No.

in the

Supreme Court

of the

United States

Term,

CHARLES CHUBB,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson* announced a new substantive rule of constitutional law retroactively applicable to cases on collateral review. Charles Chubb was sentenced as a career offender under the identical residual clause of the mandatory guidelines before *United States v. Booker*, 543 U.S. 220 (2005). A 28 U.S.C. § 2255 motion is timely filed when filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court and made retroactively available to cases on collateral review." 28 U.S.C. § 2255(f)(3). Mr. Chubb filed a 28 U.S.C. § 2255 motion within one year of *Johnson*, asserting that his sentence was unconstitutional in light of *Johnson*. Relying on its prior decision in *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), the United States Court of Appeals for the Sixth Circuit ruled that Mr. Chubb's motion was untimely and declined to reach the merits of his claim. The question presented is:

> **Does a § 2255 motion filed within one year of *Johnson*, claiming that *Johnson* invalidates the residual clause of the pre-*Booker* career offender guideline, assert a "right...initially recognized" in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3)?**

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Petitioner Charles Chubb respectfully petitions for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

Mr. Chubb filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The district court sent that motion to the Sixth Circuit as a second or successive petition. The Sixth Circuit granted the successive petition and remanded the case to the district court, instructing it to hold the decision in abeyance pending this Court's decision in *Beckles v. United States*, 136 S. Ct. 2510 (2016). The order from the Sixth Circuit is attached hereto as Appendix 1. After this Court's ruling in

Beckles, the district court denied Mr. Chubb's motion to vacate. That order is attached attached hereto as Appendix 2. The district court subsequently granted Mr. Chubb a a certificate of appealability, which is attached hereto as Appendix 3. The Sixth Circuit's panel decision affirming the dismissal of Mr. Chubb's 28 U.S.C. § 2255 motion is unpublished and is attached hereto as Appendix 4.

JURISDICTION

The court of appeals issued its decision on January 8, 2018. Mr. Chubb sought and received an extension to file up to and including June 7, 2018, so this petition is timely filed. The Court's jurisdiction is invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall... be deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 2255(f):

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from...
>
> (3) 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.

18 U.S.C. § 924(e)(2)(B):

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, ... , that –
>
> (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;...

U.S.S.G. § 4B1.2(a) (1992):

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

INTRODUCTION

Charles Chubb is one of many federal prisoners whose sentence was fixed by the residual clause of the mandatory career-offender guideline, U.S.S.G. § 4B1.2(a)(2) (1992). In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that increasing a defendant's sentence under the ACCA's residual clause violates the Constitution's prohibition on vague laws, and in *Welch v. United States*, 136 S. Ct. 1257 (2016), that Johnson is retroactively applicable to cases on collateral review. Because the residual clause of the career offender guideline was identical to that under the ACCA, many prisoners diligently filed § 2255 motions within one year of *Johnson*, claiming that their career offender sentences were unconstitutional. The motions were timely. This Court later held in *Beckles v. United States*, 137 S. Ct. 886 (2017), that the residual clause of the advisory career offender guideline is not subject to a vagueness challenge because, unlike the mandatory guidelines, the advisory guidelines do not fix the permissible range of sentences. Thus, § 2255 motions relying on *Johnson* in advisory guidelines cases were timely but wrong on the merits.

In 1992, Mr. Chubb was sentenced to 327 months based on his designation as a career offender, a designation that depended on a prior conviction that qualified as a crime of violence under the residual clause of the career offender guideline. U.S.S.G. § 4B1.2 (1992). The district court was mandated by statute to follow the guidelines. *See* 18 U.S.C. § 3553(b); *United States v. Booker*, 543 U.S. 220, 233-34, 245, 259 (2005). Within one year of *Johnson*, Mr. Chubb filed a 28 U.S.C. § 2255 motion arguing that

his sentence was imposed in violation of the Constitution in light of *Johnson*. The district court denied the motion in light of this Court's ruling in *Beckles*, and Mr. Chubb appealed.

Prior to deciding Mr. Chubb's appeal, the United States Court of Appeals for the Sixth Circuit addressed the identical issue in *Raybon* and held that "whether *Johnson* applies to the mandatory Guidelines . . . is an open question, [and therefore] is *not* a 'right' that 'has been newly recognized by the Supreme Court' let alone one that was 'made retroactively applicable to cases on collateral review' . . . by the Supreme Court." *Raybon*, 867 F.3d at 630. Relying on its decision in *Raybon*, the Sixth Circuit thereafter deemed Mr. Chubb's § 2255 motion untimely and refused to address the merits of his claim.

This petition presents the following question: (1) are 28 U.S.C. § 2255 motions timely filed, when the petitioner was sentenced as a career offender under the mandatory guidelines and the motion was raised within one year of *Johnson*?

The question has resulted in a circuit split in the lower federal courts. On one side of the divide, the Fourth, Sixth, and Tenth Circuits have ruled that such motions do not assert any right recognized in *Johnson* because *Johnson* did not expressly hold that the mandatory guidelines' residual clause is void for vagueness. *See United States v. Greer*, 881 F.3d 1241, 1247–49 (10th Cir. 2018) (holding as untimely § 2255 motions asserting entitlement to relief because the residual clause of the career-

offender guideline is unconstitutionally vague); *Chubb v. United States*, 707 Fed. Appx. 388 (6th Cir. 2018) (same); *Raybon*, 867 F.3d at 630 (same); *United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017) (same). On the other side of the divide, the First and Third Circuits have made clear that such motions assert the right recognized in *Johnson* because the invalidation of the mandatory guidelines' residual clause is a straightforward application of *Johnson*. *See Moore v. United States*, 871 F.3d 72, 81–83 (1st Cir. 2017) (authorizing filing a second and successive motion, holding it timely, and rejecting the reasoning of *Raybon*); *In re Hoffner*, 870 F.3d 301, 311–12 (3d Cir. 2017) (authorizing a second or successive motion because, under *Teague v. Lane*, 489 U.S. 288 (1989), application of *Johnson* to the Guidelines would not require recognizing a new rule).

The question presented impacts numerous federal prisoners serving lengthy mandatory career offender sentences. Whether their § 2255 petitions were timely, and can ultimately be adjudicated on the merits, is a question in need of resolution by this Court. The petition should therefore be granted.

STATEMENT OF THE CASE

A. Legal Background

1. On June 26, 2015, this Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that increasing a defendant's sentence under the residual clause of the Armed Career Criminal Act — "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii) — violates the Constitution's prohibition on vague laws. 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. 58. The Court held in *Welch v. United States,* 136 S. Ct. 1257 (2016), that *Johnson* applies retroactively to cases on collateral review.

2. The career offender provision of the Guidelines increases the guideline range by tying the offense level to the statutory maximum for the instant offense, and automatically placing the defendant in Criminal History Category VI. U.S.S.G. § 4B1.1 (1992). A defendant is a career offender if he was at least 18 years of age when he committed the instant offense, the instant offense is either a "crime of violence" or a "controlled substance offense," and he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." *Id.* § 4B1.1(a).

3. Until August 1, 2016, the term "crime of violence" was defined to include any any felony that "otherwise involves conduct that presents a serious potential risk of

physical injury to another," *id.* § 4B1.2(a)(2), and this clause, identical to the ACCA's, was interpreted using the same "ordinary case" analysis as the ACCA's. *See Johnson*, 135 S. Ct. at 2560 (analyzing several guidelines cases to demonstrate that the residual clause "has proved nearly impossible to apply consistently").

4. Nearly every court of appeals to consider the issue, the Department of Justice, and the Sentencing Commission understood that *Johnson* directly invalidated the identical residual clause of the career offender guideline.[1] Many prisoners sentenced under the guidelines' residual clause, including Petitioner, diligently filed § 2255 motions within one year of *Johnson*, asserting the right recognized in *Johnson*. Those motions were timely, and many prisoners were granted relief.

5. On March 6, 2017, in *Beckles v. United States*, 137 S. Ct. 886 (2017), the Court created an exception to the rule announced in *Johnson,* ruling on the merits that because "the advisory Guidelines do not fix the permissible range of sentences," but "merely guide the exercise of a court's discretion," they "are not subject to a vagueness challenge under the Due Process Clause." *Id.* at 892.[2] The Court explained explained that the "advisory Guidelines do not implicate the twin concerns underlying

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1 *See Beckles*, 137 S. Ct. at 902 n.3 (collecting cases) (Sotomayor, J., concurring); U.S.S.G., Supp. App. C, Amend. 798 (Aug. 1, 2016) (Reason for Amendment) (striking the residual clause in light of *Johnson*).

2 Beckles' motion, filed within one year of the date on which his conviction became final, *Beckles*, 137 S. Ct. at 891, was timely under § 2255(f)(1).

vagueness doctrine." *Id.* at 894. The "'due process concerns that . . . require notice in in a world of mandatory Guidelines no longer' apply." *Id.* (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)). The "advisory Guidelines also do not implicate the vagueness doctrine's concern with arbitrary enforcement," *id.* at 894, because district courts do not "enforce" the advisory guidelines, but rely on them "merely for advice in exercising [their] discretion," *id.* at 895. The pre-*Booker* Guidelines, in contrast, were "binding on district courts." *Id.* at 894 (citing *Booker*, 543 U.S. at 233). Accordingly, the Court held "only that the advisory Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." *Id.* at 896.

Justice Sotomayor commented in a footnote that the majority's "adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment . . . during the period in which the Guidelines *did* fix the permissible range of sentences, may mount vagueness attacks on their sentences," but "[t]hat question is not presented by this case." *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring) (internal citations and quotation marks omitted).

6. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court applied *Johnson* to a residual clause in a different statute, 18 U.S.C. § 16(b), with slightly different wording, subject to the same "ordinary case" analysis, resulting in virtually certain deportation. The Court explained that "*Johnson* is a straightforward decision, with

equally straightforward application here," *id.* at 1213, and "tells us how to resolve this case," *id.* at 1223. Section 16(b)'s residual clause has the "same two features as ACCA's, combined in the same constitutionally problematic way," *id.* at 1213, viz., "an ordinary-case requirement and an ill-defined risk threshold," *id.* at 1223, and "with that reasoning, *Johnson* effectively resolved the case," *id.* at 1213.

B. Procedural Background

1. In 1992 Petitioner Chubb was convicted after a jury trial of one count of conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. § 846; possession of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841. Prior to sentencing, a Presentence Investigation Report was prepared, which determined that Mr. Chubb was a Career Offender due to prior convictions for attempted robbery (Ohio 1981) and kidnapping (Ohio 1984). As a result, Mr. Chubb's base offense level was increased from 28 to 34. Notably, absent the Career Offender enhancement, Mr. Chubb's sentencing guidelines range would have been 63-78 months, in lieu of 262-327 months.

2. Sentencing in this matter was held on July 30, 1992. When Mr. Chubb was sentenced, the district court was bound by the guidelines as a matter of law. *See* 18 U.S.C. § 3553(b) (2004); *United States v. Booker*, 543 U.S. 220, 233-34, 259 (2005). The district court adopted the PSR's conclusions surrounding Mr. Chubb's Career Offender designation and sentenced him under the Career Offender provisions of the

guidelines. The court imposed a sentence of 327 months incarceration on the drug counts and a consecutive 60 month sentence on the 18 U.S.C. § 924(c) count, for a total sentence of 387 months (or 32 years and 3 months).

3. After sentencing, Mr. Chubb appealed his conviction and sentence to the Sixth Circuit Court of Appeals. On April 27, 1993, that sentence was affirmed. Chubb then filed a 28 U.S.C. § 2255 petition, which was denied without a hearing. A subsequent appeal of that petition was denied on April 25, 1997. Subsequent successive petitions for relief were also filed and denied.

4. On December 21, 2015, Mr. Chubb filed another Motion to Vacate his sentence under 28 U.S.C. § 2255, arguing that he was improperly categorized as a Career Offender. He supplemented that argument on December 23, 2015, noting that he was entitled to relief under *Johnson*.

5. On June 1, 2016, the district court sent Mr. Chubb's motion to the Sixth Circuit Court of Appeals as a successive petition. Mr. Chubb, thereafter, sought and received permission from the Sixth Circuit to proceed on that motion. In granting Mr. Chubb's request, the Sixth Circuit found that he could be entitled to relief from his Career Offender designation based on this Court's decision in *Johnson*. Notably, while the Sixth Circuit granted the successive petition, it also ordered the district court to hold the case in abeyance pending the decision in *Beckles*.

6. This Court decided *Beckles* on March 6, 2017, and in that decision determined that unlike the Armed Career Criminal Act, the advisory guidelines were

not subject to the same vagueness challenges under the Due Process Clause. Thus *Beckles* foreclosed relief under *Johnson* to defendants who were sentenced under the advisory guidelines scheme.

7. Within days of the *Beckles* decision, the district court issued an opinion and order denying Mr. Chubb's petition in light of the ruling in *Beckles*. The district court's order was silent as to the distinction between the mandatory and advisory guidelines schemes. Mr. Chubb promptly appealed that order. On April 19, 2017, the district court issued a certificate of appealability on the following issue: whether a defendant sentenced pursuant to the pre-*Booker* guidelines scheme could still be entitled to relief under *Johnson*, despite the Supreme Court's decision in *Beckles*. Mr. Chubb thereafter pursued that issue in his briefing before the Sixth Circuit.

8. Prior to issuing its opinion in Mr. Chubb's appeal, the Sixth Circuit addressed a case raising the same issue. *See Raybon*, 867 F.3d 625. Rather than resolve the merit of the issue, the Sixth Circuit sidestepped *Johnson*'s applicability to the mandatory guideline scheme altogether and instead dismissed Raybon's § 2255 motion as untimely. The panel in *Raybon* reasoned that because this Court had not yet decided whether the residual clause of the mandatory guidelines is unconstitutionally vague, Raybon had not asserted a "'right' that 'has been newly recognized by the Supreme Court' let alone one that was 'made retroactively applicable to cases on collateral review.'" *Id.*, 867 F.3d at 630 (quoting 28 U.S.C. § 2255(f)(3) and *Tyler v. Cain*, 533 U.S. 656, 663–64 (2001).

9. Relying on its decision in *Raybon*, the Sixth Circuit also denied Mr. Chubb relief for the same reasons. In an unpublished opinion, the Sixth Circuit held:

> *Raybon* held that whether *Johnson* applies to the mandatory Guidelines is an open question, a point it found supported by the majority and concurring opinion in *Beckles*. *Id.* at 629-30. The right Chubb claims based on *Johnson*, therefore, is not a "'right' that 'has been newly recognized by the Supreme Court' let alone one that was 'made retroactively applicable to cases on collateral review.'" *Id.* at 630 (quoting § 2255(f)(3)). Chubb's motion, then, fails to satisfy the requirements of § 2255(f)(3), as did the petitioner's motion in *Raybon*. *Id.* at 630-31.

REASONS FOR GRANTING THE WRIT

The courts are divided over whether a § 2255 motion claiming that *Johnson* invalidates the mandatory career offender guideline's residual clause asserts the "right . . . initially recognized" by this Court in *Johnson*. On one side of the divide, the Fourth, Sixth and Tenth Circuits have ruled that such motions do not assert any right recognized in *Johnson* because this Court did not expressly hold in *Johnson* that the mandatory guidelines' residual clause is unconstitutionally vague. On the other side of the divide, the First and Third Circuits have made clear that such motions assert the right recognized in *Johnson* because the invalidation of the mandatory guidelines' residual clause is a straightforward application of *Johnson*. The novel approach of the Fourth, Sixth and Tenth Circuits — that these motions were filed too early — conflicts with this Court's relevant precedents, is contrary to the statutory text, and contravenes Congress's purposes in enacting the statute of limitations.

The disagreement among the courts is clearly entrenched and without this Court's intervention, many federal prisoners are being denied the opportunity to seek relief under *Johnson*. This Court should intervene quickly to resolve this question and prevent federal prisoners from serving unconstitutional sentences.

I. This Court should clarify whether federal prisoners who were sentenced under the mandatory career-offender guideline filed timely § 2255 motions within one year of *Johnson*.

A. There is an entrenched circuit split on this question, with three circuits ruling that § 2255 motions claiming that *Johnson* invalidates the

mandatory guidelines' residual clause do not assert any right recognized in *Johnson*.

The Fourth, Sixth, and Tenth Circuits have held that § 2255 motions filed within one year of *Johnson* claiming that *Johnson* invalidates the mandatory guidelines' residual clause are untimely because this Court did not expressly so hold in *Johnson*. *See Greer*, 881 F.3d at 1247–49; *Raybon*, 867 F.3d at 630; *Brown*, 868 F.3d at 303. *See also*, *Chubb*, 707 Fed. Appx. 388. All three circuits relied on case law interpreting inapplicable statutes to reach their conclusion.

The Fourth Circuit said that it was "constrained" by AEDPA jurisprudence "from extrapolating beyond the Supreme Court's holding to apply what we view as its reasoning and principles to different facts under a different statute or sentencing regime." *Brown,* 868 F.3d at 299. For this, it relied on (1) the statement in *Williams v. Taylor*, 529 U.S. 362 (2000), that the phrase "clearly established Federal law, as determined by the Supreme Court," in 28 U.S.C. § 2254(d)(1), means "the holdings, as opposed to the dicta" of this Court, and (2) the statement in *Tyler v. Cain*, 533 U.S. 656 (2001), that the phrase "made retroactive to cases on collateral review by the Supreme Court" in 28 U.S.C. § 2244(b)(2)(A), means "held" retroactive by this Court. *Brown*, 868 F.3d at 301. The Tenth Circuit adopted this passage, *Greer*, 881 F.3d at 1247, adding that "'interests of finality and comity' underlying federal habeas review"—of state court judgments—precluded it from applying "the *reasoning* of *Johnson* in a different context." *Id.* at 1248 (quoting *Teague,* 489 U.S. at 308). The

Sixth Circuit relied on *Tyler*'s statement that "made" means "held" and said that the language in § 2244(b)(2)(A) is "identical" to that in § 2255(f)(3). *Raybon*, 867 F.3d at 630.

Raybon and *Brown* also misinterpreted Justice Sotomayor's footnote 4 in *Beckles* to mean that this Court has not recognized a right invalidating any residual clause but the ACCA's. *Raybon*, 867 F.3d at 629–30 (citing *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment); *Brown*, 868 F.3d at 302 (same). But this Court had no occasion to determine whether *Johnson*'s rule applies to mandatory guidelines; the question was only whether *Johnson* applied to advisory guidelines. *See See Beckles*, 137 S. Ct. 890–91.

From these mistaken premises, all three Circuits ruled the petitions were untimely. *See Raybon*, 867 F.3d at 630 ("Because it is an open question, it is not a 'right' that 'has been newly recognized by the Supreme Court."); *Greer*, 881 F.3d at 1248 ("Greer has not raised a true *Johnson* claim because he was not sentenced under any clause of the ACCA."); *Brown*, 868 F.3d at 303 (Petitioner's claim was untimely because it did not fall within the "narrow" confines of that "binding holding.").

B. Two other circuits, as well as numerous district courts, made clear that § 2255 motions claiming that *Johnson* invalidates the mandatory guidelines' residual clause asserts the right recognized in *Johnson*.

By contrast, the First and Third Circuits disagree with the reasoning and conclusions of *Raybon*, *Greer*, and *Brown*. The First Circuit expressly held that the defendant's motion challenging his mandatory career-offender sentence was timely

under § 2255(f)(3) because it was filed within one year of *Johnson*. *Moore*, 871 F.3d at 77 n.3. In doing so, the court rejected the reasoning of the Sixth and Fourth Circuits and thereafter concluded that the right being asserted by the petitioner was "exactly the right recognized by *Johnson*." *Id.* at 82–83. Additionally, it found it would not need to "make new constitutional law in order to hold that the pre-*Booker* SRA fixed sentences." *Id.* at 81. The Third Circuit reached a similar conclusion, noting that the courts must undertake a *Teague* analysis to determine whether applying *Johnson* to the mandatory guidelines would create a "second new rule." *Hoffner*, 870 F.3d at 311–12.

Before and after *Moore*, district courts in the First Circuit have held as timely these motions and granted relief on the merits. *See United States v. Roy*, 282 F. Supp. Supp. 3d 421, 427 (D. Mass. 2017); *United States v. Hardy*, No. 00-cr-10179 (D. Mass. Jan. 26, 2018) (oral ruling, Dkt #69). The government has not appealed those decisions. A magistrate judge in the Western District of Texas similarly held a first-time motion to vacate a mandatory guidelines sentence as timely in light of *Johnson*. *See Zuniga-Munoz*, No. 1:02-cr-00134 (W.D. Tex. Apr. 26, 2018).

Numerous district courts have expressly disagreed with *Raybon*, *Brown*, and *Greer*. *See, e.g.*, *Long v. United States*, No. CV 16-4464 CBM, at 1–7 (C.D. Cal. Sept. 15, 2017) (holding *Johnson* invalidates the mandatory Guidelines' residual clause and petition was timely); *United States v. Parks*, No. 03-CR-00490-WYD, 2017 WL 3732078, at *1–7 (D. Colo. Aug. 1, 2017) (same); *Sarracino v. United States*, No. 95-

CR-210-MCA, 2017 WL 3098262, at *2–5 & n.3 (D.N.M. June 26, 2017) (same). Additionally, one district court within the Sixth Circuit criticized the holding of *Raybon* and thereafter granted a certificate of appealability. In doing so, the court reasoned that the Sixth Circuit's restrictive reading of § 2255(f)(3) "invites Potemkin disputes about whether [this Court] has explicitly applied its precedents to a specific factual circumstance rather than asking whether the *right* the Supreme Court has newly recognized applies to that circumstance." *United States v. Chambers*, No. 1:01-1:01-CR-172, 2018 WL 1388745, at *2 (N.D. Ohio Mar. 20, 2018). Moreover, members of the Sixth Circuit have noted "the irony that a defendant in a similar position to that of the defendant in *Johnson* seems unable even to seek the same relief." *Gipson v. United States*, 710 F. App'x 697, 698 (6th Cir. 2018) (Kethledge, J.). Meanwhile, appeals by § 2255 movants are pending in three circuits: *Cross v. United States*, No. 17-2282 (7th Cir.) (argued Jan. 10, 2018); *United States v. Blackstone*, No. 17-55023 (9th Cir.) (argued April 11, 2018); *United States v. Green*, No. 17-2906 (3d Cir.) (argument calendared for June 11, 2018).

II. The Decision Below Conflicts with this Court's Relevant Precedents, the Statutory Text, and Congress's Purposes in Enacting the Statute of Limitations.

This Court has never said what it means to "recognize" a "right asserted," 28 U.S.C. § 2255(f)(3), but the lower courts have long applied this Court's "new rule" jurisprudence to the question. Under that jurisprudence, a right not to have one's sentence increased by the mandatory guidelines' residual clause is not *another* new

right but simply an application of *Johnson*. *Raybon*, along with *Brown* and *Greer*, has has taken an unprecedented approach, requiring that this Court first confirm that a motion is correct on the merits before the statute of limitations can be met. For movants like Mr. Chubb, this means their claims can never be timely and can never be adjudicated on the merits.

A. The court's decision in *Raybon*, and by extension *Chubb*, conflicts with this Court's relevant precedents.

The courts of appeals have long applied this Court's "new rule" jurisprudence to determine whether a "right asserted" in a § 2255 motion "has been newly recognized."[3] Under that jurisprudence, a case announces a "new rule" when it "breaks new ground," but "a case does *not* 'announce a new rule, when it is merely an application of the principle that governed' a prior decision." *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989). "To

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3 *See, e.g.*, *Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015) (relying on *Teague* and *Chaidez* to conclude that *Alleyne v. United States*, 133 S. Ct. 2151 (2013), is a "'newly recognized' right"); *United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013) (relying on *Teague* to conclude that the "right" recognized in *Fowler v. United States*, 131 S. Ct. 2045 (2011), "has been 'newly recognized' by the Supreme Court" under §2255(f)(3)); *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207-08 (11th Cir. 2012) ("In deciding retroactivity issues under §2255(f)(3), we have applied the rubric developed in *Teague*" to "first answer whether the Supreme Court decision in question announced a new rule."); *United States v. Hong*, 671 F.3d 1147, 1148, 1150 (10th Cir. 2011) (applying *Teague* "to decide whether *Padilla* announced a new rule" for purposes of §2255(f)(3), and concluding that it did); *Coleman v. United States*, 329 F.3d 77, 81-82 (2d Cir. 2003) (relying on *Teague* and *Stringer* to conclude that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was a "new rule" for purposes of timeliness under §2255(f)(3)).

determine what counts as a new rule," courts must "ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by [existing] precedent." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, concurring in the judgment). If a "factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies," the rule is not new. *Id.*

For example, in *Stringer v. Black*, 503 U.S. 222 (1992), this Court held that *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Clemons v. Mississippi*, 494 U.S. 1074 (1990), were not new rules but instead applications of the principles that governed its prior decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980). In invalidating an aggravating factor with slightly different language in an Oklahoma statute, *Maynard* did not break new ground with *Godfrey*. *Id.* at 228-29. *Clemons'* invalidation of Mississippi's identical aggravating factor, which followed *a fortiori* from *Godfrey*, was not a "new rule" simply because it was previously "undecided." *Id.* at 229. *See also Penry v. Lynaugh*, 492 U.S. 302, 314, 318-19 (1989) (concluding that the rule Penry sought requiring instructions permitting the jury to "give effect" to evidence of mental disability was not a "new rule" but simply an application of principles established by prior cases to a "closely analogous" case), *abrogated on other grounds by Atkins v. Virginia,* 536 U.S. 304 (2002); *Yates v. Aiken*, 484 U.S. 211, 217 (1988)) (holding that *Francis v. Franklin*, 471 U.S. 307 (1985), was not a new rule but "merely an application of the principle that governed our decision in" *Sandstrom v. Montana*,

442 U.S. 510 (1979), in which the question was "almost identical").

Applying the correct jurisprudence, a right not to have one's sentence increased by a residual clause that suffers from the same flaws that invalidated the ACCA's residual clause 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. *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013); *Teague*, 489 U.S. at 307. The pre-*Booker* guidelines' residual clause "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Moore*, *Moore*, 871 F.3d at 81. The right asserted is "logically inherent" in *Johnson*, and "is exactly the right recognized by *Johnson*." *Id.* at 82-83.

Because the right Mr. Chubb asserted is a straightforward application of *Johnson*, the proper time for filing was within one year of *Johnson*. To illustrate, in *Descamps v. United States*, 570 U.S. 254 (2013), this Court first expressly held that "courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 258. In doing doing so, it reasoned from existing precedent. *Id.* at 260-64 (discussing *Taylor v. United States*, 45 U.S. 575 (1990), and its progeny). Applying *Teague* and its progeny, courts of appeals held that § 2255 motions relying on *Descamps* were untimely because *Descamps* was merely an application of existing precedent. *See United States v. Morgan*, 845 F.3d 664, 668-69 (5th Cir. 2017) (holding motion untimely because *Descamps* "relied on existing precedent," and "a rule that applies a general principle

to a new set of facts typically does not constitute a new rule"); *United States v. Headbird*, 813 F.3d 1092, 1095-97 (8th Cir. 2016) (same); *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016); *Ezell v. United States*, 778 F.3d 762, 764, 766 (9th Cir. 2015).

Dimaya further confirms that the proper time for filing was within one year of *Johnson*. *Dimaya* refutes the Sixth Circuit's assertion that "*Johnson*[2015]'s holdings holdings extends only to individuals under convicted under the ACCA." *Raybon*, 867 F.3d at 630. *Dimaya* explained that "*Johnson* is a straightforward decision, with equally straightforward application here," 138 S. Ct. at 1213, and "tells us how to resolve this [§ 16(b)] case." *Id.* at 1223. *Dimaya* tells us that *Johnson* recognized a right not to suffer serious consequences under a residual clause that, like the ones in the ACCA, § 16(b), and the career offender guideline, "ha[s] both an ordinary-case requirement and an ill-defined risk threshold." *Id.* at 1223. If *Johnson* "effectively resolved the case" before the Court in *Dimaya*, *id.* at 1213, involving a "similar" clause resulting in "virtual[ly] certain[]" deportation, *Johnson*'s application to a clause identical in its text and mode of analysis to the ACCA's, mandating years longer in prison, resolves this case as well.

B. The Sixth Circuit's decision conflicts with the statutory text and Congress's purposes in enacting the statute of limitations.

A motion is timely under § 2255(f)(3) if filed within one year of the date on which the "right asserted was initially recognized" by this Court. The statute of limitations

is a threshold inquiry, separate from the district court's subsequent determination of the merits. The panel majority's reading not only reverses the order of operations, but but requires that this Court first confirm that the claim is correct on the merits before the statute of limitations can be met, setting a higher bar for the threshold statute-of-limitations inquiry than for courts to grant relief on the merits. This would render the statute of limitations redundant: a motion is timely only if this Court has already decided that it is correct on the merits, but if this Court has not already decided that it is correct on the merits, it is untimely.

The panel majority reads out of existence the term "asserted." To "assert" means to "state positively," or to "invoke or enforce a legal right." *Black's Law Dictionary* 139 (10th ed. 2014). There is no assumption in common usage or in law that one's assertions are necessarily correct. To the contrary. As this Court has put it, a § 2255 motion is timely if filed within one year of the date of the decision from which it "[seeks] to benefit." *Dodd v. United States*, 545 U.S. 353, 360 (2005)

Under the correct interpretation of § 2255(f)(3), motions filed within one year of *Johnson* by prisoners sentenced under the advisory guidelines were timely, but were wrong on the merits.[4] Likewise, motions asserting a right within one year of a later case applying *Johnson*—such as *Dimaya*—are unlikely to be timely because this Court

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4 If such a motion were filed after *Beckles*, it would be dismissed under Rule 4(b) of the Section 2255 Rules.

"initially recognized" the right asserted in *Johnson*. Under this correct reading, courts courts held that motions filed within a year of *Descamps* were untimely because this Court had "initially recognized" the right asserted in previous cases.

For prisoners like Mr. Chubb, the panel majority's reading is a logical and practical impossibility. If the "right initially recognized by the Supreme Court" requires a precise holding by this Court, it would be impossible for this Court to ever recognize the right or any court to adjudicate the merits. None of these prisoners has an active direct appeal, and more than one year has passed since their convictions became final. 28 U.S.C. § 2255(f)(1). Section 2255 motions would always be premature because this Court hadn't precisely decided the issue, and this Court could never precisely decide the issue because it would always be too early, in "an infinite loop." *Zuniga-Munoz*, slip op. at 8 (rejecting this position and recommending that the district court grant the motion); *see also Chambers*, 2018 WL 1388745, at *2 (expressing skepticism of *Raybon* for this reason and granting certificate of appealability).

C. The Sixth Circuit misinterpreted *Beckles*.

The Sixth Circuit relied on *Beckles* when dismissing these motions as untimely. Specifically, the court highlighted Justice Sotomayor's footnote 4, where she stated: "adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment . . . during the period in which the Guidelines *did* fix the permissible range of sentences, may mount vagueness attacks on their sentences." *Beckles*, 137

S. Ct. at 903 n.4 (internal citations and quotation marks omitted). But that comment is irrelevant as to whether Mr. Chubb's motion was timely. As this Court has acknowledged, "'the mere existence of a dissent,' like the existence of conflicting authority in state or lower federal courts, does not establish that a rule is new." *Chaidez*, 568 U.S. at 354 n.11 (quoting *Beard v. Banks,* 542 U.S. 406, 416 n.5 (2004)).

In any event, Justice Sotomayor's observation had nothing to do with the statute of limitations because that was not at issue in *Beckles*. This Court could not have held that the vagueness doctrine applies to the mandatory Guidelines without rendering an advisory opinion in violation of Article III because Mr. Beckles was sentenced under advisory guidelines. *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment) ("That question is not presented by this case.").

For these reasons, this Court has recognized a right that invalidates the sentencing guidelines' residual clause. It follows that Mr. Chubb's post-conviction motion is timely under 28 U.S.C. § 2255(f)(3).

III. The question presented is exceptionally important.

Resolution of this question will affect approximately 1,200 people. *See* APP 041 (Amicus Br. by 6th Cir. Fed. Defenders). Because this Court invalidated the mandatory Guidelines in 2005, these men and women have already served at least twelve years in prison. The career-offender enhancement has a well-known and dramatic impact on sentencing outcomes: for 48.6% of career offenders in 2016, the enhancement increased the average guidelines minimum from 70 months to 168

months, a 240% increase; for another 33.2%, it increased the minimum from 84 months to 188 months, a 223% increase. *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offenders* (June 2017), available at https://www.ussc.gov; *see also* U.S.S.G § 5A (sentencing table). There is therefore a real possibility that these men and women have already spent more time in prison than the Constitution permits.

Moreover, the effect of the timeliness holdings of the Sixth, Fourth, and Tenth Circuit, is that federal prisoners sentenced under mandatory guidelines must wait for this Court to declare the mandatory career-offender guideline unconstitutional and retroactive to file § 2255 motions. But that day may never come to pass. Not one of these prisoners has an active case on direct appeal. Thus, there are only two mechanisms for these men and women to obtain relief: filing a § 2255 motion or an original petition for a writ of habeas corpus in this Court. *See* Judiciary Act of 1789 § 14; *Felker v. Turpin*, 518 U.S. 651, 660 (1996).

Further complicating matters are decisions by the Sixth Circuit holding that 28 U.S.C. § 2244(b)(1) requires dismissal of claims presented in a second or successive § 2255 that were previously presented in a prior § 2255 motion. *E.g.*, *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013); *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999). While Mr. Chubb does not agree that § 2244(b)(1) applies to § 2255 motions, as other circuit courts have recognized, see e.g., *United States v. Winestock*, 340 F.3d 200, 204-05 (4th Cir. 2003) (doubting that § 2244(b)(1) applies to second or successive applications under § 2255); *Moore*, 871 F.3d at 78 (noting that § 2244(b)(1) "only

appear[s] to apply to § 2254 motions by [its] terms"), the Sixth Circuit's decisions could operate to preclude new filings raising *Johnson* based claims—or at least create further uncertainty and complexity while the issue is litigated. For those serving unconstitutionally severe sentences, some decades longer than the correct guideline range, dismissal of their claims because they brought them *too soon* would strike an especially cruel blow. These federal prisoners diligently pursued their claims, as statutes of limitations encourage them to do. *Cf. CTS Corp. v. Waldburger*, 134 S. Ct. Ct. 2175, 2183 (2014) ("Statutes of limitations require plaintiffs to pursue 'diligent prosecution of known claims.'" (quoting Black's Law Dictionary 1546 (9th ed. 2009))).

Finally, the disparate treatment of § 2255 motions involving mandatory career-offender guidelines also works great injustice. District courts within the Sixth Circuit Circuit are denying § 2255 motions and certificates of appealability filed by federal prisoners like Mr. Chubb. *See, e.g., Swain v. United States*, No. 1:03-cr-20031-DML (E.D. Mich. Sept. 26, 2017); *United States v. Sinclair*, No. 13-CR-20829, 2017 WL 3977888, at *4–5 (E.D. Mich. Sept. 11, 2017) (dismissing the petition and denying a certificate of appealability); *Price v. United States*, No. 16-CV-12623, 2017 WL 3581324, at *1–2 (E.D. Mich. Aug. 18, 2017) (same); *Eady v. United States*, No. 1:16-CV-588, 2017 WL 3530081, at *4–5 (W.D. Mich. Aug. 17, 2017) (same). Disagreeing with the Sixth Circuit, other district courts are granting certificates of appealability. *See Chambers*, 2018 WL 1388745, at *3; *Crowder v. United States*, No. CR 01-80098, 2018 WL 1141805, at *3 (E.D. Mich. Mar. 2, 2018). Meanwhile, in other districts,

federal prisoners presenting identical grounds for relief on appeal are granted resentencings. *See Roy*, 282 F. Supp. 3d at 428, 432.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER November 16, 2016
2. OPINION AND ORDER (district court) March 17, 2017
3. CERTIFICATE OF APPEALABILITY April 19, 2017
4. COURT OF APPEALS ORDER January 8, 2018