No. _____

In the

Supreme Court of the United States

ANTONIO DEAN BLACKSTONE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

1. Whether this Court should grant, vacate, and remand this case, where Petitioner filed a § 2255 claiming that *Johnson v. United States*, 135 S. Ct. 2551 (2015), rendered the residual clause of 18 U.S.C. § 924(c) unconstitutionally vague, where the Ninth Circuit denied that claim on timeliness grounds because this Court had not yet applied *Johnson* to that statute, and where this Court is set to address *Johnson*'s impact on Section 924(c) this term in *United States v. Davis*, 18-431.

2. Whether a § 2255 motion filed within one year of *Johnson*, claiming that *Johnson* invalidates the residual clause of the pre-*Booker* career offender guideline, asserts a "right . . . initially recognized" in *Johnson* for timeliness purposes under 28 U.S.C. § 2255(f)(3).

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Petition for Writ of Certiorari

Antonio Dean Blackstone petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's panel decision affirming the district court judgment denying Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is published at 903 F.3d 1020 (9th Cir. 2018), and is included in the Appendix at App. 13a. The Court's unpublished denial of rehearing and rehearing en banc is included in the Appendix at App. 31a.

Jurisdiction

The Ninth Circuit's opinion affirming the district court's judgment was issued on September 12, 2018. App. 13a. The Ninth Circuit denied a timely motion for rehearing on January 17, 2019. App. 31a. On March 25, 2019, Justice Kagan granted Petitioner's request for an extension of time, to May 17, 2019, to file the petition for a writ of certiorari. Order, 18A-961. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

28 U.S.C. § 2255(f) states:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> …
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as:

> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

U.S.S.G. § 4B1.2(a) (2000) reads:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that —

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) 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.

Introduction

Section 2255(f) states that a one-year statute of limitations applies to federal habeas petitions and runs from the latest of several triggering dates, including "the date on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3). This case turns on when, precisely, a "right" has been "recognized" by this Court—and whether it requires that this Court decide a case in the same statutory context, or whether a habeas petitioner should file once this Court issues a decision with clear application to his case. The Circuits are divided on this question, meaning that similarly situated petitioners receive relief, or not, depending of

the geography of their conviction. The Court should grant Petitioner's writ.

In 2015, this Court held that the residual clause in the Armed Career Criminal Act was void for vagueness. *Johnson v. United States*, 135 S. Ct. 2551 (2015). Within a year of that decision, thousands of inmates filed habeas petitions claiming that their convictions and sentences, though not based on the ACCA, were infected by the same ordinary-case analysis and ill-defined risk threshold that combined in *Johnson* to "produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558. In Mr. Blackstone's case, his § 2255 motion challenged both the residual clause in 18 U.S.C. § 924(c) and the residual clause in the career-offender provision of the mandatory guidelines, and argued that both were void for vagueness under *Johnson*. But the Ninth Circuit never reached the merits of his claims: It found both of his claims untimely because this Court had yet not decided a case that addressed directly *Johnson*'s impact on Section 924(c) or on the mandatory career-offender guideline. As such, it concluded, this Court had not recognized "the right" Petitioner asserted.

While this is a complex question, Mr. Blackstone's case has an easy answer: Once this Court decides *United States v. Davis*, 18-431, argued earlier this term, it will have spoken directly on *Johnson*'s impact on the residual clause in Section 924(c), and a central premise of the Ninth Circuit's

decision will no longer be correct. Importantly, this is true whether Petitioner or Respondent prevails in *Davis*, because both parties agree that the ordinary-case analysis as applied to Section 924(c)—the analysis that applied at the time of Mr. Blackstone's conviction—is constitutionally unsound under *Johnson*. Thus, Petitioner respectfully suggests that this Court hold this petition until it decides *Davis*, and then grant, vacate, and remand for reconsideration in light of that decision.

If the Court does not do so, it should grant plenary review to consider whether a claim raising *Johnson*'s impact on the career-offender provision of the mandatory guidelines is timely under 28 U.S.C. § 2255(f)(3). There is an entrenched division in the Circuits on this question: the First and Seventh Circuits find such claims timely, the Third, Fourth, Sixth, and Tenth Circuits find the claims untimely, and the district courts of the Second, Fifth, and D.C. Circuits are internally divided—as the district courts of the Ninth Circuit were before the decision in this case.

The unevenness of this playing field and this Court's unwillingness to intervene has created a secondary market for relief: at least one petitioner blocked from raising a mandatory guidelines claim via § 2255 in his district of *conviction* won relief raising a mandatory guideline claim via § 2241 petition in the district of *confinement*—taking advantage of favorable (but nationally

uneven) caselaw in that Circuit about whether a mandatory guideline error is a cognizable "miscarriage of justice" under that statute. As it stands, whether an inmate receives review of his mandatory-guideline claim is a matter of arbitrariness upon arbitrariness.

The status quo is intolerable, the circuit split does not appear likely to resolve itself, and the inferior federal courts have struggled without guidance on this issue for too long. If the Court does not GVR this case in light of *Davis*, it should grant the writ and decide, finally, whether a claim that *Johnson* invalidates the residual clause in the mandatory career-offender guideline is timely if filed within a year of *Johnson*.

Statement of the Case

1. Mr. Blackstone was convicted by jury of conspiracy to commit Hobbs Act robbery and Hobbs Act robbery, both in violation of 18 U.S.C. § 1951, and one count of using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). App. 1a. At sentencing, the court found Blackstone to be a career offender pursuant to U.S.S.G. 4B1.2, which increased his guideline range from 70-87 months to 210-240 months. *Id.* At the time of the sentencing hearing in 2000, the district court was mandated by statute to follow the Guidelines. *Id.*; *see also* 18 U.S.C. § 3553(b). The

district court sentenced Mr. Blackstone to 230 months for each of the Hobbs Act offenses, to be served concurrently, and a mandatory consecutive sentence of 60 months for the Section 924(c) conviction, for a total of 290 months in prison. *Id.* His conviction was affirmed on direct appeal and became final on October 1, 2001. *United States v. Gaines*, 8 F. App'x 635 (9th Cir. 2001); *Blackstone v. United States*, 534 U.S. 910 (2001).

2. On June 26, 2015, this Court decided *(Samuel) Johnson v. United States*, 135 S. Ct. 2551 (2015), holding that the residual clause in the Armed Career Criminal Act (ACCA) was unconstitutional. By combining uncertainty about how to identify the "ordinary case" of the crime with uncertainty about how to determine whether a risk is sufficiently "serious," the inquiry required by the clause "both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557-58. Shortly thereafter, the Court held in *Welch v. United States*, 136 S. Ct. 1257 (2016), that *Johnson* applies retroactively to cases on collateral review.

3. On May 19, 2016, within a year of *Johnson*, Mr. Blackstone filed a request for authorization to file a second or successive § 2255 motion in the district court attacking his conviction and sentence. He argued that *Johnson* applied to and voided the residual clauses in both the career-offender guideline and in 18 U.S.C. § 924(c)(3)(B). The Ninth Circuit authorized him

to file a second or successive § 2255 motion on June 2, 2016, and he proceeded in the district court on his two claims.

a. At the time of Mr. Blackstone's sentencing, the career-offender guideline had a residual clause worded identically to the residual clause found hopelessly vague in the ACCA, and it had been subject to the same mode of analysis that this Court found constitutionally problematic. *See* U.S.S.G. § 4B1.1 (2000). *See also Johnson*, 135 S. Ct. at 2560 (analyzing several guidelines cases to demonstrate that the residual clause "has proved nearly impossible to apply consistently"). The United States, lower courts, and the Sentencing Commission all presumed the residual clause of the career-offender guideline, too, would fall in the wake of *Johnson*.[1] Thus Mr. Blackstone—in good company—asserted that his career-offender sentence should be vacated under *Johnson*, because the two crimes underlying the enhancement, California robbery and California manslaughter, were both crimes of violence only under the residual clause of the guideline. App. 9a.

b. Mr. Blackstone also alleged that his conviction under 18 U.S.C. § 924(c) should be vacated. By the time Mr. Blackstone filed his claim,

[1] Reply Brief of Petitioner at App. 1-14, *Beckles v. United States*, 137 S. Ct. 886 (2017) (No. 15-8544) (sixty prisoners sentenced under the guidelines residual clause received *Johnson* habeas relief as of October 28, 2016); U.S.S.G. App. C., Amend. 798 (Aug. 1, 2016) (amending career-offender guideline in order to remove the residual clause in light of *Johnson*).

the Ninth Circuit had already applied *Johnson* to Section 16(b), in *Dimaya v. Lynch*, holding that the two features of the ACCA residual clause that "conspire[d] to make it vague" were equally present in the residual clause of Section 16(b) and that it, too, was constitutionally suspect. *Dimaya*, 803 F.3d 1110, 1115 (9th Cir. 2015), *aff'd*, 138 S. Ct. 1204 (2018). Blackstone argued that the residual clause in Section 924(c), like the residual clauses in *Johnson* and *Dimaya*, was unconstitutionally vague, and that his conviction under Section 924(c) should be vacated.

c. On December 27, 2016, the district court denied Mr. Blackstone's motion. It found that *Johnson* and *Dimaya* (the Ninth Circuit's decision) "require[d]" the court to conclude that Section 924(c)'s residual clause was unconstitutionally vague" and deemed both of his claims timely. App. 5a-7a. The court denied his claims on the merits, but granted a certificate of appealability to permit further review. App. 12a.

d. The Ninth Circuit affirmed in a published opinion, but did not reach the merits of the case. Instead, it dismissed Mr. Blackstone's claims on timeliness grounds.

With respect to the mandatory-guideline claim, the Court held that Blackstone's claim did not rely on a "right . . . recognized by the Supreme Court." *Blackstone*, 903 F.3d at 1026. That is, "[a]lthough they may suggest

what the answer might be, the Supreme Court's recent cases [*Johnson* and *Dimaya*] did not recognize the right needed to make Blackstone's motion timely." *Id.* at 1025-26.

The decision rested on two premises. First, the panel noted that the Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), did not decide whether *Johnson* applied to the mandatory guidelines, and that a concurrence to the opinion described the question as an open one. *Id.* at 903 n.4 (Sotomayor, J., concurring in the judgment). Thus, while the language of *Beckles* "may permit an inference that the Court might reach a different result regarding a sentence imposed while the Guidelines were mandatory . . . that inference has not been recognized by the Court." *Blackstone*, 903 F.3d at 1026.

Second, the Ninth Circuit said that AEDPA limited its ability to "apply and extend Supreme Court holdings to different contexts." *Id.* In drawing that conclusion, the Court referenced 28 U.S.C. § 2254(d)(1), and its requirement of clearly established federal law, as limiting the Court's authority to apply *Johnson* outside the context of the ACCA.

The Court noted that it was parting ways with the Seventh Circuit, and to some degree the First Circuit as well, but believed those two court had

given insufficient weight to *Beckles* and to the limitations of AEDPA. *Id.* at 1027 & n.3.

The Court dispatched Blackstone's claim that *Johnson* invalidated the residual clause of 924(c) summarily, saying that the "same reasoning applies" to that claim as the mandatory-guideline claim: "The Supreme Court has not recognized that § 924(c)'s residual clause is void for vagueness in violation of the Fifth Amendment." *Id.* at 1028.

On January 17, 2019, the Ninth Circuit summarily denied the petition for rehearing and suggestion of rehearing en banc. App. 31a.

Reason for Granting the Writ

A. The Court Should Grant, Vacate, and Remand In Light of *United States v. Davis.*

The Court should grant, vacate, and remand this case for further consideration in light of *United States v. Davis*, 18-431.

1. A GVR is appropriate where there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). One such case—and perhaps the easiest case—is where a decision of this Court that post-dates the judgment below casts doubt on an operating premise of

the decision. *See id.* at 168-69; *see also Flowers v. Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting from decision to GVR) (describing a GVR as appropriate when the Court concludes "that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court").

2. Blackstone's petition asserted that his Section 924(c) conviction should be vacated because the residual clause of that provision was void for vagueness under *Johnson*, and because his conviction could not be sustained based solely on the force clause of 18 U.S.C. § 924(c). The Ninth Circuit rejected that claim because this Court has not yet applied *Johnson* to Section 924(c) or recognized that § 924(c)'s residual clause was void for vagueness. *Blackstone*, 903 F.3d at 1028. Incorporating its analysis of the timeliness of the mandatory-guideline claim, the Ninth Circuit recognized that "[i]t is not always obvious whether and how the Supreme Court will extend its holding to different contexts." *Id.* at 1026. As such, the Ninth Circuit believed that, until this Court applied *Johnson* to the residual clause in Section 924(c), the right Blackstone asserted had not been "recognized" by the Supreme Court.

This Court is poised to decide that issue; it recently heard argument in

United States v. Davis, 18-431, where the sole question presented is whether, under the reasoning of *Johnson*, the residual clause of Section 924(c) is unconstitutionally vague. Thus, *Blackstone* rests on a "premise that the [Ninth Circuit] would reject if given the opportunity for further consideration," *Lawrence*, 516 U.S. at 167. That is, once *Davis* is decided, this Court will have spoken on the constitutionality of the residual clause in Section 924(c), and it will then be "obvious whether and how" this Court believes *Johnson* impacts Section 924(c).

3. Importantly, this is true regardless of which side prevails in *Davis*. It is taken as given in the briefing in *Davis* that *Johnson* some has application to Section 924(c). The Solicitor General's position is that the application of the ordinary case doctrine is just as unconstitutional in the context of the residual clause in Section 924(c) as it is in the context of the residual clauses in the Armed Career Criminal Act and in 18 U.S.C. § 16(b). Brief of the United States at 45, *United States v. Davis*, 18-431 (2019) ("It is now clear that construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach would render it unconstitutional."). For this reason, "in light of *Johnson* and *Dimaya*," and as a matter of constitutional avoidance, the Solicitor General urges this Court to abandon the construction the federal courts had given to the residual clause in Section 924(c) in the past. *See id.* at

47; *see also id.* at 39 (citing a Ninth Circuit case, *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995), pre-dating Petitioner's trial, that required the application of the categorical approach to Section 924(c)). As both Petitioner and Respondent[2] urge the Court to say that the interpretation of the residual clause that controlled at the time of Mr. Blackstone's conviction is unconstitutional, it appears likely that this Court's decision in *Davis* will confirm that *Johnson* established the right Mr. Blackstone asserts.

For this reason, a GVR is appropriate whether the Court rules for the Petitioner or Respondent in *Davis*. If the Respondent—the criminal defendant—prevails, then it will be clear that the Supreme Court has recognized the right Mr. Blackstone asserted, and a central premise of the Ninth Circuit's decision will have been proved wrong.

But even if the Court rules for the United States, a GVR is appropriate. It appears, based on the parties' position, that the decision is likely to recognize that Mr. Blackstone's conviction was premised on an unconstitutional interpretation of Section 924(c). And if the Court deems Section 924(c) to be subject to a fact-specific approach going forward, some individuals convicted under the previous, now admittedly unconstitutional,

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[2] Brief of Respondent at 12, *United States v. Davis*, 18-431 (2019) (arguing that the residual clause of Section 924(c) is unconstitutionally vague because it requires the ordinary case approach found fatally vague in *Johnson*).

regime would be eligible for collateral relief under that test—a fact that even the government concedes. Brief of the United States at 53, *United States v. Davis*, 18-431 (2019). Thus, whether the United States' interpretation of the residual clause prevails or not, Mr. Blackstone's claim will be ripe and should be remanded for consideration on its merits.[3]

6. Finally, the equities here strongly favor a GVR. *See Lawrence*, 516 U.S. at 167-68 ("Whether a GVR order is ultimately appropriate depends further on the equities of the case."). Mr. Blackstone has been in custody for nearly twenty years. To put him back to square one, re-filing the exact *Johnson* claim he filed three years ago would be not only a waste of resources, but an odd punishment for a person whose only fault is being too early in seeing that *Johnson* applied to his case and in raising a claim this Court appears poised to confirm.

But the equities go beyond Mr. Blackstone himself; there are 275

[3] The parties offered divergent opinions of what analysis should apply to individuals convicted under the ordinary-case approach—which includes the petitioner in *Davis* itself—if the Court were to adopt the United States' fact-specific analysis of the residual clause. The Solicitor General maintained that the error was subject to harmless-error review based on the facts of the case. Brief of the United States at 53-55, *United States v. Davis*, 18-431 (2019). Respondent argued that the error was structural, because the element had been taken away from the jury all together. Brief of Respondent at 49-51, *United States v. Davis*, 18-431 (2019). The same question would have to be answered in Mr. Blackstone's case, should the Court's decision in *Davis* not settle it, but it is better addressed by the Ninth Circuit in the first instance.

petitions currently pending in the Ninth Circuit, nearly all of which are currently stayed in that Court and all of which could be subject to dismissal on timeliness grounds under *Blackstone*. That number represents 275 petitioners serving mandatory consecutive sentences under Section 924(c) that were premised on an unconstitutional reading of the statute. It also reflects a significant number of litigation hours on the part of the Federal Defender and U.S. Attorneys' Offices across the Ninth Circuit, as well as the work of numerous district courts and the Ninth Circuit in reviewing these claims. Should the Ninth Circuit's decision stay on the books, those petitions would all be in limbo—subject to dismissal based on a decision that depends on the premise that the Supreme Court has not applied *Johnson* to Section 924(c) when, in fact, the Court will have done so. It also represents the same number of individuals who could be forced to refile their claims and again tax the resources of the Circuit in reviewing second-or-successive petitions, the attorneys and the district courts in re-reviewing and re-filing claims that were already decided once. And finally, that number includes 25 petitioners who have been released from custody based on district court grants of habeas relief that would be subject to re-arrest, as their previously granted petitions remain pending on government appeal and could be deemed untimely under *Blackstone*.

The habeas statute-of-limitations is designed to spur action and punish inaction; it should not, in this case, punish petitioners like Blackstone who were prescient in seeing *Johnson*'s impact on their cases. For these reasons, Petitioner asks that the Court grant, vacate and remand so that the Ninth Circuit can reconsider its decision in light of *Davis*.

B. In the Alternative, the Court Should Grant Plenary Review to Clarify the Timeliness of Mandatory Guidelines Claims Based on *Johnson*.

If the Court does not GVR based on *Davis*, it should grant plenary review in order to settle the deep—and expanding—disconnect between the Circuits in their treatment of timeliness of mandatory-guidelines claims.

1. *There is a deep and entrenched inter- and intra-circuit split on the timeliness of mandatory guidelines claims.*

At the beginning of OT 2018, this Court denied a number of claims raising the application of *Johnson* to the mandatory guidelines. *See Brown v. United States*, 139 S. Ct. 14, 14 & n.1 (2018) (Sotomayor, J., dissenting from denial of certiorari). At the time, the Solicitor General represented that the circuit split was shallow and might well resolve itself without the intervention of the Court. Today, seven months later, that prediction has proved false.

a. The Seventh Circuit has held that mandatory guidelines

claims based on *Johnson* are timely. *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). Contrary to the United States' prediction, *see* Brief in Opposition, at 15, *United States v. Gipson*, 17-8637 (2018), the Seventh Circuit has not retreated from that position to align itself with other courts. *Sotelo v. United States*, ___ F.3d ___, 2019 WL 1950314, at *3 (May 2, 2019) ("[W]e reject the government's suggestion to reconsider *Cross*'s holding that *Johnson* recognized a new right as to the mandatory sentencing guidelines."). Instead, it continues to grant petitioners relief under *Cross*. *E.g.*, *D'Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019)

The First Circuit issued a published order finding a mandatory guideline claim timely. *Moore v. United States*, 871 F.3d 72, 81 (1st Cir. 2017). The Solicitor General maintained that that decision did not represent the "settled circuit law on the issue," because it was issued in the context of a second-or-successive application. *See* Brief in Opposition, at 15 n.4, *United States v. Gipson*, 17-8637 (2018). But since that time, *Moore* has been the basis for grants of substantive relief in the First Circuit. *E.g.*, Order, *United States v. Moore*, 1:00-10247-WGY, 2018 WL 5982017 (D. Mass. Nov. 1, 2018) (granting § 2255 relief); *United States v. Roy*, 282 F. Supp. 3d 421, 432 (D. Mass. 2017). The United States has not appealed those decisions.

Thus, in two Circuits, petitioners have been granted substantive relief

on claims that would be shut out of court in the Ninth Circuit.

b. Meanwhile, the Third, Fourth, Sixth, and Tenth Circuits have all held that *Johnson* did not recognize the right not to be sentenced under the ordinary case doctrine in the guideline context, and thus *Johnson* claims raised by those sentenced under the mandatory career-offender guideline are untimely. *United States v. Green*, 898 F.3d 315, 322-23 (3d Cir. 2018); *United States v. Brown*, 868 F.3d 297, 301-03 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625, 629-31 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018).

Notably, while those decisions are all final, the battle in those circuits is not close to over. In *Chambers v. United States*, a judge of the Sixth Circuit called on her colleagues to reconsider their decision in *Raybon*. ___ F. App'x ___, 2019 WL 852295, at *4 (Feb. 21, 2019) (Moore, J, concurring) ("I write separately because *Raybon* was wrong on this issue.). As of this filing, a counseled petition for rehearing en banc remains pending and the U.S. Attorney's Office has been ordered to respond. Order, *Chambers v. United States*, 18-3298 (May 16, 2018). And in the Tenth Circuit, the Court continues to grant certificates of appealability—despite *Greer*—in recognition that reasonable jurists could come out the other way on the timeliness question. Order, *United States v. Crooks*, 18-1242, 2019 WL 1757314, at *2 (10th Cir.

Apr. 19, 2019).

Thus even in Circuits that have "settled law," the question continues to vex the courts.

c. Finally, some Circuits have not yet issued decisions. Thus, in some places, the timeliness of the claim depends on which courthouse, or even which courtroom in a single courthouse, one finds oneself. *Compare United States v. Hammond*, 354 F. Supp. 3d 28, 42 (D.D.C. 2018) (finding mandatory guideline claim based on *Johnson* timely) *with* Order, *United States v. Upshur*, 10-cr-251, 2019 WL 936592, at *7 (D.D.C. Feb. 26, 2019) (finding mandatory guideline claim based on *Johnson* untimely); Report and Recommendation, *Zuniga-Munoz v. United States*, 02-cr-134-JRN, Dkt #79, at 4-8 (W.D. Tex. Apr. 26, 2018), *aff'd* Dkt. #81 (finding mandatory guideline claim timely and granting relief) *with* Order, *Givens v. United States*, 16-cv-515-SS, 2018 WL 327368, at *2 (W.D. Tex. Jan. 8, 2018) (finding mandatory guideline claim untimely and denying relief); *Mapp v. United States*, 95-cr-1162, 2018 WL 3716887, at *4 (E.D.N.Y. Aug. 3, 2018) (granting relief in a habeas petition raising mandatory guideline *Johnson* claim), *vacated on other grounds*, *with Nunez v. United States*, 16-cv-4742, 2018 WL 2371714, at *2 (S.D.N.Y. May 24, 2018) (denying *Johnson* claims on timeliness grounds).

The split in this case is well-developed and mature, and it's not going

away. Nor is the issue continuing to evolve in the lower courts: Instead, as new cases are decided, courts simply decide which side of the split they will join. There is simply no reason to let the lower courts continue to struggle over the question; this is a case that "presents an important question of federal law that has divided the courts of appeal" and merits this Court's review. *See Brown*, 139 S. Ct. at 16 (Sotomayor, J., dissenting from denial of certiorari) (citing Sup. Ct. Rule 10).

2. *The question presented is of exceptional importance.*

a. This disparate caselaw is too important to be left in place. More than a thousand individuals filed petitions after *Johnson* raising a claim that *Johnson* applied to their career-offender sentence. *See id.* If their claims are not heard, many will spend an additional decade or more in custody, based solely on an improperly imposed guideline sentence. *Cf* Sentencing Resource Counsel Project, Data Analyses 1 (2016), *available* http://www.src-project.org/wp-content/uploads/2016/04/Data-Analyses-1.pdf (citing FY 2014 statistics, the average guideline minimum for career offenders charged with drug offenses was 204 months, and the average minimum for drug offenders not charged as career offenders was 83 months); *see also* App. 1a (career-offender designation in Mr. Blackstone's case raised guideline range from 70-87 months to 210-240 months).

Not only will those sentenced under the mandatory guidelines be left out in the cold, but petitioners in the future will be left without clear guidance for what event triggers the statute of limitations for filing a habeas claim. A defendant is permitted to file a single § 2255 petition before he triggers the higher standard for filing a second or successive petition under 28 U.S.C. § 2255(h). If he files too late, or too early, even his meritorious claims will likely never be adjudicated. Where such high stakes decisions have such little margin for error, it is important that litigants have clear rules to apply.

b. Moreover, this Court's failure to address this arbitrariness has created a secondary market for habeas relief, where petitioners receive differential treatment depending, not only on the Circuit where they sustained their conviction, but on the Circuit in which they happen to be serving their sentence. For example, Petitioner Stony Lester was convicted in the Eleventh Circuit, a circuit which has held *Johnson* does not apply to the mandatory guidelines at all. *In re Griffin*, 823 F.3d 1350, 1356 (11th Cir. 2017) (en banc). Like all others convicted in that Circuit, he was foreclosed from relief via § 2255 motion. *Lester v. United States*, ___ F.3d ___, 2019 WL 1896580, at *1 (11th Cir. Apr. 29, 2019)

Luckily for Mr. Lester, the BOP placed him far from home, in a facility

in the Fourth Circuit. That Court has held that a petitioner may file, via 28 U.S.C. § 2241's "escape hatch," a petition arguing that one's mandatory guideline calculation was wrong. *United States v. Wheeler*, 886 F.3d 415, 433 (4th Cir. 2018). Thus, even as the Eleventh Circuit denied his § 2255 petition, the Fourth Circuit found that his career-offender sentence should be vacated, concluded that any route to such relief was blocked in the Eleventh Circuit, and it granted his § 2241 petition. *Lester v. Flournoy*, 909 F.3d 708, 714 (4th Cir. 2018). After two Circuits expended simultaneous efforts writing separate published opinion spanning seventy-five pages (and pointing in different directions), Mr. Lester was released from custody. Notably, all that effort was poured into case where Mr. Lester's substantive eligibility for relief has been clear for a full decade. *See Lester*, 909 F.3d at 710 (citing *Chambers v. United States*, 555 U.S. 122, 127-28 (2009) as the case that established that Lester's career-offender sentence was erroneous).

If his claim is unique, it soon will not be. Three Circuits deem an error in the calculation of the mandatory guidelines to be a miscarriage of justice cognizable under 28 U.S.C. § 2241. *Wheeler*, 886 F.3d at 433; *Brown v. Caraway*, 719 F.3d 583, 587-88 (7th Cir. 2013); *Hill v. Master*, 836 F.3d 591, 593 (6th Cir. 2016). Others have caselaw foreclosing that route to the prisoners housed within their Circuit. *E.g.*, *McCarthan v. Director of*

Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1090 (11th Cir. 2017) (en banc). Thus, while it might have seemed like the fight was winding down when the Court denied *Brown v. United States,* et al., this fall, those denials in fact signaled the start of the second round. This second round creates yet another level of disparity even more disconnected from substantive merit for relief. And it requires another set of attorneys and courts, far from the relevant records and unfamiliar with the local state laws, to expend efforts reviewing a case.

This is too much arbitrariness to be tolerated. It cannot be that some federal inmates whose convictions arise in certain circuits or who are housed in certain circuits receive review of their mandatory-guidelines career offender claims, and others are foreclosed from review simply because of where they were sent to serve out their term. The evolution of this secondary market for relief underscores the need for this Court's immediate intervention.

3. *The Ninth Circuit's decision is wrong.*

On the merits, the Ninth Circuit erred in dismissing Mr. Blackstone's claim as untimely—too *early*—because the Court has not yet explicitly applied *Johnson* to the mandatory guidelines.

1. Where a federal prisoner believes he should benefit from a Supreme Court decision, he must file his petition within one year of the date "on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3).[4] *Johnson* struck down the residual clause of the Armed Career Criminal Act as void for vagueness. 135 S. Ct. at 2557. In so doing, it reiterated that due-process vagueness principles apply, not only to statutes defining the elements of crimes, but also to provisions "fixing sentences." *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). And it concluded that the combination of the ordinary-case analysis and an ill-defined risk threshold "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558. Mr. Blackstone's mandatory-guideline claim asserts the right not to have his sentence fixed by the same residual-clause analysis the Supreme Court already deemed unconstitutionally vague in *Johnson*. He satisfies Section 2255(f)(3) and his claim is timely.

The Ninth Circuit decided that Mr. Blackstone needed to wait for the Supreme Court to expressly apply *Johnson* to the mandatory guidelines.

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[4] Section 2255(f)(3) states, in whole: "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The panel's decision, however, discussed only the first clause.

Blackstone, 903 F.3d at 1026. Its decision rests on three errors: disregard for the text of Section 2255(f)(3), a faulty analogy between the statute of limitations for federal prisoners and the "clearly established federal law" standard applicable to state prisoners, and a misreading of this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017).

2. First, the panel's analysis disregards the starting place for any statutory interpretation question: the text of Section 2255(f)(3) itself. Section 2255 uses "right" and "rule," not "holding." *Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2017). "Congress presumably used these broader terms because it recognizes that the Supreme Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Id.* While *Johnson*'s holding struck down the residual clause of the ACCA, the right it recognized was the right not to have one's sentence dictated by a residual clause that combines the hopelessly vague ordinary-case analysis and an ill-defined risk threshold. That is the same right that Mr. Blackstone asserts. A contrary view "divests *Johnson*'s holding from the very principles on which it rests and thus unduly cabins *Johnson*'s newly recognized right." *United States v. Brown*, 868 F.3d 297, 310 (4th Cir. 2017) (Gregory, C.J., dissenting).

Indeed, any uncertainty about the breadth of the "right" recognized by *Johnson* was dispelled by *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018). There, the Court held that "*Johnson* is a straightforward decision, with equally straightforward application" to the 18 U.S.C. § 16(b) residual clause. *Id.* Though Section 16(b) uses wholly different statutory language, the Court acknowledged that the residual clause was subject to the same vagueness concerns highlighted in *Johnson*, and thus could not be distinguished. *Id.* at 1213-14. "And with that reasoning, *Johnson* effectively resolved the case now before us." *Id.* at 1213. Just as *Johnson* "effectively resolved" the validity of the residual clause in Section 16(b), a provision that used wholly different statutory language, *Johnson* effectively resolved the issue here.

Moreover, Section 2255(f)(3) requires only that the petitioner *assert* the right recognized by the Supreme Court. It "does not say that movant must ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized." *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). To "assert" is "to invoke or enforce a legal right." Black's Law Dictionary 139 (10th ed. 2014); *see also Dodd v. United States*, 545 U.S. 353, 360 (2005) (describing a § 2255 motion as timely if it was filed within one year of the decision from which it "sought to benefit"). And asserting a right does not require anything more than

staking a claim to some potential benefit. *Cf.* 50 U.S.C. § 3996(a) (permitting service members to take steps "for the perfection . . . or further assertion of rights"). The government's contrary reading "would require that [the Court] take the disfavored step of reading 'asserted' out of the statute." *Cross*, 892 F.3d at 294.[5]

3. The Ninth Circuit panel did not grapple with these textual points, concluding that it would violate AEDPA's purpose to read the "right" recognized by *Johnson* as encompassing those sentenced under an analogous statute. *Blackstone*, 903 F.3d at 1026. It's true that, when describing the boundaries of "clearly established federal law" for purposes of Section 2254(d)(1), the Court has cautioned against reading its holdings at a high level of generality. But this faulty analogy disregards the different text, purpose, and nature of the two inquiries.

First, the restrictive language in Section 2254(d)(1) (requiring a state decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law") appears nowhere in Section 2555(f)(3). In fact, it does not appear in all of Section 2255. "Where Congress employs

[5] The statute also requires that the right be "recognized" by the Supreme Court—though, apart from specifying *who* must make the decision, (the Supreme Court as opposed to a circuit court,) the phrase offers little interpretative aid because it depends entirely on how broadly or narrowly one defines "right."

different language in related sections of a statute, we presume these differences in language convey differences in meaning." *Lopez v. Sessions*, 901 F.3d 1071, 1077-78 (9th Cir. 2018) (internal quotation marks and alterations omitted).

Moreover, Section 2254(d)(1) serves a different purpose than Section 2255(f)(3). Section 2254(d)(1)—the clearly-established-federal-law standard—is a barrier for state prisoners who claim that a state court has contravened Federal law, as interpreted by the Supreme Court. The strictness of that rule promotes comity and federalism: Section 2254 is a vehicle to correct state courts that go rogue in violation of the Supreme Court's interpretation of the federal constitution. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). In that context, as a matter of respect to state courts, the Supreme Court will intervene only if the state court's decision is clearly answered to the contrary by a prior decision of the Supreme Court. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). Thus, the standard is "intentionally difficult to meet." *Id.* Section 2255(f)(3), by contrast, is a statute-of-limitations provision for federal prisoners. Comity and federalism concerns have no relevance when a federal prisoner asks a federal court to vacate a federal judgment. *See Danforth v. Minnesota*, 552 U.S. 264, 279 (2008) ("Federalism and comity considerations are unique to federal habeas review of state convictions.").

If the Court were to examine the purpose of AEDPA, as the panel suggests it should, *Blackstone*, 903 F.3d at 1027, the proper inquiry is not the purpose of the clearly established federal law requirement in Section 2254(d)(1), but the purpose of the statute-of-limitation provision itself. AEDPA's statute of limitations has the "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 266 (2002). This, too, is a unifying mark of statutes of limitation; they are "designed to encourage [petitioners] 'to pursue diligent prosecution of known claims.'" *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (citation omitted); *see also Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("Statutes of limitation . . . . stimulate to activity and punish negligence."). Mr. Blackstone filed as soon as he saw the relevance of *Johnson* to his own case; the Ninth Circuit's decision would thwart the very purpose of § 2255(f)(3) by forcing him to wait and file a later (now potentially successive) petition. Because Congress intended the AEDPA statute of limitations "to eliminate delays in the federal habeas review process," not create them, *Holland v. Florida*, 560 U.S. 631, 648 (2010), a reading of Section 2255(f)(3)

that encourages petitioners to sit on their hands is contrary to the purpose of AEDPA.[6]

4. Even if the panel's reliance on Section 2254(d)(1) were not precluded by the plain language and the animating principles of the statute-of-limitations provision, there is no reason to import the "clearly-established-federal-law" standard, a merits concept, into the decision whether the statute of limitations is satisfied. A statute-of-limitations analysis is a preliminary question, not intended to prejudge the merits of the case. This concept is uniform across bodies of law. *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1045 (9th Cir. 2009) (noting that courts can look at statute-of-limitations affirmative defense to evaluate fraudulent joinder, as that defense is "rather unique" in that it does not "relate to the merits of the case"); *George v. United States*, 672 F.3d 942, 946 (10th Cir. 2012) (Gorsuch, J.) ("The merits of that claim or assertion of adverse interest are irrelevant. . . . Were the rule otherwise, of course, the statute of limitations and merits inquiries would collapse and involve no analytically distinct work."). That is because a statute

[6] This concern for diligence is manifested in other linguistic choices in the same provision, which requires the petitioner to move when the right is "*initially* recognized" and "*newly* recognized"—reinforcing Congress's desire to encourage diligence, as well as its acknowledgment that a right may be addressed and refined over a number of decision. 28 U.S.C. § 2255(f)(3) (emphasis added).

of limitations is premised on notice of one's claim, not its ultimate validity. *Nevada v. United States*, 731 F.2d 633, 635 (9th Cir. 1984) ("[T]he crucial issue in our statute of limitations inquiry is whether [the City] had notice of the federal claim, not whether the claim itself is valid.").

Like other statutes of limitations, then, Section 2255(f)(3) is merely a triggering point—marking the moment when Mr. Blackstone had notice that his sentence was imposed in violation of the Constitution. When Mr. Blackstone filed his claim, *Johnson* had held that a provision materially identical to the provision that drove his sentencing was void for vagueness. It had reiterated that, under *Batchelder*, sentencing provisions that fixed sentences were subject to a vagueness challenge. *Johnson*, 135 S. Ct. at 2557. The Ninth Circuit had always applied *Batchelder* to the mandatory guidelines. *United States v. Gallagher,* 99 F.3d 329, 334 (9th Cir. 1996); *United States v. (Linda) Johnson,* 130 F.3d 1352, 1354 (9th Cir. 1997). In other words, *Johnson* was the last piece of the puzzle. Because statutes of limitations generally run from the occurrence of the last circumstance necessary to give rise to a claim, *see (Robert) Johnson v. United States*, 544 U.S. 295, 305-09 (2005), Petitioner was correct in assuming that *Johnson* was the trigger that would start the clock.

5. The Ninth Circuit's faulty analogy to the clearly-established-federal-law standard in Section 2254(d) also puts that Court in conflict with settled interpretation given to the "right" as defined in the second clause of Section 2255(f)(3), which, of course, must have the same meaning as the provision interpreted here. *See* 28 U.S.C. § 2255(f)(3) ("the date on which the right asserted was initially recognized, if *that right* has been newly recognized by the Supreme Court") (emphasis added). The Circuits have broadly read the second clause to invoke *Teague*'s "new rule" jurisprudence.[7] And in that context, this Court has recognized that the "new rule" is the case that "breaks new ground," not a later case that merely applies that rule to a different context. *Chaidez v. United States*, 568 U.S. 342, 342-48 (2013).

In *Stringer v. Black*, the Court held its decisions applying *Godfrey v. Georgia*, 446 U.S. 420 (1980), to similar capital sentencing statutes in Oklahoma and Mississippi did not create new rules. 503 U.S. 222, 229 (1992).

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[7] *Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015); *Coleman v. United States*, 329 F.3d 77, 81-82 (2d Cir. 2003); *United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013); *United States v. Morgan*, 845 F.3d 664, 667-68 (5th Cir. 2017); *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016); *United States v. Hong*, 671 F.3d 1147, 1148-50 (10th Cir. 2011); *Figueroa-Sanchez v. United States*, 678 F.3d 1203, 1207-08 (11th Cir. 2012);.The Ninth Circuit has said the same, albeit in unpublished opinions. *Simpson v. Evans*, 525 F. App'x 535, 537 (9th Cir. 2013) (applying a *Teague* "new rule" case to interpret the state prisoner corollary to Section 2255(f)(3)); *United States v. Berkley*, 623 F. App'x 346, 347 (9th Cir. 2015) (applying new rule analysis to interpret Section 2255(f)(3)).

For "new rule" purposes, it didn't matter that Oklahoma's statute "involved somewhat different language" than the Georgia statute considered in *Godfrey*. *Id.* at 228-29 ("[I]t would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case."). Nor did it matter that Mississippi's sentencing process differed from Georgia's, because those differences "could not have been considered a basis for denying relief in light of [Supreme Court] precedent existing at the time." *Id.* at 229. *Godfrey* may have broken new ground and created a new rule, but the application of *Godfrey* to analogous statutory contexts did not.

Under *Stringer* and *Chaidez*, an application of a new rule to an analogous statutory scheme does not create a second new rule; the second rule is merely derivative of the first. And for the same reason, a new rule recognized by the Supreme Court should not be confined to its narrow holding. Rather, the "right" recognized by a decision of this Court encompasses the principles and reasoning underlying the decision that have applications elsewhere—even if there are minor linguistic or mechanical differences in the provisions at issue.

Applying this standard here, the "right" recognized in *Johnson* must be defined according to the principles it recognized—and not merely its narrow result. *Johnson* did not merely strike down the residual clause of the ACCA;

it recognized the right not to have one's sentence fixed by the application of the ordinary-case analysis applied to a hazy risk threshold. And application of Johnson to the pre-*Booker* guidelines "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Moore*, 871 F.3d at 81. Because "the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enhancement as the ACCA's residual clause at issue in *Johnson*," Petitioner here is asserting the same right newly recognized in *Johnson*, and he can lay claim to Section 2255(f)(3)'s statute-of-limitation provision. *Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

6. At bottom, the Ninth Circuit's decision overlearns the lesson of *Beckles v. United States*, 137 S. Ct. 886 (2017). It's true that *Beckles* created an exception to *Johnson*'s reach where the sentencing provision does not "fix the permissible range of" sentences, as with the advisory guidelines. *Id.* at 894-95. But *Beckles* did nothing to disturb *Johnson*'s reasoning that where a vague sentencing provision *does* fix a defendant's sentence, it is subject to attack under the Due Process Clause. If anything, it reiterates that point. *Id.* at 892; *see also Cross*, 892 F.3d at 304-05; *Brown*, 868 F.3d at 308 (Gregory, C.J., dissenting). Nor did it upset *Booker*'s holding that, by virtue of Section 3553(b), the mandatory guidelines fixed sentences; they "had the force and

effect of laws" and that, "[i]n most cases . . . the judge [was] bound to impose a sentence within the Guidelines range." *Booker v. United States*, 543 U.S. 220, 234 (2005); *see Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

The Ninth Circuit's decision thus read too much into the Justice Sotomayor's statement, in *Beckles*, that the application of *Johnson* to the mandatory guidelines is an "open" question. *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring). The concurrence simply clarified that the Court's holding was limited to the advisory guidelines; the case did not present the application of *Johnson* to the mandatory guidelines, and, perforce, did not foreclose it. And it certainly casts no doubt on Mr. Blackstone's assertion of the right recognized in *Johnson*.

For all of these reasons, the Ninth Circuit's decision is wrong, and should be reversed.

4. *Mr. Blackstone's Petition Presents a Good Vehicle For This Issue.*

Finally, Mr. Blackstone's case presents a good vehicle for the issue. The Ninth Circuit addressed this issue squarely, and the timeliness analysis of Section 2255(f)(3) controlled the outcome. The Court's decision below was not fact-bound, and a decision here would resolve the timeliness of *Johnson* claims based on the mandatory guidelines nationwide. Thus, this case

presents an excellent opportunity for the Court to address the timeliness of a claim based on *Johnson* in the context of the mandatory guidelines.

Conclusion

For the foregoing reasons, Mr. Blackstone respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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