).

Accordingly, as the Second Circuit held in *Davis,* "one cannot simply assume that a federal installation on federal land automatically comes within federal jurisdiction." 726 F.3d at 366-67. Aside from the Ninth Circuit's opinions in *Read* and this case, the circuit courts are in agreement on this point. *See, e.g., United States ex rel. Greer v. Pate*, 393 F.2d 44, 45-47 (7th Cir. 1968) (United States post office); *DeKalb County, Georgia v. Henry C. Beck Co.*, 382 F.2d 992, 994-96 (5th Cir. 1967) (Veterans Administration hospital); *United States v. Williams*, 17 M.J. 207, 211, 215 (Ct. Mil. App. 1984) (federal military base). Furthermore, in *Adams v. United States*, 319 U.S. 312, 314-15 (1943), this Court held that "[s]ince the [federal] government had not accepted jurisdiction in the manner required by [40 U.S.C. §3112], the federal court had no jurisdiction" over charges that three

[2] Cession is when the state cedes jurisdiction over territory to the federal government through legislation. *See, e.g., Fort Leavenworth Railway Co. v. Lowe*, 114 U.S. 525, 526 (1885).

soldiers committed rape at "a government military camp." And the Second Circuit's opinion in *Davis* is directly on point because it, like this case, dealt with a federal prison.

In *Davis*, the extent of the government's trial evidence with respect to §113(a)'s jurisdictional element was a prison employee's testimony that the assault occurred at "'a federal prison' that is 'on federal land.'" 726 F.3d at 361. Addressing a sufficiency claim, the Second Circuit court began by summarizing the history of federal land acquisition and the relevant case law and then stated that the "upshot . . . is that the United States does not have jurisdiction over all lands owned by the federal government within the states." *Id.* at 364. The court then concluded "that the evidence at trial in [*Davis*] was not sufficient to satisfy the jurisdictional element of the offense of conviction. . . . Put simply, the mere fact that the assault took place in a federal prison on federal land – the full extent of the evidence that the government presented on the jurisdictional question – does not mean that the federal government had jurisdiction over the location of the assault." *Id.* at 364-65.

Another recent case from the Eighth Circuit is also directly on point, and consistent with *Davis*. In that case, the defendant was charged with assault at the Bureau of Prisons's Federal Medical Center (FMC) in Springfield, Missouri. *See United States v. Love*, 20 F.4th 407, 408 (8th Cir. 2021). The Eighth Circuit readily acknowledged, and the government did not dispute, that to establish federal jurisdiction the government had to meet §3112(b)'s requirements for showing the state's transfer, and the federal government's acceptance, of jurisdiction over the land where the FMC sits. *See id.* at 409-10. Indeed, with the exception of the Ninth Circuit's opinions in this case and *Read*, that conclusion is uncontroversial, under the plain language of the statutes involved and related case law.

III. The Ninth Circuit's Evolving Treatment Of The Jurisdiction Issue

As discussed above, the Ninth Circuit has addressed the issue of whether there is special territorial jurisdiction at USP Victorville in three cases, and in doing so has moved from using the correct analysis, exemplified by the Second Circuit's opinion in *Davis*, to adopting a faulty analysis that ignores the requirements of 40 U.S.C. §3112(b). That evolution is traced below.

A. The Ninth Circuit's Treatment Of The Jurisdiction Issue In *Redmond I*

When the defendant-appellant raised the jurisdictional issue in the context of a sufficiency of the evidence claim in *Redmond I*, the government acknowledged that the appropriate analysis is set out in the Second Circuit's *Davis* opinion. Thus, in an attempt to make up for its insufficient trial evidence, the government: (1) submitted new documents for the first time on appeal; (2) asked the Ninth Circuit to rely on those documents to find the facts required to be shown under 40 U.S.C. §3112(b); and (3) based on those findings, asked the court to take judicial notice of the jurisdictional element on appeal. *See id.* Redmond objected because, as the Ninth Circuit correctly recognized in *Read*, "[t]he existence of federal jurisdiction over the place in which the offense occurred is an element of the offenses defined at 18 U.S.C. § 113(a), and it must be proved to the jury beyond a reasonable doubt." 918 F.3d at 718; *see also Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016) (holding that jury must decide jurisdictional element); *United States v. Gaudin*, 515 U.S. 506, 511-14, 522-23 (1995) (holding that jury must decide mixed question of fact and law).

Without addressing Redmond's arguments against taking judicial notice of the jurisdictional element, the two-judge majority in *Redmond I* agreed to consider the government's new evidence on appeal and, based on that evidence, took judicial notice that "the United States has special maritime and territorial jurisdiction over USP Victorville as required by 18 U.S.C. §7 and 40 U.S.C. §3112." *Redmond I*, 748 Fed. App'x at 761-62. In a dissenting opinion, however, Judge Ikuta

disagreed with the majority's conclusion that the documents submitted by the government on appeal establish the jurisdictional element, stating:

> The government provided a copy of a letter dated August 16, 1944, from the United States War Department to the Governor of California, stating that the United States "accepts exclusive jurisdiction over all land acquired by it for military purposes within the State of California, title to which [illegible] in the United States and over which exclusive jurisdiction has not heretofore been obtained." *The other documents presented by the United States, however, fail to establish that the land underlying USP Victorville was part of this general acceptance of jurisdiction*. Therefore, we lack authority to take judicial notice that USP Victorville is within the special territorial and maritime jurisdiction of the United States. *See* Fed. R. Evid. 201(b)(2). Because the government has failed to satisfy the jurisdictional element of the offense of conviction, I would vacate the conviction.

Redmond I, 748 Fed. App'x at 762-63 (Ikuta, J., dissenting) (emphasis added).

B. The Ninth Circuit's Treatment Of The Jurisdiction Issue In *Redmond II*

Redmond raised the jurisdictional element issue again in an unsuccessful 28 U.S.C. §2255 motion in the district court, arguing that his counsel was ineffective for not pressing that issue during the initial district court proceedings.

In the ensuing appeal, a three-judge panel echoed Judge Ikuta's prior dissent, agreeing that the documents the government submitted during Redmond's direct appeal don't show the United States obtained jurisdiction over the land underlying USP Victorville, because there is insufficient evidence that the government accepted jurisdiction as required under 40 U.S.C. §3112(b). The panel's reasoning was somewhat different than Judge Ikuta's, however. It began by discussing the documents over which the panel took judicial notice in *Redmond I*:

> The two most relevant documents included a letter from the United States Department of War to the California governor, dated September 29, 1944, which accepted jurisdiction over the land underlying Victorville on behalf of the federal government, and a letter from the California State Lands Commission, dated September 27, 2002, stating that, while there was no information in the Commission's files indicating that the War Department letter was recorded with the

> San Bernardino County Recorder, the Commission "presum[ed]" that it was. *Redmond I*, 748 F. App'x at 761.

Redmond II, 2022 WL 1658445, *1 n.1. The panel then addressed the fact that there was no actual evidence that the federal government's acceptance of jurisdiction was recorded in the San Bernadino County Recorder's Office, as required by law:

> [F]or the federal government to gain jurisdiction over state land, it must comply with 40 U.S.C. §3112, which requires an "authorized officer" to "indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated." In 1944, California Government Code §120 required the governor to record that federal acceptance of jurisdiction over the land with the county recorder's office to effectuate the transfer of jurisdiction. *See People v. Brown*, 69 Cal. App. 2d 602, 605 (Cal. App. 1945).

Redmond II, 2022 WL 1658445, *1 n.1. In short, the panel recognized the propriety of the analysis undertaken by the Second Circuit in *Davis*, and concluded that under the circumstances, "there could well be merit to the claim that the transfer of jurisdiction from California to the federal government was not legally effectuated, as there is a lack of proof that the 1944 War Department letter was recorded in San Bernardino County," which is required under 40 U.S.C. §3112(b) and state law. *Id.*

The panel nonetheless held that Redmond couldn't establish the deficient performance prong of ineffective assistance of counsel because (1) in a 2010 order a district court judge in another case took judicial notice of USP Victorville's "jurisdictional status based on the same documents the government presented to [the Ninth Circuit] in *Redmond I*," thus (2) "it was not unreasonable for Redmond's attorney to decide not to argue Victorville's jurisdictional status" in the initial district court proceedings. *Id.* at *2. But the Ninth Circuit panel's ruling on the ineffective assistance aspect of *Redmond II* is irrelevant here, because Banks is on direct appeal, raising a sufficiency claim that was preserved with a motion for judgment of acquittal. *See* 6/20/19 Reporter's Transcript 14 (CR 257); *United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir. 2004). And the sufficiency

challenge cannot be turned back by a dubious resort to new evidence and judicial notice on appeal, as in *Redmond I*, because four out of six Ninth Circuit judges have concluded that the documents submitted by the government in *Redmond I* don't establish the jurisdictional element.

C. The Ninth Circuit's Treatment Of The Jurisdiction Issue In This Case

Nonetheless, when Banks raised the same sufficiency claim that Redmond raised in his direct appeal, the government responded that the Ninth Circuit should rely on the documents the government submitted in *Redmond I* and again decide the jurisdictional element for itself. Banks opposed that suggestion because of the impropriety of taking judicial notice of a "fact" that four out of six Ninth Circuit judges believe is not true based on the documents submitted.

The panel in Banks's case avoided dealing with that issue – and took an entirely different approach than did the two panels in *Redmond I* and *II* – by holding that it was bound by the Ninth Circuit's prior opinion in *Read*:

> *Read* forecloses Defendants' challenge because the government here offered precisely the type of uncontroverted testimony that the *Read* court held was sufficient. *See Read*, 918 F.3d at 718. Two officers who responded to the attack testified that they worked for the Federal Bureau of Prisons at USPV. Another officer testified that he worked for the Bureau of Prisons at USPV at the time of the attack. All three officers testified that the attack occurred on the field at USPV.

Banks, 2022 WL 3278942, *2. In short, the Ninth Circuit in *Read* – and thus in *Banks's* case – held that the government could establish special territorial jurisdiction without making the necessary showings under 40 U.S.C. §3112(b). Judge Koh wrote a concurring opinion in which she agreed that the panel was bound by *Read*, but explained why *Read* was wrongly decided. *See id.* at *2-4 (Koh, J., concurring).

REASONS FOR ALLOWING THE WRIT

As explained above, the Ninth Circuit in *Read* held that the government may establish federal jurisdiction under 18 U.S.C. §7(3) without showing what is required to be shown under 40 U.S.C. §3112(b). That holding conflicts with the Second Circuit's opinion in *Davis*, the Eighth Circuit's opinion in *Love*, and every other circuit court to have addressed the issue. Those courts have all held that to establish jurisdiction under §7(3) the government must make the showings mandated under §3112(b). Accordingly, the question presented implicates a circuit conflict involving an "important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(a) & (c).

Furthermore, the Ninth Circuit's holding in this context is obviously wrong, for the reasons set out above and explained in Judge Koh's concurring opinion in Banks's case. Tracking the discussion above with respect to the Second Circuit's opinion *Davis*, Judge Koh began by noting that the fact that a federal prison is on federally owned land does not establish that there is federal jurisdiction there. *See Banks*, 2022 WL 3278942, at *2-3 (Koh, J., concurring). Judge Koh then explained how, in *Read*, the Ninth Circuit concluded there was federal jurisdiction at a federal prison in Phoenix even though there was no evidence to establish the requirements of 40 U.S.C. §3112(b):

> Recall that the government must prove . . . that the state agreed to, and the federal government accepted, the transfer of jurisdiction. A prisoner or employee's testimony about the location of the assault fails to prove either state agreement to transfer, or federal government acceptance of, jurisdiction beyond a reasonable doubt. . . . Indeed, *Read* fails to explain why such testimony is sufficient to rebut [40 U.S.C. §3112(c)'s] conclusive presumption against federal government acceptance of jurisdiction for federal lands acquired after 1940.

Id. at *3 (Koh, J., concurring). Judge Koh concluded:

> At bottom, the Constitution requires that the government "prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *United States v. Perlaza*, 439 F.3d 1149, 1171 n.24 (9th Cir. 2006) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)); *see also United States v. Gaudin*, 515 U.S. 506, 510 (1995). Our decision in *Read* acknowledges the

> government's burden to prove "[t]he existence of federal jurisdiction over the place in which the offense occurred . . . to the jury beyond a reasonable doubt," 916 F.3d at 718, but excuses the government from being held to its proper burden.

Banks, 2022 WL 3278942, *4 (Koh, J., concurring). In sum, although Judge Koh agreed that *Read* controlled the outcome in Banks's case, she explained persuasively why that case was wrongly decided, at least to the extent it applies to transfers that occurred after 1940.

This Court should grant the petition to resolve the circuit split in this regard, and to clarify that the government must prove the existence of federal jurisdiction, not just federal proprietorship, as jurisdiction is described in 18 U.S.C. §7(3) and 40 U.S.C. §3112(b).

CONCLUSION

Because the error raised in this petition involves a circuit split on an important issue, Banks requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Todd W. Burns

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