No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY C. BARRETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Anthony Barrett received a sentence enhancement pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA") based upon prior convictions qualifying as predicate offenses. At the time he was sentenced, the trial court did not specify which of the three provisions of the ACCA—the elements clause, the enumerated clause, or the residual clause—served as the basis for the enhancement. This Court subsequently held that the ACCA's so-called "residual clause" was void for vagueness, and therefore predicate offenses falling within the residual clause could not constitutionally support a sentence enhancement under the ACCA. *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"). The next year, the Court held that *Johnson II* announced a new rule of constitutional law retroactively applicable on collateral review. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). Mr. Barrett brought a second 28 U.S.C. § 2255 petition relying on *Johnson II*, but the district court held that he could not take advantage of that decision because he could not demonstrate that the original sentencing court relied *exclusively* on the now-void residual clause. Deepening a well-established circuit split, the court of appeals affirmed.

The question presented is thus:

Whether a second or successive habeas petitioner asserting that his sentence is invalid under *Johnson II* must show that the sentencing court relied exclusively on the ACCA's residual clause when the sentencing record is silent on the issue.

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JURISDICTION

The court of appeals entered its judgment on November 15, 2018. Petitioner filed a timely petition for rehearing and rehearing en banc on November 29, 2018, which was denied on January 3, 2019. Pet. App. 7. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act provides, in pertinent part:

> (e)(1) In the case of a person who . . . has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .
>
> (2) As used in this subsection . . .
>
> > (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) 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).

The provision of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") that deals with the filing of second or successive § 2255 motions provides:

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> >
> > (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

The pertinent portion of § 2244 cross-referenced above in § 2255(h) is:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) 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 . . . .

28 U.S.C. § 2244(b)(2)(A).

STATEMENT OF THE CASE

The Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), increases the minimum sentence for individuals with three prior "violent felony" convictions. 18 U.S.C. § 924(e)(1). The statute defines a "violent" felony as one that falls into three categories: First, under the "elements" or "force" clause, a felony is "violent" if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). Second, "burglary, arson, or extortion," and felonies that "involve[] the use of explosives," are categorically "violent" felonies under the "enumerated offenses" clause. § 924(e)(2)(B)(ii). Third, under the "residual clause," a felony would qualify as "violent" if it "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.*

In 2011, Mr. Barrett was sentenced to 228 months (19 years) after he pleaded guilty to armed bank robbery and being a felon in possession. At the time he was sentenced, Mr. Barrett had two previous convictions for robberies in Florida and one previous conviction for robbery in Ohio. In reliance on these previous convictions, the district court enhanced Mr. Barrett's sentence under the ACCA, expressly citing 18 U.S.C. § 924(e). Neither the sentencing court nor the Government, however, specified which clause of the ACCA (the elements clause or the residual clause) supported the sentencing enhancement.

In 2015, this Court held that the ACCA's residual clause is void for vagueness. *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"). The next year, the Court held that *Johnson II* announced a new rule of constitutional

law that is retroactively applicable on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

In light of *Johnson II* and *Welch*, Mr. Barrett sought to file a second 28 U.S.C. § 2255 motion. To do so, as federal statute requires, *see* 28 U.S.C. § 2255(h), he obtained from the court of appeals the necessary permission to file his second petition, and that order directed the district court to consider the § 2255 motion. *In re Anthony Barrett*, No. 15-4252 (6th Cir. Aug. 24, 2016).

Mr. Barrett argued in his pro se § 2255 motion that this Court's ruling in *Johnson II* invalidated his prior convictions as eligible predicate offenses under the ACCA. The district court denied the motion, holding that Mr. Barrett's prior convictions were unaffected by *Johnson II*. Pet. App. 2.

Ultimately, the court of appeals affirmed the district court's denial on the grounds that his claim did not meet the threshold requirement of relying on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(2). The Sixth Circuit held that Mr. Barrett could not bring a *Johnson II* claim unless he could show "that the district court in fact relied only upon the residual clause when it sentenced him in 2011," Pet. App. 5, even if the sentencing court did not state which ACCA clause was the basis for the sentence enhancement. The Sixth Circuit had previously addressed this question in other cases. *See, e.g.*, *Potter v. United States*, 887 F.3d 785 (6th Cir. 2018).

Because the sentencing record does not definitively explain whether Mr. Barrett was sentenced under the now-void residual clause or the still-operative elements clause, the Court held Mr. Barrett was not entitled to relief and that the potentially unconstitutional sentence must stand. The ambiguity in the record with respect to which clause was the basis for his sentence, in other words, would be construed against Mr. Barrett. As a result, petitioners like Mr. Barrett whose sentencing records are silent with respect to whether they were imposed on the basis of a constitutionally valid or invalid provision of the ACCA are not entitled to relief (while other petitioners, by happenstance of how they were sentenced, are entitled to such relief).

Complicating the standard for petitioners like Mr. Barrett even further, the Court also held that its determination rested in part on the fact that the district court judge who reviewed and denied Mr. Barrett's second § 2255 motion was the same judge who sentenced Mr. Barrett in 2011. Because that trial judge found—in retrospect, after the fact, and on the basis of a silent record—that he had in fact relied on the valid elements clause and not the void residual clause in prescribing Mr. Barrett's original sentence, it could stand.

After Mr. Barrett timely petitioned for rehearing en banc, the court of appeals denied the request on January 3, 2019. Pet. App. 17. Mr. Barrett now seeks this Court's review on the issue of how, on a sentencing record that is silent, a second § 2255 movant can meet his burden of showing that his motion relies on *Johnson II*'s invalidation of the residual clause.

REASONS FOR GRANTING THE PETITION

The courts of appeals are deeply divided on the question how, on the basis of a silent sentencing record, a successive § 2255 movant can meet his burden to seek relief under *Johnson II*. This deep division on an oft-litigated question is perhaps unsurprising given the ubiquity of silent sentencing records, which arise because "nothing in the law requires a court to specify which clause it relied upon in imposing a sentence." *United States v. Winston*, 850 F.3d 677, 682 (3d Cir. 2017) (cleaned up) (quoting *In re Chance*, 831 F.3d 1335, 1340) (11th Cir. 2016)).

As the law currently stands, *Johnson II* could entitle a federal prisoner in Pennsylvania, California, or Virginia to significant relief from an otherwise lengthy prison sentence, but similarly situated prisoners in Ohio, Massachusetts, Missouri, Colorado, and Florida receive no such relief, even if they were sentenced for the same prior convictions and under the same federal statute. This disparity in outcomes violates the Court's clear command that criminal penalties should apply to similarly situated criminal defendants in the same way. This issue merits the Court's intervention to correct that disparity, and to ensure the same application of the law nationwide. This question also merits this Court's review because it recurs frequently, affects a great number of prisoners, and raises an issue of significant national importance. *Johnson II* and *Welch* should not be read to entitle some federal prisoners to relief in some places: These decisions should entitle *all* qualifying federal prisoners to that *same* relief in *all* places.

I. This Court Should Grant The Petition Because The Courts Of Appeals Are Deeply Divided On The Question How A Movant Meets His Burden To Show A Successive § 2255 Motion Relies On *Johnson II*.

There is a deep split among the federal courts of appeals on the question how *Johnson II* and *Welch* apply to federal prisoners who were sentenced under the ACCA but whose sentencing records are silent with respect to the basis of their enhancement. As a result, these decisions have drastically inconsistent effects on federal prisoners depending on which circuit court's interpretation of these cases applies. At least four courts of appeals (the First, Eighth, Tenth, and Eleventh Circuits) align with the Sixth Circuit below and require a second or successive § 2255 movant to show that "only" the residual clause could have formed the basis of his ACCA sentence enhancement in order to obtain relief under *Johnson II* and *Welch*. Conversely, at least three circuits (the Third, Fourth, and Ninth) recognize that a movant meets his § 2255(h) burden whenever the sentencing court "may have" relied on the now-void residual clause. Other circuits (including the Second, Fifth, and Seventh) have addressed the question without squarely weighing in (perhaps awaiting much-needed guidance from this Court).

A. The Sixth Circuit's Decision Below Directly Conflicts With Decisions From The Third, Fourth, And Ninth Circuits.

The Sixth Circuit's requirement that a petitioner seeking relief under *Johnson II* must show that his sentencing enhancement relied "only" on the residual clause in order to satisfy § 2255(h) has been considered and rejected by at least three circuits.

1. In the Sixth Circuit, a second or successive habeas petitioner is entitled to relief under *Johnson II* and *Welch* only if he can demonstrate that there is no question his sentence relied on the now-void residual clause. *Potter*, 887 F.3d at 787 (requiring § 2255 movant to show "the district court relied only on the residual clause in sentencing"); *see also Raines v. United States*, 898 F.3d 680, 684 (6th Cir. 2018) (noting the circuit split and that, in *Potter*, the Sixth Circuit has "entered the fray," joining the Tenth and Eleventh Circuits in requiring a movant to show that the sentencing judge relied only on the residual clause).

Thus, as the law in the Sixth Circuit stands, where a sentencing record—perhaps even a sentencing record that is more than a decade old—is silent, and the defendant may have been sentenced under the now-void residual clause, the Petitioner is not entitled to relief. The ambiguity in the sentencing record, through no fault of the petitioner, is construed against him. As the Sixth Circuit has acknowledged, these decisions squarely conflict with others from different courts of appeals. *See Raines*, 898 F.3d at 684–85 (recognizing circuit split).

2. The Sixth Circuit's crabbed reading of *Johnson II* and *Welch* directly conflicts with a decision of the United States Court of Appeals for the Fourth Circuit. After *Johnson II* and *Welch*, the Fourth Circuit was the first to confront the specific question of how a *Johnson II* movant satisfies his § 2255(h) burden. In *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), a successive § 2255 movant collaterally challenged his sentence under *Johnson II*. As here, the government there argued that the movant's claim did not rely on a new rule of constitutional

law (*Johnson II*), as required by 28 U.S.C. § 2244(b), because the movant could not show that his ACCA sentence enhancement was based on the void residual clause. *Id.* at 681–82.

The Fourth Circuit rejected this argument, noting that the sentencing record was silent on which ACCA clause applied, and holding that "when an inmate's sentence *may have* been predicated on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in *Johnson II*," the petitioner is entitled to relief. *Id.* at 682. That is because, on an ambiguous record, "the inmate has shown that he 'relies on' a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A) . . . regardless of any non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence." *Id.*

The Fourth Circuit held that, although the movant's sentencing record was silent as to which ACCA clause was the basis for the enhancement at the time of sentencing, it was enough to show that the movant's collateral challenge relied on, "at least in part," *Johnson II*, and thus the petitioner satisfied § 2255(h) such that the court could proceed to the merits of the movant's claim. *Id.* at 682. In reaching this conclusion, the court opted not to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id.* To do otherwise, the court noted, would violate "'the principle of treating similarly situated defendants the same.'" *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)).

3. The decision below also squarely conflicts with decisions from the Ninth Circuit. In *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), the Ninth Circuit articulated the question as follows:

> When a defendant was sentenced as an armed career criminal, but the sentencing court did not specify under which clause(s) it found the predicate "violent felony" convictions to qualify, how can the defendant show that a new claim "relies on" *Johnson II*, a decision that invalidated only the residual clause?

Id. 894. That is, of course, the same question decided in this case, although the Ninth Circuit reached precisely the opposite conclusion. In *Geozos*, the Ninth Circuit noted that this "question has cropped up somewhat frequently" because "at many pre-*Johnson II* sentencings, the [sentencing] court did not specify under which clause it found the ACCA predicate offenses to qualify." *Id.* at 894 n.4; *accord United States v. Booker*, 240 F. Supp. 3d 164, 168 (D.D.C. 2017) (ambiguity in the record as to what ACCA clause supported the sentence was "neither []surprising nor fatal").

Aligning itself with the Fourth Circuit, the Ninth Circuit concluded, "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *Johnson II*." *Geozos*, 870 F.3d at 896; *id.* n.6 (noting that the Fourth Circuit in *Winston* came to a similar conclusion).

In reaching this conclusion, the Ninth Circuit invoked the principle this Court announced in *Stromberg v. California*, 283 U.S. 359 (1931), that a general verdict violates the Constitution when it "may have" rested on a particular ground

that has since been ruled unconstitutional. *Id.* at 895 (quoting *Griffin v. United States*, 502 U.S. 46, 53 (1991)). The Ninth Circuit held that, despite the procedural differences between a general verdict and a collateral challenge to a sentence under § 2255, "a rule analogous to the *Stromberg* principle should apply" here because there is no principled reason for treating a jury's potentially unconstitutional basis differently than a sentencing court's. *Id*. at 896. Accordingly, the court held that Geozos had satisfied the threshold § 2255(h) requirement, and proceeded to the merits of his claim for relief.

4. More recently, the Third Circuit joined the Fourth and Ninth in *United States v. Peppers*, 899 F.3d 211 (3d Cir. 2018). Addressing the same issue involving an ambiguous sentencing record and a second or successive § 2255 movant seeking relief under *Johnson II*, the Third Circuit held that the jurisdictional threshold of § 2255(h) was a distinct inquiry from the merits of a § 2255 motion, such that an ambiguous record did not preclude a petitioner from seeking relief under *Johnson II*. The Court explained that:

> The statutory text, case law from our sister circuits, and policy considerations indicate that § 2255(h) only requires a movant to show that his sentence may be, not that it must be, unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court. It is true that Congress passed AEDPA with the purpose of restricting a defendant's ability to collaterally attack his conviction or sentence, especially with a second or successive attack. But, strict though Congress intended to be, AEDPA surely was not meant to conflate jurisdictional inquiries with analyses of the merits of a defendant's claims.

Id. at 222 (citations omitted). Accordingly, the court held that the plain meaning of 28 U.S.C. § 2244's jurisdictional requirement that a successive habeas petition "rely

on" a new constitutional rule was satisfied whenever a movant could show that his sentence "may be" unconstitutional under such a rule. *Id.* After the court determined that Peppers had sufficiently shown that his conviction "may be" unconstitutional under *Johnson II* because it could have been based on the residual clause, the court proceeded to the merits of his § 2255 motion.

Collectively, *Winston*, *Geozos*, and *Peppers* stand for the proposition that a petitioner seeking relief from a lengthy ACCA sentence may take advantage of this Court's decisions in *Johnson II* and *Welch* by filing a second or successive § 2255 motion even when the underlying sentencing record is ambiguous, in order to determine whether their ACCA sentence is constitutionally infirm.

B. The Split Is Even Deeper, Because The Decision Below Aligns With The First, Eighth, Tenth, And Eleventh Circuits, All Of Which Evince The Same Crabbed Reading Of *Johnson II* And *Welch*.

The Sixth Circuit's decision is just one of several to take an approach opposite that adopted by the Third, Fourth, and Ninth Circuits. In fact, the split of authority on this question is real and deep, as decisions of the First, Eighth, Tenth, and Eleventh Circuits make clear. Yet even the decisions on this putatively weightier side of the split make clear that the question is subject to debate and fracture.

1. The Sixth Circuit's approach aligns with decisions from the Eleventh Circuit. In *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), the Eleventh Circuit required a first-time § 2255 movant asserting a *Johnson II* claim to establish on the merits that the "sentencing court relied solely on the residual clause." *Id.* at 1221. The court held that a sentencing court's silence on the

applicable ACCA provision, resulting in an "unclear" record, means that the § 2255 movant is not entitled to relief, because it is the movant's burden to show that it is more likely than not that the sentence he received was unconstitutional. *Id.* at 1224–25.

The *Beeman* decision was issued over a vigorous dissent. The dissent explained the absurdity of the conclusion the Court was reaching by providing an illustrative example of "two defendants, sentenced on the same day, for the same offense, by the same judge, with the same ACCA predicates." *Beeman*, 871 F.3d at 1229 (Williams, J., sitting by designation and dissenting). In one case, the judge expressly stated that the sentence he was imposing relied on the residual clause, but in the (more common) other case, the sentencing judge (by mere happenstance or oversight, perhaps) did not state the basis for the sentence. *Id.* Judge Williams noted the disparity that would result, stating that "[u]nder the majority's rationale, one of the defendants could bring a *Johnson* claim because the judge specified that he was sentenced under the residual clause, but the other defendant could not, because the judge used no such language and made no specific reference to any ACCA sub-clause." *Id.* But such an approach "not only would be unfair, but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court." *Id.* Judge Williams made clear that there could be "no basis for predicating a defendant's right to relief on the precision of the verbiage employed by a judge, an attorney, or even a defendant himself at the time of sentencing, when the highest court has announced that "[t]he residual clause is invalid

under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* (quoting *Welch*, 136 S. Ct. at 1265).

Notwithstanding Judge Williams's analysis, the Eleventh Circuit has since extended *Beeman*'s reasoning to successive § 2255 motions asserting *Johnson II* claims. *See, e.g.*, *Levert v. United States*, No. 18-10620, 2019 WL 1306802, at *3 (11th Cir. Mar. 21, 2019) (holding that district court properly dismissed a successive, *Johnson II*-based § 2255 motion as not having satisfied "the requirements of § 2244" because, "[u]nder our binding precedent in *Beeman*," the movant could not make the requisite showing on the merits).

2. The First Circuit expressly adopted the reasoning of *Beeman* in *Dimott v. United States*, 881 F.3d 232, 240 (1st Cir. 2018), *cert. denied*, 138 S. Ct. 2678 (2018). Like *Beeman*, *Dimott* involved a first-time § 2255 motion, and therefore did not directly implicate § 2255(h). The court held that the movants' claims were not actionable under *Johnson II* because they could not show that it was more likely than not that the sentencing court relied on ACCA's residual clause. *Id.* at 240. Although the First Circuit has not squarely addressed the issue, there is no reason to believe it will come to a different conclusion in evaluating a second or successive § 2255 petition. Thus, the First Circuit falls on the Sixth Circuit side of this split of authority.

3. Also following suit, the Tenth Circuit joined the First and Eleventh Circuits in *United States v. Washington*, 890 F.3d 891 (10th Cir. 2018). In a case involving a successive § 2255 motion seeking relief under *Johnson II*, the Tenth

Circuit rejected the movant's argument that his ambiguous sentencing record should entitle him to relief. The Tenth Circuit rejected the argument that "the district court *could have* relied on the residual clause." *Id.* at 896 (emphasis added). The court also squarely held that *Stromberg* did not apply, noting that that rule "has historically only applied to general jury verdicts," and that courts undertaking *Johnson II* challenges can look to the relevant legal background that existed at the time of the sentencing, even though no such backward-looking analysis would be permissible to sustain a jury verdict. *See id.* While the court cited to the jurisdictional requirements of § 2255(h), it did not distinguish whether its analysis applied to this provision's jurisdictional threshold or to the underlying merits of the movant's § 2255 motion. Ultimately, the court proceeded to the merits, and affirmed the district court's denial.

4. More recently, the Eighth Circuit aligned with the Sixth, First, Tenth, and Eleventh Circuits by holding, in *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018), that a successive § 2255 movant asserting a *Johnson II* claim cannot satisfy his burden by showing only a "possibility that the sentencing court relied on the residual clause." *Id.* at 1015. The majority cited to *Beeman* and held that a sentencing court's silence on the applicable ACCA clause no more cuts in favor of the movant than it does for the government, and because § 2255 places the burden of proof on the movant, the lack of clarity in the sentencing record is the movant's problem to overcome. *Id.* Ultimately, the majority vacated the district court's

denial of a § 2255 motion and remanded for a determination as to whether the § 2255 motion relied on *Johnson II*.

Judge Kelly concurred in the vacatur but dissented from the standard established by the majority and expressly endorsed the approach adopted by the Fourth and Ninth Circuits. *Id.* at 1016 (Kelly, J., concurring in part and dissenting in part). As Judge Kelly explained, the movant satisfied § 2255(h)'s jurisdictional threshold because, "where the record is silent, Walker's claim 'relies on' *Johnson* because his claim would not have been meritorious before the residual clause was held unconstitutional." *Id.* at 1016. The majority's standard, by contrast, "would 'penalize a movant for a district court's discretionary choice'" not to specify which ACCA clause supported the sentence enhancement. *Id.* (cleaned up) (quoting *Winston*, 850 F.3d at 682).

C. Other Circuits Appear Ready To Entrench The Divide Further.

The few remaining circuit courts that have not yet weighed in on this issue appear ready to settle in opposite camps. For instance, while the Second Circuit did not directly address the issue in *Belk v. United States*, 743 F. App'x 481, 482 n.4 (2d Cir. 2018), it affirmed denial on the merits of a *Johnson II*-based § 2255 motion, noting that, when it was "unclear" whether the district court relied on the residual clause, it appears that the motion "does rely on the new rule of constitutional law announced in [*Johnson II*]." *Id.* (citing favorably to *Geozos*, 870 F.3d 890 (9th Cir. 2017)).

By contrast, the Fifth Circuit stated its preference for the standard applied in *Potter* (Sixth Circuit), *Dimott* (First Circuit), and *Beeman* (Eleventh Circuit), but

expressly declined to weigh in on how a § 2255 movant must meet his burden of showing his claim relies on *Johnson II*. *United States v. Wiese*, 896 F.3d 720, 724–25 (5th Cir. 2018) ("But we need not conclusively decided that here because even under the standard Wiese argues is most favorable to him—the Fourth Circuit's standard . . . Wiese has not shown that the sentencing court 'may have' relied on the residual clause."). These recent decisions make clear that this ongoing split is poised to deepen even further. But however these Courts decide the question, it is now clear that the split of authority among the courts of appeals cannot be reconciled. The split is real, stark, and deep.

II. This Court Should Grant The Petition Because The Decision Below Is Wrong.

This Court should grant review in this case because the decision below is wrong and should be reversed. The Sixth Circuity's approach conflicts with this Court's holdings and reasoning in *Welch* and *Teague*, violates the constitutional announced in *Stromberg*, and does violence to the plain text of AEDPA.

1. The Sixth Circuit's decision collides with this Court's holding in *Welch* that *Johnson II* announced a new rule that is retroactive on collateral review. *Welch* reached this holding even though the movant in *Welch* "did not show he was sentenced solely under the residual clause and was not challenging his ACCA enhancement solely under that clause." *Raines*, 898 F.3d at 691–92 (Cole, C.J., concurring); *Welch*, 136 S. Ct. at 1268. Rather, the record in *Welch* was such that "reasonable jurists at least could debate whether Welch is entitled to relief" given that the predicate offenses may have been cognizable under other clauses in the

ACCA, apart from the residual clause. *Welch*, 136 S. Ct. at 1268 (noting that the Court of Appeals on remand could evaluate whether Welch qualified for an enhanced sentence under the elements clause).

Indeed, the trial court that sentenced *Welch* stated that his Florida robbery conviction qualified Welch for an ACCA sentence enhancement under both the elements clause and the residual clause. *Id.* at 1262. This Court held that he was, nonetheless, entitled to seek relief. Like Welch, Mr. Barrett cannot show definitively whether he was sentenced under the elements clause or the residual clause. And like Welch, Mr. Barrett too should be entitled to seek relief. *See also Raines*, 898 F.3d at 691 (Cole, C.J., concurring) ("Like Raines, the petitioner here, there was a wrinkle in Welch's claim. Welch did not show that he was sentenced solely under the residual clause. In fact, he could not make this showing because the sentencing court expressly found that his "violent felony" under review counted as a violent felony under both the residual clause and the elements clause. . . . Brushing these wrinkles aside, the Supreme Court found that Welch had made a substantial showing of the denial of a 'constitutional' right.").

Welch's holding accords with the practical reality that "it makes sense that a movant's sentencing record . . . would be silent as to which specific ACCA clause was being applied when the sentence was handed down well before" *Johnson II* and related ACCA cases. *Raines*, 898 F.3d at 685; *see also Booker*, 240 F. Supp. 3d at 168 (ambiguity in the record as to what ACCA clause supported the sentence was "neither []surprising nor fatal"). Even on such a record, this Court held that Welch

had a cognizable claim under a new rule of constitutional law that was retroactive upon collateral review. *Welch*, 136 S. Ct. at 1268; *see also Raines*, 898 F.3d at 693 (Cole, C.J., concurring) ("Indeed, petitioners with an ambiguous sentencing record have an even better argument for bringing a petition because any *Johnson* error would not be harmless (as it could be for petitioners who were expressly sentenced under another clause)."). The Sixth Circuit's approach below relegates *Welch* to merely "tantaliz[ing] habeas petitioners with the possibility of relief for an unconstitutional sentence." *Raines*, 898 F.3d at 690–91 (Cole, C.J., concurring). *Johnson II* and *Welch* plainly entitle petitioners like Mr. Barrett to seek relief by allowing challenges to sentences that may have been based on a constitutionally-infirm statutory provision.

2. The decision below also is wrong because it undermines *Teague*'s "principle of treating similarly situated defendants the same." *Teague*, 489 U.S. at 304; *see also United States v. Taylor*, 873 F.3d 476, 480 (5th Cir. 2017); *Winston*, 850 F.3d at 682. The Sixth Circuit's rule creates an "absurd result" as between "two defendants who had filed the same motions and had the same prior convictions," because one would be entitled to relief if his sentencing judge years earlier had made clear that the sentence was based on the residual clause while another remained silent on which clause formed the basis for the enhanced sentence. *Taylor*, 873 F.3d at 480. This undermines not only *Teague*'s imperative that the law treat similarly situated defendants the same, but also the "categorical approach" that undergirds the whole *Johnson* analysis, which requires courts to look to how

the law defines the predicate offense, and not to other factors, such as the facts underlying the defendant's conviction or the sentencing judge's conception of the ACCA.[1] Thus, the Sixth Circuit's reasoning conflicts with this Court's jurisprudence on both the procedures of habeas review and the substance of *Johnson II* claims.

3. The Sixth Circuit's rule also violates the fundamental constitutional principle that a criminal conviction cannot stand if it rests on potentially constitutionally-infirm grounds. Thus, the Court has held in an analogous context that a general verdict which may have rested upon multiple grounds, at least one of which is unconstitutional, must be invalidated. *Stromberg*, 283 U.S. at 368 (A general verdict cannot be upheld "if any of the clauses in question is invalid under the Federal Constitution."); *see also Griffin*, 502 U.S. at 53. Just as general jury verdicts are vague with respect to the basis for conviction, *Johnson II* may be vague with respect to sentencing, "when it is unclear from the record whether the sentencing court relied on the residual clause," such that "it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Geozos*, 870 F.3d at 895. In such cases, it is proper to recognize that "the constitutional guarantee is violated by a general verdict that *may have* rested

[1] For analogous reasons, when (as here) the judge reviewing a § 2255 motion is the same judge who presided over the movant's ACCA sentence, the judge's hindsight-based assessment of which ACCA clause purportedly justified the sentence should be afforded little deference. This is true not only because the judge's hindsight is now informed by *Johnson II* and *Welch*, but also because of *Teague*'s preference for treating similarly situated litigants (such as two defendants with the same prior convictions and identical § 2255 motions) the same, regardless of the sentencing court's subjective understanding of the ACCA or after-the-fact interpretation of what occurred at sentencing.

on that ground," such that movants are not required to show that the verdict resulted exclusively from an unconstitutional theory. *Griffin*, 502 U.S. at 53 (emphasis added). Similarly, for *Johnson II* claims, when an ACCA sentence "'*may* have rested on' a particular ground that 'the Constitution forbids,' then it is an easy extension of *Stromberg* to see that a sentence is invalid also." *Raines*, 898 F.3d at 693 (Cole, C.J., concurring) (quoting *Griffin*, 502 U.S. at 53).

The constitutional guarantee in *Stromberg* rings hollow if a *conviction* can be invalidated on the mere hint of constitutional impropriety, but a sentence—which is the deprivation of liberty that a criminal defendant suffers for his crimes—cannot. If the constitution protects a criminal defendant from *conviction* on this basis, so too should it protect him from *sentencing*.

4. Finally, the Sixth Circuit's analysis below finds no basis in the plain text of AEDPA, which requires a movant to show only that a sentence relies upon—not that it is resolved by—a new retroactive rule of constitutional law. As the Third Circuit and the dissenting Eighth Circuit judge pointed out in *Walker*, "[u]nder § 2255, a movant does not have to show that [the movant's] claim is 'resolved by' a new and retroactive rule of constitutional law, but rather that [the movant's] claim 'relies on' the same." *Walker*, 900 F.3d at 1016 (Kelly, J. concurring in part and dissenting in part). "Here, where the record is silent, [a movant's] claim 'relies on' *Johnson* because his claim would not have been meritorious before the residual clause was held unconstitutional." *Id.* Contrary to the structure and text of AEDPA, the Sixth Circuit's approach conflates the jurisdictional inquiry of

§ 2255(h) and § 2244 for second or successive motions with the core merits inquiry of the motion itself. *See Peppers*, 899 F.3d at 222 ("AEDPA surely was not meant to conflate jurisdictional inquiries with analyses of the merits of a defendant's claims.').

In short, the Sixth Circuit's decision finds no basis in the text of the statute and conflicts with this Court's holdings in *Welch* and *Teague*. It also undercuts the important and long-standing constitutional value announced in *Stromberg* that the law will not tolerate even the possibility of a conviction based on unconstitutional grounds. This Court's review is needed to correct the error.

III. This Court Should Grant The Petition Because The Question Is Exceptionally Important.

Finally, the Court should grant review of this question because it is exceptionally important. This issue impacts thousands of federal prisoners in every federal jurisdiction. As several courts of appeals have noted, the issue of how a successive § 2255 movant asserting a *Johnson II* claim can meet his § 2255(h) burden is frequently litigated. *Geozos*, 870 F.3d at 894 n.4 ("The question has cropped up somewhat frequently . . . ."); *Raines*, 898 F.3d at 684–85 (citing cases).

Potential litigants are legion. In 2011 alone, the year Mr. Barrett was sentenced, at least 571 criminal defendants received sentence enhancements under the ACCA. *See* U.S. Sentencing Comm'n, Sourcebook 2011, Table 22, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table22_0.pdf. The next year, the figure was 631. U.S. Sentencing Comm'n, Sourcebook 2012, Table 22, *available at*

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table22_0.pdf. As these figures make clear, there are thousands of individuals who have been sentenced under the ACCA since it was enacted in 1984.

As various federal judges on both sides of the circuit split have noted, how these thousands of individuals come to experience the Constitutional right recognized in *Johnson II* and made retroactively applicable on collateral review by *Welch* varies depending on the fortuity the circuit court in which a petitioner finds himself. The decisions on both sides of this split of authority make clear that this division cannot be reconciled without this Court's intervention. While the split of authority will no doubt become deeper over time, the rationale for each side's standard is unlikely to become clearer. This Court should grant review now, with the benefit of many well-reasoned decisions on each side of this split of authority. Further percolation on this issue will only deepen the division that already exists; it will not make this Court's eventual review of the question any easier.

Federal courts will continue to be bombarded with § 2255 petitions, including second and successive petitions, until this Court definitively decides how movants can meet their statutory burden under the decisions it announced in *Johnson II* and *Welch*. There is no sign that the debate between the circuit courts is slowing down. There is likewise no sign that § 2255 movants are becoming any less litigious, as similarly situated prisoners continue to receive disparate relief across circuit-court lines. This Court should grant review on this question to resolve the deep and

enduring conflict surrounding how a successive § 2255 movant satisfies his burden of showing that his claim relies on *Johnson II*'s constitutional guarantee when his sentencing record says no more than that he may—or may not—have been unconstitutionally sentenced.

CONCLUSION

The petition for a writ of certiorari should be granted.

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