No. 16-___

IN THE

Supreme Court of the United States

CALVIN GARY WALKER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari
to the Texas Court of Appeals,
Ninth District at Beaumont

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as Justices Ginsburg and Thomas suggested last Term, this Court should conduct a "fresh examination" of the "separate sovereigns" exception to the Double Jeopardy Clause. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring).

2. Whether, as this Court has previously suggested, the "separate sovereigns" exception at least should be inapplicable when state and federal prosecutors have worked so closely together that they are "in essential fact" one entity. *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Calvin Walker respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Pet. App. 1a, is reported at 489 S.W.3d 1 (Tex. App. 2016). The order of the Texas District Court, Pet. App. 28a, is not reported.

JURISDICTION

The judgment of the Texas Court of Appeals was entered on March 9, 2016, and the Texas Court of Criminal Appeals denied petitioner's timely petition for discretionary review on June 15, 2016. Pet. App. 34a. On August 29, 2016, Justice Thomas extended the time within which to file this petition to and including November 12, 2016. No. 16A189. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See, e.g.*, *Smalis v. Pennsylvania*, 476 U.S. 140, 143 n.4 (1986).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

"Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting). The protection against double jeopardy thus "represents a fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794 (1969). This case presents important questions concerning the scope of this vital guarantee.

A. First Prosecution

In 2008, the Beaumont (Texas) Independent School District chose petitioner Calvin Walker through a competitive bidding process to provide its electrical services. Petitioner was the first non-union electrician to hold that job in at least thirty-seven years. He is also, unlike previous electricians, black. A native of Beaumont, petitioner depended for his success on his hard-earned reputation in the community.

For several years, petitioner served the school district without incident. Among other things, he helped to rebuild numerous facilities after Hurricane Ike devastated the area. The school district was consistently pleased with his work. But acting on their own initiative, federal prosecutors began investigating the possibility of corruption.

The United States Attorney's Office for the Eastern District of Texas ultimately obtained a thirty-seven count indictment accusing petitioner of using his electrical contracting business to defraud the school district. Pet. App. 2a. The government

charged petitioner with mail fraud, wire fraud, interstate transportation of funds by fraud, fraud upon programs receiving federal funds, and money laundering. *Id.* Several of the charged offenses carried penalties of up to twenty years of imprisonment. 18 U.S.C. §§ 1341, 1343.

Petitioner maintained his innocence and spent eighteen months fighting the charges. Meanwhile, with a cloud of suspicion continually hanging over his head, he struggled to find new work and had to lay off employees.

The case ultimately went to trial in federal court. After two weeks of trial and lengthy deliberations, the jury deadlocked. Convinced that the jury would not reach a verdict, the judge declared a mistrial.[1]

In lieu of retrying petitioner, the government offered to drop all charges in exchange for petitioner pleading guilty to a single misdemeanor count of failing to timely pay income taxes. Pet. App. 2a-3a. Hoping to bring closure to these allegations against him and this episode of his life, petitioner agreed. The government accordingly dismissed the indictment. *Id.* 3a.

U.S. Attorney Malcolm Bales later told reporters that he was deeply disappointed by the "ill-fated prosecution" of petitioner. Appl. for Writ of Habeas Corpus Ex. B (quoting news article); Pet. App. 3a. At a subsequent public appearance, he elaborated on that regret, declaring that he "would love to have

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[1] The record does not contain the jury's tally upon the district court's declaration of a mistrial. But jurors told defense counsel that the vote was 10-2 for acquittal on all counts.

another shot at the prosecution of Calvin Walker." Sara Flores, *U.S. Attorney, Malcolm Bales Announces Retirement*, Beaumont Enter. (Sept. 14, 2016), http://bit.ly/2eMqQc7.

B. Second Prosecution

1. Just two months after he had bemoaned petitioner's "ill-fated prosecution," Bales held a press conference with Corey Crenshaw, the newly appointed local District Attorney. Crenshaw had previously served as an Assistant U.S. Attorney in Bales's office, and had been working under Bales at the time of petitioner's federal plea agreement. Pet. App. 3a-4a. The two announced they were creating a federal-state task force aimed at combatting local crimes "related to the abuse of public trust." *Id.* 4a.

A few weeks later, Bales and Crenshaw exchanged emails. Crenshaw indicated that he was "ready to move forward with reviewing [petitioner's] case for state prosecution" and asked if Bales had "received guidance on the issue of allowing me to have a copy of your file." State's Resp. to Appl. for Writ of Habeas Corpus Ex. C. Bales responded: "We can provide you information developed in the federal investigation. We are only constrained from actively participating in any subsequent state prosecution." *Id.* Bales also cautioned Crenshaw, going forward, "not [to] refer to the any [sic] Walker case that is generated from the DA's office as part of the work of the joint task force." *Id.*

After sending Crenshaw "seized documents as well as information developed in the federal case," State's Resp. to Appl. for Writ of Habeas Corpus Ex. C, Bales formally deputized Crenshaw as a Special Assistant U.S. Attorney to "assist with Joint Task

Force Cases," Pet. App. 4a. As a condition of the appointment, Crenshaw was required to "report to and act under" the direction of Bales. *Id.*

Soon thereafter, the District Attorney's Office arrested petitioner and charged him with six violations of the state laws prohibiting fraud and money laundering. These charges involve "precisely the same conduct . . . covered by [petitioner's] federal plea agreement." Pet. App. 4a (quotation marks omitted). Bail was set at a total of $300,000. And each charge is a first-degree felony under state law, for which petitioner faces a potential sentence of life imprisonment. *See* Tex. Penal Code Ann. §§ 12.32, 32.46, 34.02.

2. Petitioner filed six pretrial applications for writs of habeas corpus (one for each charge, per Texas procedural requirements), alleging the new charges violated his right under the Fifth Amendment's Double Jeopardy Clause not to be tried twice for the same offense. Pet. App. 2a.[2]

In response, the State invoked the "separate sovereigns" exception to the Double Jeopardy Clause. Under that exception (also known as the "dual sovereignty" exception), the Clause does not "bar a second trial even though there ha[s] been a prior trial by another government for a similar offense."

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[2] This Court and the Texas Court of Criminal Appeals, have held that pretrial applications are the preferred method of challenging the validity of an indictment on double jeopardy grounds and operate functionally like direct review. Pet. App. 9a-10a (citing *Abney v. United States*, 431 U.S. 651, 660 (1977); *Stephens v. State*, 806 S.W.2d 812, 814 (Tex. Crim. App. 1990)).

Bartkus v. Illinois, 359 U.S. 121, 136 (1959). The *Bartkus* Court suggested this exception would not apply if the second sovereign was "merely a tool" of, or its prosecution was "a sham and a cover" for, the other sovereign. *Id.* at 123-24. But the State here argued that it was "not acting as a tool of the federal government by prosecuting [Walker] for violation of state laws." State's Resp. to Appl. for Writ of Habeas Corpus 7.

The trial court denied petitioner's applications without allowing an evidentiary hearing or any other form of discovery on the issue. Pet. App. 28a, 32a. The court reasoned that the State was acting sufficiently independently to take advantage of the separate sovereigns exception. *Id.* 30a-32a.

3. The Texas Court of Appeals affirmed. Pet. App. 26a. It first "question[ed]" whether any limitation to the separate sovereigns exception exists. *Id.* 24a. It then held that, even if there is a limit, the allegations and preliminary evidence petitioner introduced showed that he would not be able to establish a violation of the Double Jeopardy Clause. *Id.* 26a.

The court of appeals acknowledged petitioner's allegation that his state case is a "'joint task force' case[] that Crenshaw—by virtue of his authority as a state district attorney and cross-designation as a Special Assistant United States Attorney—had the power to prosecute both as a federal and state prosecutor." Pet. App. 15a. But, accepting Crenshaw's representation that he was bringing the prosecution solely "in his capacity as a state district attorney," *id.* 23a n.4, the court of appeals ruled for the State, reasoning that "the mere fact that a state prosecutor

is cross-designated as a Special Assistant United States Attorney, without more, is insufficient to establish that the State and federal government are so intertwined that they are, in actuality, one sovereign prosecuting the defendant twice," *id.* 24a.

4. Petitioner sought discretionary review of this double jeopardy holding in the Texas Court of Criminal Appeals. That court denied review without comment. Pet. App. 34a.

5. This petition follows.

REASONS FOR GRANTING THE WRIT

Justices of this Court, as well as other courts, former law enforcement officials, and scholars, have urged the Court to revisit the separate sovereigns exception to the Double Jeopardy Clause. It should do so now.

The separate sovereigns exception contravenes the Double Jeopardy Clause's core protection against being tried twice for the same alleged offense. It also squarely conflicts with the common law guarantee the Clause was meant to enshrine. And the exception turns our federal-state structure on its head, using our "diffusion of sovereign power" to deprive individuals of liberty, rather than to "enhance[]" their protection from the government. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quotation marks and citation omitted).

At a minimum, this Court should take up the suggestion in *Bartkus v. Illinois*, 359 U.S. 121, 123-24 (1959), to identify limits on the separate sovereigns exception. State and federal courts are deeply confused over whether any such limits exist and, if they do, what they are. This confusion

disserves defendants, prosecutors, and courts alike. Wherever the Court may choose to draw the line, the facts of this case provide an opportunity to clarify that, at least when a case arises from a joint federal-state operation, prosecutors may not force a defendant to defend himself twice for the same alleged misconduct.

I. This Court Should Reconsider the Separate Sovereigns Exception.

A. Justices, Judges, and Scholars Urge This Court to Reexamine the Exception.

Last Term, this Court dealt for the first time in many years with a case concerning the separate sovereigns exception. Although the parties took the legitimacy of the doctrine as given, Justice Ginsburg, joined by Justice Thomas, wrote separately to urge that the exception "warrants attention" and "bears fresh examination in an appropriate case." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). They noted that the exception thwarts the Double Jeopardy Clause's central objective of "shield[ing] individuals from the harassment of multiple prosecutions for the same misconduct," and therefore appears to contravene the purpose and original understanding of the Clause. *Id.*

The *Sanchez Valle* concurrence echoes a steady drumbeat over recent years from a wide array of federal and state judges for "the Supreme Court to revisit the issue." *United States v. Wilson*, 413 F.3d 382, 394 (3d Cir. 2005) (Aldisert, J., dissenting). These judges have concluded that "the entire [separate sovereigns exception] is in need of serious

reconsideration," *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring), because the exception "is fundamentally and morally wrong," *State v. Hogg*, 385 A.2d 844, 845 (N.H. 1978). *See also, e.g.*, *United States v. Berry*, 164 F.3d 844, 847 n.4 (3d Cir. 1999); *Turley v. Wyrick*, 554 F.2d 840, 842-44 (8th Cir. 1977) (Lay, J., concurring); *Commonwealth v. Mills*, 286 A.2d 638, 640-41 (Pa. 1971).

Additionally, former Attorney General (and former state prosecutor) Edwin Meese III has spoken out to encourage this Court to "abolish the dual sovereign exception to the Double Jeopardy Clause." Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 23 (1997). As Meese emphasized, "legal commentators are almost entirely critical" of the exception as well. *Id.* at 17 & n.102 (collecting a "sample of articles" to that effect).

B. The Separate Sovereigns Exception Is Deeply Flawed.

As Justices Ginsburg and Thomas indicated last Term, the separate sovereigns exception to the Double Jeopardy Clause contravenes the Clause's basic purpose and its original meaning. And the reasons the Court once advanced in defense of the exception can no longer justify it.

1. a. The Double Jeopardy Clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957); *see also Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1874). This rule against forcing a defendant to "'run the gauntlet' a second time," *Abney v. United*

States, 431 U.S. 651, 662 (1977), "represents a constitutional policy of finality for the defendant's benefit," *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion). "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green*, 355 U.S. at 187-88.

The separate sovereigns exception is an affront to this fundamental protection. Permitting both the federal and a state government to try and convict an individual affords prosecutors "an opportunity for the proverbial 'second bite at the apple.'" *Burks v. United States*, 437 U.S. 1, 17 (1978). And "[i]t is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the same offense." *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting). If the harm of being prosecuted twice "is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one." *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting). To the defendant, the anxiety, insecurity, and harassment that come from a second prosecution are all the same, regardless of the office for which the prosecutor works.

b. The original meaning of the Double Jeopardy Clause confirms the illegitimacy of the separate

sovereigns exception. The Clause was specifically designed to prohibit successive prosecutions "so far as the common law gave that protection." *Ex parte Lange*, 85 U.S. (18 Wall.) at 170; *see also* 3 Joseph Story, Commentaries on the Constitution § 1781 (1833) (recognizing the Double Jeopardy Clause codifies the common law right); 1 Annals of Congress 781-82 (Aug. 17, 1789) (relating that, in the debates during the First Congress over the Bill of Rights, representatives appealed to the "universal practice in Great Britain" and sought to ensure that the Double Jeopardy Clause would be "declaratory of the law as it [then] stood").

The common law unambiguously protected against successive prosecution by separate sovereigns. Authoritative common law treatises recognized "the universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England *335-36 (1768); *see also* 2 William Hawkins, A Treatise of the Pleas of the Crown 515, 526 (John Curwood ed., 8th ed. 1824). And this protection against double jeopardy was triggered by a prior prosecution "in *any* court whatsoever." 2 Hawkins, Pleas of the Crown 522 (emphasis added); *accord* 4 Blackstone, Commentaries *335.

As authority for that proposition, Founding-era treatises cited *King v. Hutchinson* (1678) 84 Eng. Rep. 1011, 1011; 3 Keble 785, 785 (KB), a case in which England attempted to prosecute a man for murder after a court in Portugal had acquitted him of the same offense. The King's Bench held the man "could not be tried again" in England, even though

"that [first] judgment was out of the King[']s dominions" and "the King was very willing to have him tried here." *Beak v. Thyrwhit* (1689) 87 Eng. Rep. 124, 125; 3 Mod. 194, 195 (KB) (citing *Hutchinson*, 84 Eng. Rep. at 1011; 3 Keble at 785).

Even prior judgments from the courts of quasi-sovereigns triggered double jeopardy protection. In one case, the King's Bench held that a man acquitted before the Grand Sessions of Wales could "not be tried again for the same offense" in England. *King v. Thomas* (1664) 83 Eng. Rep. 326, 327; 1 Lev. 118, 118 (KB). And in another, the Crown Court ruled that an acquittal in colonial South Africa "would be a bar" in England. *King v. Roche* (1775) 168 Eng. Rep. 169, 169 a; 1 Leach 134, 135 (Crown).

The rule "that an acquittal or conviction by a court of competent jurisdiction abroad is a bar to a prosecution for the same offense in England had been definitively settled . . . prior to the American revolution." J. A. C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. Rev. 1, 8 (1956). And contemporaneous with America's founding, English courts cited and reaffirmed that rule. *See, e.g.*, *Roche* (1775) 168 Eng. Rep. at 169 a; 1 Leach at 135. "These cases were [so] widely cited and universally accepted" that "it would have been difficult to have made more than the most cursory examination of nineteenth century or later English

treatises or digests without encountering them." Grant, 4 UCLA L. Rev. at 9-11.[3]

Indeed, when this Court first addressed the question, every Justice confirmed the Founding-era understanding that the Double Jeopardy Clause prohibited successive prosecutions regardless of the whether the later-prosecuting sovereign was the same as the first. In *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), the Marshall Court divided over whether Pennsylvania had the authority to punish failures to join the state militia—an act Congress could criminalize too. But all agreed that, if Pennsylvania could punish this conduct, no man could "be twice tried for [that] offence" by the federal and state governments. *Id.* at 29; *see also id.* at 72 (Story, J., dissenting). As Justice Story put it: Such successive prosecutions would violate "the principles of the common law, and the genius of our free government." *Id.* at 72 (Story, J., dissenting).

2. The separate sovereigns exception, as it exists today, derives from a pair of cases decided over fifty years ago: *Bartkus v. Illinois*, 359 U.S. 121 (1959),

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[3] The common law rule continues to prevail in international law. Subject to narrow exceptions not relevant here, neither the International Criminal Court nor one of its signatories may prosecute any person who has previously been tried by the other for the same conduct. U.N. Diplomatic Conf. of Plenipotentiaries on the Estab. of an Int'l Criminal Court, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, at Art. 20 (July 17, 1998). *See also Joined Cases C-187/01 & 385/01, Gözütok and Brügge*, E.C.R. 2003 I-1345, I-1391 (European Union law).

and *Abbate v. United States*, 359 U.S. 187 (1959).[4] In both cases, Justice Black, joined by Chief Justice Warren and Justice Douglas, protested that the exception violates the bedrock principle that a government may not "try people twice for the same act." *Bartkus*, 359 U.S. at 156 (Black, J., dissenting). The majority conceded that "there is some language [in *Houston v. Moore*] to the effect that there would be a bar to a second prosecution by a different government." *Bartkus*, 359 U.S. at 130. But the majority countered with arguments rooted in non-incorporation, the meaning of the word "offence," and the demands of our federal-state structure. These arguments no longer hold water—if they ever did.

a. The *Bartkus* Court emphasized, first and foremost, that "the Double Jeopardy Clause of the Fifth Amendment [does] not bind the States." *Bartkus*, 359 U.S. at 127 (citing *Palko v. Connecticut*, 302 U.S. 319, 323 (1937)). Thus, in accord with the other separate sovereigns exceptions prevailing at the time, this Court reasoned that action that, if done wholly by the federal government, would violate the Constitution is permissible if done partly by a state. *Id.*; *see also Abbate*, 359 U.S. at 194 (reasoning that federal government may prosecute after a state because the Double Jeopardy Clause did not cover the first prosecution).

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[4] While this Court has since applied the exception several times, each time it has simply assumed, without ever deciding, that the exception continues to exist. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016); *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985); *United States v. Wheeler*, 435 U.S. 313, 321-22 (1978); *Waller v. Florida*, 397 U.S. 387, 394 (1970).

This Court has since abolished the other two separate sovereigns exceptions. The Court first eliminated the rule allowing prosecutors to introduce evidence officers of another government obtained through searches that contravened the strictures of the Fourth Amendment. The Court explained that "[t]he foundation upon which the [rule] originally rested . . . disappeared" once the Fourth Amendment was incorporated against the States. *Elkins v. United States*, 364 U.S. 206, 213 (1960). The Court next abrogated the separate sovereigns exception to the right against self-incrimination—the Double Jeopardy Clause's Fifth Amendment neighbor—which had permitted "one jurisdiction in our federal structure [to] compel a witness to give testimony which might incriminate him under the laws of another." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 54, 74 (1964). Once the relevant constitutional provision applied to the states, that "necessitate[d] a reconsideration of th[e separate sovereigns] rule" and led to its abrogation—the rule's "fundamental assumption" having "no continuing legal vitality." *Id.* at 57, 75, 77.

So too here. The Double Jeopardy Clause now applies to the states. *See Benton v. Maryland*, 395 U.S. 784, 787 (1969) (overruling *Palko*). Thus, the foundation for the separate sovereigns exception to the Clause has "disappeared." *All Assets of G.P.S.*, 66 F.3d at 493-94 n.8 (Calabresi, J., concurring). *See also Smith v. United States*, 423 U.S. 1303, 1307 (1975) (Douglas, J., in chambers) (incorporation of Double Jeopardy Clause "may cast doubt upon the continuing vitality of *Bartkus*"); *United States v. Grimes*, 641 F.2d 96, 101-02 (3d Cir. 1981); *Turley*, 554 F.2d at 842 (Lay, J., concurring).

b. The *Bartkus* Court also asserted—drawing on *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852)—that the word "offence" in the text of the Double Jeopardy Clause, "in its legal signification, means the transgression of a law." *Bartkus*, 359 U.S. at 131 (quoting *Moore*, 55 U.S. (14 How.) at 19). Thus, the Court reasoned that "[t]he same act" constitutes two separate offenses whenever it violates two sovereigns' criminal codes, even when the two provisions proscribe identical conduct. *Id.*

It should be obvious that "the single term 'same offence'" cannot have "two different meanings." *United States v. Dixon*, 509 U.S. 688, 704 (1993). Yet the definition *Bartkus* recited is inconsistent with this Court's post-*Moore* interpretation of the term "offence" in *Blockburger v. United States*, 284 U.S. 299 (1932). In *Blockburger*, the Court explained that two provisions constitute the same "offence" for double jeopardy purposes when neither "requires proof of a fact which the other does not." *Id.* at 304. Put another way, the "violation of two distinct statutory provisions" can still constitute one "offence" under the Double Jeopardy Clause. *Id.*

Blockburger's element-by-element approach to defining "offence"—rarely pertinent when criminal codes were thinner than today, but a vital precept of double jeopardy law now—cannot be squared with *Bartkus*'s crabbed construction of the term as a mere "transgression of a law." There would be no need to conduct *Blockburger*'s element-by-element analysis if each violation of a distinct statute were, by definition, a separate "offence."

The common law, as explained above, reinforces the error in the *Bartkus* Court's conception of the

term "offence." The common law makes clear that two statutory provisions can constitute the same "offence" even when appearing in two different sovereigns' criminal codes. *See supra* at 10-12.

Bartkus shrugged off this English common law authority in a footnote, suggesting "[i]t has not been deemed relevant." 359 U.S. at 128 n.9. But when later abrogating the separate sovereigns exception to the Fifth Amendment's Self-Incrimination Clause, this Court deemed such "English antecedents" directly pertinent and controlling. *Murphy*, 378 U.S. at 57; *see also id.* at 58-63, 77. And more recently, this Court has insisted that where the Constitution codified a common law criminal procedure guarantee, the Court must preserve the level of protection "that existed when [the guarantee] was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (Fourth Amendment); *see also, e.g.*, *Giles v. California*, 554 U.S. 353, 375 (2008) (plurality opinion) (Sixth Amendment); *Carmell v. Texas*, 529 U.S. 513, 521-42 (2000) (Ex Post Facto Clause).

c. Finally, in *Bartkus* and *Abbate*, the Court invoked the nature of our federal-state structure as a justification for the separate sovereigns exception. The Court suggested that federal and state governments have different interests that require treating violations of their respective criminal statutes as distinct "offences." *See Bartkus*, 359 U.S. at 137; *Abbate*, 359 U.S. at 195. But this reasoning, too, is mistaken—in both principle and practice.

i. In terms of principle, invoking our federal-state structure to strip defendants of a constitutional protection when both sovereigns, instead of just one, are involved upends our governmental design.

As this Court recently emphasized, our federal-state structure exists to "secure[] to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). The Framers intended freedom to be "*enhanced* by the creation of two governments not one." *Bond*, 564 U.S. at 220-21 (emphasis added) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). The effect of "split[ting] the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), therefore, is to afford "a double security . . . to the rights of the people," The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003).

Permitting "a State and the Nation [to] be considered two wholly separate sovereignties for the purpose of allowing them to do together what . . . neither can do separately" transforms our federal-state structure from a shield into a sword. *Abbate*, 359 U.S. at 203 (Black, J., dissenting). It accomplishes the opposite of the Framers' intentions.

ii. The *Bartkus-Abbate* Court's conception of distinct federal and state interests in criminal prosecution is equally misguided in practice. Historically, federal and state criminal codes seldom overlapped, meaning there was "little, if any, official coordination" between state and federal prosecutors. Thomas White, *Limitations Imposed on the Dual Sovereignty Doctrine by Federal and State Governments*, 38 N. Ky. L. Rev. 173, 205 & n.223 (2011) (quoting memo from Maureen H. Killion, U.S. Dep't of Justice (May 22, 2008)); *see also* Am. Bar Ass'n, *Task Force on the Federalization of Criminal*

Law 7 (1998). Thus, it was long safe for the Court to assume that persons generally would not face jeopardy a second time for the same conduct. *See Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847).

Today, however, state and federal criminal law largely overlap, and states and the federal government regularly cooperate, belying any notion that their crime-fighting interests are so distinct that state and federal criminalization of the same conduct constitutes separate offenses. U.S. Attorneys' Offices, for instance, regularly direct joint federal-state operations. And as this case illustrates, these initiatives often involve designating and deputizing local prosecutors and investigators as federal officers. *See* Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 68 & n.345 (1992); Pet App. 4a. Federal and state prosecutors are thus in constant communication. Indeed, in advance of initiating certain prosecutions, the Justice Department requires U.S. Attorneys to consult with state prosecutors. *See* U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-2.031 (2009).

None of this is to suggest that federal-state cooperation is anything other than "entirely commendable." *Elkins*, 364 U.S. at 211. But the modern reality and pervasive extent of that cooperation make it illogical "to maintain the fiction that federal and state governments are so separate in their interests that the [Double Jeopardy Clause's] dual sovereignty doctrine is universally needed to protect one from the other." *All Assets of G.P.S.*, 66 F.3d at 499 (Calabresi, J., concurring).

C. The Exception Causes Serious Harm.

The separate sovereigns exception harms criminal defendants in the precise ways the Double Jeopardy Clause seeks to avoid.

1. As former Attorney General Meese has explained, the modern federalization of crime has greatly increased the salience of the separate sovereigns exception because the explosion of new, overlapping federal prohibitions "creates more opportunities for successive prosecutions." Meese, 1 Tex. Rev. L. & Pol. at 22. Federal criminal laws now reach many matters traditionally addressed only by the states, touching everything from odometer tampering to carjacking to garden-variety drug crimes. *See* 49 U.S.C. § 32704; 18 U.S.C. § 2119; 21 U.S.C. § 801 et seq.; *see also Yates v. United States*, 135 S. Ct. 1074, 1100-01 (2015) (Kagan, J., dissenting) (noting that all Justices agree there is a modern "pathology" towards "overcriminalization and excessive punishment in the U.S. Code").

This overlap creates a risk the Framers did not imagine and that even the *Bartkus* Court could not have foreseen: the everyday prospect of individuals being hauled before both federal and state courts for the same alleged misconduct. "In the previous era of separate and distinct roles for the federal and state governments in law enforcement, the dual sovereign exception to double jeopardy protection was unfortunate but tolerable. However, in [today's] era of the federalization of crime, there is little difference between the federal government and state governments in law enforcement because the federal government has duplicated virtually every major state crime." Meese, 1 Tex. Rev. L. & Pol. at 22.

2. Successive prosecutions by separate sovereigns for the same conduct oppress the innocent and the guilty alike. A second prosecution forces the accused to endure double the anxiety; double the expense of defending himself; and double the disruption to his family and professional life. *See Green*, 355 U.S. at 187. And when the defendant is in fact innocent, the second prosecution enhances "the possibility that [he nonetheless] may be found guilty." *Id.* at 188. The record from the first prosecution gives the government a window into the defense strategy and allows its own witnesses to be "better prepared for the rigors of cross-examination" during the second trial. *Crist v. Bretz*, 437 U.S. 28, 52 (1978) (Powell, J., dissenting). Where an initial trial resulted in a conviction, the Double Jeopardy Clause is likewise thwarted when the defendant is forced to stand trial and endure punishment a second time.

3. Even where the separate sovereigns exception does not lead to an immediate reprosecution, the mere *threat* of double prosecution forces multitudes who have already endured one prosecution to "live in a continuing state of anxiety and insecurity." *Green*, 355 U.S. at 187.

To be sure, some prosecutors face some internal restraints on the power the separate sovereigns exception gives them to prosecute virtually every criminal act for a second time. Some twenty states restrict subsequent prosecutions following federal charges.[5] And in response to *Bartkus* and *Abbate*, the

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[5] *See* Ark. Code Ann. § 5-1-114; Cal. Penal Code § 656; Colo. Rev. Stat. § 18-1-303; Del. Code Ann. tit. 11, § 209; Ga.

U.S. Department of Justice formulated an internal policy—later termed the *Petite* Policy—"to limit the exercise of the power to bring successive prosecutions for the same offense." *Rinaldi v. United States*, 434 U.S. 22, 28-29 (1977) (per curiam). The Policy establishes certain criteria that must be met before a U.S. Attorney may initiate a prosecution "following a prior state . . . prosecution based on substantially the same act(s)," and it requires that any such prosecution "be approved by the appropriate Assistant Attorney General." U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-2.031 (2009).

But these self-imposed restrictions do not eliminate the injustices the Double Jeopardy Clause is meant to prevent. More than half of the states, including Texas, impose no restraints whatsoever on subsequent state prosecutions. And when a subsequent federal prosecution violates the Justice Department's *Petite* Policy, defendants have no recourse. Internal Department directives do not create enforceable rights. *See, e.g.*, *United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003); *United States v. Harrison*, 918 F.2d 469, 475 (5th Cir. 1990).

Code Ann. § 16-1-8(c); Haw. Rev. Stat. § 701-112; Idaho Code § 19-315; 720 Ill. Comp. Stat. 5/3-4(c); Ind. Code Ann. § 35-41-4-5; Ky. Rev. Stat. Ann. § 505.050; Minn. Stat. § 609.045; Miss. Code Ann. § 99-11-27; Nev. Rev. Stat. § 171.075; N.J. Stat. Ann. § 2C:1-11; N.Y. Code Crim. Proc. § 40.20(2)(f); 18 Pa. Cons. Stat. § 111; Utah Code Ann. § 76-1-404; Va. Code Ann. § 19.2-294; Wash. Rev. Code § 10.43.040; Wisc. Stat. § 939.71. Two other states have similar laws pertaining to specific crimes. *See* Mich. Comp. Laws § 767.64 (theft of property outside the state); N.D. Cent. Code § 19-03.1-28 (prior federal prosecution brought under Uniform Controlled Substances Act).

More fundamentally, the Court has recently stressed that the guarantees enshrined in the Bill of Rights should not depend on the exercise of prosecutorial self-restraint. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). This Court should not entrust the protection of the Double Jeopardy Clause—any more than any other constitutional right—to "the mercy of *noblesse oblige*." *Id.* "[T]he Founders did not fight a revolution to gain the right to government agency protocols." *Riley v. California*, 134 S. Ct. 2473, 2491 (2014).

D. This Case Presents an Excellent Opportunity to Reconsider the Exception.

In their concurring opinion in *Sanchez Valle*, Justices Ginsburg and Thomas urged the Court to give the separate sovereigns exception a fresh look in "a future case in which a defendant faces successive prosecutions by parts of the whole USA." 136 S. Ct. at 1877 (Ginsburg, J., concurring). This case answers that call.

Petitioner's double jeopardy claims come to this Court on the equivalent of direct review. And the Texas Court of Appeals delivered a comprehensive opinion that turned solely on the separate sovereigns exception. *See* Pet. App. 8a-26a.

This case is also a striking example of how the separate sovereigns exception threatens individual liberty. Petitioner has already felt the full brunt of federal power and endured a weeks-long trial on the charges here. Only after that trial ended with the "one career disappointment" of Bales's tenure as U.S.

Attorney did the State of Texas express any interest in pursuing a case against petitioner. Yet because of the federal-state task force, petitioner now faces a second full trial and the prospect of life in prison for each charge. This is the prototypical "second bite at the apple" that the Double Jeopardy Clause was designed to prevent.

Finally, this case substantiates Justice Black's concern that the separate sovereigns exception would "be used . . . to make scapegoats of helpless, political, religious, or racial minorities and those who differ, who do not conform and who resist tyranny." *Bartkus*, 359 U.S. at 163 (Black, J., dissenting). Petitioner is a black, non-union electrician who outbid his predecessor—a white, union electrician—for an important school district contract. He is thus the kind of outsider who is most likely to be the object of repeated prosecutions—and most likely to need the Double Jeopardy Clause's protections.

II. This Court Should at Least Resolve Whether the Separate Sovereigns Exception Applies When State and Federal Authorities Work Jointly.

In reasoning that the collaboration between federal and state authorities in *Bartkus v. Illinois*, 359 U.S. 121 (1959), did not establish that the second prosecution was "in essential fact another federal prosecution," *id.* at 124, this Court implied that at some point collaboration between separate sovereigns becomes the work of one entity for double jeopardy purposes. If this Court retains the separate sovereigns exception, it should use this case to identify where that line is crossed.

A. Lower Courts Are Confused About the Exception's Limits.

This Court's post-*Bartkus* silence about the extent to which the Double Jeopardy Clause permits federal and state authorities to collaborate to bring a second prosecution has caused widespread confusion in the lower courts.

1. Some courts have declined to recognize any limits on the separate sovereigns exception. In general, these courts treat the "*Bartkus* Court's failure to identify a particular instance of a sham prosecution" as establishing that a constitutional limitation "does not exist." *United States v. Angleton*, 314 F.3d 767, 773-74 (5th Cir. 2002); *see also United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1361 (11th Cir. 1994). In this case, the Texas Court of Appeals similarly "question[ed] whether the *Bartkus* [limitation] is even recognized in Texas." Pet. App. 24a; *see also Kappmeyer v. State*, 127 S.W.3d 178, 182 n.1 (Tex. App. 2003) ("We disagree . . . that the Supreme Court held that a subsequent prosecution was prevented when one sovereign is used as a tool for a sham prosecution by another sovereign, or where there is collusion between the sovereigns.").

2. Other courts accept that the Double Jeopardy Clause imposes limits on the separate sovereigns exception, but even these courts differ as to what those limits are.

Several federal courts of appeals and state high courts have held that the Double Jeopardy Clause prohibits successive prosecutions if the second sovereign lacks meaningful control over its own proceedings. For those courts, the separate

sovereigns exception should yield where the second prosecutorial authority "had little or no independent volition" in the successive proceeding, *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976), one sovereign "thoroughly dominates or manipulates the prosecutorial machinery of another," *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996), or when one jurisdiction "ced[es] its sovereign authority to prosecute and act[s] only because" the other "told it to do so," *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008). *Accord United States v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984); *United States v. Piekarsky*, 687 F.3d 134, 149 (3d Cir. 2012); *United States v. Montgomery*, 262 F.3d 233, 238 (4th Cir. 2001); *United States v. Leathers*, 354 F.3d 955, 960 (8th Cir. 2004); *United States v. Raymer*, 941 F.2d 1031, 1037 (10th Cir. 1991); *Koon v. State*, 463 So. 2d 201, 203 (Fla. 1985); *State v. Hoover*, 121 A.3d 1281, 1283 (Me. 2015), *cert. denied* 136 S. Ct. 905 (2016); *State v. Rodriguez*, 917 A.2d 409, 416 (R.I. 2007).

By contrast, the Ninth Circuit and the Arkansas Supreme Court have adopted standards that focus on evidence of "collusion" between federal and state authorities. *See United States v. Zone*, 403 F.3d 1101, 1106 (9th Cir. 2005); *Hale v. State*, 985 S.W.2d 303, 307 (Ark. 1999). As the Ninth Circuit has described this test, courts should look for evidence of more than "mere cooperation" between the two sovereigns and consider the extent to which the second sovereign acts on its own in the successive proceeding. *United States v. Bernhardt*, 831 F.2d 181, 182 (9th Cir. 1987). Yet under this test, one sovereign need not dominate the other. *See Zone*, 403 F. 3d at 1106.

3. In light of this Court's silence on the boundaries of the separate sovereigns exception, lower courts are reluctant to grant defendants relief—even in the most extreme cases.

In *Bernhardt*, for example, state officials arranged for the appointment of a Special Assistant U.S. Attorney and paid for him to bring a successive prosecution of the defendant in federal court. The district court dismissed a federal indictment on double jeopardy grounds. *Bernhardt*, 831 F.2d at 181-82. The Ninth Circuit agreed the circumstances of the case were "troubling." *Id.* at 183. Yet it vacated the judgment, uncertain of whether the case necessarily fit within the "narrow" limitations on the separate sovereigns exception. *Id.*

In another case, the state prosecutor who oversaw the defendant's first prosecution also brought the subsequent federal charges in his capacity as a Special Assistant U.S. Attorney. The district court invoked *Bartkus* to dismiss the federal indictment. *United States v. Belcher*, 762 F. Supp. 666, 668, 670-71 (W.D. Va. 1991). But a later decision of the same court backed away from that ruling, asserting that "[t]he *Belcher* facts have been recognized as unique." *United States v. Johnson*, 576 F. Supp. 2d 758, 764 n.6 (W.D. Va. 2008) (quoting *United States v. Ealy*, No. 1:00CR0104, 2001 WL 855894, at *1 (W.D. Va. July 30, 2001)).

B. Defendants, Prosecutors, and Courts Need to Know What the Limits Are.

1. Defendants, prosecutors, and judges are disserved by the current state of limbo over the limits on the separate sovereigns exception.

Assuming some limits do exist, lower courts' reluctance to enforce them robs defendants of the Double Jeopardy Clause's protection when sovereigns work jointly on a second prosecution. As courts repeatedly decline to find that scenarios involving lockstep federal-state coordination are in essential fact second prosecutions by the same sovereign, the possibility of establishing meaningful limits on the separate sovereigns exception drifts further out of reach. And second-bite-at-the-apple prosecutions continue unchecked.

The continued confusion also impedes plea agreements from delivering the finality they are intended to provide. Defendants' objectives in plea negotiations include not only minimizing possible punishment from the current proceeding but also avoiding any future legal wrangling. Indeed, "one should not underestimate the value to a defendant of making peace with the government and being able to plan his life, unthreatened by the risk of future prosecution." Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 Vand. L. Rev. 1181, 1187 (1996). Currently, however, defendants cannot know what the contours of their constitutional rights (or lack thereof) truly are under the Double Jeopardy Clause.

This lack of clarity also burdens prosecutors and courts. If limitations on the separate sovereigns exception actually exist, state prosecutors—like those here—need to know the extent to which they can collaborate with their federal colleagues (and vice versa) without running the risk that a court will void subsequent convictions or indictments. *See supra* at 4 (describing correspondence between federal and state prosecutors in this case concerning permissible

modes of collaborating). Conversely, if there are no limitations on the separate sovereigns exception, prosecutors should not be required to tiptoe around the issue when working jointly on a successive prosecution. Nor should they be forced to continually litigate the issue, expending prosecutorial and judicial resources and delaying trials.

2. The need for clarifying the boundaries of the separate sovereigns exception is now more pressing than ever, as formal federal-state law enforcement efforts have become increasingly common. *See supra* at 18-19. For example, in 2016, the Drug Enforcement Administration alone managed 271 federal-state task forces. *DEA Programs: State & Local Task Forces*, Drug Enf't Admin., http://bit.ly/2ezrQUX (last visited Nov. 9, 2016). This collaboration extends to a wide variety of crimes subject to both state and federal punishments, including financial crimes like the ones alleged in this case. *See, e.g.*, Paul Kurtz, *Philadelphia DA Creates New Public Corruption Task Force,* CBS Philly (June 2, 2011), http://cbsloc.al/2eASube; *Maryland and the Federal Government*, Maryland.gov, http://bit.ly/2dDP7Ug (last visited Nov. 9, 2016); U.S. Attorney's Office, Dist. of N.H., *Mortgage Fraud Task Force* (May 2, 2016), http://bit.ly/2eDgBb3. These joint initiatives are perfectly laudable. But federal and state officials—as well as criminal defendants and courts—should know the double jeopardy implications of their joint efforts.

C. This Case Provides an Ideal Opportunity to Clarify the Exception's Limits.

This case arises from such tight federal-state collaboration that the State should not be treated as a separate sovereign for double jeopardy purposes.

1. In considering whether to impose limits on the Double Jeopardy Clause's separate sovereigns exception, the Court's precedent on a related matter provides a helpful reference point. When this Court maintained a separate sovereigns exception to the Fourth Amendment, it recognized a limit in cases of joint activity. *See Elkins v. United States*, 364 U.S. 206, 223 (1960). Specifically, in *Byars v. United States*, 273 U.S. 28 (1927), this Court held that that exception did not apply where a search "in substance and effect was a joint operation of the local and federal officers." *Id.* at 33. The Court explained: "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search and seizure." *Id.*

If this Court chooses to maintain the Double Jeopardy Clause's separate sovereigns exception, then it should impose a comparable limit on the exception's reach. That is, when state and federal authorities pool their resources to bring a successive prosecution such that the second proceeding "in substance and effect [is] a joint operation," *Byars*, 273 U.S. at 33, this Court should recognize that they should no longer be treated as two separate sovereigns. Put another way, "[w]here the record of

cooperation between state and federal authorities refutes an assertion that two independent sovereigns are acting to vindicate their own interests, the law should presume that the facts [of such cooperation] convey the truth." Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 73 (1992).

2. The nature of the federal and state prosecutors' cooperation in this case demonstrates that the two governments did not act as separate sovereigns. Accordingly, the Double Jeopardy Clause bars this prosecution—or at least entitles petitioner to an evidentiary hearing concerning the extent of the joint action at issue.

Shortly before the State filed its charges, the local U.S. Attorney and District Attorney formed a joint task force to prosecute exactly what is allegedly involved here: local instances of public corruption. And the Texas Court of Appeals accepted as true—as it had to in this procedural posture—that "Walker's state cases are 'joint task force' cases." Pet. App. 15a. Moreover, at the time the state charged petitioner, the District Attorney was deputized as a Special Assistant U.S. Attorney. As a condition of this appointment, he "was required to 'report to and act under' the direction of Bales," *id.* 4a, and "assist with Joint Task Force Cases," Appl. for Writ of Habeas Corpus Ex. D.

Adopting the State's representation, the Texas Court of Appeals asserted that the District Attorney is bringing this prosecution solely "in his capacity as a state district attorney." Pet. App. 23a n.4. But this assertion does not undercut petitioner's entitlement

to relief, or at least to an evidentiary hearing. The "capacity" the District Attorney claims to be acting in cannot change whether this prosecution arose from the federal-state task force created to prosecute "crimes related to the abuse of public trust." Appl. for Writ of Habeas Corpus Ex. C. And as just noted, this case arose from that task force.[6]

Furthermore, the question whether two sovereigns are acting separately for double jeopardy purposes should not hinge on whether a district attorney who is cross-deputized as a federal prosecutor formally proclaims to be acting solely in his state capacity. "[L]abels do not control in a double jeopardy inquiry." *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994). Rather, the protections of the Double Jeopardy Clause turn on functional realities—that is, the "purpose or effect" of the prosecution or alleged punishment. *United States v. Ursery*, 518 U.S. 267, 278, 289-90 n.3 (1996).

And here, the facts already known show that the State has not acted in a genuinely separate capacity. One month after District Attorney Crenshaw and U.S. Attorney Bales jointly announced the creation of the task force (and shortly before petitioner's state charges were issued), the District Attorney's Office requested a "copy of [the federal government's] file." State's Resp. to Appl. for Writ of Habeas Corpus Ex.

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[6] Local newspaper articles likewise reported that the task force was focused on alleged financial misconduct at Beaumont Independent School District, such as the fraud alleged in this case. Brandon Scott, *Appeals Court Declines Review in Beaumont ISD Walker Case*, Houston Chron. (June 16, 2016), http://bit.ly/2ebi5pT.

C. This request apparently harkened back to earlier strategizing between the two about the State's ability to bring charges against petitioner. *See id.* The U.S. Attorney's Office provided its "seized documents as well as information developed in the federal case." *Id.* The State then indicted petitioner.

In short, all indications are that this prosecution is aimed at giving the U.S. Attorney exactly what he said he wanted: "another shot at the prosecution of Calvin Walker." Sara Flores, *U.S. Attorney, Malcolm Bales Announces Retirement*, Beaumont Enter. (Sept. 14, 2016), http://bit.ly/2eMqQc7. At a minimum, petitioner is entitled to a hearing on the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 10, 2016