No. 18-8125

IN THE

Supreme Court of the United States

DARRELL D. WALKER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF FAMM AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, or under what circumstances, a criminal defendant pursuing a second or successive motion under 28 U.S.C. § 2255 is entitled to relief under a retroactive constitutional decision invalidating a federal statutory provision, where the record is silent as to whether the district court based its original judgment on that provision or another provision of the same statute.

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1991 as Families Against Mandatory Minimums, **FAMM** is a national, nonprofit, nonpartisan organization with more than 75,000 members. FAMM's original mission was to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. Today, FAMM pursues a broader mission of creating a more fair and effective justice system that respects American values of individual accountability and dignity while keeping communities safe. By mobilizing and sharing the stories of prisoners and their families who have been adversely affected by unjust sentences and prison polices, FAMM gives voice to incarcerated individuals, their families, and their communities.

FAMM advances its charitable purposes in part through education of the general public and through selected amicus filings in important cases.

The **National Association of Criminal Defense Lawyers (NACDL)** is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions in *Johnson v. United States*, 576 U.S. —, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 578 U.S. —, 136 S. Ct. 1257 (2016), offered a ray of hope to thousands of incarcerated men and women across the country serving mandatory minimum sentences of 15-plus years under the Armed Career Criminal Act (ACCA). *Johnson* struck down ACCA's residual clause, and *Welch* confirmed that *Johnson* had announced a new rule of constitutional law that applies retroactively on collateral review. This meant that relief was available even for those who had already unsuccessfully sought collateral review of their convictions and sentences.

The circuits have since divided, however, on whether *Johnson* and *Welch*'s promise was real for a substantial share of defendants who received ACCA sentences before *Johnson*. In the decision below, the Eighth Circuit joined five other circuits in holding that a defendant sentenced under ACCA who brings a second or successive § 2255 motion must show by a preponderance of the evidence that the sentencing court actually relied on the residual clause, rather than one of ACCA's other two clauses (the "elements clause" or the "enumerated offenses clause"). This is no small task. In many pre-*Johnson* cases, the sentencing court never specified which ACCA provision it was relying on, because under then-prevailing law there was no need to declare whether a past offense constituted, say, generic "burglary" or merely an "otherwise" violent felony. Three other circuits have held

that defendants with a "silent record" may still proceed with their motions for resentencing.

The Eighth Circuit's rule is wrong. It confuses the *jurisdictional requirements* of a second or successive § 2255 motion with the *merits* of the motion. A movant whose motion "relies on" *Johnson* satisfies Congress's threshold requirements for a second or successive petition; whether the defendant is ultimately entitled to relief is a determination a *district court* will make when evaluating the merits of the motion. The Eighth Circuit's contrary rule ignores both the text of the relevant statutes and important policy considerations.

This split should not be allowed to persist where the stakes for federal criminal defendants are so high. The *maximum* sentence for a felon in possession of a firearm is ordinarily 10 years. But ACCA imposes a mandatory *minimum* of 15 years for a defendant who violates the same statute and has three qualifying prior convictions. Thus, in every case that this split implicates, at least five years in prison are on the line—and often many more. Based on amici's experience reviewing individual defendants' ACCA sentences, this case is an unusually strong vehicle for addressing the question presented: It is undisputed that an ACCA sentence would *not* be proper if Mr. Walker were allowed to be heard on the merits of his motion, given that his Missouri burglary conviction would not qualify under either the residual clause (which is now invalid) or the enumerated offenses clause (because the Eighth Circuit has now said Missouri burglary is broader than the generic federal offense). This Court should therefore grant the petition and confirm that defendants who may have been

sentenced under an unconstitutional statute should have their sentences reconsidered under a constitutionally sound provision.

ARGUMENT

I. The Question That Has Divided The Circuits Is Of Critical Importance To Thousands Of Federal Prisoners.

As the petition ably explains (at 8–10), the circuits are divided over the conditions a movant must satisfy to proceed with a second or successive § 2255 motion under *Johnson* and *Welch* when the sentencing court did not specify the basis for the movant's ACCA sentence.

The Third, Fourth, and Ninth Circuits have all held that a movant must show only that the residual clause "may have" been the basis for his sentence. *United States v. Peppers*, 899 F.3d 211, 221–224 (3d Cir. 2018); *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). Many district courts have agreed with this approach as well. *E.g.*, *United States v. Wilson*, 249 F. Supp. 3d 305, 311–313 (D.D.C. 2017).

In the decision below, the Eighth Circuit applied a different rule. It held that "a movant [must] show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." Pet. App. 5a. The First, Sixth, Tenth, and Eleventh Circuits all apply a rule that is materially the same. *See id.* (citing *Dimott v. United States*, 881 F.3d 232, 242–243 (1st Cir. 2018), *cert. denied*,

138 S. Ct. 2678 (2018); *United States v. Washington*, 890 F.3d 891 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 789 (2019); *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 1168 (2019); *Potter v. United States*, 887 F.3d 785, 787–788 (6th Cir. 2018)).[2]

In short, the circuits are intractably split over this issue. The availability of relief thus turns on the happenstance of geography. Inmates sentenced in Arizona may have years shaved off their sentences while inmates with identical criminal histories and similarly silent records who were sentenced in New Mexico are out of luck. This "selective application of new rules violates the principle of treating similarly situated defendants the same" and warrants this Court's intervention. *Teague v. Lane*, 489 U.S. 288, 304 (1989).

This issue also has far-reaching consequences. Since *Johnson* and *Welch*, "hundreds of inmates" have sought resentencing in the Eleventh Circuit alone. *In re Chance*, 831 F.3d 1335, 1339 (11th Cir. 2016), *abrogated by Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). Based on research by FAMM and NACDL, there appear to have been more than a thousand such motions. And the result of these motions can be life-changing. The typical defendant sentenced

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[2] The Fifth Circuit has purported to "not conclusively decide [the question]." *United States v. Wiese*, 896 F.3d 720, 724 (5th Cir. 2018), *cert. denied*, 139 S. Ct. — (2019). But that court has labeled the majority rule "the more appropriate standard" and required defendants to show more than just a silent record to proceed with their second or successive motions. *Id.* at 724.

for violating 18 U.S.C. § 922(g) is subject to a 10-year maximum and receives, on average, a 60-month sentence. 18 U.S.C. § 924(a)(2); U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm*, https://tinyurl.com/y3j3tp2w (last visited Apr. 12, 2019). A defendant who receives an ACCA sentence for identical conduct, by contrast, is subject to a 15-year mandatory minimum, 18 U.S.C. § 924(e), with many defendants receiving sentences that are even longer—up to life.

This Court's immediate intervention is thus needed to resolve this split and open an avenue to relief for the many inmates who would otherwise remain imprisoned for years based on an unconstitutional provision.

II. The Decision Below Gravely Misreads The Federal Post-Conviction Relief Statute.

The majority rule, which the Eighth Circuit adopted here, confuses a jurisdictional threshold with the merits of a motion. It is thus "quite wrong." *In re Chance*, 831 F.3d at 1339. Both the statutory text and relevant policy considerations instead favor Mr. Walker's position and that of the Third, Fourth, and Ninth Circuits.

A. The Eighth Circuit's rule contradicts the plain text of § 2244.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") eliminated discretionary consideration of second-and-successive habeas petitions (or analogous motions under 28 U.S.C. § 2255) based

on an equitable "abuse of the writ" standard, *see McCleskey v. Zant*, 499 U.S. 467 (1991), and instead authorized federal courts to consider such petitions only in narrow circumstances and according to specifically described procedures. A movant must seek authorization from a court of appeals to make a second or successive motion, and the motion must seek relief for one of two substantive reasons. *See* 28 U.S.C. § 2255(h) (incorporating *id.* § 2244(b)(3)). Relevant here, a § 2255 motion may proceed if "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2244(b)(2)(A).[3] These "gatekeeping requirements" are jurisdictional, *Burton v. Stewart*, 549 U.S. 147, 149 (2007), and district courts "shall dismiss" any second or successive motion that does not satisfy them, 28 U.S.C. § 2244(b)(4). *See Burton*, 549 U.S. at 149.

Mr. Walker's motion "obviously" satisfies the jurisdictional requirements of § 2244. Pet. 14. He received authorization from the Eighth Circuit to file his motion. Pet. App. 2a. And his motion relies on this Court's decision in *Johnson*, which this Court has already held is a "new rule" of constitutional law that has "retroactive effect in cases … on collateral review." *Welch*, 136 S. Ct. at 1264–1265. Mr. Walker's motion argues that, "[i]n light of *Johnson*, Mr. Walker does not have three prior convictions that qualify as ACCA predicate offenses." Motion to Vacate at 3,

[3] This brief assumes, as did the Eighth Circuit below, that federal prisoners moving for relief under § 2255 must satisfy the requirements of § 2244(b)(2). *See* Pet. App. 3a n.2.

Walker v. United States, No. 4:16-cv-703, (W.D. Mo. June 27, 2016), Dkt. 1. There is thus no question that his "*claim* relies on" *Johnson*. 28 U.S.C. § 2244(b)(2)(A) (emphasis added). Congress did not require him to show anything more before the district court could consider the merits of his motion.

The Eighth Circuit went astray by confusing the jurisdictional requirements of § 2244 with the motion's merits. The court held that to proceed with a § 2255 motion, the "movant" must "show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." Pet. App. 5a; *accord Beeman*, 871 F.3d at 1221 (requiring the movant to "establish that his sentence enhancement turn[ed] on the validity of the residual clause") (internal quotation marks omitted) (alteration in original); *Dimott*, 881 F.3d at 242–243; *Potter*, 887 F.3d at 787–88; *Washington*, 890 F.3d at 895; *Wiese*, 896 F.3d at 724 ("The dispositive question for jurisdictional purposes here is whether the sentencing court relied on the residual clause in making its sentencing determination.…").

These courts all address the wrong question. They ask whether the sentencing court *definitively did rely* on the residual clause, rather than whether the sentence *may have rested* on an unconstitutional ground, as alleged by a § 2255 motion. That approach fails as a textual matter because it focuses on the wrong subject. As the petition explains (at 14–15), at the gatekeeping step, the statute asks what the "*claim* relies on," not what "the sentencing court" or "the sentence" relied on. 28 U.S.C. § 2244(b)(2)(A) (emphasis added).

Of course, not all second or successive motions that satisfy the basic gateway requirement of asserting a *Johnson* claim will ultimately succeed on the merits merely by having incanted "*Johnson*." As the petition explains, "a defendant in Mr. Walker's position" still "must demonstrate that his sentence actually violates *Johnson*" at the merits stage. Pet. 16. Where, for example, a defendant has three prior convictions that qualify as "violent felon[ies]" under ACCA's elements clause or enumerated offense clause, then a district court will deny the motion on the merits because the sentence is not "in excess of the maximum authorized by law," 28 U.S.C. § 2255(a), even if the court originally relied on the residual clause. *See, e.g.*, *Mutee v. United States*, — F.3d —, No. 17-15415, 2019 WL 1474653, at *1–*2 (9th Cir. Apr. 4, 2019). But that has nothing to do with the gatekeeping requirements of § 2244. A "claim" can "rel[y] on" *Johnson* even if it is ultimately unsuccessful. *Cf. Tyler v. Cain*, 533 U.S. 656, 662 (2001) (assuming that a claim "relie[d]" on *Cage v. Louisiana*, 498 U.S. 39 (1990) without examining whether the defendant's jury was actually instructed in a way that *Cage* prohibited); *see also* Pet. 15 (explaining how *Tyler* supports Mr. Walker's position here).

District courts are also well positioned to resolve the merits of motions with ambiguous sentencing records. This Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991), provides the principles that can guide a court's analysis. *See* Pet. 15–17; *Geozos*, 870 F.3d at 896. Under that rule, a "conviction cannot be upheld" where it "*may have* rested on" an unconstitutional or otherwise unlawful ground, even where "it is impossible to say under which clause of the statute"—

a constitutional or unconstitutional one—supported the original judgment. *Griffin*, 502 U.S. at 52–53 (emphasis added).

B. The Eighth Circuit's rule leads to arbitrary results.

Mr. Walker's position enjoys support from more than just the statutory text. Longstanding doctrines that militate in favor of criminal defendants and against incarceration also undermine the Eighth Circuit's rule. That is especially true here, where the issue arose not because of any fault of the defendant. The Eighth Circuit's position would arbitrarily leave years of excess incarceration to the happenstance of whether long-ago sentencing courts pronounced which prong of ACCA they were relying on, at a time when there was no need to do so.

1. If Mr. Walker were sentenced *today*, he would face a maximum sentence of ten years. Pet. 4–7. The predicate convictions that triggered an ACCA sentence in his case were for burglary in Missouri. And the Eighth Circuit has since held (and the Government does not dispute) that Missouri burglary is broader than generic burglary and so does not fall within ACCA's enumerated offense clause. *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc); Pet. App. 2a. With the residual clause also unavailable, there is thus no dispute that if a defendant with an identical criminal history to Mr. Walker's were being sentenced for a gun-possession offense, his sentence would be capped by the standard 10-year statutory maximum for felon-in-possession convictions. *See* 18 U.S.C. § 924(a)(2).

Mr. Walker is instead currently serving the 15th year of a 24-year sentence. Pet. 5. His case thus exemplifies the unequal treatment of similarly situated defendants.

The Eighth Circuit was not concerned by this inequity. Agreeing with the Eleventh Circuit, the court believed that "[i]t is no more arbitrary to have a movant lose in a § 2255 proceeding because of a silent record than to have the Government lose because of one. What would be arbitrary is to treat *Johnson* claimants differently than all other § 2255 movants claiming a constitutional violation." Pet. App. 5a (quoting *Beeman*, 871 F.3d at 1224). That reasoning is flawed.

First, the premise is incorrect. Mr. Walker's position would not treat *Johnson* claimants differently. *Any* defendant convicted under a statute that is later struck down as unconstitutional in some applications, but where it is unclear whether the defendant's sentence involved those applications, should be able to seek a new sentence that stands on sure constitutional footing. Indeed, this is why the question presented is not limited to *Johnson* claims; it is a question of the proper interpretation of AEDPA's gatekeeping provision that applies far more broadly. *See* Pet. 11–12.

Second, and in any event, it is not "arbitrary" for the tie to go to the criminal defendant. Rather, it is a deeply rooted principle that criminal procedural rules err on the side of individual liberty rather than the government's powers to restrict that liberty. For instance, "[t]he requirement that guilt of a criminal

charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." *In re Winship*, 397 U.S. 358, 361 (1970). This rule of course means that two defendants may engage in identical conduct and one may go to prison while the other goes free based on inadequate evidence. But it is not "arbitrary" that "the Government lose[s]" the latter case. Rather, this rule is "indispensable" because of the threat to "liberty" that a conviction poses. *Id.* at 364.

Similarly, when a criminal statute is irreconcilably ambiguous, "we don't default to the most severe possible interpretation of the statute but to the rule of lenity." *United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (Gorsuch, J.). That rule ensures that "[courts] will not relegate men and women … to decades more time in prison[] because they did something that might—or might not—have amounted to a violation of the law as enacted." *Id.* The rule of lenity is not "arbitrary" just because the government loses every time it is applied.

There is likewise nothing "arbitrary" about resolving silent-record cases in favor of the movant. As explained above (at 7), the motions in these cases mean the difference of years—if not decades—more in prison. It is hardly arbitrary to reexamine those sentences if they may be unconstitutional.

2. If anything, the Eighth Circuit's rule would lead to arbitrary results, because it would allow two similarly situated defendants to have drastically different sentences depending on a factor entirely beyond their control: how much the district court chose

to say at sentencing about the basis for an ACCA sentence—a question that was, at the time, legally irrelevant.

As the Eleventh Circuit has explained, "[n]othing in the law requires a judge to specify which clause of [ACCA]—residual or elements clause—it relied upon in imposing a sentence." *In re Chance*, 831 F.3d at 1340; *see also Winston*, 850 F.3d at 682; *Peppers*, 899 F.3d at 224. Rather, courts have inherent discretion over how much to specify. So, before *Johnson*, many courts of appeals regularly affirmed ACCA enhancements without deciding whether any clause beyond the residual clause justified the sentence. *See* Pet. App. 9a; *see also United States v. Lane*, 909 F.2d 895, 902 (6th Cir. 1990); *United States v. Lee*, 458 F. App'x 741, 746 (10th Cir. 2012); *United States v. Boggan*, 550 F. App'x 731, 735 (11th Cir. 2013); *cf. also United States v. Cantrell*, 530 F.3d 684, 695–696 (8th Cir. 2008) (holding that "regardless of whether [the defendant's] [Missouri] burglary conviction was a 'generic burglary,'" he was a career offender under the Sentencing Guidelines "because [his] [Missouri] second-degree burglary conviction constituted a 'crime of violence' under the" Guidelines' residual clause).

The Eighth Circuit's rule thus faults the movant for not demanding a record that the sentencing court was under no obligation to create. As the Third Circuit has recognized, "a defendant's *Johnson* claim should not be unfairly tethered to the discretionary decision of his sentencing judge to specify the ACCA clause under which each prior conviction qualifies as a violent felony." *Peppers*, 899 F.3d at 224. The

contrary rule "results in randomly unequal treatment of § 2255 claims." *Id.*

3. In opposing a petition for certiorari raising the same question presented here, the government has argued that Mr. Walker's position would "produce anomalous results" because "[i]t would bar relief for a defendant who invited the creation of a record by objecting at sentencing to his ACCA classification, while at the same time allowing a collateral attack by a defendant … who made no such objection." Br. in Opp. at 18, *King v. United States*, No. 17-8280 (July 13, 2018). This argument is misplaced for several reasons.

First, this argument assumes that a district court will explain its rationale for delivering an ACCA sentence upon an objection. But that is no guarantee. As just explained, district courts are not obliged to identify the clause they are relying on to impose an ACCA sentence. A defendant's objection or request that the district court specify the clause that is the basis for the sentence does not create any such obligation; it still appeals to the district court's inherent discretion. So silent record cases will exist either way, and the circuits disagree about how to proceed with those cases.

Second, the government's objection appeals to a concern that Congress did not share. Congress could, of course, have provided that a second or successive motion predicated on a change in constitutional law could proceed only if the defendant anticipated that change and argued for it at sentencing. But while Congress narrowly circumscribed the availability of

second or successive motions such that they are rarely available, *see* 28 U.S.C. § 2244(b), it chose not to include that requirement.

Third, the "anomalous results" the government foresees will never occur. As explained both above (at 10) and in the petition (at 21 & n.3), defendants with silent records will not ultimately obtain relief if a different ACCA clause can sustain the sentence. Thus, the only people serving illegal sentences for whom relief under § 2255 would be unavailable on account of a *more* clear record would be those who objected to their sentence, received a detailed decision that identified either the elements clause or enumerated offense clause as the basis for the sentence, and are serving a sentence based on a rationale that was later invalidated on statutory grounds that cannot be raised on a § 2255 motion (like *Mathis*'s clarification of the modified categorical approach). But those defendants have an alternative avenue to relief regardless. As the petition explains, nine circuits have held "that federal prisoners can obtain relief under 28 U.S.C. § 2241—the habeas [corpus] 'savings clause'—when a subsequent decision makes clear that the statute under which they were convicted or sentenced does not apply to them." Pet. at 21 n.3 (citing U.S. Pet. for Cert. at 23–24, *United States v. Wheeler*, No. 18-420 (Oct. 3, 2018) (citing cases)).

While the plain text of § 2244 and § 2255 alone can resolve this issue in Mr. Walker's favor, the consequences also point decidedly toward allowing his motion to proceed to the merits. This Court should grant the petition to correct the Eighth Circuit's incorrect decision.

III. The Severity Of The Consequences To Petitioner And Many Others Similarly Situated—And The Disutility Of Their Sentences To Society—Underline The Urgency Of Granting Review.

Mr. Walker has already served 15 years in prison for his crime. He has missed seeing his child, who was a newborn at the time of sentencing, grow up. *See* Sentencing Memorandum at 6, *United States v. Walker*, No. 4:02-cr-161 (W.D. Mo. Aug. 8, 2005), Dkt. 152. During his imprisonment, Mr. Walker has been violently attacked by a cellmate. Letter from Darrell Walker at 1–2, *United States v. Walker*, No. 4:02-cr-161 (W.D. Mo. Nov. 18, 2010), Dkt. 173. His injuries were so severe that they required emergency surgery and left him temporarily in a coma. *Id.*

Nobody benefits from Mr. Walker's continued imprisonment under a sentence that could not be imposed today. Recent research concludes that "increases in sentence length … are unlikely to have much deterrent effect when the baseline sentence is already long." Giovanni Mastrobuoni & David Rivers, *Criminal Discount Factors and Deterrence* 5 (Feb. 7, 2016), https://tinyurl.com/yxgzo968. For "those with sentences that are longer than six years," more time in prison results in almost no reduction in future recidivism. *Id.* at 16. Meanwhile, "the average cost of incarceration for Federal inmates was … $36,299.25 ($99.45 per day) in FY 2017." Bureau of Prisons, *Annual Determination of Average Cost of Incarceration* (Apr. 30, 2018), https://tinyurl.com/y4ga9bn8. The costs of keeping Mr. Walker incarcerated far outweigh any societal interests.

As explained above (at 7) and in the petition (at 4–5), Mr. Walker is eligible for immediate release if this petition is granted and the district court agrees with the merits of his motion, but he faces another nine years in prison if the petition is denied. Sadly, Mr. Walker's story is not unique.

Fred Winterroth has been imprisoned since 2006 for violating the same federal statute that Mr. Walker did. *United States v. Winterroth*, No. 17-40554, 2019 WL 151332, at *1 (5th Cir. Jan. 9, 2019). Like Mr. Walker, he would have received a maximum sentence of 10 years if not for an ACCA enhancement. Instead, he will remain imprisoned for another eight years. *Id.* Like Mr. Walker, there is no question that if Mr. Winterroth were sentenced today he would not receive an ACCA enhancement. His predicate convictions were for Texas burglary, a crime the Fifth Circuit has since concluded falls outside ACCA's reach. *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc). And like Mr. Walker, Mr. Winterroth's sentencing court "said nothing at sentencing as to whether it considered [his] prior … convictions to be ACCA predicates as … enumerated offense[s] … or to be violent felonies under § 924(e)'s residual clause." *Winterroth*, 2019 WL 151332 at *2. That was not enough for the Fifth Circuit, which concluded that Mr. Winterroth had "fail[ed] to make the necessary showing" to proceed with his § 2255 motion. *Id.*

Brian Morman is serving the 12th year of his nearly 16-year sentence that, "[w]ithout application of the ACCA," would be limited to 10 years. *Morman v. United States*, No. 3:16-CV-483-WKW, 2018 WL 3552337, at *2 (M.D. Ala. July 24, 2018). As here, the

district court denied his § 2255 motion even though "the record is unclear" as to which ACCA clause triggered his enhanced sentence. *Id.* at *8. That court adhered to the Eleventh Circuit's rule that "where … the evidence does not clearly explain what happened … the party with the burden loses." *Id.* (alterations in original) (quoting *Beeman*, 871 F.3d at 1221).

Andrew Levert is 17 years into his 236-month sentence for violating 18 U.S.C. § 922(g). *Levert v. United States*, No. 18-10620, 2019 WL 1306802, at *1 (11th Cir. Mar. 21, 2019). Without an ACCA enhancement, he would have been released long ago. Instead, he remains incarcerated even though "the [sentencing] court did not specify at sentencing whether it relied upon" the residual clause or the elements clause. *Id.* at *3.

These cases are legion. Indeed, Mr. Walker's case is not even the only one that is based on Missouri burglary convictions, which the Eighth Circuit has since said do not otherwise fall within ACCA. Fabian Jackson has served 16 years of a 295-month sentence that would have been limited to 10 years if not for ACCA. *Jackson v. United States*, 745 F. App'x 658, 659 (8th Cir. 2018). Yet again, "[t]he original sentencing court did not specify whether it sentenced Jackson as an armed career criminal based on the residual clause or another provision of the ACCA." *Id.* at 659. But, citing *Walker*, the Eighth Circuit remanded for the district court to determine "whether Jackson has shown by a preponderance of the evidence that his successive § 2255 claim relies on *Johnson*'s new rule invalidating the residual clause." *Id.* at 660.

These cases share many traits. Each features an individual who received an ACCA sentence from a court that did not specify the basis for his ACCA enhancement. In each case, the defendant has already served more than the 10-year maximum that would apply but for his ACCA enhancement. And none of these defendants can proceed with a § 2255 motion absent some evidence from at least a decade ago that shows the basis for his sentence. But they have one more thing in common: They are not over. Mr. Morman appealed the district court's denial of his § 2255 motion. Mr. Jackson's case is proceeding in district court, after which he will have time to appeal any adverse decision. Mr. Winterroth continues to seek habeas relief. And Mr. Levert has already petitioned for certiorari on this same question. *See* Petition for Certiorari, *Levert v. United States*, No. 18-1276 (U.S. Apr. 5, 2019).

The question presented will continue to recur because so much is at stake for so many. And should this Court grant Mr. Walker's petition and resolve the case in his favor, these defendants and many more may be eligible for relief after spending years more in prison than their criminal history justified or than the protection of society required.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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