No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ALFORD D. EMBRY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2000, when the guidelines were mandatory, Alford D. Embry, Jr., was sentenced as a career offender under U.S.S.G. § 4B1.1. His career offender designation depended on the fact that he had a prior Kentucky conviction for wanton endangerment, which at the time qualified as a crime of violence only under the residual clause in § 4B1.2(a)(2). In 2015, this Court struck down as void for vagueness the identical residual clause in the Armed Career Criminal Act's definition of "violent felony" at 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson v. United States*, 135 S. Ct. 2551 (2015). Within a year, Mr. Embry filed a § 2255 motion challenging his career offender designation in light of the new rule announced in *Johnson*. But the district court dismissed the motion as untimely under 28 U.S.C. § 2255(f)(3) as required by the Sixth Circuit's decision in *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), in which it held that the new rule announced in *Johnson* does not apply to the mandatory guidelines unless and until this Court says so.

The questions presented are:

I. Whether, for purposes of 28 U.S.C. § 2255(f)(3), the new rule announced in *Johnson* applies to the identical residual clause in the mandatory guidelines, U.S.S.G. § 4B1.2 (2000)?

II. Whether the residual clause in the mandatory guidelines, U.S.S.G. § 4B1.2 (2000), is void for vagueness?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Embry*, Nos. 1:00-cr-11, 1:99-cr-67, 1:99-cr-68, District Court for the Eastern District of Tennessee. Judgment entered August 4, 2000.

(2) *Embry v. United States*, No. 1:01-cv-227, District Court for the Eastern District of Tennessee. Decision and order entered May 15, 2002.

(3) *Embry v. United States*, No. 02-5808, U.S. Court of Appeals for the Sixth Circuit. Order entered February 19, 2003.

(4) *In re Embry*, 831 F.3d 377 (6th Cir. 2016) (No. 16-5447), U.S. Court of Appeals for the Sixth Circuit. Decision entered July 29, 2016.

(5) *Embry v. United States*, Nos. 1:00-cr-11, 1:99-cr-67, 1:99-cr-68 (Nos. 1:16-cv-00518, 1:16-cv-00519, 1:16-cv-00520), District Court for the Eastern District of Tennessee. Decision and order entered October 25, 2018.

(6) *Embry v. United States*, No. 18-6346, U.S. Court of Appeals for the Sixth Circuit. Order entered September 24, 2019.

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Petitioner Alford D. Embry, Jr., respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Sixth Circuit appears at pages 1a to 4a of the appendix to this petition. The district court's unpublished decisions denying and dismissing Mr. Embry's motion under 28 U.S.C. § 2255 appear along with accompanying orders at pages 5a to 28a of the appendix to this petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' denial of Mr. Embry's certificate of appealability was entered on September 24, 2019. Pet. App. 1a. Mr. Embry requested and received a thirty-day extension to file this petition. *See* App. 19A666. This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment's Due Process Clause provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 2255(f) provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (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
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

U.S.S.G. § 4B1.2(a) (2000) provides:

> (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.

Kentucky Revised Statutes § 508.060 (1974) provided:

> A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or seriouf physical injury to another person.

STATEMENT OF THE CASE

Alford Embry, Jr., is serving a career offender sentence based on a prior conviction that qualified as a crime of violence only under § 4B1.2(a)'s hopelessly vague residual clause, which because the guidelines were mandatory fixed his permissible sentencing range. This Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015), struck down as void for vagueness the identical residual clause in 18 U.S.C. § 924(e), then applied the rule in *Johnson* to strike down as void for vagueness two similar residual clauses in two different statutes. Each was applied in the same categorical way. Yet, the courts of appeals cannot agree on whether *Johnson* likewise invalidates the mandatory guidelines' residual clause, though it was identical to the one struck down in *Johnson* and was applied in the same categorical way to fix sentencing ranges. Because the lower courts have reached a deep and intractable impasse, only this Court can resolve the matter.

This question is extremely important. Its resolution "could determine the

liberty of over 1,000 people." *Brown v. United States*, 139 S. Ct. 14, 16 (2018) (Sotomayor, J., dissenting from the denial of certiorari). With the residual clause excised as unconstitutional, Mr. Embry's § 2255 motion should be considered on the merits, and he is entitled to § 2255 relief. If resentenced today, he would likely be released from prison immediately.

A. Legal background

A federal prisoner may move to vacate his sentence under § 2255 if the sentence violates the Constitution. *See* 28 U.S.C. § 2255(a). Any such motion generally must be filed within one year of the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255(f)(1). However, a federal prisoner may later file a § 2255 motion within one year from "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." 28 U.S.C. § 2255(f)(3).

In 2015, this Court in *Johnson* struck down as void for vagueness the residual clause in the Armed Career Criminal Act at 18 U.S.C. § 924(e)(2)(B)(ii), thereby announcing a new, substantive rule retroactively applicable to cases on collateral review. 135 S. Ct. at 2557, 2563; *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). Then in *Dimaya*, this Court applied *Johnson* to strike down § 16(b)'s residual clause as void for vagueness. 138 S. Ct. at 1214-15. And in *Davis*, the Court applied *Johnson* to strike down the residual clause at § 924(c)(3)(B) as void for vagueness, once it confirmed that the same categorical approach applied to it as to

the others. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) ("We agree with the court of appeals' conclusion that § 924(c)(3)(B) is unconstitutionally vague."). By that time, even the government "acknowledge[d] that, if [the categorical approach applies to § 924(c)(3)(B)], then § 924(c)(3)(B) must be held unconstitutional too." *Id.* at 2326-27.

When Mr. Embry was sentenced in 2000, the guidelines were mandatory. When the guidelines were mandatory, they "impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S. 220, 233 (2005). It was the "binding" nature of the guidelines that created the constitutional problem in *Booker*: "[i]f the Guidelines as currently written could be read as merely advisory provisions," "their use would not implicate the Sixth Amendment." *Id.* And this "mandatory and binding" nature of the guidelines came directly from Congress. *Id.* at 233-34; *see* 18 U.S.C. § 3553(b) (directing that courts "shall impose a sentence of the kind, and within the range" established by the Guidelines). "Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws." 543 U.S. at 234.

Booker made clear that the availability of departures in no way rendered the guidelines less than mandatory and binding laws. "In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and *no departure will be legally permissible*. In those instances*, the judge is bound to impose a sentence within the Guidelines range*." *Id.* (emphasis added). Indeed, *Booker* acknowledged that had the district court departed from the mandatory

guidelines range in Booker's case, the judge "would have been reversed." *Id.* at 234-35. And *Booker*'s understanding that the mandatory guideline range fixed the statutory penalty range was well-established. *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) ("The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory."); *Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"); *Stinson v. United States*, 508 U.S. 36, 42 (1993) (noting "the principle that the Guidelines Manual is binding on federal courts").

The career offender guideline creates a "category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). Congress mandated that the Sentencing Commission "specify a sentence to a term of imprisonment at or near the maximum term authorized" for "categories of defendants" convicted for at least the third time of a "felony that is" a "crime of violence" or "an offense described in" particular federal statutes prohibiting drug trafficking. *See* 28 U.S.C. § 994(h). The Commission implemented the directive by tying the offense level to the statutory maximum for the instant offense of conviction and automatically placing the defendant in Criminal History Category VI if the defendant's instant offense, and at least two prior convictions, constitute a "crime of violence" or a "controlled substance offense." U.S.S.G. § 4B1.1(a)-(b).

Beginning in 1989 and continuing through 2015, the Commission used the

definition of "violent felony" in § 924(e) to define "crime of violence" as an offense punishable by a term of imprisonment 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." U.S.S.G. § 4B1.2 (1989).

Because Congress mandated that the Commission specify a term of imprisonment at or near the statutory maximum, the Commission's one attempt to ameliorate the severity of the guideline when it was mandatory was held invalid. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997). At the same time, courts applied the guideline broadly under the vague language of the residual clause, imagining all sorts of potential risk posed by the idealized "ordinary" case. *See Johnson*, 135 S. Ct. at 2557-58, 2561. Many career offenders sentenced to harsh prison terms based on minor offenses have been unable to get relief under guideline amendments or changes in law.

B. Proceedings below

1. In 1999, Mr. Embry pled guilty in the Eastern District of Tennessee to one count of armed bank robbery in violation of 18 U.S.C. § 2113(a), (d); one count of using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). (Case No. 1:99-cr-67.) On the same day, he pled guilty in a separate case to two counts of armed bank robbery and

two counts of being a felon in possession of a firearm. (Case No. 1:99-cr-68.) Later, on April 12, 2000, he was found guilty after a jury trial of one count of conspiracy to escape, in violation of 18 U.S.C. § 371, and one count of assault of a federal law enforcement officer, in violation of 18 U.S.C. § 115(a)(1). (Case No. 1:00-cr-11.)

The three cases were consolidated for sentencing. The Presentence Report ("PSR") determined that he qualified as a career offender based on a finding that he had two qualifying prior convictions for "crimes of violence": a 1988 Kentucky conviction for four counts of wanton endangerment and a 1991 Kentucky conviction for fourteen counts of robbery. (PSR ¶¶ 103, 110, 111.) At the time, the Kentucky convictions for wanton endangerment qualified as a "crime of violence" only under the residual clause in § 4B1.2(a).[1]

The career offender designation dictated an enhanced guideline range of 346 to 411 months (which included a mandatory consecutive 84-month term for the conviction under 18 U.S.C. § 924(c)). (PSR ¶¶ 134, 135.) The guideline range at that time was mandatory, and Mr. Embry was sentenced on July 21, 2000 to serve an aggregate term of 378 months in prison to be followed by an aggregate term of 5 years' supervised release. (Judgment, R. 49 (No. 1:99-cr-67); Judgment, R. 12 (No. 1-99-cr-68); Judgment, R. 27 (No. 1:00-cr-11).)

[1] *See United States v. Clark*, 458 F. App'x 512, 516 (6th Cir. 2012) ("[Kentucky] first degree wanton endangerment does not include the use, attempted use, or threatened use of physical force as one if its elements, and because it does not inclue burglary of a dwelling, arson, extortion, or the use of explosives, the parties' dispute focuses on whether a conviction for wanton endangerment falls within the residucal clause of § 4B1.2(a)(2).").

Without the career offender enhancement, his guideline range (after including the mandatory 84-month consecutive term) would likely have been 252 to 294 months, based on a total offense level of 32 and a criminal history category of IV. (PSR ¶¶ 102, 114.) The career offender guideline thus increased the bottom of his guideline range by 94 months, or 7 years and 10 months.

2. Mr. Embry did not appeal, and in 2001 he filed an initial § 2255 motion. The district court denied the motion, and the Sixth Circuit denied a certificate of appealability. *Embry v. United States*, No. 02-5808 (6th Cir. Feb. 19, 2003) (order).

3. In 2015, the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the so-called residual clause in the Armed Career Criminal Act's definition of the term "violent felony" was unconstitutionally vague. After certification and authorization by the Sixth Circuit pursuant to 28 U.S.C. § 2255(h)(2) and § 2244(b)(3), *see In re Embry*, 831 F.3d 377 (6th Cir. 2016), Mr. Embry filed a § 2255 motion challenging his career offender designation. He argued that because the ACCA's residual clause is invalid, the identical provision in U.S.S.G. § 4B1.2 (2000) is also invalid; that his prior Kentucky conviction for wanton endangerment does not otherwise qualify as a crime of violence under § 4B1.2; and that, therefore, his designation as a career offender and resulting sentence are unconstitutional and he should be resentenced. The motion was held in abeyance pending pending this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017).

4. The district court denied the motion as time-barred under § 2255(f)(3) and dismissed the case with prejudice. Pet. App. 9a-10a, 17a-18a, 15a-26a. Relying on *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), the court noted that "[t]he Supreme Court to date has not recognized that individuals have a constitutional right not to be sentenced as career offenders under the residual clause of the pre-*Booker* mandatory [Sentencing Guidelines]." Pet. App. 10a n.3, 17a n.3, 25a n.3. Because the court denied Mr. Embry's claim as untimely, it did not reach the merits. It denied him permission to proceed *in forma pauperis* on appeal, and denied any future request for a certificate of appealability. Pet. App. 11a-12a, 19a, 27a.

5. Mr. Embry filed a notice of appeal and applied for a certificate of appealability on the timeliness question, as well as the question whether the rule in *Johnson* voids the residual clause of the mandatory guidelines. He pointed to the disagreement among and within circuits, and argued that *Raybon* could not be squared with this Court's later decisions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019). He argued that reasonable jurists can and do debate whether this Court recognized in *Johnson* that a person has a constitutional right not to be sentenced as a career offender under the residual clause of the mandatory guidelines. *See Welch*, 136 S. Ct. at 1263 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

6. The Sixth Circuit denied the certificate of appealability, viewing itself bound by its reaffirmance of *Raybon* in a decision issued after *Dimaya*. *See*

Chambers v. United States, 763 F. App'x 514, 518-19 (6th Cir. 2019), *pet. rh'g denied by Chambers v. United States*, 2019 U.S. App. LEXIS 19180 (6th Cir. June 26, 2019). Pet. App. 3a-4a.

Mr. Embry now seeks review of the legal questions related to timeliness directly implicated by the Sixth Circuit's denial of his certificate of appealability. *Welch*, 136 S. Ct. at 1264-65.

REASONS FOR GRANTING THE PETITION

I. The circuits are split on the question whether, for purposes of 28 U.S.C. § 2255(f)(3), the new retroactive rule announced in *Johnson* applies to the residual clause in the mandatory guidelines.

The circuits are divided. The Seventh Circuit has held that, for purposes of the statute of limitations at 28 U.S.C. § 2255(f)(3), the new retroactive rule announced in *Johnson* applies to the residual clause in the mandatory guidelines. *United States v. Cross*, 892 F.3d 288, 299-306 (7th Cir. 2018). In direct conflict, eight circuits (including the Sixth Circuit) have held that *Johnson*'s new retroactive right does not apply to the residual clause in the mandatory guidelines. *United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. Brown,* 868 F.3d 297 (4th Cir. 2017), *cert. denied*, 139 S. Ct. 14 (2018); *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. Pullen*, 913 F.3d 1270, 1283-84 (10th Cir. 2019); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

Even within these eight circuits, judges sharply disagree. *See, e.g.*, *Chambers*

v. United States, 763 F. App'x 514, 519 (6th Cir. Feb. 21, 2019) (Moore, J., concurring), *pet. for rh'g denied*, No. 18-3298 (6th Cir. June 26, 2019) (expressing view that *Raybon* "was wrong on this issue."); *Brown*, 868 F.3d at 304-05, 310 (Gregory, C.J., dissenting), *cert. denied*, 139 S. Ct. 14 (2018) ("Because Brown asserts th[e] same right [recognized in *Johnson*], I would find his petition timely under § 2255(f)(3), even though his challenge is to the residual clause under the mandatory Sentencing Guidelines, rather than the ACCA."); *London*, 937 F.3d at 510 (5th Cir.) (Costa, J., concurring in judgment) ("We are on the wrong side of a split. . . . Our approach fails to apply the plain language of the statue and undermines the prompt presentation of habeas claims the statute promotes."); *Hodges v. United States*, 778 F. App'x 413, 414-15 (9th Cir. 2019) (Berzon, J., concurring) ("[I]n my view, *Blackstone* was wrongly decided."); *Lester v. United States*, 921 F.3d 1306, 1319 (11th Cir. 2019) (en banc) (Martin, J., joined by Rosenbaum and J. Pryor, JJ., statement respecting the denial of rehearing en banc) ([T]he opinion in *In re Griffin* is mistaken."); *id.* at 1328-33 (Rosenbaum, J., joined by Martin and J. Pryor, JJ.); *see also In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir. 2016) (Jordan, Rosenbaum, Pryor, JJ.) (calling *Griffin* into question).

The First, Second, and D.C. Circuits have not decided the question, but the First Circuit strongly implied (in the context of the *prima facie* showing required for certification of a second or successive § 2255 motion) that it would agree with the Seventh Circuit on the merits. *Moore v. United States*, 871 F.3d 72, 81-82 (1st Cir. 2017); *see Pullen*, 913 F.3d at 1284 n.16 (noting that "language in Moore suggests

the panel of the First Circuit would have reached the same conclusion had it been conducting a [substantive] analysis"). Meanwhile district courts in these three circuits have granted *Johnson* relief to individuals sentenced under the residual clause in the mandatory guidelines. *United States v. Carter*, 2019 WL 5580091 (D.D.C. Oct. 29, 2019); *United States v. Hammond*, 351 F. Supp. 3d 106 (D.D.C. 2018); *Blackmon v. United States*, 2019 WL 3767511 (D. Conn. Aug. 9, 2019); *United States v. Moore*, 2018 WL 5982017 (D. Mass. Nov. 14, 2018); *Mapp v. United States*, 2018 WL 3716887 (E.D.N.Y. Aug. 3, 2018).

The deep disagreement between and within the circuits is cemented. By denying rehearing en banc in *Chambers*, the Sixth Circuit reaffirmed its holding in *Raybon* despite this Court's "straightforward application" in *Dimaya* of the rule in *Johnson* to invalidate § 16(b)'s residual clause. 138 S. Ct. at 1213. The Fifth and Eleventh Circuits also recently denied rehearing en banc. Order, *Hodges v. United States*, 778 F. App'x 413 (9th Cir. Oct. 17, 2019) (No. 17-35408); *Lester*, 921 F.3d at 1307. The Third and Eighth Circuits have likewise signaled they are not budging. *United States v. Wolfe*, 767 F. App'x 390, 391 (3d Cir. 2019); *Mora-Higuera v. United States*, 914 F.3d 1152, 1154 (8th Cir. 2019). And the Seventh Circuit has declined the government's suggestion to reconsider *Cross*, *Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019), reaffirming as recently as October 2019 its view that the mandatory guidelines' residucal clause is void for vagueness under *Johnson*, *Daniels v. United States*, 939 F.3d 898, 900 (7th Cir. 2019). This conflict will remain until this Court resolves it.

As Judge Moore in *Chambers* urged,

> [This] Court should resolve this matter. It is problematic that these individuals are potentially sentenced in violation of the Constitution or laws of the United States without clarification as to whether *Johnson* applies to a sentencing provision that is worded identically to, and is equally binding as, the ACCA's unconstitutionally vague residual clause.

Chambers, 763 F. App'x at 526-27 (Moore, J., concurring).

II. The circuits holding that *Johnson* does not apply by its own force to the mandatory guidelines' residual clause are wrong.

1. The Fourth and Tenth Circuits held before *Dimaya* that *Johnson* does not apply beyond cases involving the exact statute at issue in *Johnson*. *Brown*, 868 F.3d at 302; *Greer*, 881 F.3d at 1258. But *Dimaya* proves them wrong. It applied *Johnson* to strike down as unconstitutionally vague a similar provision in a different statute, explaining that "*Johnson* is a straightforward decision, with equally straightforward application here," and "tells us how to resolve this [§ 16(b)] case." 138 S. Ct. at 1213, 1223.

Then in *Davis*, this Court applied *Johnson* to strike down as unconstitutionally vague an identical provision in yet another statute, explaining that *Johnson* and *Dimaya* "teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" 139 S. Ct. 2319, 2326 (2019). After *Dimaya*, even the government "acknowledge[d] that, if [the categorical approach applies to § 924(c)(3)(B)], then § 924(c)(3)(B) must be held unconstitutional too." *Id.* at 2326-27; *see also Moore*, 871 F.3d at 82 (noting that government "appear[ed] to agree

that the rule is broader than [*Johnson*'s] technical holding"). Once this Court held that the categorical approach applies to § 924(c)(3)(B), the Court simply applied the rule in *Johnson* to invalidate it. *Id.* at 2336 ("We agree with the court of appeals' conclusion that § 924(c)(3)(B) is unconstitutionally vague."). The Fourth and Tenth Circuit's reasoning cannot survive *Dimaya* and *Davis*.

The Third Circuit also adopted an exact-statute approach, but it did so after *Dimaya*. *Green*, 898 F.3d at 321-22. The decision in *Green* is just as unpersuasive as *Brown* and *Greer*, however, because that decision ignores *Dimaya* entirely. *Ibid*.

These circuits' exact-statute approach conflicts with this Court's void-for-vagueness habeas precedent. In *Godfrey v. Georgia*, this Court held unconstitutional a vague Georgia capital-sentencing statute. 446 U.S. 420, 433 (1980). In a later habeas case, *Maynard v. Cartwright* held unconstitutional a vague Oklahoma capital-sentencing statute. 486 U.S. 356, 363-64 (1988). The decision in *Maynard* was "controlled by *Godfrey*," even though *Godfrey* and *Maynard* involved different sentencing statutes. *Stringer v. Black*, 503 U.S. 222, 228-29 (1992). And *Godfrey* also controlled in *Stringer* even though that case involved a vague Mississippi capital-sentencing scheme of a different character than the one in *Godfrey*. *Id.* at 229. This line of precedent makes clear that an exact-statute approach is wrong. They show that this case is "controlled by [*Johnson*]," even though *Johnson* involved a different law fixing permissible sentences. [2]

[2] Although *Raybon* might be read as limited to the guidelines' context, the Sixth Circuit after *Dimaya* applied *Raybon* before *Davis* as an exact-statute rule in the context of the residual clause in § 924(c)(3)(B) and § 2255(h)(2). *In re Waters*, No. 18-

The Sixth and Ninth Circuits relied primarily on *Beckles* (as did the Third Circuit in addition to the exact-statute approach). *Raybon*, 867 F.3d at 63; *Blackstone*, 903 F.3d at 1026; *Green*, 898 F.3d at 321-22. *Beckles* held that *Johnson* does not provide relief for individuals sentenced under the advisory guidelines' residual clause because the advisory guidelines "do not fix the permissible range of sentences." 137 S. Ct. at 892. But *Beckles* distinguished advisory guidelines from mandatory guidelines, *id.* at 894, and cabined its decision: "We 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," *id.* at 896. *Beckles* does not hold that *Johnson*'s rule does not apply to the mandatory guidelines.

The Sixth and Ninth Circuits also relied on footnote 4 of Justice Sotomayor's concurrence in *Beckles*. *Blackstone*, 903 F.3d at 1026; *Raybon*, 867 F.3d at 629-30. In that footnote, Justice Sotomayor, like the majority opinion, cabined the decision in *Beckles* to the advisory guidelines:

> The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in [*Booker*]—that is, during the period in which the Guidelines did "fix the permissible range of sentences"— may mount vagueness attacks on their sentences.

Beckles, 137 S. Ct. at 903 n.4 (cleaned up). Rather than take *Beckles* (and Justice

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5580, 2018 U.S. App. LEXIS 30510, at *4 (6th Cir. Oct. 26, 2018). It acknowledged that *Johnson* and *Dimaya* may "require the invalidation" of that statute's residual clause, but said that this Court had not yet so held. But under the *Godfrey/Maynard/Stringer* line of precedent, if *Johnson* "*requires* the invalidation" of a criminal provision fixing the scope of criminal liability, as *Davis* has since held, then *Johnson* is the rule.

Sotomayor's concurrence) at its word—that *Johnson* does not extend to the advisory guidelines—the courts fixate on Justice Sotomayor's use of the phrase "leaves open the question" to conclude that *Johnson* could not apply to the mandatory guidelines because that question is an open one. *Blackstone*, 903 F.3d at 1027; *Raybon*, 867 F.3d at 629-30. But it is the decision in *Beckles*, not *Johnson*, that purports to leave that question open. *Brown*, 139 S. Ct. at 15 (Sotomayor, J., dissenting). Although the advisory guidelines are not subject to void-for-vagueness challenges, that does not mean that the mandatory guidelines are not. *Beckles*, 137 S. Ct. at 894-96. *Beckles* did not answer this question because it was not presented. These circuits have misinterpreted *Beckles* to preclude them from doing what they may certainly do: apply the rule in *Johnson* to an identical residual clause applied in the identical categorical way to fix the permissible range of sentences.

The Eleventh Circuit in *Griffin* drew a line between statutes and guidelines and held that a guideline could never be void for vagueness—whether advisory or mandatory. 823 F.3d at 1355. But it used bad reasoning. According to the Eleventh Circuit, guidelines cannot be vague because they "do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." *Id.* But this equally describes the recidivist sentencing statute held void for vagueness in *Johnson*. And as mentioned above, this Court declared sentencing provisions void for vagueness in *Godfrey*, *Maynard*, and *Stringer*. The Eleventh Circuit's reasoning also "denies [] reality" by pretending that the mandatory "'were never really mandatory,'" even though courts applied them that way for two

decades." *Lester*, 921 F.3d at 1330-31 (Rosenbaum, J., joined by Martin and J. Pryor, JJ.,).

The Fifth, Eighth, and Tenth Circuits engaged in a retroactivity analysis under *Teague v. Lane*, 489 U.S. 268 (1989), to define the scope of *Johnson*'s right. *London*, 937 F.3d at 506-07; *Russo*, 902 F.3d at 882-83; *Pullen*, 913 F.3d at 1280-81. But *Johnson*'s retroactivity is not in question. This Court has already held that *Johnson*'s new rule is retroactive. *Welch*, 136 S. Ct. at 1265. The dispositive question here is the substantive scope of the rule, which this Court has defined as applying to provisions that "fix the permissible range of sentences." *Beckles*, 137 S. Ct. at 892.

The Tenth Circuit adopted the test employed by the Eighth Circuit in *Russo*. *Pullen*, 913 F.3d at 1281. That test asks whether the application of the newly recognized right is "dictated by precedent" and "apparent to all reasonable jurists" as opposed to "susceptible to debate among reasonable minds." *Id.* The Eighth Circuit derived this test from three decisions: *Teague*, 489 U.S. at 301, *Butler v. McKellar*, 494 U.S. 407, 415 (1990), and *Chaidez v. United States*, 568 U.S. 342, 347 (2013).

These decisions dealt with retroactivity, not the scope of a newly recognized right. In *Teague*, this Court conducted a retroactivity analysis and determined that the petitioners' proposed new rule would not apply retroactively to cases on collateral review. 489 U.S. at 301. Thus, this Court declined to consider "whether the fair cross section requirement should be extended to the petit jury." *Id.* at 309-

10, 316. Because *Teague* did not address the scope of the right asserted by the defendant, *Teague* provides no direct guidance on that issue.

Butler also involved retroactivity. There, a later decision made clear that the defendant's interrogation was unconstitutional. 494 U.S. at 411-12. The scope of the new right was not in question, only whether this right applied retroactively to cases on collateral review. *Id.* at 412-13. The issue here is not whether *Johnson* is retroactive. It is. The issue is whether *Johnson*'s right encompasses the mandatory guidelines. Nothing in *Butler* helps to answer that question.

Chaidez also involved retroactivity, so for that reason is also not directly on point. 568 U.S. at 344. Even so, as Judge Costa recognized, the retroactivity analysis provides a useful analogy for defining the scope of a newly recognized right. *London*, 937 F.3d at 512 (Costa, J., concurring in the judgment). *Chaidez* explains "that a case does not announce a new rule when it is merely an application of the principle that governed a prior decision to a different set of facts." *Id.* at 347-48 (cleaned up).

> Where the beginning point of our analysis is a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent. Otherwise said, when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes.

Id. at 348 (cleaned up). If anything, *Chaidez* confirms that *Johnson*'s newly recognized right applies to the mandatory guidelines. *Dimaya* plainly shows us that *Johnson* announced "a rule of general application, a rule designed for the

specific purpose of evaluating a myriad of factual contexts," *id.*; 138 S. Ct. at 1210-23, while *Booker* establishes that the mandatory guidelines fixed the permissible range of sentences, satisfying *Beckles*' test for the substantive scope of *Johnson*'s rule. For purposes of the statute of limitations under § 2255(f)(3), Mr. Embry needs no new rule to have timely asserted the right announced in *Johnson*

2. *Booker* held that the application of the mandatory guidelines violated a defendant's Sixth Amendment right to have a jury find facts "essential to his punishment." 543 U.S. at 232. Because, under a mandatory guidelines scheme, judges were authorized to find facts "necessary to support a sentence exceeding the maximum authorized by" a defendant's guilty plea or a jury's verdict, the mandatory guidelines violated the Sixth Amendment. *Id.* at 244 (emphasis added). *Booker* made clear that the mandatory guidelines "impose[d] binding requirements on all sentencing judges." *Id.* at 233. It was the "binding" nature of the guidelines that triggered a constitutional problem: "[i]f the Guidelines as currently written could be read as merely advisory provisions," "their use would not implicate the Sixth Amendment." *Id.* And this "mandatory and binding" nature of the guidelines came directly from Congress. *Id.* at 233-34; 18 U.S.C. § 3553(b) (directing that courts "shall impose a sentence of the kind, and within the range" established by the Guidelines). "Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws." 543 U.S. at 234.

Booker rejected the idea that the availability of departures rendered the guidelines anything less than mandatory and binding laws. "In most cases, as a

matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range." *Id.* (emphasis added). Indeed, *Booker* acknowledged that, had the district court departed from the mandatory guidelines range in Booker's case, the judge "would have been reversed." *Id.* at 234-35.

In *Booker*, the government argued that the guidelines did not violate the Sixth Amendment because they "were promulgated by a Commission rather than the Legislature." *Id.* at 237. But *Booker* rejected the distinction. "In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance." 543 U.S. at 237. It did not matter "whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission." *Id.* at 239. Rather, "the Commission is an independent agency that exercises policymaking authority delegated to it by Congress." *Id.* at 243.

Booker reflects this Court's long understanding that the mandatory guidelines range fixes the statutory penalty range. *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) ("The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory."); *Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in

criminal cases"); *Stinson v. United States*, 508 U.S. 36, 42 (1993) (noting "the principle that the Guidelines Manual is binding on federal courts"). In *R.L.C.*, this Court held that the applicable "maximum" term of imprisonment authorized for a juvenile tried and convicted as an adult was the upper limit of the guidelines range that would apply to a similarly situated adult offender. 503 U.S. at 306-07. The decision in *R.L.C.* makes sense only if the mandatory guidelines range was the statutory penalty range.

Beckles cabins *Johnson*'s right to provisions that "fix the permissible range of sentences." 137 S. Ct at 892. The mandatory guidelines did just that. *Booker*, 543 U.S. at 232-243; *Cross*, 892 F.3d at 306 ("as the Supreme Court understood in *Booker*, the residual clause of the mandatory guidelines did not merely guide judges' discretion; rather, it mandated a specific sentencing range and permitted deviation only on narrow, statutorily fixed bases"); *Moore*, 871 F.3d at 81 (noting *Booker* "essentially resolved" this issue when it ruled that "the Guidelines [were] binding on district judges").

3. The Seventh Circuit got it right. It held that for purposes of § 2255(f)(3), the new retroactive rule announced in *Johnson* applies to the residual clause in the mandatory guidelines. *United States v. Cross*, 892 F.3d 288, 299-306 (7th Cir. 2018). In doing so, the Seventh Circuit rejected the approach taken by other circuits, explaining that it "suffers from a fundamental flaw" because

> [i]t improperly reads a merits analysis into the limitations period. Section 2255(f)(3) runs from "the date on which the right *asserted* was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3) (emphasis added). It does not say that the 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. An alternative reading would require that we take the disfavored step of reading "asserted" out of the statute.

Id. at 293-94. The court held that the right asserted "was recognized in *Johnson*." *Id.* "Under *Johnson*, a person has a right not to have his sentence dictated by the unconstitutionally vague language of the mandatory residual clause." *Id.* at 294. Because the appellants "assert precisely that right," they therefore "complied with the limitations period of section 2255(f)(3) by filing their motions within one year of *Johnson*." *Id.*

Turning to the merits question, the Seventh Circuit concluded that the "same two faults" that render the ACCA's residual clause—the combined indeterminacy of how much risk the crime of conviction posed and the degree of risk required—"inhere in the residual clause of the guidelines." *Id.* at 299. It "hardly could be otherwise" because the clauses are identically worded and the categorical approach applies to both. *Id.* Additionally, the Seventh Circuit held that the mandatory Guidelines' residual clause implicated the twin concerns of the vagueness doctrine because it fixed the permissible range of sentences. *Id.* at 305.

The court explained that *Beckles* "reaffirmed that the void-for-vagueness doctrine applies to 'laws that fix the permissible sentences for criminal offenses.'" *Id.* (quoting *Beckles*, 137 S. Ct. at 892). "As Booker described, the mandatory guidelines did just that. They fixed sentencing ranges from a constitutional perspective." *Id.* Because the Guidelines were "'not advisory'" but "'mandatory and binding on all judges,'" *id.* (quoting *Booker*, 543 U.S. at 233-34), "[t]he mandatory

guidelines did . . . implicate the concerns of the vagueness doctrine." *Id.*

In sum, because the Sixth Circuit's decision is both inconsistent with this Court's precedent and incorrect on its own terms, review is necessary.

III. This case is an excellent vehicle for addressing this important question.

"Regardless of where one stands on the merits of how far *Johnson* extends, this case presents an important question of federal law that has divided the courts of appeals and in theory could determine the liberty of over 1,000 people." *Brown*, 139 S. Ct. at 14 (Sotomayor, J., dissenting from the denial of certiorari). And because the guidelines are no longer mandatory, it is impossible to resolve this issue on direct appeal.

It is no answer that some of these offenders ultimately may not be eligible for relief. This Court in *Welch* decided the question of *Johnson*'s retroactivity even though his eligibility for relief remained in dispute. *Welch*, 136 S. Ct. at 1263-64. In any event, Mr. Embry is plainly eligible, and the government has never contended otherwise. In the absence of the residual clause, he does not have two prior convictions for crimes of violence.[3] As the law stands, he will serve an illegal sentence simply because he was sentenced in the Sixth Circuit, while untold numbers of offenders will get relief from their sentences in the Seventh Circuit and elsewhere. Unless this Court grants certiorari to resolve the issue, the liberty of

[3] The multiple counts of robbery referenced in paragraph 11 of the PSR are counted only as a single crime of violence, as they were not counted separately for criminal history points. Pursuant to U.S.S.G. § 4B1.2(c)(2), in order for a person to have two prior felony convictions count as two career offender predicates, their sentences must be "counted separarely under the provisions of § 4A1.1(a), (b), or (c)."

federal prisoners sentenced under the mandatory residual clause will continue to depend on the luck of geography.

This case also squarely presents the issue. Mr. Embry preserved the issue below, and the Sixth Circuit denied the certificate of appealability in these § 2255 proceedings based on its binding precedent in *Raybon*. Should this Court hold that *Johnson* applies by its own force to the mandatory guidelines, Mr. Embry would prevail on the merits of his claim, and his guideline range would be reduced by nearly eight years, to 252 to 294 months. Having now served approximately 225 months in real time (the equivalent of 264 months served assumeing full credit for good time), he would eligible for immediate relase. His liberty interests are urgent and compelling.

IV. This Court should also resolve whether the mandatory guidelines' residual clause is void for vagueness.

The one circuit (the Seventh) that has definitively reached the merits of this issue after *Beckles* has held that the mandatory guidelines' residual clause is void for vagueness. *Cross*, 892 F.3d at 307. That decision is correct. The language of § 4B1.2(a)(2)'s residual clause at issue in *Cross* (and here) is identical to the residual clause struck down in *Johnson* (§ 924(e)(2)(B)(ii)). When mandatory, the guidelines operated as statutes, so could be void for vagueness like statutes. *See* Part II.2, *supra*. Just as the residual clauses at issue in *Johnson*, *Dimaya*, and *Davis* are void for vagueness, § 4Bl.2(a)(2)'s mandatory residual clause must also be void for vagueness.

CONCLUSION

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

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