No. 19-5315

IN THE
Supreme Court of the United States

RAYMOND AGUILAR AND SAMMY NICHOLS,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The government admits that the Circuits are split over whether the new rule announced in *Johnson v. United States*, 135 S.Ct. 2551 (2015), applies to the analogous residual clause in the mandatory sentencing guidelines. BIO 13. But the government asks this Court to leave this split in place, rather than resolve it, for four reasons: (1) the conflict is "shallow," BIO 13; (2) the issue is unimportant ("few claimants would be entitled to relief on the merits"), BIO 13; (3) the Tenth Circuit's decision below is correct, BIO 12-19; and (4) this petition is a poor vehicle to resolve the split, BIO 13-14.

None of the government's arguments are persuasive. Nor should they deter this Court from resolving this Circuit split. As the government admits, this issue is recurring. BIO 7 (noting that this Court has refused to resolve the issue on at least nine different occasions, and citing eighteen currently pending petitions that raise this issue). Until this Court steps in to resolve the split, it will continue to receive petitions asking it to do just that. And not just in this specific context. This issue affects how courts define the scope of *any* newly recognized retroactive right. Pet. 14. This Court's primary function is to maintain uniformity in the lower courts. Sup.Ct.R. 10(a). On this issue, there is no uniformity (and there never will be uniformity without this Court's review). Review is necessary.

I. The Circuit split is not "shallow."

To be clear, there is an established conflict within the courts of appeals over whether *Johnson*'s rule applies to the residual clause of the mandatory guidelines. Pet. 9-12; BIO 8. The government refers to this conflict as "shallow," however, because

only the Seventh Circuit has decided the issue differently. BIO 13. But the government ignores the First Circuit's decision in *Moore v. United States*, 871 F.3d 72, 81-82 (1st Cir. 2018). A federal district court in Massachusetts just reminded us that district courts within the First Circuit read *Moore* to hold that the mandatory guidelines' residual clause is void for vagueness. *Boria v. United States*, __ F.Supp.3d __, 2019 WL 6699611, at *4 (D. Mass. Dec. 9, 2019) (citing, *inter alia*, *United States v. Roy*, 282 F.Supp.3d 421 (D. Mass. 2017)). The district court in *Boria* "decline[d] the government's invitation to 'realign its views' with the views of other circuits which have already been rejected by the First Circuit." *Boria*, 2019 WL 6699611, at *4.

The government also ignores the various dissents/concurrences from judges outside of the Seventh Circuit supporting that Circuit's position on this issue. Pet. 15-16. Indeed, after we filed our petition in this case, a Ninth Circuit Judge, Judge Berzon, authored a concurrence, disagreeing with that Circuit's precedent and stating her belief that "the Seventh and First Circuits have correctly decided this question." *Hodges v. United States*, 778 Fed. Appx. 413, 414-415 (9th Cir. July 26, 2019) (unpublished).

The Fifth Circuit has also published a decision on this issue, siding with the majority position that *Johnson*'s rule does not apply to the residual clause of the mandatory guidelines. *United States v. London*, 937 F.3d 502 (5th Cir. 2019). But the Fifth Circuit's decision engages in a *Teague*[1] retroactivity analysis to define the scope of *Johnson*'s right. *Id.* at 506-507. We have already explained why this analysis is

[1] *Teague v. Lane*, 489 U.S. 268 (1989).

misplaced. Pet. 19-22. To reiterate, this Court has already held that *Johnson*'s new rule is retroactive. Pet. 19-20 (citing *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016)). Thus, there is no point in doing a retroactivity analysis. The question is the scope of *Johnson*'s new rule. And this Court defined that scope in *Beckles v. United States*, 137 S.Ct. 886 (2017). *Beckles*, not *Teague* or any other retroactivity decision, defines *Johnson*'s scope: the new rule applies to provisions that "fix the permissible range of sentences." 137 S.Ct. at 892. The question is whether the mandatory guidelines fixed the permissible range of sentences. The Fifth Circuit (like most others) never answered this dispositive question. *See* Pet. 19-22.

Judge Costa concurred in *London*, noting his belief that the Fifth Circuit was "on the wrong side of a split over the habeas limitations statute." *London*, 937 F.3d at 510. Judge Costa noted "a unique impediment" to review: because the guidelines are no longer mandatory, "a cramped reading of the limitations provision prevents the only litigants affected by this issue from ever pursuing it." *Id.* at 513 (citing *Brown v. United States*, 139 S.Ct. 14, 15 (2018) (Sotomayor, J., dissenting)).

As importantly, Judge Costa's concurrence recognizes that this issue "affects more than the *Johnson* line of cases." *Id.* Ultimately, the issue involves the appropriate interpretation of § 2255(h)(2), and this issue will arise any time this Court recognizes a new retroactive rule. *See id.* at 510 ("Our approach fails to apply the plain language of the statute and undermines the prompt presentation of habeas claims the statute promotes."). Judge Costa ended with a plea for this Court's review: "at a minimum, an issue that has divided so many judges within and among circuits, and that affects so many prisoners, 'calls out for an answer.'" *Id.* at 513-514 (quoting *Brown*, 139 S.Ct.

at 14 (Sotomayor, J., dissenting)).

Also, the Seventh Circuit has again reaffirmed, in yet another published decision, that the mandatory guidelines' residual clause is void for vagueness under *Johnson*. *Daniels v. United States*, 939 F.3d 898, 903 (7th Cir. 2019) (Sykes, J.). This conflict will remain until this Court resolves it.

Finally, this issue is still an open one in the Second and D.C. Circuits. Pet. 10-11. On August 9, 2019, a district court within the Second Circuit found that a petitioner could bring a *Johnson* challenge to the residual clause of the mandatory guidelines. *Blackmon v. United States*, 2019 WL 3767511, at *6 (D. Conn. Aug. 9, 2019) (Bolden, J.). And on October 29, 2019, a district court within the D.C. Circuit did so as well, and then granted the defendant habeas relief. *United States v. Carter*, 2019 WL 5580091 (D.D.C. Oct. 29, 2019) (Huvelle, J.).

In light of the established Circuit conflict, the dissension within the Circuits, and the uncertainty within the Second and D.C. Circuits, this conflict is not shallow, and it is likely to deepen even further soon. There is no good reason for this Court not to resolve it. This Court has resolved analogous issues within the last few years. *See Johnson*, 135 S.Ct. 2551; *Beckles*, 137 S.Ct. 886; *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018); *United States v. Davis*, 139 S.Ct. 2319 (2019). The resolution of this issue is as needed as the resolution of the issues in *Johnson*, *Beckles*, *Sessions*, and *Davis*. Without resolution, prisoners suffer different fates based solely on geography. That arbitrariness should not be tolerated. Review is necessary.

II. This issue is extremely important.

The government claims that this is "an issue as to which few claimants would be entitled to relief on the merits." BIO 8. This is so, according to the government, because this issue "is relevant only to a now-closed set of cases in which a Section 2255 motion was filed within one year of *Johnson*." BIO 13 (citing BIO in *Gipson v. United States*, No. 17-8637, at 16). But the government never attempts to put a number on this "now-closed set of cases." One data-based estimate puts this number at over 1,000 cases. *Brown*, 139 S.Ct. at 16 & 16 n.4 (Sotomayor, J., dissenting). The government does not dispute that estimate. So, whether these cases are "now-closed" or not, an issue that plausibly affects over 1,000 individuals is indeed one of exceptional importance. *Id.* at 16.

The government also claims that, of these individuals, "many" "could have been deemed qualified for that enhancement irrespective of the residual clause, and thus would not be entitled to resentencing." BIO 13 (citing BIO in *Gipson*, No. 17-8637, at 16). This is pure speculation. The government offers no empirical data to support its claim. Nor does the government dispute that petitioner Aguilar is otherwise ineligible for resentencing. And in a case similar to this one, *Pullen v. United States*, No. 19-5219 (pet. for cert. filed July 15, 2019), the government has conceded that the defendant would not qualify as a career offender if *Johnson* applied to his case, *United States v. Pullen*, 913 F.3d 1270, 1272 (10th Cir. 2019).

We also know that individuals within the First, Seventh, and D.C. Circuits have been granted relief in these circumstances. *See*, *e.g.*, *Roy*, 282 F.Supp.3d at 432; *Reid v. United States*, 252 F.Supp.3d 63, 68 (D. Mass. 2017); *United States v. Cross*, 892

F.3d 288, 307 (7th Cir. 2018); *D'Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019); *Swanson v. United States*, 2019 WL 2144796 (C.D. Ill. May 16, 2019); *McCullough v. United States*, 2018 WL 4186384 (C.D. Ill. Aug. 31, 2018); *Zollicoffer v. United States*, 2018 WL 4107998 (C.D. Ill. Aug. 29, 2018); *Cruz v. United States*, 2018 WL 3772698 (S.D. Ill. Aug. 9, 2018); *Best v. United States*, 2019 WL 3067241 (N.D. Ind. July 12, 2019); *United States v. Nelums*, No. 2:02-cr-00147-PP, D.E.285 (E.D. Wis. Jan. 1, 2019); *United States v. Parker*, No. 2:92-cr-00178-PP-6, D.E.310 (E.D. Wis. Dec. 17, 2018); *United States v. Hernandez*, 3:00-cr-00113-BBC, D.E.54, 57 (W.D. Wis. Nov. 2, 2018); *United States v. Moore*, No. 1:00-cr-10247-WGY, D.E.122 (D. Mass. Nov. 14, 2018); *Boria*, 2019 WL 6699611, at *4; *Carter*, 2019 WL 5580091 (D.D.C. Oct. 29, 2019).

Moreover, if the government's alternative-qualification argument was persuasive, this Court would not have granted certiorari in *Johnson*, *Beckles*, *Sessions*, or *Davis*. Those decisions involved identical or analogous residual clauses, also interpreted via a categorical approach. If "many" defendants are not entitled to relief in the mandatory guidelines context, then the same would hold true in those other contexts as well. But many have obtained relief under these decisions, and many more would obtain relief with a favorable decision here. In the end, this Court has addressed the constitutionality of analogous residual clauses on four separate occasions over the last five years. It has done so because, *inter alia*, the issues were exceptionally important. So too here.

Finally, as we have already explained, Pet. 14, and as Judge Costa's concurrence in *London* explains, this "issue affects more than the *Johnson* line of cases." 937 F.3d

at 510. Thus, it is not true, as the government claims, that the resolution of this question resolves nothing more than the "now-closed set of cases" involving the mandatory guidelines' residual clause. The resolution of this question would resolve the uncertainty over the meaning of § 2255(h)(2), and it would provide much needed guidance to the lower courts with respect to cases involving the scope of newly recognized retroactive rights. Review is necessary.

III. The Tenth Circuit erred.

a. The government never responds to our arguments on the merits. Instead, the government incorporates the arguments it made in its brief in opposition in *Gipson v. United States*, No. 17-8637. BIO 6-7. The brief in *Gipson* was filed 17 months ago (on July 25, 2018). BIO 7. We did not represent the petitioner in *Gipson*. The petition in *Gipson* looks very little like our petition here. By responding to different arguments, the government has done essentially nothing to undermine the points we've made in our petition.

In any event, the government's arguments in *Gipson* are not persuasive. First, the government claimed in *Gipson* that *Johnson* announced a new "right not to be sentenced pursuant to a vague *federal enhanced-punishment statute*." *Gipson* BIO 10 (emphasis added). But that's not how this Court has interpreted the scope of *Johnson*'s right. In *Beckles*, this Court held that *Johnson*'s new rule applies to "*laws that fix the permissible sentences* for criminal offenses." 137 S.Ct. at 892 (emphasis in original). The guidelines, when mandatory, did just that. Pet. 22-25 (citing, *inter alia*, *United States v. Booker*, 543 U.S. 220 (2005)). The government has never offered any counterargument on this point. At no point has the government even attempted to

explain how *Booker* – which struck down the mandatory guidelines as unconstitutional because those guidelines are "binding on judges" and "have the force and effect of laws" – somehow do not qualify as "laws that fix the permissible sentences for criminal offenses." Pet. 25 (quoting *Booker*, 543 U.S. at 234); *Beckles*, 137 S.Ct. at 892. Of course they do.

The government's only *Booker*-related argument goes like this: because no court held *Booker* retroactive on collateral review, it is impossible for a court to hold a mandatory-guidelines-based *Johnson* claim retroactively applicable on collateral review. *Gipson* BIO 14. This argument is a red herring. Regardless of *Booker*'s retroactivity, this Court made *Johnson* retroactively applicable to cases on collateral review in *Welch*. 136 S.Ct. at 1265. *Booker*'s non-retroactivity is irrelevant to *Johnson*'s retroactivity. Again, the question presented here involves the scope of *Johnson*'s already-made retroactive right; it has nothing do with retroactivity (or "watershed rules") in the first instance.

The *Booker* non-retroactivity argument is also a bad comparator. A *Johnson* claim is premised on a constitutional violation that results in an incorrect penalty range, which in turn results in an illegal sentence. But a *Booker* claim is not. The Sixth Amendment's guarantee that requires an advisory rather than mandatory guidelines regime has nothing whatsoever to do with whether the guidelines were properly calculated in any given case.

The government claims that our definition of the scope of *Johnson*'s right "operates at a level of generality and abstraction that is too high to be meaningful." *Gipson* BIO 10. But our definition comes straight from this Court's decision in

Beckles. There is nothing abstract or general about the way in which *Beckles* defined the scope of *Johnson*'s right. And even if there were, *Beckles* is the controlling precedent on the scope of *Johnson*'s right. Section 2255(f)(3) does not "lose force" simply because the petitioners have asked this Court to decide whether the mandatory guidelines fall within *Beckles*' definition of the scope of *Johnson*'s right. *Gipson* BIO 11. That is a fair question, similar to the one this Court answered in *Beckles* itself. Indeed, it was the government's position in *Beckles* that *Johnson*'s right encompassed the advisory guidelines. 137 S.Ct. at 892. If an answer to that question (especially an affirmative answer) did not undermine § 2255(h)(2)'s "force," then the resolution of the question presented here will not undermine that provision's "force" either.

The government offers no meaningful response to our argument that the mandatory guidelines fall within *Johnson*'s new rule, as the scope of that rule is defined in *Beckles*. Instead, the government, citing Justice Sotomayor's concurrence in *Beckles*, claims that *Beckles* "'leaves open' the question whether mandatory Guidelines would be subject to vagueness challenges." *Gipson* BIO 12 (quoting *Beckles*, 137 S.Ct. at 903 n.4 (Sotomayor, J., concurring)).

We already addressed this faulty logic. Pet. 18-19. To reiterate, *Beckles* cabined its decision: "[w]e hold only that the *advisory* Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." 137 S.Ct. at 896 (emphasis added). *Beckles* did not hold that *Johnson*'s rule does not apply to the *mandatory* guidelines. Although the advisory guidelines are not subject to void-for-vagueness challenges, that does not mean that

this same rule applies to the mandatory guidelines. *Beckles*, 137 S.Ct. at 894-896. *Beckles* did not answer this specific question because it was not presented. But by defining the scope of *Johnson*'s right, *Beckles* provides the necessary framework to answer the question.

The government further claims that our definition of the scope of *Johnson*'s right "blurs critical differences between statutes and guidelines." *Gipson* BIO 10. According to the government, the mandatory guidelines differ because of their departure provisions. *Gipson* BIO 13. But, as we have already explained, this Court in *Booker* rejected that very logic. Pet. 25. The government offers no response on this point. Again, it all but ignores *Booker*.

The government spends much time on retroactivity. Gipson BIO 12-14. Again, that focus is nonsensical. We know that *Johnson*'s new right is retroactive. *Welch*, 136 S.Ct. at 1265. The question is the scope of that right, and any discussion of retroactivity does not answer that question. Pet. 19-22. But this Court should.

b. The government also defends the Tenth Circuit's interpretation of § 2255(h)(2) as requiring *district courts* to review appellate courts' certificate-of-appealability determinations. BIO 15-19. The government's argument misunderstands the proceedings below and ignores § 2255(h)'s plain text (as well as the arguments we've made in our petition).

The government incorrectly claims that the district courts dismissed petitioners' motions as "untimely." BIO 7. The district courts dismissed the motions as unauthorized successive motions under § 2255(h)(2), not as untimely under § 2255(f)(3). Pet. App. 7a (finding that Mr. Aguilar "failed to satisfy the preconditions

of § 2255(h)(2) and his motion must be dismissed"); Pet. App. 16a (finding that Mr. Nichols's "motion to vacate fails to meet the authorization standards for a second or successive motion under Section 2255(h)"). The government also incorrectly claims that the Tenth Circuit "held that petitioners' Section 2255 motions were untimely." BIO 18. In both appeals, the Tenth Circuit summarily affirmed under its prior decision in *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019), Pet. App. 1a-2a, 9a-10a, which is a case involving § 2255(h)(2), not § 2255(f)(3).

For reasons already explained, this distinction is significant. Pet. 4-14. Rather than address these reasons, the government claims that "[w]hether the district court employed the correct procedures when addressing petitioners' motions makes no practical difference to the outcome of this case." BIO 18. But this no-practical-difference claim must be based on the government's incorrect premise that the lower courts denied the motions as untimely under § 2255(f)(3). With that premise gone, and with a correct understanding that the district courts dismissed *already authorized* § 2255 motions under § 2255(h)(2) as *unauthorized* under § 2255(h)(2), the need for review becomes obvious. Pet. 4-14.

On the merits, the government criticizes our position as "atextual[]." BIO 16. According to the government, § 2255(h)'s cross-reference to § 2244 includes § 2244(b)(4) (and its requirement that district courts dismiss any "successive application that the court of appeals has authorized to be filed" if the motion fails to "satisfy[y] the requirements of this section"). But it is the government that ignores the relevant text.

Section 2255(h) does not simply cross-reference § 2244. Instead, § 2255(h)'s full

text provides that a successive § 2255 motion "must be certified as provided in section 2244." 28 U.S.C. § 2255(h). As already explained, § 2244's certification procedures are found in § 2244(b)(3). Pet. 7. Because § 2244(b)(4) has nothing to do with Circuit certification procedures, Congress did not incorporate that provision into § 2255(h). Pet. 7. It is the government's contrary position that is "atextual."

The government appears to believe that, without incorporating § 2244(b)(4) into § 2255(h), district courts could not dismiss authorized successive § 2255 motions that fail to raise claims based on new retroactive rights. BIO 16. That is not true. In such cases, the government is free to raise this defense as a timeliness bar under § 2255(f)(3). Pet. 5. But if the government waives the timeliness requirement, nothing within § 2244 or § 2255 authorizes a district court to consider the requirement sua sponte. Pet. 14.

The government admits that § 2255(h)'s cross-reference to § 2244 does not include § 2244(b)(1). BIO 18. That concession is sound because of § 2255(h)'s plain text, which only incorporates § 2244's certification procedures. Pet. 7. But the government instead points to § 2244(b)(1)'s supposed "restrictive clause," which "refers exclusively to state prisoners." BIO 18. This argument ignores the fact that it is not just § 2244(b)(1) that applies solely to state prisoners. This Court has already held that the whole of § 2244(b) applies to state prisoners. Pet. 8 (quoting *McCleskey v. Zant*, 499 U.S. 467, 486 (1991)). The only reason that § 2244(b)(3)'s certification procedures apply to federal prisoners is because of § 2255(h)'s cross-reference to those procedures. Otherwise, it is § 2244(a) that applies to federal prisoners, while § 2244(b) applies to state prisoners. *See* Pet. 8-10.

This issue of statutory interpretation extends beyond the discrete issue presented here to all successive federal habeas motions. It is critically important that this Court grant review to fix the Tenth Circuit's erroneous interpretation of § 2255(h).

IV. This is an excellent vehicle, and, if not, this Court should grant review in a different case and remand this one to the lower courts for further proceedings.

The government claims that this petition is a poor vehicle because the petitioners "could not prevail on the merits of their claims." BIO 13. The government claims that *Beckles* forecloses relief for Mr. Nichols because he was sentenced after this Court declared the guidelines advisory in *Booker*. BIO 14. We acknowledge that Mr. Nichols was sentenced nine months after this Court's decision in *Booker*. But he was also sentenced as a career offender under § 4B1.2. Even after *Booker*, there was confusion in the lower courts whether § 4B1.2 was still mandatory in light of 28 U.S.C. § 994(h)'s directive to sentence career offenders at or near the statutory maximum. *See*, *e.g.*, *United States v. Corner*, 598 F.3d 411, 415-416 (7th Cir. 2010) (en banc) (overruling precedent holding that § 4B1.2 was still mandatory post-*Booker*); *United States v. Friedman*, 554 F.3d 1301, 1311 n.13 (10th Cir. 2009) (questioning whether courts could vary from a career-offender guidelines range post-*Booker*). Whether that confusion is sufficient to permit relief here is an issue the district court should address in the first instance. And regardless, Mr. Aguilar was sentenced pre-*Booker*, at a time when the guidelines were undisputedly mandatory. BIO 6. Thus, this is not a reason to deny this petition.

The only other reason the government gives is that the petitioners' § 2255 motions might be time-barred under § 2255(f)(3). BIO 14. But that is not a reason to deny this

petition. We have another petition pending on the § 2255(f)(3) issue. *Bronson v. United States*, No. 19-5316 (filed July 19, 2019). The issues raised here in the § 2255(h)(2) context are analogous to the issues raised in the § 2255(f)(3) context. A decision in one context would almost certainly apply in the other context. And this Court could grant both *Bronson* and this petition (or the petition in *Pullen v. United States*, No. 19-5219, which raises the identical issues raised here) if it wants to ensure a universal answer to the *Johnson* mandatory guidelines issue (one that addresses both § 2255(f)(3) and § 2255(h)(2)).

Other than this latter argument, the government does not argue that Mr. Aguilar would not be entitled to relief if this Court struck down the mandatory guidelines residual clause as void for vagueness. Thus, there are no vehicle problems with this petition.

In any event, this Court could simply grant certiorari in *Pullen v. United States*, No. 19-5219. *Pullen* raises this identical claim, and the petitioner in *Pullen* is, without a doubt, not a career offender post-*Johnson* (he qualified only via a prior escape conviction). Both this case and *Pullen* are excellent vehicles to resolve this conflict. If this Court grants certiorari in *Pullen*, it should hold this case pending a decision in *Pullen*. Either way, this is an important question that has divided the Circuits and that the Tenth Circuit has gotten wrong. Whether here or in *Pullen* (or in the § 2255(f)(3) context via *Bronson*), this Court should resolve the question.

CONCLUSION

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

Respectfully submitted,

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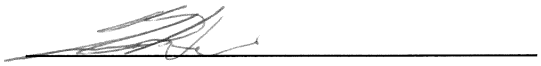

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