No. 20-1233

IN THE
Supreme Court of the United States

JOHNNY GATEWOOD,
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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

This is the rare case that presents two clear, acknowledged, and outcome-determinative circuit splits. In four circuits, Gatewood would be entitled to an adjudication on the merits of his habeas petition. In three circuits—including the Sixth Circuit below—he is not. The government agrees that there is a "division of authority," Opp. 20, and that division has only deepened. *See Granda* v. *United States*, 990 F.3d 1272, 1287-88 (11th Cir. 2021) (joining Sixth Circuit's position). The decision below is contrary to this Court's precedent and is bad policy: Requiring defendants to raise fruitless arguments—in the hope that this Court may someday reverse course—

prevents defendants from focusing on their meritorious claims, and it wastes the resources of the federal courts. The Court should grant review now, when the courts are in the midst of addressing these issues, and resolve the deep division among the circuit courts.

ARGUMENT

I. THERE ARE TWO ACKNOWLEDGED CIRCUIT SPLITS, WHICH HAVE NOW DEEPENED.

1. The government contends that Gatewood "overstates the extent of any conflict" over the first question presented, Opp. 17, which asks "[w]hether cause exists to excuse a habeas petitioner's procedural default when near-unanimous circuit precedent foreclosed the petitioner's claim." Pet. i. There is a clear split.

The Seventh Circuit holds that a habeas petitioner who did not challenge his residual-clause sentence on direct review can show cause to excuse procedural default given the "substantial body of circuit court precedent" foreclosing such challenges. *Cross* v. *United States*, 892 F.3d 288, 296 (7th Cir. 2018) (describing this scenario as "compelling grounds to excuse * * * procedural defaults"). The Sixth Circuit held below, in contrast, that "[e]ven the alignment of the circuits against a particular legal argument does not equate to cause for procedurally defaulting it." Pet. App. 9a-10a (internal quotation marks omitted). That is a straightforward, acknowledged circuit split involving two nearly identical cases. *See id.* at 9a-10a n.2.

The government concedes that *Cross* "directly address[es] the * * * question presented here," but claims that decision "offers no rebuttal to the logic of the decision below." Opp. 19. The fact that the

Seventh Circuit adopted a different analysis than the Sixth Circuit, however, is a reason to grant certiorari, not a reason to deny review. The government also contends that there is an intra-circuit split between *Cross* and *United States* v. *Smith*, 241 F.3d 546, 548 (7th Cir. 2001). Opp. 19. As the petition explains, however, the Seventh Circuit's two-decades-old decision in *Smith* states merely "that a legal argument would have been unpersuasive to a given court does not constitute 'cause' for failing to present that argument." *Smith*, 241 F.3d at 548. *Smith* does not address the question presented here—whether *uniform circuit precedent* excuses procedural default. *See* Pet. 21 n.3. The Seventh Circuit agrees that *Smith* does not govern that question: The government cited *Smith* in its brief in *Cross*, but the Seventh Circuit was unpersuaded. *See* Appellee Br. at 28, *Cross*, 892 F.3d 288 (No. 17-2282).

The split is much deeper, moreover, than the Sixth and Seventh Circuits. The Third and Ninth agree that a petitioner is not required to raise a claim on direct review to preserve it for later habeas proceedings where "a solid wall of circuit authority" foreclosed that claim. *English* v. *United States*, 42 F.3d 473, 479 (1994); *see United States* v. *Doe*, 810 F.3d 132, 153 (3d Cir. 2015). The government asserts that *English* is not on point, *see* Opp. 17, but the fact that Gatewood would be entitled to a hearing on the merits of his claim in the Ninth Circuit, but is not entitled to such a hearing in the Sixth, demonstrates the split.

The government also asserts that *Doe* does not "clearly" address the question presented. Opp. 18. But *Doe* plainly states that "[w]hen the legal basis for a claim was not reasonably available to counsel, there

is 'cause' for a procedural default," and it cites a "solid wall of [contrary] circuit authority" as a circumstance when a claim is not reasonably available. 801 F.3d at 153 (internal quotation marks and citation omitted). So in the Third Circuit, Gatewood would be entitled to a hearing on the merits, once again underscoring the split. The fact that *Doe also* ruled against the government on alternative grounds does not undermine the split; *Doe* governs subsequent Third Circuit cases. *See Mariana* v. *Fisher*, 338 F.3d 189, 201 (3d Cir. 2003) (alternative holdings are "binding precedent" in the Third Circuit (internal quotation marks omitted)).

The government does not contest that the Eighth and Eleventh Circuits join the Sixth Circuit's side of the split. *See* Pet. 19-21. Nor does it contest that the Eight and Eleventh Circuits' positions were adopted over vigorous intra-circuit dissent. *See United States* v. *Moss*, 252 F.3d 993, 1005-1006 (8th Cir. 2001) (Arnold, J., dissenting); *McCoy* v. *United States*, 266 F.3d 1245, 1272-74 (11th Cir. 2001) (Barkett, J., concurring in result only). The Eleventh Circuit has recently affirmed its position. *See Granda*, 990 F.3d at 1286-88; *Samson* v. *United States*, No. 19-11048, 2021 WL 1235698, at *3 (11th Cir. Apr. 2, 2021) (per curiam) (citing *Granda* for the proposition that none of circumstances identified in *Reed* v. *Ross*, 468 U.S. 1 (1984), excuse procedural default of a residual-clause challenge). No further percolation is needed on this straightforward legal question, on which many courts have weighed in.[1]

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[1] The government contends that the First, Fourth, and Tenth Circuits join the Sixth's side of the split. *See* Opp. 16-17. But these circuits have suggested that *Bousley* narrowed *Reed* in

2. There is also a clear, acknowledged split over the second question presented, which asks "[w]hether cause exists to excuse a habeas petitioner's procedural default when this Court explicitly overrules one of its precedents." Pet. i.

The government agrees that there is a "division of authority" among the Sixth, Seventh, and Tenth Circuits, which it concedes have "squarely confronted the question presented." Opp. 20-21. Since the petition was filed, the Eleventh Circuit has joined the Sixth Circuit's side of the split, holding that this Court's decisions in *Johnson* v. *United States*, 576 U.S. 591 (2015), and *United States* v. *Davis*, 139 S. Ct. 2319 (2019), do not provide cause to excuse procedural default of a residual-clause challenge. *See Granda*, 990 F.3d at 1286. Courts in the Eleventh Circuit have followed that approach in at least four more cases in the past two months alone. *See, e.g.*, *Martinez* v. *United States*, No. 20-10598, 2021 WL 1561593, at *2-3 (11th Cir. Apr. 21, 2021) (per curiam); *Gonzalez* v. *United States*, No. 20-13413, 2021 WL 1987185, at *2-3 (11th Cir. May 18, 2021); *Samson*, 2021 WL 1235698, at *3; *Brown* v. *United States*, No. 19-62117-CV, 2021 WL 2012357, at *1 n.1 (S.D. Fla. May 20, 2021).

A clear, acknowledged 2-2 split on an important issue of habeas law is plainly worthy of this Court's attention. To the extent the government claims that the split should be even deeper before this Court grants certiorari, it does not contest that it has repeatedly declined to appeal adverse district court decisions in

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certain respects; they have not addressed whether near-unanimous circuit precedent provides cause to excuse procedural default. *See* Pet. 21 n.3. In any event, if the split is deeper, it is more—not less—worthy of this Court's attention.

this area, preventing a deeper split from developing. *See* Pet. 23 n.4.

3. Both questions presented operate in tandem to control whether litigants have an opportunity to pursue procedurally-defaulted claims. Whether a defendant can challenge a constitutional error in his sentence—or is instead forever barred from doing so—is a fundamental legal question that deeply impacts habeas petitioners. Right now, petitioners in the Third, Seventh, Ninth, and Tenth Circuits are entitled to a hearing on the merits of their residual-clause challenge. Petitioners in the Sixth, Eighth, and Eleventh Circuits are not. That split is the only one that matters to habeas petitioners, who in many cases seek relief from life sentences. This deep division in authority is ample reason to grant certiorari.

II. THE DECISION BELOW IS WRONG.

The decision below is wrong, and none of the government's attempts to rehabilitate it succeed.

The Sixth Circuit's decision is irreconcilable with this Court's decision in *Reed*. *See* Pet. 25-28. The government repeatedly cites *Bousley* v. *United States*, 523 U.S. 614 (1998), but that case addresses whether a petitioner can overcome procedural default when he failed to raise a claim that was the subject of a circuit split. *See* Pet. 26. It does not address claims that are foreclosed by uniform circuit precedent or situations where this Court overrules its own precedent. *See id.* at 26-27; Br. Amicus Curiae of Americans for Prosperity Foundation 13-14 ("Americans for Prosperity Br."). The Sixth Circuit's rule has no basis in precedent, and it "layers onto Section 2255's already onerous statutory requirements an additional judicial roadblock that stands in tension with the statutory scheme

itself." Americans for Prosperity Br. 14-15. Habeas relief "should not be precluded by application of insurmountable judge-made barriers that deny the relief that Congress intended to confer." *Id.* at 15.

The decision below is also bad policy. The Sixth Circuit's approach "undermines a criminal defendant's right to receive an effective defense and imposes significant, unnecessary burdens on defendants, their counsel, and the courts." Br. Amici Curiae of Center on the Administration of Criminal Law at NYU School of Law et al. 3. "[D]efendants are necessarily hurt by a rule that encourages counsel to devote a portion of their time to developing and pursuing arguments that are foreclosed by existing precedent." *Id.* at 7-8. Such a rule hurts courts too, which are "already overburdened with meritless and frivolous cases and contentions." *Reed*, 468 U.S. at 16 (internal quotation marks omitted); *see also* Americans for Prosperity Br. 18 (characterizing the rule below as "wildly inefficient").

The Government asserts that this is speculation, Opp. 15, but the decision below has *already* forced practitioners in the Sixth Circuit to make arguments on appeal that are plainly foreclosed by precedent. In *United States* v. *Skaggs*, the defendant appealed a claim that he acknowledged would not succeed under current law, citing *Gatewood* for the proposition that "defendants must raise even the most hopeless claims to preserve them in the event the Supreme Court someday changes the law." Appellant's Br. at 9, *Skaggs*, No. 20-6106 (6th Cir. Apr. 29, 2021), 2021 WL 1847017. And in *United States* v. *Williams*, the defendant raised an argument that the Sixth Circuit had rejected "in no uncertain terms in a published opinion" because "*Gatewood* suggests" that the defendant

"must raise the issue to avoid procedural default of his claim should he be in a position to challenge his sentence while imprisoned." Appellant's Br. at 23-24, *Williams*, No. 20-6161 (6th Cir. Dec. 10, 2020), 2020 WL 7482241.

The government contends, for the first time in these proceedings, that *Reed*'s framework for procedural default is no longer good law after this Court's decision in *Griffith* v. *Kentucky*, 479 U.S. 314, 325-326 (1987). *See* Opp. 13. If the government is arguing that *Reed* should be overruled, it draws the wrong conclusion. In *Griffith* and its progeny, this Court rejected a case-by-case approach to determining whether a defendant is entitled to retroactive relief. *See* 479 U.S. at 326-328. It instead held that defendants are entitled to the benefit of new constitutional rules if their case is pending on direct review or if a new constitutional rule applies retroactively on collateral review. *See id.*; *Teague* v. *Lane*, 489 U.S. 288, 307-310 (1989) (plurality op.). To the extent the government advocates for adopting that framework to assess whether petitioners can raise claims on collateral review, the answer is clear: This Court held in *Welch* v. *United States*, 136 S. Ct. 1257 (2016), that *Johnson* is a "new rule" that "has retroactive effect * * * in cases on collateral review." *Id.* at 1264-65. Under that framework, Gatewood is entitled to adjudication of the merits of his claim.

III. THERE ARE NO VEHICLE PROBLEMS.

1. In an attempt to sidestep this Court's review of two acknowledged circuit splits, the government argues that Gatewood's habeas petition fails on the merits. *See* Opp. 22-25. But neither the district court nor the Sixth Circuit reached the merits. *See* Pet. App.

14a, 19a-21a. This Court "does not ordinarily decide questions that were not passed on below." *City & Cnty. of San Francisco* v. *Sheehan*, 575 U.S. 600, 609 (2015).

In any event, the government is wrong. Petitioner's prior convictions for Arkansas robbery are *not* a categorical match for the enumerated offense or elements clauses of 18 U.S.C. § 3559. Those clauses require the government to show that a robbery offense categorically requires the use of "force," 18 U.S.C. § 3559(c)(2)(F)(ii), or "force and violence," *id*. § 2111 (cross-referenced by *id*. § 3559(c)(2)(F)(i)). Arkansas' robbery statute does not meet those requirements.

The government cites only a portion of the statute at issue, which defined robbery as the "felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation." Opp. 23 (quoting Ark. Stat. Ann. § 41-3601 (1964)). The government tellingly omits the remainder of the statute, which states that "the manner of the force or the mode of intimidation *is not material*, further than it may show the intent of the offender." *Decker* v. *State*, 471 S.W.2d 343, 344 (Ark. 1971) (emphasis added) (quoting Ark. Stat. Ann. § 41-3601 (1964)). This statutory text does *not* meet the "force" or "force and violence" requirements.

In fact, the Arkansas legislature subsequently modified the definition of robbery—*after* Petitioner's convictions—"to shift the focus of the offense from the taking of property to the threat of physical harm to the victim." *Jarrett* v. *State*, 580 S.W.2d 460, 461 (Ark. 1979). Arkansas' revised statute requires a person to "employ physical force upon another," and defined force to include "among other things, any bodily

impact or the threat thereof." *Id*. (quoting Ark. Stat. Ann. §§ 41-2103, 41-2102 (1977)). That amendment confirms that, at the time of Petitioner's conviction, Arkansas robbery did not require "force" as defined in either the elements or enumerated offense clauses.

An issue that was not passed on below (and where petitioner is likely to prevail) is not an obstacle to certiorari.

2. The government also contends that review in this case is "complicated" by the fact that Gatewood was sentenced under the residual clause of the three-strikes statute, rather than the residual clause of the Armed Career Criminal Act, which was at issue in *Johnson*. Opp. 25. That is not a vehicle problem, for two reasons.

First, most of the circuit courts that have addressed whether a petitioner has cause to excuse procedural default of a residual-clause challenge have done so in cases that do not involve sentences under the Armed Career Criminal Act. The decision below addresses the residual clause of the three-strikes statute, the Seventh Circuit's decision in *Cross* addresses the residual clause of the mandatory sentencing guidelines, and the Eleventh Circuit's decision in *Granda* addresses the residual clause of 18 U.S.C. § 924(c). *See also supra* p. 5 (citing additional Eleventh Circuit decisions addressing other residual-clause provisions). None of those cases suggests that a different constitutional analysis applies depending on the residual clause at issue. Indeed, the Sixth Circuit held below that Gatewood could not show cause to excuse procedural default because other defendants had raised residual-clause challenges to other statutes. *See* Pet. App. 7a-8a. And in *Granda*, the Eleventh Circuit

similarly concluded that residual-clause challenges to other criminal statutes gave a petitioner the "tools" to challenge a different residual-clause provision. 990 F.3d at 1287-88.[2]

Second, the time to challenge sentences under this Court's 2015 decision in *Johnson*, which addressed the residual clause of the Armed Career Criminal Act, has come and gone. *See* 28 U.S.C. § 2255(f)(3) (habeas petitions must be filed within one year of this Court's decision). The circuit courts, however, are still addressing residual-clause challenges to other statutory provisions under the Court's 2019 decision in *Davis*. By asking the Court to wait for a case that involves a challenge to the residual clause of the Armed Career Criminal Act, the government seeks to avoid review altogether. In contrast, granting this petition would permit the Court to address the kind of case that the courts of appeals currently face.

3. The government asserts that the second question presented is of "diminishing significance." Opp. 21-22. That is incorrect. This question is of pressing significance right now. The Eleventh Circuit has issued four decisions addressing it in just the past two months. *See supra* p. 5. This question has broader relevance, moreover, beyond the residual-clause context; it arises any time this Court explicitly overrules prior precedent. Given the acknowledged split on this

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[2] To the extent the government contends there was no circuit precedent foreclosing Gatewood's claim, that is flatly inconsistent with the government's argument that Gatewood cannot show cause to excuse procedural default because other defendants "had raised the same vagueness challenge" at the time of his sentencing. Opp. 11-12 (internal quotation marks omitted).

question—which will continue to arise in different contexts—the Court should grant certiorari.

IV. THIS COURT'S REVIEW IS URGENTLY NEEDED.

Review is urgently needed: Seven circuits are divided with respect to whether habeas petitioners can show cause to excuse procedural default of a residual-clause challenge. Given the depth of the circuit split, further percolation is unwarranted. And the time to address this issue is now. As the Eleventh Circuit's recent decisions demonstrate, the courts of appeals are facing the questions presented at this very moment, as residual-clause challenges under *Davis* work their way through the courts of appeals. If the Court forgoes review of this petition, many of those cases may reach final resolution before this Court can address the questions presented. The Court should grant the petition.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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