No. ____

IN THE

Supreme Court of the United States

CHARLES FOXX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015), this Court declared unconstitutionally vague the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii). In *Welch v. United States*, 578 U.S. __, 136 S. Ct. 1257 (2016), this Court held that *Johnson* announced a new, substantive rule of constitutional law that had retroactive effect in cases on collateral review.

In *Beckles v. United States*, 580 U.S. __, 137 S. Ct. 886 (2017), this Court held that an identical residual clause contained in the Career Offender provision of the Sentencing Guidelines was not unconstitutionally vague. U.S.S.G. § 4B1.2(a)(2). The Court reasoned that the advisory Guidelines were not subject to the constitutional vagueness prohibition at all because, unlike the ACCA, they do not "fix the permissible range of sentences." *Beckles*, 137 S. Ct. at 892.

However, the Court in *Beckles* "le[ft] open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220 (2005)—that is, during the period in which the Guidelines did fix the permissible range of sentences—may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (Sotomayor, J., concurring in the judgment) (citations omitted).

The questions presented are:

1. Whether U.S.S.G. § 4B1.2(a)(2)'s residual clause is void for vagueness vis-à-vis defendants sentenced under the pre-*Booker* mandatory Guidelines.

2. Whether the invalidation of § 4B1.2(a)(2)'s mandatory residual clause has retroactive effect in cases on collateral review.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 736 F. App'x 253 (11th Cir. 2018) and reproduced as Appendix A. App. 1a. The district court's order denying the 28 U.S.C. § 2255 motion is unreported but reproduced as Appendix B. App. 4a.

JURISDICTION

The Eleventh Circuit issued its decision on September 4, 2018. Justice Thomas granted a 60-day extension of time to file the petition, making it due on February 1, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

The Armed Career Criminal Act defines a "violent felony" to include any felony "that is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii). The italicized language is the "residual clause."

At the time of Petitioner's sentencing, the Career Offender provision of the Sentencing Guidelines contained an identical residual clause, defining a "crime of violence" to include any felony "that is burglary of a dwelling, arson, or extortion, involves 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)(2) (1995).

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

1. The Armed Career Criminal Act ("ACCA") transforms a ten-year statutory maximum penalty into a fifteen-year mandatory minimum for certain defendants convicted of federal firearms offenses. 18 U.S.C. §§ 924(a)(2), 924(e). The ACCA enhancement applies when the defendant has a total of three "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e). For purposes of the ACCA, "violent felony" is defined as, *inter alia*, any felony "that is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). The italicized language is known as the "residual clause."

In *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015), the Court held that the ACCA's residual clause was unconstitutionally vague. The Court explained: "Two features of the residual clause conspire to make it unconstitutionally vague." *Id.* at 2557. First, the "ordinary-case" analysis—requiring courts to "picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents a serious risk of physical injury"—created "grave uncertainty about how to estimate the risk posed by a crime." *Id.* (citation omitted). And, second, the residual clause created "uncertainty about how much risk it takes for a crime to qualify as a violent felony," because it "forces courts to interpret 'serious potential risk' in light of the four enumerated crime" preceding it, and those crimes were "far from clear in respect to

the degree of risk each poses." *Id.* at 2558 (citation omitted). Those uncertainties led the Court to conclude that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," "produc[ing] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2557–58.

In *Welch v. United States*, 578 U.S. __, 136 S. Ct. 1257 (2016), the Court held that *Johnson* announced a new, substantive rule of constitutional law, and it therefore had retroactive effect to cases on collateral review. The Court reaffirmed that "a rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes," and that determination is made "by considering the function of the rule." *Id.* at 1264–65 (citation omitted). The Court concluded that, "[u]nder th[at] framework, the rule announced in *Johnson* is substantive," because it "changed the substantive reach" of the ACCA by "altering the range of conduct or the class of persons that the Act punishes." *Id.* at 1265.

2. The Career Offender provision of the Sentencing Guidelines implements a congressional mandate to assure that a certain category of offenders receive a sentence "at or near the maximum term authorized." 28 U.S.C. § 994(h); *see* U.S.S.G. § 4B1.1 cmt. backg'd (2015). The career offender provision creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). It does so by generally prescribing enhanced offense levels and automatically placing career offenders in criminal history category VI, the highest category available under the Guidelines. *See* U.S.S.G. § 4B1.1(b).

A defendant is a career offender if he is at least eighteen years of age, commits an offense that is a "crime of violence" or controlled substance offense, and has at least two prior felony convictions for a "crime of violence" or controlled substance offense. U.S.S.G. § 4B1.1. At the time of Petitioner's sentencing in 1996, the term "crime of violence" was defined to include any felony "that is burglary of a dwelling, arson, or extortion, involves 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)(2) (1996) (emphasis added).[1] The italicized language in the Career Offender Guideline was perfectly identical to the ACCA residual clause that *Johnson* invalidated.

As a result, thousands of federal prisoners who had been sentenced as career offenders sought to collaterally challenge their sentences under 28 U.S.C. § 2255 in light of *Johnson*. Some of those prisoners had been sentenced before this Court's decision in *United* States *v. Booker*, 543 U.S. 220 (2005) rendered the Guidelines advisory. Because those prisoners had been sentenced over a decade earlier, many had already filed an initial § 2255 motion in the past. Thus, they were legally required to obtain authorization from the court of appeals before filing a second or successive § 2255 motion based on *Johnson*. 28 U.S.C. § 2255(h).

Marvin Griffin was one such inmate, and he filed a *pro se* application for leave to file a successive § 2255 motion based on *Johnson*. *See* 11th Cir. No. 16-

[1] Shortly after *Johnson*, the Sentencing Commission amended § 4B1.2 and deleted its residual clause. U.S.S.G., app. C, amend. 798 (Aug. 1, 2016). All references here are to the pre-amendment version of § 4B1.2(a)(2).

12012. Without appointing counsel or holding oral argument, the Eleventh Circuit issued a published opinion denying the application. *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016). In doing so, the Court made two holdings. First, it held that "the Guidelines—whether mandatory or advisory—cannot be unconstitutionally vague." *Id.* at 1354. Second, and alternatively, the court held that any ruling invalidating § 4B1.2(a)(2)'s then-mandatory residual clause would not be retroactive. *Id.* at 1355. Because *In re Griffin* arose in the context of a successive application, Mr. Griffin was statutorily barred from seeking rehearing or certiorari review. 28 U.S.C. § 2244(b)(3)(E).[2]

3. After *In re Griffin*, this Court granted certiorari in *Beckles v. United States*, 580 U.S. __, 137 S. Ct. 886 (2017) to decide, *inter alia*, whether *Johnson* rendered § 4B1.2(a)(2)'s residual clause void for vagueness, and, if so, whether that holding would have retroactive effect in cases on collateral review. The Court ultimately did not reach the retroactivity question because it held that the advisory Guidelines were not subject to the constitutional prohibition on vagueness at all, and therefore the residual clause in § 4B1.2(a)(2) could not be unconstitutionally vague.

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[2] Mr. Griffin nonetheless re-filed two subsequent *Johnson* applications with the court of appeals—one with counseled briefing, urging reconsideration of *In re Griffin*; and one after this Court's decision *Beckles*. *See* 11th Cir. Nos. 16-13752 & 17-11663. In the interim period, however, the court of appeals held that inmates were legally barred from re-filing a *Johnson*-based application after a previous application had been denied on the merits. *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). Accordingly, Mr. Griffin's subsequent applications were denied on that basis.

Critically, however, the Court's holding was expressly limited to the *advisory* Guidelines. *Id.* at 890, 895–96. Moreover, throughout the opinion, the Court contrasted the post-*Booker* advisory Guidelines subject to its holding from the pre-*Booker* mandatory Guidelines. As a result, Justice Sotomayor's separate opinion made explicit what was implicit in the majority opinion—namely, that it did not address defendants sentenced under the pre-*Booker* mandatory Guidelines:

> The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220 (2005)—that is, during the period in which the Guidelines did "fix the permissible range of sentences," *ante*, at 892—may mount vagueness attacks on their sentences. That question is not presented by this case and I, like the majority, take no position on its appropriate resolution.

Id. at 903 n.4 (Sotomayor, J., concurring in the judgment) (internal citations omitted). This case squarely presents that question left open in *Beckles*.

B. PROCEDURAL BACKGROUND

Petitioner was sentenced as a career offender in 1996. Within one year of *Johnson*, he filed an initial § 2255 motion to correct his pre-*Booker* career-offender sentence in light of *Johnson*. He argued that, given the invalidation of the Guidelines' residual clause, he was no longer a career offender and should be re-sentenced without the enhancement. His § 2255 motion was held pending *Beckles*.

After *Beckles* was decided, a Magistrate Judge issued a Report, recommending that the § 2255 motion be dismissed as untimely. He reasoned that, because *Beckles* held that *Johnson* did not apply to the Guidelines, *Johnson* did not trigger a new statute of limitations under § 2255(f)(3). Dist. Ct. Dkt. Entry 22 at 7–

8. Petitioner objected to the Report, emphasizing that he was sentenced as a career offender before *Booker* rendered the Guidelines advisory, that *Beckles*' holding addressed only the advisory Guidelines, and that *Beckles*' reasoning compelled the opposite conclusion for the mandatory Guidelines. He acknowledged that *In re Griffin* reached a contrary holding, but he argued that it should not be treated as binding precedent because it arose in the unique context of a successive application and had been abrogated by *Beckles*' reasoning. Dist, Ct. Dkt. Entry 23.

The district court adopted the Magistrate Judge's Report to the extent it recommended denying Petitioner's § 2255 motion on the merits. App. 6a–8a. The court recognized that, because Petitioner "was sentenced under the mandatory Guidelines, the Court appears bound to dismiss his Section 2255 Motion based on *In re Griffin*." App. 7a. But because *In re Griffin* predated *Beckles*, which "specifically framed, analyzed, and resolved" the issue "in the context of the advisory Guidelines and did not extend its ruling to the mandatory Guidelines," the court granted Petitioner a certificate of appealability on whether *Johnson* applied to those sentenced as career offenders before *Booker*. App. 7a–9a

On appeal, Petitioner reiterated his arguments. Specifically, he argued that, although *Beckles*' holding addressed only the advisory Guidelines, its reasoning compelled the conclusion that the mandatory Guidelines were subject to the void-for-vagueness doctrine. Pet. Initial C.A. Br. 13–24. He further argued that, while *In re Griffin* reached a contrary holding, that decision "does not constitute binding precedent here because it was decided in the unique SOS [second or successive]

context," and that "truncated decision-making process . . . is not amenable to precedential decisions." *Id.* at 25–26. He also argued that *In re Griffin* was not binding precedent because the subsequent reasoning in *Beckles* had undermined it to the point of abrogation, as there was "simply no way to reconcile" the two decisions. *Id.* at 28–38

The court of appeals affirmed, relying exclusively on *In re Griffin*. The court first rejected Petitioner's "arg[ument] that *In re Griffin* does not bind this panel, as it was decided in the second or successive application context." App. 2a. The court explained that its "prior panel precedent rule applies to published second or successive orders (such as *In re Griffin*). *Id.* And "[a]lthough this rule is subject to dissent within the Circuit, it is the one that binds us, and we will follow it." *Id.* at 2a–3a. The court next rejected Petitioner's "arg[ument] that *Beckles* undermines *In re Griffin* to the point of abrogation, freeing us from *In re Griffin*'s rule." *Id.* at 3a. (citation omitted). It reasoned that "*Beckles* did not squarely decide whether the mandatory Guidelines are susceptible to a vagueness challenge," and its prior panel precedent rule required that a subsequent Supreme Court opinion be "squarely on point" and "actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel." *Id.* (quotations and citation omitted). Thus, the court concluded that it "cannot deviate from *In re Griffin* given the current state of the law, and this forecloses Foxx's appeal." *Id.* The court of appeals did not affirm the denial of Petitioner's § 2255 motion on any alternative ground.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON THE QUESTIONS PRESENTED

The circuits are divided on whether *Johnson* invalidates the mandatory, pre-*Booker* residual clause of the Guidelines, and, if so, whether that invalidation would have retroactive effect on collateral review. The Seventh Circuit has answered both questions affirmatively. The Eleventh Circuit has answered both negatively.

A. The Seventh Circuit Has Declared the Guidelines' Mandatory Residual Clause Retroactively Void for Vagueness

1. In *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), a unanimous panel of the Seventh Circuit held that "the residual clause of the [mandatory] guidelines suffers from the same indeterminacy" as the ACCA's residual clause struck down in *Johnson*. *Id.* at 299. The court explained that the "ordinary case" approach and "serious potential risk" standard that had plagued the ACCA's residual clause applied equally to the Guidelines' residual clause. *Id.* at 299–300. "It hardly could be otherwise because the two clauses are materially identical." *Id.* That the Guidelines referred to burglary "of a dwelling," while the ACCA referred only to "burglary," made no difference, particularly in light of *Sessions v. Dimaya*, 584 U.S. __, 138 S. Ct. 1204 (2018)—declaring 18 U.S.C. § 16(b) void for vagueness in light of *Johnson*—because "the textual differences between the ACCA and guidelines pale in comparison to the differences between the ACCA and section 16." *Id.* at 302. And concerns about the categorical approach in *Dimaya* were expressed only by a minority of the Court and were limited only to § 16(b). *Id.* at 302–03.

Because the residual clause in the Guidelines suffered from the same indeterminacy as the residual clause in the ACCA, the Court proceeded to determine whether "the constitutional requirement of clarity applies to the mandatory guidelines." *Id.* at 299. The court concluded that *Beckles*' "logic for declining to apply the vagueness doctrine" to the advisory Guidelines resulted in the opposite outcome for the mandatory Guidelines. *Id.* at 304. It reasoned that, unlike the advisory Guidelines, "[t]he *mandatory* guidelines did . . . implicate the concerns of the vagueness doctrine" because, as described by *Booker*, they fixed the permissible sentences for criminal offenses. *Id.* at 305–06. "In sum, as the Supreme Court understood in *Booker*, the residual clause of the mandatory guidelines did not merely guide judges' discretion; rather, it mandated a specific sentencing range and permitted deviation only on narrow, statutorily fixed bases." *Id.* at 306. Thus, the court of appeals "conclude[d] that the mandatory guidelines' incorporation of the vague residual clause impeded a person's efforts to 'regulate his conduct so as to avoid particular penalties' and left it to the judge to 'prescribe the sentencing range available.'" *Id.* (quoting *Beckles*, 137 S. Ct. at 894–95 (ellipsis omitted)). "The mandatory guidelines are thus subject to attack on vagueness grounds." *Id.*

2. The Seventh Circuit then proceeded to address "whether *Johnson* applies retroactively to the residual clause of the career-offender guideline." *Id.* Relying heavily on this Court's decision in *Welch*, the court of appeals answered that question affirmatively. *Id.* It reasoned: "The same logic justifies treating

Johnson as substantive, and therefore retroactive, when applied to the mandatory guidelines." *Id.* "Just as excising the residual clause from the ACCA changed the punishment associated with illegally carrying a firearm, striking down the residual clause in the mandatory guidelines changes the sentencing range associated with Cross's and Davis's bank robberies. At the same time, it narrows the set of defendants punishable as career offenders for the commission of any number of crimes." *Id.* "Elimination of the residual clause of section 4B1.2(a)(2) (in its mandatory guise) thus alters the range of conduct or the class of persons that the law punishes and qualifies as a retroactive, substantive rule." *Id.* (citations omitted).

Having declared the mandatory residual clause retroactively void for vagueness, the court "h[e]ld that [movants] are entitled to relief from their career-offender classifications, based on the Supreme Court's decision in *Johnson*. We thus REVERSE the district court and REMAND these cases with instructions to grant [the] section 2255 motions and to resentence them" without the enhancement. *Id.*

B. The Eleventh Circuit Has Held That the Guidelines' Mandatory Residual Clause Is Not Void for Vagueness and That Any Such Ruling Would Not Have Retroactive Effect

Binding Eleventh Circuit precedent categorically precludes such relief.

1. In a pre-*Beckles* decision issued on a *pro se* application to file a successive § 2255 motion, the Eleventh Circuit held that "the Guidelines—whether mandatory or advisory—cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to assist and limit the

discretion of the sentencing judge." *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016). It reasoned that "[t]he Guidelines do not define illegal conduct: they are directives to judges for their guidance in sentencing convicted criminals, not to citizens at large." *Id.* And, the court emphasized, "[d]ue process does not mandate notice of where, within the statutory range, the guidelines sentence will fall." *Id.* "Indeed, a defendant's due process rights are unimpaired by the complete absence of sentencing guidelines." *Id.* at 1355. Thus, the court opined, "[t]he limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague." *Id.* at 1354. And, it further noted, the PSI afforded adequate notice of the career-offender enhancement. *Id.* at 1355.

2. The court of appeals alternatively held that, even if the mandatory residual clause was void for vagueness, "that does not mean that the ruling in *Welch* makes *Johnson* retroactive." *Id.* The court reasoned that "[t]he application of *Johnson* to the ACCA was a substantive change in the law because it altered the statutory range of permissible sentences." *Id.* "By contrast, a rule extending *Johnson* and concluding that it invalidates the crime-of-violence residual clause in the Guidelines would establish only that the defendant's guidelines range had been incorrectly calculated, but it would not alter the statutory boundaries for sentencing set by Congress for the crime." *Id.* Because that invalidation would not "produce a sentence that exceeds the statutory maximum," and instead would "produce changes in how the sentencing procedural process is to be conducted," the court characterized it as a procedural rather than a substantive rule. *Id.* And, unlike in

the ACCA context, the retroactive invalidation of the mandatory residual clause of the Guidelines would not preclude the district court from re-imposing the same sentence under the now-advisory Guidelines. *Id.* The court concluded: "A rule that the Guidelines must satisfy due process vagueness standards therefore differs fundamentally and qualitatively from a holding that a particular criminal statute or the ACCA sentencing statute—that increases the statutory maximum penalty for the underlying new crime—is substantively vague." *Id.* at 1356.

In sum, geography alone will now determine whether career offenders sentenced before *Booker* will be eligible for relief. Those from Chicago may walk free; those from Miami will not. Only this Court can resolve that disparity.

II. THE ELEVENTH CIRCUIT'S DECISION IN *IN RE GRIFFIN* CONTRAVENES THIS COURT'S PRECEDENTS

In this case, the court of appeals relied exclusively on its pre-*Beckles* decision in *In re Griffin*. App. 2a–4a. That decision's pair of holdings—*i.e.*, that the mandatory Guidelines cannot be unconstitutionally vague, and that the invalidation of § 4B1.2(a)(2)'s mandatory residual clause would not have retroactive effect—contravene this Court's precedents in *Beckles* and *Welch*, respectively.

A. *In re Griffin*'s Vagueness Holding Contravenes *Beckles*

1. In *Beckles*, this Court explained, to determine whether a legal provision is subject to the constitutional prohibition on vague laws, the key "inquiry" is "whether a law regulating private conduct by fixing permissible sentences provides notices and avoids arbitrary enforcement by clearly specifying the range of penalties available." 137 S. Ct. at 895. The Court concluded that the

advisory Guidelines do not fit that description, because they do not "fix the permissible range of sentences," but instead merely guide the exercise of sentencing discretion under 18 U.S.C. § 3553(a). *Id.* at 892, 894.

Due to their advisory nature, the Court concluded that they do "not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 894. It reasoned that "even perfectly clear Guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid particular penalties within the statutory range," since the sentencing court retained discretion to vary outside the advisory guideline range. *Id.* And vague advisory Guidelines do not implicate the concern of arbitrary judicial enforcement because, rather than "prescribe the sentences or sentencing range available," they merely "advise sentencing courts how to exercise their discretion within the bounds established by Congress." *Id.* at 894–95.

2. *Beckles*' reasoning compels the exact opposite outcome for the pre-*Booker* mandatory Guidelines. While the advisory Guidelines do not "fix the permissible range of sentences," *id.* at 892, the mandatory Guidelines did precisely that, *id.* at 903 n.4 (Sotomayor, J., concurring in the judgment). Indeed, *Beckles* itself distinguished the mandatory Guidelines from the advisory Guidelines, recognizing that the former were "binding on district courts" and "constrain[ed] [their] discretion." *Id.* at 894. The landmark decision in *Booker* made that clear.

In *Booker*, the Court was forced to confront (rather than avoid) the Sixth Amendment challenge to the Guidelines precisely because they could not "be read

as merely advisory provisions that recommended, rather than required, the selection of particular sentences." 543 U.S. at 233. It explained:

> The Guidelines as written . . . are not advisory; they are mandatory and binding on all judges. While subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court "*shall* impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases. (Emphasis added.) Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws.

Id. at 233–34 (footnotes and parallel citations omitted); *see Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"); *Stinson v. United States*, 508 U.S. 36, 42 (1993) (reiterating that Guidelines are "binding on federal courts"). As a result, the Court in *Booker* repeatedly recognized that the Guidelines effectively prescribed the range of permissible sentences. *See* 543 U.S. at 226 ("binding rules in the Guidelines limited the severity of the sentence that the judge could lawfully impose on the defendant"); *id.* at 227 (Guidelines "mandated that the judge select a sentence" in the range); *id.* at 236 (guideline range established "the maximum sentence" and "upper limits of sentencing"). Thus, it equated the guideline maximum with the statutory maximum. *Id.* at 238.

Booker further explained that the mandatory Guidelines had the "force and effect of laws" despite "[t]he availability of a departure in specified circumstances." *Id.* at 234. Departures were determined by considering "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission," 18 U.S.C. § 3553(b) (emphasis added); *see Burns v. United States*, 501

U.S. 129, 133 (1991), which were themselves "binding," *Stinson*, 508 U.S. at 42–43. Courts were not permitted "to decide for themselves, by reference to the" goals of § 3553(a), "whether a given factor ever [could] be an appropriate sentencing consideration." *Koon v. United States*, 518 U.S. 81, 108 (1996). Thus, "the guidelines were no different from statutes, which often specify exceptions." *Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013); *see, e.g.*, 18 U.S.C. § 3553(e) (substantial-assistance exception to statutory minimum); 18 U.S.C. § 3553(f) (safety-valve exception to statutory minimum).

Indeed, *Booker* expressly rejected the notion that "the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory" range. 543 U.S. at 234. The Court emphasized that "departures are not available in every case, and in fact are unavailable in most," where, "as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guideline range." *Id.* Departing from that mandatory guideline range was reversible error. *Id.* at 234–35. And nowhere was that true more than in the career-offender context, where Congress uniquely directed the Commission to promulgate that particular Guideline. 28 U.S.C. § 994(h).

Because the mandatory Guidelines prescribed the permissible range of sentences, any lack of clarity therein would squarely implicate the twin concerns of the vagueness doctrine. While "even perfectly clear [advisory] Guidelines could not provide notice to a person who seeks to regulate his conduct so as to avoid

particular penalties," *Beckles*, 137 S. Ct. at 894, the same was not true for the mandatory Guidelines. Because the mandatory Guidelines constrained the court's sentencing discretion, they provided concrete notice to a defendant of the particular penalties available. Indeed, *Beckles* expressly reiterated that "due process concerns . . . require[d] notice in a world of mandatory Guidelines." *Id.* (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)); *see also Burns*, 501 U.S. at 138.

Applying a vague Guideline in the pre-*Booker* era would also invite arbitrary judicial enforcement. Because the mandatory Guidelines did not merely provide the sentencing court with advice, but rather mandated a specific range of permissible sentences, a vague Guideline would permit the court, "without any legally fixed standards," to arbitrarily "prescribe the sentences or sentencing range available." *Beckles*, 137 S. Ct. at 894–95 (citation omitted). That is precisely the sort of arbitrary judicial enforcement that motivated *Johnson*. In this case, for example, the sentencing court had no intelligible standard by which to determine whether Petitioner's prior offenses constituted "crimes of violence" under the residual clause. Rather than guide the sentencing court's discretion, that standardless determination established the fixed range of permissible sentences. Permitting judges to set that range without any intelligible legal standard directly implicates the vagueness doctrine's concern with arbitrary enforcement.

In short, the pre-*Booker* Guidelines were called "mandatory" for a reason: they bound the sentencing judge. Carrying the force and effect of law, they prescribed the sentences that a court was permitted to impose and that a defendant

was eligible to receive. In stark contrast to the advisory Guidelines, they "fixed the range of permissible sentences." *Beckles*, 137 S. Ct. at 892. Thus, *Beckles* compels the conclusion that the mandatory Guidelines under which Petitioner was sentenced are subject to the constitutional prohibition on vagueness. And because the mandatory residual clause in § 4B1.2(a)(2) is identical to the residual clause invalidated in *Johnson*, it too must be declared void for vagueness.

3. The contrary reasoning and conclusion of *In re Griffin* cannot be reconciled with *Beckles*. For starters, at no time did it conduct the key "inquiry" that *Beckles* now requires—*i.e.*, whether the mandatory Guidelines fixed or prescribed the range of permissible sentences. *Id.* at 892, 894–95. Instead, *In re Griffin* adopted an incompatibly narrow understanding of the vagueness doctrine, concluding that the mandatory Guidelines cannot be unconstitutionally vague because "they do not establish the illegality of any conduct." 823 F.3d at 1354; *see id.* (repeating same). But *Beckles* reaffirmed what *Johnson* had already made clear: the vagueness doctrine applies not only to "laws that define criminal offenses," but to "laws that fix the permissible sentences for criminal offenses." *Beckles*, 137 S. Ct. at 892 (emphasis omitted); *see Johnson*, 135 S. Ct. at 2557.

The court of appeals also failed to ask, as *Beckles* now requires, whether the mandatory Guidelines "implicate[d] the twin concerns" of notice and arbitrary enforcement underlying the vagueness doctrine. *Beckles*, 137 S. Ct. at 894. As for the latter, *In re Griffin* said absolutely nothing at all, a glaring analytical omission. As for the former, it reasoned that "[d]ue process does not mandate notice of where,

within the statutory range, the guidelines sentence will fall." 823 F.3d at 1354. That may be so, but *Beckles* made clear that due process *does* mandate notice of the permissible "range" of sentences. And while that does not include the range established by advisory Guidelines (since they merely guide the exercise of discretion), it does include the range established by mandatory Guidelines (since they fixed the range of permissible sentences). By fixing the range of permissible sentences, the mandatory Guidelines communicated the available sentences to a defendant. *See Beckles*, 137 S. Ct. 894. Indeed, *Beckles* specifically contrasted the mandatory Guidelines from the advisory Guidelines with regard to due process notice principles. *See id.* ("the due process concerns that . . . require notice in a world of mandatory Guidelines no longer apply'" post-*Booker*) (citations omitted)).

In re Griffin also reasoned that due process is satisfied whenever the PSI notifies the defendant of the career-offender enhancement. 823 F.3d at 1355. But *Beckles* made clear that the relevant notice question is not whether the defendant receives notice of a potential sentence after having already committed the offense and been convicted. Rather, it is whether the Guidelines supply notice *ex ante* to a "person who seeks to regulate his conduct so as to avoid particular penalties." *Beckles*, 137 S. Ct. at 894. In that regard, *In re Griffin*'s reasoning is also irreconcilable with *Johnson*: in the ACCA context, probation officers routinely notified defendants, after conviction but before sentencing, that they might receive an enhanced sentence based on the residual clause. But that notice did not cure the constitutional infirmity of the ACCA's residual clause.

The remainder of *In re Griffin*'s analysis continues to overlook the key distinction between advisory and mandatory Guidelines. For example, in concluding that the Guidelines, "whether mandatory or advisory," cannot be unconstitutionally vague, it reasoned that they were "designed to *assist and limit* the discretion of the sentencing judge." 823 F.3d at 1354 (emphasis added). That conflates the key distinction—emphasized in *Beckles*—between advisory Guidelines that "assist" (*i.e.*, guide) sentencing discretion and mandatory Guidelines that "limit" (*i.e.*, constrain) such discretion. *Beckles*, 137 S. Ct. at 892, 894.

Continuing to treat the advisory and mandatory Guidelines as one and the same, *In re Griffin* also reasoned that the Guidelines could not be vague because the Constitution permitted completely indeterminate sentencing. 823 F.3d at 1355. While *Beckle*s did embrace that point, its reasoning applies only to the advisory Guidelines. Specifically, *Beckles* reasoned that, because a purely discretionary sentencing regime was constitutional, there could be no vagueness problem with Guidelines that sought only to guide that discretion. 137 S. Ct. at 892–94. At the same time, however, *Beckles* made clear that the vagueness doctrine *does* apply to laws prescribing the range of authorized penalties. *See id*. at 892 (laws "must specify the range of available sentences with sufficient clarity") (citation omitted); *id*. at 893 (reaffirming that sentencing laws must "specif[y] the 'penalties available' and define[ ] the 'punishment authorized'") (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). Again, the mandatory Guidelines did just that.

In sum, at no time did *In re Griffin* acknowledge the binding nature of the mandatory Guidelines, let alone ask whether they fixed the range of permissible sentences, the key "inquiry" under *Beckles*. Instead, it focused on the fact that the Guidelines did not define illegal conduct, which is not relevant under *Beckles*. It repeatedly overlooked or conflated the key distinction between advisory and mandatory Guidelines, a distinction that *Beckles* reaffirmed and emphasized. And it did not properly analyze whether the mandatory Guidelines implicated the notice and arbitrary enforcement concerns underlying the vagueness doctrine. Had it done so, it would have reached the same conclusion as the Seventh Circuit in *Cross*.

B. *In re Griffin*'s Retroactivity Holding Contravenes *Welch*

1. *In re Griffin*'s retroactivity holding fares no better. In *Welch*, this Court explained: "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." 136 S. Ct. at 1265 (citation omitted). "Before *Johnson*, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell only under the residual clause." *Id.* However, after *Johnson*, the "same person engaged in the same conduct is no longer subject" to the enhancement. *Id.* Thus, it announced a "substantive" rule with retroactive effect.

"By the same logic," the Court added, "*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 did not, for example, "allocate decisionmaking authority between judge and jury, or regulate the evidence that the court could consider in making its decision." *Id.* (citation omitted). Rather, "*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Id.* Its function was therefore substantive, not procedural.

2. *Welch*'s reasoning applies with full force here. Just as with *Johnson*, any decision invalidating § 4B1.2(a)(2)'s mandatory residual clause would "change[ ] the substantive reach of the [career offender Guideline], altering the range of conduct or the class of persons that the [Guideline] punishes." *Id.* (internal quotation marks omitted). Before that invalidation, the career offender Guideline applied to any person who, *inter alia*, was convicted of a crime of violence after two prior convictions for a crime of violence, "even if one or more of those convictions fell under only the residual clause." *Id.* But after the invalidation, "some crimes will no longer fit the Sentencing Guidelines' definition of a crime of violence and will therefore be incapable of resulting in a career-offender sentencing enhancement." *In re Hubbard*, 825 F.3d 225, 234 (4th Cir. 2016). Thus, the very same person who qualified as a career offender based on § 4B1.2(a)(2)'s mandatory residual clause before its invalidation would no longer be subject to the enhancement after the invalidation. It therefore affects the substantive reach of the career offender Guideline and, in turn, the class of persons eligible for its enhanced penalty.

3. Ignoring *Welch*'s core reasoning, *In re Griffin* held that the invalidation of § 4B1.2(a)(2)'s mandatory residual clause would be procedural rather than

substantive. Attempting to distinguish *Welch*, it reasoned that any such ruling would not be substantive because it "would not alter the statutory boundaries for sentencing," and thus would not "produce a sentence that exceeds the statutory maximum." *In re Griffin*, 823 F.3d at 1355. Rather, it reasoned, that ruling would be procedural because it "would establish only that the defendant's guidelines range had been incorrectly calculated," which "would produce changes in how the sentencing procedural process is to be conducted." *Id.*

That attempt to distinguish *Welch* is wholly unpersuasive, because it neglects that the mandatory Guidelines had "the force and effect of laws." *Booker*, 543 U.S. at 234. As explained at length above, under the pre-*Booker* regime, the sentencing court was legally bound to sentence defendants in accordance with the Guidelines. The Guidelines were thus the functional equivalent of what the statutory range is today. As a result, the career-offender enhancement, just like the ACCA enhancement, subjected defendants to increased sentences that they could not otherwise lawfully receive. Whether the sentence exceeded the correct statutory maximum or the correctly-calculated high-end of the mandatory guideline range, the result is the same: the defendant's sentence was not "authorized by law." *Welch*, 136 S. Ct. at 1266. Therefore, invalidating § 4B1.2(a)(2)'s mandatory residual clause would not "produce changes in the sentencing procedural process" any more than *Johnson* did. *In re Griffin*, 823 F.3d at 1355.

That conclusion is not affected by the limited availability of departures from mandatory guideline range. Again, there are exceptions to the statutory range, yet

they did not render *Johnson* any less substantive. Moreover, this Court has already determined, in a related context, that changing a "presumptive" guideline range—one more liberally permitting departures based on any clear and convincing reason—was substantive, not procedural, in nature. *Miller v. Florida*, 482 U.S. 423 (1987). Surely then, narrowing the reach of a mandatory guideline range, subject to only limited departures in exceptional cases, must be substantive as well. Again, had the Eleventh Circuit in *In re Griffin* properly applied *Welch*, it would have reached the same conclusion as the Seventh Circuit in *Cross*. In short, there is no sound basis to distinguish *Welch*'s retroactivity holding.

III. THE QUESTIONS PRESENTED ARE OF GREAT PUBLIC IMPORTANCE REQUIRING URGENT RESOLUTION BY THIS COURT

In light of the arguments above, many federal prisoners are currently serving unlawful sentences. Accordingly to one recent estimate, there are approximately five thousand federal prisoners who were sentenced as career offenders pre-*Booker* and who remain in prison. *See Raybon v. United States*, 867 F.3d 625, Amicus Br. of Sixth Circuit Fed. & Cmty. Def., App. 2a (6th Cir. No. 16-2522) (Oct. 18, 2017). That high number reflects the severe operation of the enhancement. *See, e.g.*, *Beckles*, 137 S. Ct. 886, Am. Br. of Fed. Pub. & Cmty. Def. & NAFD 6, App. 2a (U.S. No. 15-8544) (Aug. 18, 2016) (observing that, in on year, "[t]he average sentence imposed on career offenders was 2.3 times that imposed on non-career offenders convicted of the same offense types") (emphasis omitted).

Moreover, it is estimated that over 1,100 of those 5,000 prisoners were sentenced in the Eleventh Circuit. That is more than any other circuit. Indeed,

only the Fourth Circuit comes close to the thousand mark; no other circuit surpasses 500 prisoners. *See Raybon*, FPD Amicus Br. App. 3a–6a. Yet, as explained above, binding Eleventh Circuit precludes any of those prisoners from obtaining relief under *Johnson*, *Welch*, and *Beckles*. To be sure, some will ultimately not be entitled to relief; some will have drug offenses as predicates, and others will have crimes of violence that remain so even without the residual clause. Nonetheless, some will have meritorious claims. Yet *In re Griffin* categorically bars such claims from even being evaluated by a court.

The same dynamic is now also true in the Fourth, Sixth, Ninth, and Tenth Circuits, which have dismissed similar mandatory Guidelines claims based on *Johnson* as untimely. *See United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018); *Brown v. United States*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017). In those circuits, there are another estimated 1,600 pre-*Booker* career offenders who remain in prison, and they too are unable to obtain relief. Adding that figure to the 1,100 career offenders in the Eleventh Circuit means that, just in those four circuits alone, there are approximately 2,700 federal prisoners who, under this Court's precedents, may be serving unlawful sentences.

This situation requires prompt resolution. Indeed, because all of these prisoners were sentenced before *Booker*, they have already been serving their potentially-unlawful sentences for more than a *dozen* years. Confronted with a similar dire situation, the federal courts—including this Court in *Welch*—have

moved expeditiously after *Johnson* in order to remedy illegal ACCA sentences. The same haste is required here, lest this significant swath of illegal sentences go unremedied. Federal prisoners should not be required to serve an illegal sentence for a single day, let alone years. *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) (observing that even "a minimal amount of additional time in prison" is prejudicial). Absent prompt intervention by this Court, however, numerous prisoners will be forced to continue serving illegal sentences without recourse. This Court should not permit these potential miscarriages of justice to persist. *See Brown v. United States*, 139 S. Ct. 14, 16 (2018) (Sotomayor, J., dissenting from denial of certiorari) (recognizing that this issue "presents an important question of federal law that has divided the courts of appeals and in theory could determine the liberty of over 1,000 people).

IV. THIS CASE SQUARELY PRESENTS BOTH QUESTIONS FOR REVIEW

This case affords the Court an opportunity to intervene.

1. The vagueness question presented here was extensively litigated below. In the district court, Petitioner repeatedly pressed his contention that the mandatory Guidelines were subject to the vagueness prohibition, and therefore § 4B1.2(a)(2)'s then-mandatory residual clause was unconstitutionally vague. The government repeatedly argued the opposite, relying on *In re Griffin*'s holding to the contrary. And the district court agreed with the government, concluding that *In re Griffin* foreclosed Petitioner's § 2255 motion. App. 5a–6a.

Having received a COA on whether *Johnson* applies to the mandatory Guidelines, App. 7a–9a, Petitioner reiterated his contentions on appeal, setting forth his arguments in even greater detail. The government did the same. The court of appeals squarely held that *In re Griffin* remained binding circuit precedent even after *Beckles*, and therefore its holding—that the mandatory Guidelines could not be unconstitutionally vague—"foreclose[d]" Petitioner's § 2255 motion. App. 2a–3a. The court of appeals rested its decision solely on that basis. *Id.* Accordingly, the question expressly left open in *Beckles* is squarely presented for decision here.

2. The retroactivity question is also presented for decision here. In *In re Griffin*, the Eleventh Circuit held not only that the mandatory Guidelines were immune from vagueness, but also that the invalidation of § 4B1.2(a)(2)'s mandatory residual clause would not have retroactive effect in cases on collateral review. 823 F.3d at 1355–56. That decision considered, yet sought to distinguish, this Court's decision in *Welch*. And while the court of appeals did not need to expressly reiterate that retroactivity holding here, it made clear that *In re Griffin* constitutes binding circuit precedent. App. 2a–3a. Given *In re Griffin*'s precedential status, remanding for resolution of the retroactivity question here would be futile. And resolving that question is necessary not only to resolve this case, but to provide critical guidance to the lower courts about whether a ruling invalidating the mandatory residual clause would create a "new" rule of constitutional law distinct from the substantive rule announced in *Johnson*; and, if so, whether that new rule would also be entitled to

retroactive effect, thereby triggering a new statute of limitations under § 2255(f)(3), and satisfying the gatekeeping requirements for successive motions in § 2255(h)(2).

3. Finally, this case is one of a limited number of vehicles that will viably present the mandatory Guidelines questions to the Court. All federal prisoners subject to the mandatory Guidelines were sentenced over a decade ago. In the interim, the vast majority of them have filed a § 2255 motion. That places them in the successive posture, obligating them to obtain authorization from the court of appeals before filing another one. 28 U.S.C. § 2255(h). The problem is that, while there have been many decisions from the courts of appeals denying successive applications in those cases, prisoners are statutorily barred from seeking certiorari review of them. 28 U.S.C. § 2244(b)(3)(E). That is precisely why certiorari was never sought in *In re Griffin*. And, of course, there are no longer any mandatory Guidelines cases still on direct appeal. Thus, with the exception of an original habeas petition, the only way for this Court to decide the mandatory Guidelines question left open in *Beckles* is to do so by granting certiorari from the denial of an initial § 2255 motion like this one. Again, that question is perfectly preserved and squarely presented here. The Court should decide it and the accompanying retroactivity question along with it.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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