No. 17-9276

IN THE
Supreme Court of the United States

THILO BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI

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PETITIONER'S REPLY BRIEF

The Court should grant this petition because it presents an important question of statutory interpretation concerning the statute of limitations, 28 U.S.C. § 2255(f)(3), which is urgently in need of resolution. The lower courts are split on whether a motion claiming a right not to have one's sentence increased by the residual clause of the mandatory guidelines "asserts" the "right" that was "recognized" in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and made retroactive in *Welch v. United States,* 136 S. Ct. 1257 (2016). The government's position that such a motion asserts a different right that has yet to be recognized, and thus can never be recognized, is wrong. Its suggestion that the split may resolve itself without this Court's intervention is unfounded, and its assertion that the question is of little importance blinks reality. The government's excessively narrow interpretation of § 2255(f)(3) deprives prisoners who were sentenced under mandatory guidelines, received particularly severe sentences, and suffered an actual constitutional violation, of any possibility of relief. In future cases, it will discourage prisoners from diligently pursuing meritorious claims. Finally, the PROTECT Act is not relevant in this case or in any other pending case.

I. The Government Is Wrong That the Right Asserted Is Not the Right Announced in *Johnson* and Made Retroactive in *Welch*.

This Court held in *Johnson* that increasing a defendant's sentence under the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii)—"otherwise involves conduct that presents a serious potential risk of physical injury to another"—interpreted under an "ordinary case" analysis, violates the Constitution's prohibition on vague laws that

"fix[] sentences." 135 S. Ct. at 2557-58. By combining uncertainty about how to identify the "ordinary case" of the crime with uncertainty about how to determine whether a risk is sufficiently "serious," the inquiry required by the clause "both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557-58.

The government acknowledges that "*Johnson* applied due process principles to recognize a right not to be sentenced pursuant to a vague federal enhanced-punishment statute." *Gipson* Br. Opp. 10.[1] The government also concedes that the Guidelines under which Petitioner was sentenced were binding. *Brown* Mem. Opp. 1, 3. The government does not, and cannot, dispute that the text and mode of analysis of the career-offender guideline's residual clause under which Petitioner was sentenced were identical to those of the ACCA's residual clause.[2] *Johnson*, 135 S. Ct. at 2560 (analyzing guidelines cases to demonstrate that the residual clause "has proved nearly impossible to apply consistently"). Nonetheless, the government claims

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[1] The government's memorandum in opposition in this case refers for most of its argument to reasons "similar" to those at pages 9-16 of its brief in opposition in *Gipson v. United States*, No. 17-8637 (Apr. 17, 2018), a case arising from the Sixth Circuit.

[2] In implementing the congressional directive to "assure that the Guidelines specify a sentence . . . at or near the maximum term authorized" for defendants convicted for the third time of a "crime of violence" or "controlled substance offense," 28 U.S.C. § 994(h), the Commission initially defined "crime of violence" by express reference to 18 U.S.C. § 16(b). U.S.S.G. § 4B1.2(1) (Oct. 1987). When amending the career offender guideline two years later, after Congress had amended the ACCA to add the term "violent felony," the Commission defined "crime of violence" using the same residual clause as the ACCA: "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. amend. 268 ("The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)."); *see* Pub. L. 99-570, § 1402, 100 Stat. 3207-39 (Oct. 27, 1986) (adding term "violent felony" and defining it to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another").

that the right Petitioner asserts is not the right announced in *Johnson*, but rather is a "due process right not to have a defendant's Guidelines range calculated under an allegedly vague provision within otherwise-fixed statutory limits on the sentence." *Gipson* Br. Opp. 10. The government further claims that this asserted right "operates at a level of generality and abstraction that is too high to be meaningful and blurs critical distinctions between statutes and guidelines." *Id.* The government is wrong.

First, there is no material distinction between a statute and a mandatory guideline. The career-offender guideline was directed by statute, *see* 28 U.S.C. § 994(h), and the Guidelines were made mandatory by a statute: 18 U.S.C. § 3553(b). "The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory." *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) (citing § 3553(b)). Moreover, agency regulations are "laws" for all relevant purposes, including the vagueness doctrine. *See Beckles v. United States*, 137 S. Ct. 886, 894 (2017) ("Laws that 'regulate persons or entities,' we have explained, must be sufficiently clear 'that those enforcing the law do not act in an arbitrary or discriminatory way.'") (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). The fact that the Guidelines were promulgated by the Commission pursuant to lawmaking authority delegated by Congress, rather than directly enacted by Congress, is a distinction without a difference.

Second, the law under which Petitioner was sentenced "fixed sentences." *Johnson*, 135 S. Ct. at 2557. That law, § 3553(b), made the Guidelines "mandatory

and impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). By virtue of § 3553(b), the Guidelines "had the force and effect of laws." *Id.* at 234. *See also Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("[T]he Guidelines bind judges and courts in . . . pass[ing] sentence in criminal cases."); *Stinson v. United States*, 508 U.S. 36, 42 (1993) ("[T]he Guidelines Manual is binding on federal courts."). Section 3553(b) required "that the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited circumstances." *Booker*, 543 U.S. at 234. Specifically, departure was permitted only if the Commission had "not adequately" taken a circumstance into account, to be determined by considering "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission," all of which were binding, *Stinson*, 508 U.S. at 42-43. Thus, "[i]n most cases, as a matter of law, … no departure [was] legally permissible [and] the judge [was] bound to impose a sentence within the Guidelines range." *Booker*, 543 U.S. at 234. Judges were not "bound only by the statutory maximum." *Id.* at 234. Instead, the mandatory Guidelines "limited the severity of the sentence that the judge could lawfully impose," "determined upper limits of sentencing," and "mandated that the judge select a sentence" within the range. *Id.* at 220, 226, 227, 236.

Thus, the right Petitioner asserts—a due process right not to have his penalty range fixed by a residual clause identical in its text and mode of interpretation to the ACCA's—is precisely the same right announced in *Johnson* and made retroactive in *Welch*. *See United States v. Brown*, 868 F.3d 297, 310 (4th Cir. 2017) (Gregory, C.J.,

dissenting); *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018); *United States v. Moore*, 871 F.3d 72, 83 (1st Cir. 2017).

II. The Government's Defense of the Panel Majority's Decision Is Unpersuasive.

Petitioner demonstrates that even under this Court's relatively strict "new rule" jurisprudence, the right asserted here is not *another* new right that "breaks new ground" with *Johnson*, but is "merely an application of the principle that governed" *Johnson* to a closely analogous set of facts. *See* Pet. 22-25; *Gipson* Pet. 20-28. But the panel majority relied on wholly inapplicable caselaw interpreting the state-prisoner re-litigation bar to find itself "constrained" from considering *Johnson*'s reasoning and principles. Pet. 20-22. Further, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) refutes its conclusion that "*Johnson* only recognized that ACCA's residual clause was unconstitutionally vague." Pet. 24-26.

The government's only response is that the "collateral-review decisions" on which Petitioner relies do not show that "the particular rule in *Johnson* would apply here," because, it says, *Beckles* "did not decide whether [the guidelines' residual] clause would be unconstitutionally vague in the context of binding Guidelines," thus "mak[ing] clear" that the right asserted would "in fact be a new rule." *Gipson* Br. Opp. 11-12. *Beckles* did not expressly decide that question (though it pointedly distinguished the advisory guidelines from the mandatory guidelines) because Beckles was sentenced under the advisory guidelines. The government cites no authority here (nor did it in the case below) for the proposition that an issue this Court did not decide in a previous case (because it was not before the Court) by

definition requires the creation of a "new rule." Indeed, the decisions the government seeks to avoid by pointing to *Beckles* are to the contrary. *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013); *Teague v. Lane*, 489 U.S. 288, 307 (1989); *Yates v. Aiken*, 484 U.S. 211, 217 (1988); *Stringer v. Black*, 503 U.S. 222, 228-29 (1992); *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, concurring in the judgment). Even the two cases the government cites (for the first time here) proceed from the premise that the rule petitioners sought may not require the announcement of a new rule. *Sawyer v. Smith*, 497 U.S. 227 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990).

The government also contends that even assuming this Court had recognized the right Petitioner asserts, it was not "made retroactively applicable to cases on collateral review," as required by § 2255(f)(3). *Gipson* Br. Opp. 12. This is so, it claims, because "even under a binding Guidelines regime," defendants were sentenced "within the applicable statutory range," and departures were permitted under "appropriate circumstances," so the "rule asserted" does not present a risk that they could receive a sentence the law could not impose upon them. *Id.* at 12-14.

This argument is contrary to the plain text of § 2255(f)(3). Section 2255(f)(3) provides that a § 2255 motion is timely when filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Petitioner asserts the right recognized by this Court in *Johnson*, and that right was indisputably "made retroactively applicable to cases on collateral review" in *Welch*.

Accordingly, this Court should reach the merits and hold that a straightforward application of *Johnson* invalidates the mandatory guidelines' residual clause. Pet. 29-31. Such a ruling would not be another new rule triggering a new statute of limitations. *Id.* at 24-26, 27.[3] If, however, the Court were to say that it was announcing another new rule, petitioners would be in a successive posture and unable to proceed unless this Court made the rule retroactive in the same case or within one year.[4] *See* § 2255(h)(2); *Dodd v. United States*, 545 U.S. 353, 359 (2005).

In the interest of assuring the Court that a favorable merits ruling would apply retroactively, Petitioner responds to the government's arguments, though they are misplaced in a discussion of the statute of limitations. Contrary to the government's contention (*Gipson* Br. Opp. 14), the logic of *Welch* leads ineluctably to the conclusion that applying *Johnson* to the mandatory guidelines' residual clause would be retroactive. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1264-65. "Procedural rules," by contrast, "alter 'the range of permissible methods for determining whether a defendant's conduct is punishable,'" for example, by

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[3] It is not clear that anything more is required for a first § 2255. It is still an open question whether *Teague* "applies in a federal collateral challenge to a federal conviction." *Welch*, 136 S. Ct. at 1264. And there is "no case to support the proposition that a rule can be substantive in one context but procedural in another." *In re Hubbard*, 825 F.3d 225, 234 (4th Cir. 2016). *But see Cross*, 892 F.3d at 306-07 (concluding on the merits that the residual clause of the pre-*Booker* guidelines is unconstitutionally vague, then concluding that *Johnson* applies retroactively to the mandatory guidelines' residual clause under the logic of *Welch*).

[4] In that event, the Court should also clarify, after full briefing, that 28 U.S.C. § 2244(b)(1), which requires dismissal of a claim "presented in a second or successive habeas corpus *application under 28 U.S.C. § 2254* that was presented in a prior application" (emphasis added), does not apply to federal prisoners' section 2255 motions.

"allocat[ing] decision-making authority between judge and jury," or "regulat[ing] the evidence that a court could consider in making its decision." *Id.* at 1265 (citations omitted). A rule is procedural if it "'regulate[s] only the *manner of determining* the defendant's culpability.'" *Welch*, 136 S. Ct. at 1265; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 734-35 (2016) (same).

As the Court explained, "[u]nder this framework, the rule announced in *Johnson* is substantive. By striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'" *Id.* at 1265. *Johnson* "is not a procedural decision" because it "had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Armed Career Criminal Act." *Id.* It "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Id.* The Court concluded: "The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* (internal citation omitted).

By the same logic, *Johnson* changed the "substantive reach" of the mandatory career offender guideline, "altering the range of conduct [and] the class of persons that the [guideline] punishes," and "had nothing to do with" procedures for determining "whether a defendant should be sentenced under the [guideline]." *Id.* at 1265. Before *Johnson*, the mandatory career-offender guideline applied to any person who was convicted for the third time of a controlled substance offense or a crime of violence, even if one or more of those convictions satisfied only the residual clause.

After *Johnson*, the same person engaging in the same conduct is not a career offender. *Id.* In this case, application of the career offender guideline added a minimum of 22 months to the otherwise-applicable maximum.

The government's argument that applying *Johnson* to the mandatory guidelines' residual clause would not be substantive because defendants could not receive a sentence the law could not impose upon them even under a "binding Guidelines regime" (*Gipson* Br. Opp. 12-13) is thus contrary to pre-*Booker* sentencing reality,[5] and this Court's consistent interpretation of the relevant law. *See* Part I, *supra*. Indeed, the government conceded that *Johnson* would apply retroactively to mandatory guidelines cases at oral argument in *Beckles*. In response to Justice Sotomayor's question whether *Johnson* would be retroactively applicable to any guidelines cases, given that guideline ranges were within statutory maxima, the Deputy Solicitor General acknowledged that the mandatory guidelines "impose[d] an insuperable barrier that require[d] a specific finding of fact before the judge [could] sentence outside the Guidelines."[6]

The government correctly notes that the Court said in *Koon v. United States*, 518 U.S. 81 (1996), that departures would "in most cases be due substantial deference" on appeal. *Brown* Mem. Opp. 13 (citing 518 U.S. at 98). But *Koon* re-

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[5] *See Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013) ("Departures were permitted on specified grounds, but in that respect the guidelines were no different from statutes, which often specify exceptions."); *United States v. Bell*, 991 F.2d 1445, 1450 (8th Cir. 1993) (observing that the guidelines represented "additional minimums and maximums that [were] superimposed over the minimums and maximums statutorily enacted by Congress").

[6] Tr. of Oral Argument at 40-41, *Beckles* (No. 15-8544).

affirmed the Commission's binding guidelines, policy statements, and commentary as the sole framework for appellate review, *id.* at 92-96, and district courts' interpretation of those provisions was subject to *de novo* review.[7] *Id.* at 100. *Koon* also rejected the notion that courts could "decide for themselves, by reference to the broad, open-ended goals of [§ 3553(a)(2)] whether a given factor ever can be an appropriate sentencing consideration." *Id.* at 108. Not surprisingly, the rate of judicial downward departures was "substantially the same" before and after *Koon* and had "actually declined" as of 2001. U.S. Sent'g. Comm'n, *Downward Departures from the Federal Sentencing Guidelines* 55-56, 59-60 (2003).

III. The Circuit Conflict Will Not Resolve Itself Without This Court's Intervention, and the Issue Is of Extraordinary Importance.

The government contends that that the circuit conflict does not warrant this Court's intervention because it is "shallow," "of limited importance," and "may resolve itself." *Brown* Mem. Opp. 3 (citing *Gipson* Br. Opp. 14-16). To the contrary, the disagreement is entrenched, has only deepened and widened, and will continue to do so unless this Court intervenes. It is extraordinarily important that this Court resolve the issue. The statute of limitations has never been interpreted to require as a prerequisite a merits holding by this Court in each materially indistinct context, and the decisions that have now adopted that approach are deeply flawed. The issue

[7] *See, e.g.*, *United States v. Roberts*, 313 F.3d 1050, 1053 (8th Cir. 2002); *United States v. Bayles*, 310 F.3d 1302, 1314 (10th Cir. 2002); *United States v. Harris*, 293 F.3d 863, 871 (5th Cir. 2002).

impacts all *Johnson*-based § 2255s, § 2255s beyond *Johnson*, and § 2254 applications. *See* 28 U.S.C. § 2244(d)(1)(C).

In addition to the Fourth Circuit in this case, the Third, Sixth and Tenth Circuits have thus far accepted the government's argument that petitioners must wait for this Court to expressly decide that *Johnson* applies to the residual clause of the mandatory guidelines before their motions can be considered. *See United States v. Green*, __ F.3d __, 2018 WL 3717064 (3d Cir. Aug. 6, 2018); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018). The First and Seventh Circuits have rejected that position. *See Cross*, *supra*; *Moore*, *supra*.

The government suggests that the split may resolve itself because it has filed a petition for rehearing in *Cross*. A reply has also been filed in *Cross*, and regardless of the outcome, will not resolve the problem. A petition for rehearing is being filed in *Green*, which ignored *Dimaya* and rested solely on the government's reading of *Beckles*. The Tenth Circuit recently granted rehearing in a case that had summarily affirmed based on *Greer*, in light of *Dimaya* and *Cross*. *See United States v. Ward*, No. 17-3182, dkt. 010110033070 (10th Cir. Aug. 6, 2018). The Tenth Circuit had also been relying on *Greer* to hold *Johnson* motions in § 924(c) cases untimely. Less than a week before rehearing was granted in *Ward*, a panel of the Tenth Circuit, including two judges on the *Greer* panel, ruled that a motion asserting a right to relief under *Johnson* in a § 924(c) case was timely. *United States v. Nguyen*, __ F. Appx. __, 2018 WL 3633094, *2 (10th Cir. July 31, 2018). The day before *Nguyen*, the Fifth Circuit

held that a motion invoking *Johnson* in a § 924(c) case was untimely, citing a Tenth Circuit case necessarily rejected in *Nguyen*. *See United States v. Williams*, 2018 WL 3621979, *2 (5th Cir. July 30, 2018) ("For Williams's motion to even be considered, the statute must actually have first been invalidated. . . . So in that sense, his motion ***is*** untimely, but because it was filed too early, not too late." (citing *United States v. Santistevan*, __F. App'x __, 2018 WL 1779331 (10th Cir. Apr. 13, 2018)).

The government claims that the First Circuit's decision in *Moore* is "not settled circuit law" because it was issued in the context of authorizing a second-or-successive motion. *Gipson* Br. Opp.16 n.4. *Moore* is not going away. It was litigated over the course of more than a year with counsel on both sides, full briefing, and oral argument.[8] The court issued a carefully-reasoned published decision that explicitly rejected *Brown* and *Raybon* and said, definitively, that "the right *Moore* seeks to assert is exactly the right recognized by *Johnson*." 871 F.3d at 82-83. District courts in the First Circuit have been granting relief based on *Moore*, and the government has not appealed.[9] Petitioner is unaware of any district court in the First Circuit that has ruled that a motion filed within a year of *Johnson* was untimely.

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[8] *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016), cited favorably by the government (*Gipson* Br. Opp. 15), was decided in less than 30 days, without counsel, briefing, argument, or any opportunity for review, yet it is binding Eleventh Circuit law.

[9] *See, e.g.*, *United States v. Roy*, 282 F. Supp. 3d 421, 425-28 (D. Mass. 2017); *United States v. Hardy*, No. 00-cr-10179 (D. Mass. Jan. 26, 2018) (oral ruling, dkt. #69); *United States v. Beaver*, Doc. 58, D.R.I. No. 04-cr-009 (amended judgment filed Jan. 8, 2018); *United States v. Sequeira*, Doc. 96, D.R.I. No. 98-cr-00002 (amended judgment filed Jan. 11, 2018); *Ahern v. United States*, Doc. 11, D.N.H. No. 00-cr-148 (amended judgment filed Jan. 30, 2018).

Appeals are pending in the Second, Fifth, Eighth, and Ninth Circuits. District courts in these circuits have been granting relief, and increasingly so in light of *Dimaya*.[10] District courts in the Sixth and Tenth Circuits have issued certificates of appealability so that petitioners can seek further review. *See United States v. Bronson*, 2018 WL 2020765, at *2 (D. Kan. May 1, 2018) ("reasonable jurists would find it debatable whether *Dimaya* sufficiently undermines the Circuit's rationale in *Greer* . . . to warrant a retreat from [its] holding"); *United States v. Chambers*, 2018 WL 1388745, *2 (N.D. Ohio Mar. 20, 2018) (criticizing *Raybon*'s "excessively narrow construction" of § 2255(f)(3)).

The problem is not confined to mandatory guidelines cases; the government is making the same argument in § 924(c) cases asserting the right recognized in *Johnson*. Some district courts are holding these motions untimely. *See Nunez v. United States*, 16-cv-4742, 2018 WL 2371714, at *2 (S.D.N.Y. May 24, 2018) (relying on *Raybon* and *Brown*). Others are holding them timely,[11] including in circuits that have adopted the government's restrictive interpretation in mandatory guidelines cases. *See United States v. Khan*, 2018 WL 3651582, **7-8 (E.D. Va. Aug. 1, 2018)

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[10] *See, e.g., United States v. Gray*, No. 95-CR-00324, 2018 WL 3058868, at *4 (D. Nev. June 20, 2018) (rejecting government's *Beckles* argument, noting that *Dimaya* suggests "*Johnson*'s substantive rule is broader than its narrow holding," and relying on the dissent in *Brown*); *Mapp v. United States*, No. 95-cr-01162, 2018 WL 3716887 (E.D.N.Y. Aug. 3, 2018); *Zuniga-Munoz*, No. 16-cv-0732, dkt. 79 & 81 (W.D. Tex. June 11, 2018); *United States v. Meza*, No. 11-cr-133, 2018 WL 2048899 (D. Mont. May 2, 2018).

[11] *See United States v. Johnson*, 2018 WL 3518448, at *2 (D. Nev. July 19, 2018); *United States v. Birdinground*, 2018 WL 3242294, at **8-10 (D. Mont. July 3, 2018); *United States v. Adams*, 16-CV-5979, 2018 WL 3141829, at *3 (N.D. Ill. June 27, 2018); *Russaw v. United States*, 212-CR-00432, 2018 WL 2337301, at *2 n.1 (N.D. Ala. May 23, 2018); *Otero v. United States*, 10-CR-743, 2018 WL 2224990, at *1 n.2 (E.D.N.Y. May 15, 2018).

(rejecting government's argument that *Brown* "foreclosed" a ruling that motion was timely; *Dimaya* "makes clear" that *Johnson*'s holding "is not so restricted" to apply only to the ACCA, "but instead applies to invalidate any provision that possesses 'an ordinary-case requirement and an ill-defined risk threshold'"); *Wiseman v. United States*, 2018 WL 3621022, at *2 n.3 (D.N.M. July 27, 2018) ("*Greer* may have been called into question by [*Dimaya*]," but finding no need to decide because government "waived any argument for untimeliness").

Finally, the question is of exceptional importance. The decisions accepting the government's position are poorly reasoned, ungrounded in the text, and with consequences Congress could not have intended. In the Fourth Circuit's view, even though the mandatory guidelines' residual clause admittedly "looks" and "operates" like the ACCA's, the statute of limitations cannot be met unless and until this Court first expressly holds that *Johnson* applies to the mandatory guidelines' residual clause. *Brown*, 868 F.3d at 299, 303. But under that logic, the Court could never reach the issue because the motions would always be premature. Pet. 26-28. Congress intended the statute of limitations to "eliminate delays in the federal habeas review process," not encourage them, *Holland v. Florida*, 560 U.S. 631, 648 (2010), or worse, eliminate review of meritorious claims altogether.

IV. The PROTECT Act Is Irrelevant.

The Court should reject the government's suggestion, based on the passage of the PROTECT Act shortly before Petitioner's sentencing, that few defendants in Petitioner's position will be affected by a decision in his case. *Brown* Mem. Opp. 3-4.

The PROTECT Act is not relevant in this case or any other pending case. First, it did not amend the text of § 3553(b) dating from 1987, other than to designate the original language as paragraph (1) and add paragraph (2) for child crimes and sex offenses. Pub. L. No. 108-21, § 401(a) (Apr. 30, 2003). Second, *Booker* made no distinction between pre- and post-PROTECT Act cases; it simply interpreted the language of § 3553(b)(1), which remained the same from 1987 through its excision in 2005. *See* 543 U.S. at 233-35, 259. As explained above, *supra* pages 3-4, the Court has consistently interpreted § 3553(b) as making the Guidelines as mandatory, and relied on that interpretation in *Booker*: "Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of law." *Id.* at 234 (citing *Mistretta*, 488 U.S. at 391; *Stinson*, 508 U.S. at 42). Third, no departure was legally permissible in this case under the binding pre-PROTECT Act Guidelines Manual in effect when Petitioner was sentenced.[12] Tr. of Sentencing Hearing, *Brown*, No. 02-00519 (D.S.C. July 2, 2003).

Thus, the PROTECT Act is irrelevant in general and in this case. This case is an excellent vehicle for this Court to resolve the important questions presented. It has none of the vehicle problems that may have led the Court to deny the petitions in the cases the government cites, while continuing to request responses in other cases.

CONCLUSION

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

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[12] The PROTECT Act directly amended the Guidelines Manual only with respect to child crimes and sex offenses effective April 30, 2003. Pub. L. No. 108-21, § 401(b) (2003). The Commission promulgated more general amendments pursuant to the PROTECT Act effective October 27, 2003. *See* U.S.S.C., App. C, Amend. 651 (Oct. 27, 2003).

Respectfully submitted,

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