No. 19-6492

IN THE

Supreme Court of the United States

TYLAN TREMAINE AUTREY,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

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PETITIONER'S REPLY

Petitioner Tylan Tremaine Autrey offers the following responses to the United States' arguments against a grant of certiorari in this case.

ARGUMENT

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 residual clause contained in the mandatory Sentencing Guidelines' definition of the term "crime of violence." Mem. in Opp. 3-4. But the government asks this Court to leave this split in place, rather than resolve it, for three reasons: (1) the conflict is "shallow," Mem. in Opp. 3-4; (2) the issue is unimportant because "few claimants would be entitled to relief on the merits," Mem.in Opp. 4; and (3) this case is a poor vehicle to resolve the split, Mem. in Opp. 4-5.

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. Mem. in Opp. 2 (noting that this Court has denied review of the issue in at least eight other occasions). But all of those denials occurred before the Court decided *United States v. Davis*, 139 S. Ct. 2319 (June 24, 2019), in which it held the residual clause in 18 U.S.C. § 924(c)(3)'s definition of "crime of violence" to be unconstitutionally vague. Moreover, of the sixteen pending petitions noted by the government, Mem. in Opp. 2 n.2, all but one were filed *after Davis*. Until this Court steps in to resolve the split, it will continue to receive petitions asking it to do just that. And for good reason. 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 will be none without this Court's review.

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, and thus whether a § 2255 motion filed within one year of *Johnson* was timely under § 2255(f)(3). Pet. 11-14; Mem. in Opp. 3. The government refers to this conflict as "shallow," however, because only the Seventh Circuit has decided the issue differently. Mem. in Opp. 3. But unlike the government, this Court should not ignore the increasing disagreement by judges within the Circuits taking the majority position. *See* Pet. 12 (identifying intra-circuit disagreement in the Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits).

Finally, this issue is still an open one in the Second and D.C. Circuits. Pet. 10-11. And 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.).

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, just as it has in the contexts of § 924(e)(2)(B), §16(b), and § 924(c)(3). *See Johnson*, 135 S. Ct. 2551 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *United States v. Davis*, 139 S. Ct. 2319 (2019). The resolution of this issue is every

bit as needed as was the resolution of the issues in *Johnson*, *Dimaya*, and *Davis*. Without resolution, prisoners suffer different fates based solely on geography. That arbitrariness should not be tolerated. Review is necessary.

II. The Constitutionality of the Mandatory Guidelines' Residual Clause Presents an Issue of Exceptional Importance That Urgently Needs Resolution by This Court.

The government claims that this is "an issue as to which few claimants would be entitled to relief on the merits." Mem. in Opp. 4 (citing Br. in Opp. at 16, *Gipson v. United States*, No. 17-8637). But the government never attempts to put a number on the number of defendants who could receive relief. One estimate puts this number at over 1,000 cases. *Brown*, 139 S. Ct. at 16 n.1 (Sotomayor, J., dissenting). The government has not disputed that estimate. But regardless of the precise number, an issue that plausibly affects even a few hundred defendants is indeed one of exceptional importance. *Id.* at 16.

Further, numerous individuals within the Seventh Circuit alone have been granted relief in these circumstances.[1] It is thus not unreasonable to think that numerous defendants in the Circuits that have ruled opposite to the Seventh Circuit would also receive relief if the Guidelines' residual clause were struck down.

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[1] *See*, *e.g.*, *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).

Moreover, if the government's claim were persuasive, this Court would not have granted certiorari in *Johnson*, *Dimaya*, or *Davis*. Again, 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 have been the case 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. This issue is no different.

III. This Case Presents an Excellent Vehicle for Considering the Issue.

Alternatively, the government asserts that Mr. Autrey's case is an unsuitable vehicle because he would still qualify as a career offender even if § 4B1.2's residual clause were struck down as void for vagueness. Mem. in Opp. 4-5. This is because, the government claims, Mr. Autrey's instant offense of federal kidnapping would still count as a crime of violence because the application note to § 4B1.2 listed "kidnapping" as a crime of violence. Mem. in Opp. 4. That argument is not persuasive.

To begin, it is the text of § 4B1.2, not its application notes, that defines a "crime of violence." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) (§ 4B1.2's application notes have no independent force, and any enumerated offenses within those notes are "enforceable only as an interpretation of the definition of the

term 'crime of violence' in the guideline itself"); *see also United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (same; guidelines commentary "serves only to interpret the Guidelines' text, not to replace or modify it"); *Stinson v. United States*, 508 U.S. 36, 46 (1993) (guidelines commentary is valid only if it interprets or explains the text of the applicable guideline). As it existed in 1998, § 4B1.2 defined a crime of violence as one with an element of violent force or as one "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in committing the offense." U.S.S.G. § 4B1.2 (Nov. 1998). That definition did not include any enumerated offenses, in contrast to the Guidelines' current definition, which was amended in August 2016 not only to eliminate the residual clause from the text, but also to move a revised list of enumerated offenses from the commentary to the text. *See* U.S.S.G. § 4B1.2 (Nov. 2018); U.S.S.G. Supp. App. C, amend. 798, at 120-22. (eff. Aug. 1, 2016).

Further, as the government appears to concede through its silence on this point, federal kidnapping does not qualify under § 4B1.2's force clause. Indeed, in the context of the nearly identically-worded force clause in 18 U.S.C. § 924(c)(1)(A), the Fourth Circuit recently held that federal kidnapping does not require the use of force as an element. *United States v. Walker*, 934 F.3d 375 (4th Cir. 2019) (considering 18 U.S.C. § 1201). Therefore, Mr. Autrey's federal kidnapping conviction qualified only under the mandatory Guidelines' residual clause, and he can no longer be deemed a career offender under that scheme.

In short, with § 4B1.2's residual clause struck down as void for vagueness, Mr. Autrey's instant offense of kidnapping could not count as a crime of violence, making this case an excellent vehicle for deciding the residual clause question.

CONCLUSION

For the foregoing reasons and those argued in the petition, the Court should grant a writ of certiorari in this case. If the Court does not grant review outright, however, then the case should be held until the Court rules on similar cases presenting the issues raised here (*e.g.*, *Pullen v. United States*, No. 19-5219; *Bronson v. United States*, No. 19-5316) and considered at that time, and then remanded back to the Fourth Circuit for further consideration in light of that court's reconsideration of the issue (*see United States v. Rumph*, No. 17-7080 (4th Cir.); *United States v. Sarratt*, No. 19-6075 (4th Cir.)).

Respectfully submitted,

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