No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN HICKS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit misapplied this Court's "debatable among jurists of reason" standard for a certificate of appealability.

2. Whether the residual clause of the mandatory Sentencing Guidelines at U.S.S.G. § 4B1.2(a)(2) is void for vagueness.

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Petitioner Steven Hicks respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on August 22, 2019.

OPINIONS BELOW

Before the district court, Mr. Hicks filed a petition for a writ of habeas corpus under 28 U.S.C. § 2255 challenging his designation as a "career offender" under U.S.S.G. § 4B1.2(a). The district court denied this petition and declined to issue him a certificate of appealability. *See* Appendix A. The court of appeals then denied Mr. Hicks's request for a certificate of appealability in an unpublished order. *See United States v. Hicks*, No. 18-56512 (9th Cir. Aug. 22, 2019). *See* Appendix B.

JURISDICTION

On August 22, 2019, the court of appeals denied Mr. Hicks's request for a certificate of appealability from the denial of his petition for a writ of habeas corpus. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND SENTENCING GUIDELINE INVOLVED

The pertinent Sentencing Guideline, former U.S.S.G. § 4B1.2(a) (1995), defined a "crime of violence" as an offense 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.

The statute governing certificates of appealability states, in relevant part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

STATEMENT OF FACTS

In 2002, Mr. Hicks pleaded guilty of a single count of conspiracy to distribute cocaine and cocaine base under 21 U.S.C. § 841(a) and § 846. In calculating his Sentencing Guidelines range, the Presentence Report alleged that Mr. Hicks was a career offender under U.S.S.G. § 4B1.1(a) by relying on a prior conviction for attempted robbery under California Penal Code § 211.

Without the career offender designation, Mr. Hicks would have had a Guidelines range of 210-262 months. But *with* the career offender designation, Mr. Hicks was placed in Criminal History Category VI, resulting in a Guidelines range of 235-293 months. At sentencing, the district court agreed that Mr. Hicks was a career offender and imposed a low-end sentence of 235 months.

In 2015, this Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), striking down the residual clause of the Armed Career Criminal Act ("ACCA"). Within one year, Mr. Hicks obtained permission from the Ninth Circuit to file a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2255 and timely did so. This petition argued that the identically-worded residual clause of the career offender provision in § 4B1.2 was void for vagueness. On this basis, Mr. Hicks requested that the district court vacate his sentence under the mandatory Guidelines and resentence him without the career offender enhancement.

While his petition was pending, this Court issued its decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). In *Beckles*, the Court held that "the advisory

Sentencing Guidelines, including §4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." *Id.* at 896. But *Beckles* stressed that its holding only applied to the "advisory" Sentencing Guidelines, using the words "advisory," "discretionary," and "discretion" no fewer than 40 times. *Id.* at 890-97. Indeed, *Beckles* distinguished the current discretionary nature of the Guidelines from the mandatory nature of the Guidelines before 2005, noting that "the due process concerns that require notice in a world of mandatory Guidelines no longer apply." *Id.* at 894 (quotations omitted).

In 2018, the district court denied Mr. Hicks's habeas petition. *See* Appendix A. The district court found that Mr. Hicks's claim had not been defaulted and did not suffer from any other procedural defect. *See* Appendix A at 4-7. But on the merits, the district court held in part that the Supreme Court in *Beckles* "did not choose to carve" out an exception for the mandatory Guidelines when it declined to apply *Johnson* to the advisory Guidelines. Appendix A at 11. Accordingly, "this Court finds Petitioner's void-for-vagueness challenge to his sentence is impermissible." Appendix A at 11. The court also denied Mr. Hicks a certificate of appealability. *See* Appendix A at 11-12.

Mr. Hicks timely filed a request for a certificate of appealability to the Ninth Circuit Court of Appeals. In this request, he explained that the Ninth Circuit should grant him a certificate of appealability because reasonable jurists could (and had) disagreed with the district court's conclusion. Specifically, he pointed out that at least two circuit courts had granted *Johnson* relief to defendants who, like

Mr. Hicks, were sentenced under the mandatory Guidelines. But the Ninth Circuit denied Mr. Hicks's request for a certificate of appealability in a single sentence, stating that he had "not shown that jurists of reason would find it debatable." Appendix B (quotations omitted). This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

In a series of cases, this Court has defined the lenient standard for a certificate of appealability—that a petitioner need *not* show they would prevail on the merits, but only that the legal issue is debatable among jurists of reason. Here, Mr. Hicks pointed to a plethora of district court and circuit court judges who believe that *Johnson* invalidates the residual clause of the mandatory Guidelines. The Ninth Circuit's denial of a certificate of appealability in the face of this judicial disagreement shows that it is grossly misapplying the Court's precedent.

The Court should also grant certiorari on the merits because the question of whether *Johnson* applies to the mandatory Sentencing Guidelines is not going away. The inter-circuit split is permanently entrenched. District and circuit court judges spend countless hours adjudicating mandatory Guidelines petitions and appeals, sometimes leading to contentious disputes with their colleagues. Department of Justice attorneys and federal defenders spend countless hours briefing a repetitive version of the same issue. Petitioners spend countless hours awaiting unsatisfying decisions, while the Bureau of Prisons spends over $36 million a year incarcerating prisoners who might otherwise be released. All it would

take to spare everyone this unnecessary waste of time and resources is for the Court to reach the merits of this issue in a single case.

Mr. Hicks's case presents these precise issues. His 2002 career offender enhancement was triggered by an offense that *only* qualifies as a "crime of violence" under the residual clause of § 4B1.2(a)(2) pursuant to binding Ninth Circuit law. He preserved his legal claims and filed them timely at every stage of litigation. And Mr. Hicks would prevail on the merits, because, as in *Johnson*, courts applied the "ordinary case" analysis to the residual clause in the mandatory Guidelines at § 4B1.2(a)(2), rendering it void for vagueness. Accordingly the Court should grant Mr. Hicks's petition.

REASONS FOR GRANTING THE PETITION

I.

The Courts of Appeals Are Misapplying the Standard for a Certificate of Appealability.

In a series of recent cases, this Court has defined the standard for granting habeas petitioners a "certificate of appealability." *See* 28 U.S.C. § 2253(c). To make a "substantial showing of the denial of a constitutional right" under § 2253(c)(2), a petitioner "need not show that he should prevail on the merits." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Rather, he need only show the issue presents a "question of some substance"—that is, an issue that (1) is "debatable among jurists of reason," (2) could be "resolved in a different manner" by courts, (3) is "adequate to deserve encouragement to proceed further," or (4) is not "squarely foreclosed by statute, rule or authoritative court decision" or "lacking any factual basis in the

record." *Id.* at 893-94 & n.4 (quotations omitted). *See also Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The bar for a certificate of appealability is not high: a court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El*, 537 U.S. at 337. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the movant] will not prevail." *Id.* at 338. All an applicant need show is that the issues presented were "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484.

The Ninth Circuit's denial of Mr. Hicks's certificate of appealability grossly misapplied this standard. The question at issue in Mr. Hicks's case—whether the residual clause of the mandatory Guidelines is void for vagueness—is the very epitome of an issue that is "debatable among jurists of reason." At least two circuits have answered this question in the affirmative.[1] Eight have held to the contrary.[2]

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[1] *See Cross v. United States*, 892 F.3d 288 (7th Cir. 2018); *Moore v. United States*, 871 F.3d 72 (1st Cir. 2018).

[2] *See United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *United States v. Greer*, 881 F.3d 1241 (10th Cir.); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

And many of these decisions have not been unanimous.[3] It is difficult to imagine a *more* perfect example of an issue that reasonable judges can disagree upon such that it meets the standard for a certificate of appealability.

Indeed, this Court itself has confirmed that the question remains open to debate. In *Beckles*, the Court repeatedly distinguished the advisory Guidelines from the pre-2005 mandatory Guidelines, noting that "the due process concerns that require notice in a world of mandatory Guidelines no longer apply." 137 S. Ct. at 894 (quotations omitted). As Justice Sotomayor rightly noted, this "at least leaves open the question" of whether the mandatory Guidelines are void for vagueness. 137 S. Ct. at 903 n.4. And the Court recently ordered the Solicitor General to file a response to a petition raising this exact issue. *See* Bronson v. United States, 19-5316 (response requested on Sept. 6, 2019). So the Court's statements and actions alone confirm that the issue remains open and debatable.

But here, despite the obvious disagreement among jurists of reason, the Ninth Circuit defied this Court's well-established precedent by denying Mr. Hicks a certificate of appealability. To do so, the Ninth Circuit cited *inter alia* its decision in

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[3] *See Brown*, 868 F.3d at 304 (Gregory, C.J., dissenting); *London*, 937 F.3d at 510 (stating that the Fifth Circuit is on "the wrong side of a split") (Costa, J., concurring); *Chambers v. United States*, 763 F. App'x 514, 519 (6th Cir. 2019) (stating that *Raybon* "was wrong on this issue") (Moore, J., concurring); *Hodges v. United States*, 778 F. App'x 413, 414 (9th Cir. 2019) (stating that "*Blackstone* was wrongly decided" and "the Seventh and First Circuits have correctly decided" the issue) (Berzon, J., concurring); *In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir. 2016) ("Although we are bound by *Griffin*, we write separately to explain why we believe *Griffin* is deeply flawed and wrongly decided.") (Jordan, Rosenbaum, Pryor, J., dissenting).

United States v. Blackstone, which held that "*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review." 903 F.3d 1020, 1028 (9th Cir. 2018). By citing *Blackstone*, the Ninth Circuit appeared to suggest that its decision in that case rendered this question not "debatable among jurists of reason." This is incorrect, for two reasons.

First, nothing in this Court's precedent suggests that the pool of "jurists of reason" is limited to the judges of a particular circuit. For instance, while judges in the Ninth Circuit may be *bound* by *Blackstone*, this does not mean the legal issue is not *debatable* between judges of the Ninth Circuit and judges of other circuits.[4] Indeed, the split between the First and Seventh Circuits on one side and the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits on the other side confirms the opposite.

Second, even if the pool of "jurists of reason" *were* limited to a particular circuit, an issue remains debatable among judges of that circuit so long as no en banc precedent dictating that conclusion exists. For instance, *Blackstone* was issued by a three-judge panel, and although the petition for rehearing en banc was denied,

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[4] Other circuit courts have also erroneously concluded that in-circuit precedent foreclosing a void-for-vagueness challenge to the mandatory Guidelines renders an issue not "debatable among jurists of reason." *See, e.g.*, *United States v. Martinez*, 772 F. App'x 766, 767 (10th Cir. 2019) ("Given this binding circuit precedent, no reasonable jurist could debate the district court's conclusion that Mr. Martinez's § 2255 motion was untimely."); *Posey v. United States*, No. 17-6374, 2018 WL 6133751, at *2 (6th Cir. May 7, 2018) (citing in-circuit precedent to hold that "[r]easonable jurists would not debate whether the district court was correct in finding that Posey's motion was time-barred").

the judges of the Ninth Circuit could always change their minds and grant rehearing in the future. Indeed, Judge Berzon recently opined in a concurrence that *Blackstone* was "wrongly decided." *Hodges*, 778 F. App'x at 414. So when judges deny a certificate of appealability on the basis of a decision from a three-judge panel, it effectively forecloses petitioners like Mr. Hicks from the opportunity to even *request* en banc rehearing, thereby enshrining the three-judge precedent from any further review.

In other words, the Ninth Circuit (and other courts of appeals) are straying far from this Court's well-established standard for a certificate of appealability by placing insurmountable barriers in front of habeas petitioners who deserve to have their day in court. While the well-intentioned restrictions on a certificate of appealability may make sense to weed out frivolous arguments or overly-litigious petitioners, they do *not* make sense in situations where there is a demonstrated circuit split and an acknowledgment by this Court that the issue remains open. For this reason, the Court should grant Mr. Hicks's petition to correct the circuit courts' misapplication of the phrase "debatable among jurists of reason."

II.

The Court Should Resolve Whether the Residual Clause of the Mandatory Guidelines Is Void for Vagueness.

Four years ago in *Johnson*, the Court struck down as unconstitutionally vague the "residual clause" of the Armed Career Criminal Act of 18 U.S.C. § 924(e)(2)(B)(ii). In its wake, courts, lawyers, and prisoners immediately began evaluating *Johnson*'s impact on U.S.S.G. § 4B1.2(a)(2), an identically-worded

provision in the Sentencing Guidelines that triggers a "career offender" sentencing enhancement.

Less than one year later, the Court held that *Johnson* had no impact on § 4B1.2(a)(2) for defendants sentenced under the *advisory* Sentencing Guidelines. *See Beckles*, 137 S. Ct. at 896. But the Court took pains to clarify that its holding applied only in that context, using the words "advisory" and "discretion" or "discretionary" nearly 40 times. *Id.* at 890-97. As Justice Sotomayor rightly noted, this "at least leaves open the question" of whether defendants sentenced under the mandatory Guidelines could raise a similar challenge. *Id.* at 903 n.4.

But in the several years since, no petitioner has been able to get an answer from the Court on the question *Beckles* left open. This is not for lack of trying. No fewer than 30 petitions have presented this issue.[5] The Court has denied them all.

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[5] *Lester v. United States*, U.S. No. 17-1366; *Allen v. United States*, U.S. No. 17-5684; *Gates v. United States*, U.S. No. 17-6262; *James v. United States*, U.S. No. 17-6769; *Robinson v. United States*, U.S. No. 17-6877; *Cottman v. United States*, U.S. No. 17-7563; *Miller v. United States*, U.S. No. 17-7635; *Molette v. United States*, U.S. No. 17-8368; *Gipson v. United States*, U.S. No. 17-8637; *Wilson v. United States*, U.S. No. 17-8746; *Greer v. United States*, U.S. No. 17-8775; *Raybon v. United States*, U.S. No. 17-8878; *Homrich v. United States*, No. 17-9045; *Sublett v. United States*, U.S. No. 17-9049; *Brown v. United States*, U.S. No. 17-9276; *Chubb v. United States*, U.S. No. 17-9379; *Smith v. United States*, U.S. No. 17-9400; *Buckner v. United States*, U.S. No. 17-9411; *Lewis v. United States*, U.S. No. 17-9490; *Garrett v. United States*, U.S. No. 18-5422; *Posey v. United States*, U.S. No. 18-5504; *Kenner v. United States*, U.S. No. 18-5549; *Swain v. United States*, U.S. No. 18-5674; *Allen v. United States*, U.S. No. 18-5939; *Whisby v. United States*, U.S. No. 18-6375; *Jordan v. United States*, U.S. No. 18-6599; *Robinson v. United States*, U.S. No. 18-6915; *Bright v. United States*, U.S. No. 18-7132; *Allen v. United States*, U.S. No. 18-7421; *Sterling v. United States*, U.S. No. 18-7453; *Russo v. United States*, U.S. No. 18-7538; *Cannady v. United States*, U.S. No. 18-7783; *Green v. United States*, No. 18-8435; *Blackstone v. United States*, U.S. No. 18-9368.

Two Justices of this Court have consistently dissented from the denials of these petitions. *See, e.g., Brown v. United States*, 139 S. Ct. 14 (2018) (Sotomayor, J., with whom Ginsburg, J. joins, dissenting from denial of certiorari). They point out that one court of appeals permits challenges to the residual clause of the mandatory Guidelines while another "strongly hinted" that it would, after which the Government "dismissed at least one appeal that would have allowed the court to answer the question directly." *Id.* at 15-16 (citing *Moore v. United States*, 871 F.3d 72, 80-84 (1st Cir. 2017), and *United States v. Roy*, 282 F.Supp.3d 421 (D.Mass. 2017); *United States v. Roy*, Withdrawal of Appeal in No. 17–2169 (CA1)). On the other side, three courts of appeals have held that *Johnson* does not invalidate identical language in the mandatory Guidelines, while one has concluded that the mandatory Guidelines themselves cannot be challenged for vagueness. *Id.* at 15-16 (citing *United States V. Brown*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States,* 867 F.3d 625 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018)).

Because of this, the two Justices opined that "[r]egardless of where one stands on the merits of how far *Johnson* extends," cases such as Mr. Hicks's present "an important question of federal law that has divided the courts of appeals." *Id.* at 16. The Justices also note that such a decision could "determine the liberty of over 1,000 people" who are still incarcerated pursuant to this enhancement under the

mandatory Guidelines. *Id.* They conclude, "[t]hat sounds like the kind of case we ought to hear." *Id.*

It is difficult to overstate the negative effects of this Court's reluctance to grant certiorari on this issue. To begin, lower-court judges have long awaited guidance from this Court on the issue of whether *Johnson* applies to the mandatory Guidelines, ever since Justice Sotomayor's concurrence acknowledging it as an "open question" made its resolution seem imminent. But with no guidance forthcoming, low-court judges must now expend substantial time and resources to arrive at a conclusion on their own—often leading to contentious results.

For instance, the judges of the Eleventh Circuit recently voted to deny a petition for rehearing en banc in a multi-part 27-page slip opinion. *See Lester v. United States*, 921 F.3d 1306 (11th Cir. 2019). One judge wrote separately to explain why the court's prior decisions denying relief to mandatory Guidelines petitioners were correct. *See id.* at 1307-17 (William Pryor, J.). Another judge, joined by two others, wrote to explain why one of the court's prior decisions was wrongly decided, noting that the petitioner's case was "a testament to the arbitrariness of contemporary habeas law, where liberty can depend as much on geography as anything else." *Id.* at 1317-28 (Martin, J., joined by Rosenbaum, J. and Jill Pryor, J.). And a third judge, joined by two others, wrote to "add a few points in response" to the first judge's statement respecting the denial of rehearing en banc. *Id.* at 1328-33 (Rosenbaum, J., joined by Martin, J., and Jill Pryor, J.). Specifically, Judge Rosenbaum responded to Judge William Pryor's claim that the

Guidelines were "never really mandatory" by stating that such a claim was "certainly interesting on a metaphysical level" but that it "ignores reality." *Id.* at 1331. Judge Rosenbaum explained, "Back here on Earth, the laws of physics still apply. And the Supreme Court's invalidation of a law does not alter the space-time continuum" for defendants who "still sit in prison" because of the mandatory Guidelines. *Id.*

This judicial jousting exemplifies the desperate need of lower courts for guidance on the mandatory Guidelines issue. Without such guidance, judges will continue to struggle to interpret this Court's precedent in *Johnson* and *Beckles*, leading to evermore clashes and judicial sniping. And it will force judges to continue to invest significant time in opinions—time that could have been spent on the thousands of other cases piling up on their dockets.

The lack of guidance on this issue burdens other public servants as well. Virtually all lawyers providing briefing for the courts in these cases are employed by the Department of Justice or a federal defender organization. As employees or contractees of a government organization, they do not receive extra remuneration for these cases—they must absorb them into their already-overflowing caseloads. And while many mandatory Guidelines cases present similar fact patterns, attorneys on both sides must comb through the details of each case to avoid error and spend endless hours drafting repetitive opening, answering, reply, or supplemental briefs. So every mandatory Guidelines brief represents time that could have been better spent on cases that pose a greater threat to the public—

terrorism, drug trafficking, or white-collar fraud schemes, to name a few. The longer the Court delays resolving this issue, the more time dedicated public servants will spend needlessly litigating nearly-identical cases with no clear outcome.

Finally, petitioners and even their jailers deserve a final resolution. The Bureau of Prisons spends over $36,000 a year to incarcerate a federal inmate.[6] With over one thousand mandatory Guidelines cases still pending, this means that it costs the Bureau of Prisons approximately $36 million a year to incarcerate people who might otherwise be released. And for many petitioners, even an unfavorable answer to their good-faith claim under the mandatory Guidelines would be better than no answer at all. Spending four years living in hope, only to see that hope extinguished in an unsatisfyingly-vague expiration of one's claim before a lower court, is hardly a guarantee of due process. "At some point, justice delayed is justice denied." *S. Pac. Transp. Co. v. Interstate Commerce Com.*, 871 F.2d 838, 848 (9th Cir. 1989).

III.

Mr. Hicks's Case Squarely Presents These Issues.

Mr. Hicks's case squarely presents the issues in need of resolution here. He was sentenced under the mandatory Guidelines in 2002. His career offender

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[6] *See* "Annual Determination of Average Cost of Incarceration," Federal Register, April 30, 2018, *available at*: https://www.federalregister.gov/documents/2018/04/30/2018-09062/annual-determination-of-average-cost-of-incarceration (stating that the average cost of incarceration for federal inmates in 2017 was $36, 299.25).

enhancement was triggered by a conviction that *only* qualifies as a "crime of violence" under the residual clause. He preserved his legal claims at every stage of litigation. All of his petitions and appeals were timely filed. He presented more than enough evidence of judicial disagreement to qualify for a certificate of appealability. There is nothing in Mr. Hicks's case to distract this Court from resolving once and for all the mandatory Guidelines question left open by *Beckles*. Whatever the outcome, he deserves a fair, final, and objective answer to his good-faith legal claim.

IV.

Johnson Applies to the Mandatory Guidelines.

As Justice Sotomayor explains, urgent reasons exist to grant certiorari "[r]egardless of where one stands on the merits." *Brown*, 139 S. Ct. at 16. But the Court should also grant certiorari because the residual clause of § 4B1.2(a)(2) is void for vagueness.

The core of *Johnson*'s holding was that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Johnson*, 135 S. Ct. at 2557. First, the residual clause "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* At the same time, courts must determine whether this "judge-imagined abstraction" rises to the level of a "violent felony." *Id.* at 2558. "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony," the residual clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

Said another way, the ACCA residual clause's flaw was that it applied the categorical approach to a risk-based definition. *See Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) ("The vagueness of the residual clause rests in large part on its operation under the categorical approach.").

This is precisely the same analysis § 4B1.2(a)(2) requires. To determine whether an offense falls under § 4B1.2(a)(2), every court of appeals has applied the "ordinary case" test set forth in *James v. United States*, 550 U.S. 192 (2007).[7] Because courts apply the "ordinary case" to both ACCA and § 4B1.2(a)(2), and because it is precisely this "ordinary case" that rendered ACCA unconstitutional, *Johnson* also invalidates § 4B1.2(a)(2).

Simply put, while the *outcome* of *Johnson* was to strike down the ACCA residual clause, its *holding* was that applying the categorical approach to a risk-based definition is unconstitutional. And because courts apply the categorical approach to the risk-based definition of § 4B1.2(a)(2), it too is unconstitutional under *Johnson*.

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[7] *See United States v. Jonas*, 689 F.3d 83 (1st Cir. 2012); *United States v. Mead*, 773 F.3d 429, 432–33 (2d Cir. 2014); *United States v. Hopkins*, 577 F.3d 507, 510 (3d Cir. 2009); *United States v. Carthorne*, 726 F.3d 503, 513-14 (4th Cir. 2013); *United States v. Gonzalez-Longoria*, 831 F.3d 670, 675 n.4 (5th Cir. 2016) (en banc); *United States v. Stoker*, 706 F.3d 643, 649 (5th Cir. 2013); *United States v. Rogers*, 594 F.3d 517, 521 (6th Cir. 2010), *vacated on other grounds sub nom. Rogers v. United States*, 131 S. Ct. 3018 (2011); *United States v. Scanlan*, 667 F.3d 896, 899 (7th Cir. 2012); *United States v. Ross*, 613 F.3d 805, 807 (8th Cir. 2010); *United States v. Crews*, 621 F.3d 849, 852-53 (9th Cir. 2010); *United States v. Williams*, 559 F.3d 1143, 1148 (10th Cir. 2009); *United States v. Alexander*, 609 F.3d 1250, 1253-57 (11th Cir. 2010); *United States v. Thomas*, 361 F.3d 653, 660 (D.C. Cir. 2004), *vacated on other grounds sub nom.,* 543 U.S. 1111 (2005).

Beckles confirmed this. In ruling that the advisory Guidelines were not subject to void-for-vagueness challenges, the Court made clear that the reason they could not be challenged was precisely because they *were* advisory. The Court pointed out that it had only ever invalidated two kinds of criminal laws as void for vagueness—"laws that define criminal offenses and laws that fix the permissible sentences for criminal offenses." *Id.* (cite) (emphasis deleted). And because the advisory Guidelines "merely guide the district courts' discretion" rather than constraining it, those advisory Guidelines "do not implicate the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 894.

As for inviting arbitrary judicial enforcement, *Beckles* made clear that "[t]he *advisory* Guidelines also do not implicate the vagueness doctrine's concern with arbitrary enforcement" because they "*advise* sentencing courts how to exercise their discretion within the bounds established by Congress," rather than fixing bounds that courts must follow. *Beckles*, 137 S. Ct. at 894-95 (emphasis added). In Mr. Beckles's own case, the Court pointed out, "the [district] court relied on the career-offender Guideline merely for advice in exercising its discretion to choose a sentence within those statutory limits." *Id.* at 895. By contrast, the *mandatory* Guidelines expressly "fetter[ed] the discretion of sentencing judges to do what they have done for generations – impose sentences within the broad limits established by Congress." *Mistretta v. United States*, 488 U.S. 361, 396 (1989).

In sum, *Johnson* by its own terms held that the "ordinary case" analysis required by the language of § 924(e)(2)(B) cannot constitutionally be used to fix the bounds constraining a judge's discretion in selecting a sentence. And *Beckles* clarified that *Johnson* could not apply to *advisory* Guidelines precisely due to their advisory nature: they "merely guide," rather than constrain, that discretion. Combined, these cases lead to the conclusion that the residual clause of the mandatory Guidelines is void for vagueness.

CONCLUSION

For these reasons, Mr. Hicks respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

Date: November 20, 2019

s/ Kara Hartlzer

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