No. 19-6510

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY L. DOUGLAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

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The government admits that the circuits are divided over whether the new rule announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies to the residual clause in the mandatory 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 two reasons: (1) the conflict is "shallow"; and (2) the issue is unimportant because "few claimants would be entitled to relief on the merits," Mem. in Opp. 4.

Neither of the government's arguments is 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" is unconstitutionally vague. Moreover, of the nineteen pending petitions noted by the government, Mem. in Opp. 2 n.2, all but one were filed *after Davis*.

The issue is also not limited to the guidelines' context, but affects how courts define the scope of *any* newly recognized retroactive right. Pet. 16 n.4. Until this Court steps in to resolve the split, it will continue to receive petitions asking it to do so.

I. The circuit split is not "shallow."

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* is timely under 28 U.S.C. § 2255(f)(3). Pet. 12; Mem. in Opp. 3-4. The government refers to this conflict as "shallow" because only the Seventh Circuit has decided the issue differently. Mem. in Opp. 4. But whether called shallow or deep, the conflict is firmly entrenched and will continue until resolved. And this Court should not ignore the increasing disagreement by judges within the circuits taking the majority position. *See* Pet. 12-13 (identifying intra-circuit disagreement in the Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits).

Moreover, this issue is still an open one in the Second and D.C. Circuits. Pet. 13-14. 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 deep disagreement within the circuits, and the uncertainty remaining in 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 not to resolve it, just as it has in the contexts of § 924(e)(2)(B), § 16(b), and § 924(c)(3). *See Johnson v. United States*, 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). One data-based 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 the liberty of 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 reject claims as untimely would also receive relief if the Guidelines' residual clause were struck downMoreover, 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 applied using a categorical approach. We can

[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).

fairly assume that "many" defendants were not entitled to relief in those contexts as well. But the Court addressed the constitutionality of those analogous residual because the issues were exceptionally important. This issue is no different.

III. This is an excellent vehicle to consider the questions presented.

The government appears to concede through its silence that this case presents an excellent vehicle to consider these questions. Pet. 25-26. Mr. Douglas's career offender sentence depends on a prior Tennessee conviction for escape, an offense that without question could have qualified only under the residual clause—if at all. Pet. 7-8 (Mr. Douglas was convicted of escape for impersonating another inmate, signing his bonding papers, and leaving the jail. (PSR ¶ 47.)) Should the Court hold the residual clause void for vagueness, no further inquiry or analysis would be required. He would be eligible for immediate release. Pet. 25-26.

CONCLUSION

For the reasons here and in the petition, the Court should grant the petition for a writ of certiorari. 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; *Autrey v. United States*, No. 19-6492) and considered at that time.

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Respectfully submitted,

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