No. 17-9411

IN THE
Supreme Court of the United States

JOHN ELWOOD BUCKNER,
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 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 28 U.S.C. § 2255 (h) and (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, there is no mootness problem.

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. *Buckner* Mem. Opp. 1, 3. The government does not 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. *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 that the right Petitioner asserts is not the right announced in *Johnson*. *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

[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.

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. A Straightforward Application of *Johnson* Invalidates the Mandatory Guidelines' Residual Clause.

Accordingly, this Court should reach the merits and hold that a straightforward application of *Johnson* invalidates the mandatory guidelines' residual clause. Such a ruling would not be another new rule triggering a new statute of limitations. The logic of *Welch* leads 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 "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.*

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. at 12-13) is contrary to pre-*Booker* sentencing reality,[2] and this Court's consistent interpretation of the relevant law. 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." Tr. of Oral Argument at 40-41, *Beckles* (No. 15-8544).

III. 28 U.S.C. § 2255 (h) Provides No Independent Basis for Denying Petitioner's Motion.

The government suggests that because Mr. Buckner's § 2255 motion was a second or successive motion, it "may provide an independent basis for denying" his request for certiorari review. (Br. Opp'n, at 4.) There is a current circuit split on

[2] *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").

whether authorizing second or successive petitions under § 2255(h)(2) for petitioners seeking relief under *Johnson* from sentences imposed when the Sentencing Guidelines were mandatory is appropriate.

Where § 2255(f)(3) uses "new right," § 2255(h)(2) uses "new rule." When a petitioner wishes to file a second or successive petition for habeas relief under § 2255(h), the court of appeals must first authorize it. *See* 28 U.S.C. § 2255(h). Certification requires a prima facie showing the petition "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.*; 28 U.S.C. § 2244(b)(3)(C) (establishing a prima facie standard, which § 2255(h) incorporates). If the court of appeals certifies the petition, the district court must conduct a "fuller exploration" of whether the petition has satisfied the requirements of § 2255(h). See, e.g*., Bennett v. United States*, 119 F.3d 468, 469-70 (7th Cir. 1997).

In *Beckles v. United States* this Court held that the rule in *Johnson* does not apply to the advisory Sentencing Guidelines. *See Beckles v. United States*, 137 S. Ct. 886, 890 (2017). The *Beckles* Court did not reach the question of whether the mandatory Sentencing Guidelines, prior to *Booker*, could be subject to such a challenge under *Johnson*. *See id.* Because *Beckles* was decided on certiorari from a first petition under § 2255, not a second or successive petition implicating § 2255(h), see *id.* at 891, the Court also did not address whether the circuits that certified successive petitions under *Johnson* had correctly interpreted § 2255(h).

The circuits have split on whether authorizing such petitions would be an appropriate application of § 2255(h)(2). *Compare Moore v. United States*, 871 F.3d 72, 74 (1st Cir. 2017) (certifying the successive petition); *Vargas v. United States*, No. 16-2112, 2017 U.S. App. LEXIS 17158, at *2 (2d Cir. May 8, 2017) (certifying the successive petition); *In re Hoffner*, 870 F.3d 301, 309-12 (3d Cir. 2017) (same); *In re Hubbard*, 825 F.3d 225 (4th Cir. 2016) (same, prior to *Beckles*); *In re Patrick*, 833 F.3d 584 (6th Cir. 2016) (same); *In re Encinias*, 821 F.3d 1224 (10th Cir. 2016) (same), *with In re Arnick*, 826 F.3d 787 (5th Cir. 2016) (denying certification as barred by § 2255(h)); *Donnell v. United States*, 826 F.3d 1014 (8th Cir. 2016) (same); *In re Griffin,* 823 F.3d 1350 (11th Cir. 2016) (same).

It is not at all clear that there is a difference between the "new rule" and "new right" language under §§ 2255(f)(3) and 2255(h)(2), respectively. *See* Brian R. Means, Federal Habeas Manual: A new rule recognized by the Supreme Court § 9A:29 (Thomson West 2018) ("Although neither § 2244 (d)(1)(C) nor § 2255(f)(3) use the term 'new rule,' but instead refer to a 'newly recognized' right that has been made retroactive, circuit courts have held that the two inquiries are equivalent.") (citing *Headbird v. United States.*, 813 F.3d 1092, 1095-97 (8th Cir. 2016); *Butterworth v. United States.*, 775 F.3d 459, 464-65 (1st Cir. 2015), cert. denied, 135 S. Ct. 1517 (2015); *United States v. Mathur*, 685 F.3d 396, 398-99 (4th Cir. 2012); *Figuereo-Sanchez v. United States.*, 678 F.3d 1203, 1207 (11th Cir. 2012)); *but see United States v. Colasanti,* 282 F. Supp. 3d 1213, 1221 (D. Or. 2017) (concluding that new rights were something different from new rules); *United States v. Hurtado-Villa*, CR-

08-01249-PHX-FJM-MHB, 2011 U.S. Dist. LEXIS 118535, at *18 (D. Ariz. Aug. 12, 2011) ("Although the Supreme Court in *Dodd [v. United States*, 545 U.S. 353 (2005)] did not specifically address whether or not § 2255(f)(3) contemplates the existence of 'new rights' that do not necessarily constitute 'new rules,' the reasoning highlights the interdependence of the 'new right' and 'retroactive application' clauses of the limitations statute.").

The same issue is presented in both instances -- whether *Johnson* applies to the mandatory guidelines' residual clause. The government relies on the Sixth Circuit case of *Homrich v. United States*, which purports to address the merits of the issue under § 2255(h)(2). (See *Gipson* Br. Opp., 18 (citing *Homrich v. United States*, No. 17-1612, 2017 U.S. App. LEXIS 24900, at *3 (6th Cir. Dec. 8, 2017), cert. pending, No. 17-9045 (filed May 7, 2018).) In holding *Johnson* did not invalidate the guideline's residual clause, *Homrich* relied upon the Sixth Circuit's decision in *Raybon v. United States*, 867 F.3d 625, 629-30 (6th Cir. 2017). That case addresses both § 2255(f)(3) and § 2255(h)(2)'s standards as though they are interchangeable, further showing the same issue needs to be addressed either way.

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

The Fourth, 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. Brown,* 868 F.3d 297 (4th Cir. 2017); *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* was litigated over the course of more than a year with counsel on both sides, full briefing, and oral argument.[3] 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.[4]

[3] *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.

[4] *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).

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.

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*.[5] District courts in the Sixth and Tenth Circuits have issued certificates of appealability. *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,[6] including in circuits that have adopted the government's restrictive interpretation in mandatory guidelines

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[5] *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).

[6] *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).

cases. *See United States v. Khan*, 2018 WL 3651582, **7-8 (E.D. Va. Aug. 1, 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. There Is No Mootness Problem.

Mr. Buckner's case is not moot. The term of supervised release that he will serve is a part of his sentence. If his § 2255 motion is granted, he will receive a

resentencing de novo. *See United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir. 1991). The district court will have to decide anew how much supervised release to impose, as well as what conditions to impose. *See generally Pepper v. United States*, 562 U.S. 476, 505–08 (2011) (discussing de novo resentencing). In deciding the length and conditions of Mr. Buckner's supervised release, the district court would be entitled to consider as a mitigating factor that he was required to serve too much time in prison. See 18 U.S.C. § 3661; *Pepper*, 562 U.S. at 490–91. Because Mr. Buckner might receive a shorter term of supervised release, or less onerous conditions, his appeal is not moot.[7]

It makes no difference that the reason Mr. Buckner would receive a resentencing is unrelated to the sentencing court's calculation of the supervised release term; the district court would still have to revisit the supervised release issue. *See, e.g., United States v. West*, 646 F.3d 745, 748–51 (10th Cir. 2011) (district court erred by failing to revisit amount of restitution after court of appeals vacated and remanded for re-sentencing based on an issue entirely unrelated to restitution).

Mr. Buckner would begin resentencing with no term of supervised release at all. His sentence, including his term of supervised release, would have been vacated—"nullif[ied] or cancel[led]; ma[d]e void; invalidate[d]." *Vacate*, Black's Law Dictionary

[7] *See, e.g., In re Sealed Case*, 809 F.3d 672, 675 (D.C. Cir. 2016); *United States v. Molak,* 276 F.3d 45, 49 (1st Cir. 2002); *Levine v. Apker*, 455 F.3d 71, 77 (2d Cir. 2006); *United States v. Larez-Meras,* 452 F.3d 352, 355 (5th Cir. 2006); *United States v. Albaani*, 863 F.3d 496, 502–03 (6th Cir. 2017); *United States v. Rash*, 840 F.3d 462, 464 (7th Cir. 2016); *United States v. Strong*, 489 F.3d 1055, 1060 (9th Cir. 2007); *United States v. Montgomery,* 550 F.3d 1229, 1331 n.1 (10th Cir. 2008); *United States v. Duckworth*, 618 F. App'x 631, 632 n.1 (11th Cir. 2015) (unpublished).

(10th ed. 2014). Mr. Buckner would only receive the same terms and conditions of supervised release if, after conducting a *de novo* resentencing, the district court decided to reimpose an identical sentence as to supervised release. It would seem highly dubious to suppose that "the history and characteristics of [Mr. Buckner]," 18 U.S.C. § 3553(a), are so unchanged in the sixteen years since his original sentencing that no recalibration, in any direction, of the length or conditions of supervision is warranted.

The Government misreads *Rhodes v. Judiscak*, 676 F.3d 931 (10th Cir. 2012), and *Burkey v. Marberry*, 556 F.3d 142 (3d Cir. 2009), as supporting its mootness argument. Those cases did not involve a challenge to a sentence. They involved only challenges to how the Bureau of Prisons had implemented the defendants' sentences. Because the relief granted on those claims would not include a resentencing at which the district court would revisit the term of supervised release, the defendants in those cases would have to file a separate motion to shorten the term of supervised release pursuant to § 3583(e)(1). The connection between the Bureau of Prison's erroneous implementation of a sentence and a separate § 3583(e)(1) motion is tenuous, so the defendant's suits in *Rhodes* and *Burkey* were mooted by their release from prison. But because Mr. Buckner's relief *would* include a *de novo* resentencing, *Rhodes* and *Burkey* do not apply here.

CONCLUSION

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

Respectfully submitted,

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