No. 20-7522

IN THE
SUPREME COURT OF THE UNITED STATES

JOSHUA R. JONES,

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The government admits that the circuits are divided over whether the new rule announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidates by its own force the residual clause in the mandatory guidelines. BIO at 12. But the government asks this Court to leave the split in place, rather than resolve it, offering a number of reasons: (1) the conflict is "shallow"; (2) the issue is unimportant because "only a small number of federal prisoners would be entitled to relief" on the merits; (3) the importance of the issue "diminishes" as these defendants finish serving their sentences; and (4) Mr. Jones himself may ultimately obtain relief through another, wholly discretionary mechanism that, so far at least, has been unavailable to him.

None of these arguments should deter this Court from resolving this circuit split. As the government recognizes, this issue is recurring and has not gone away. BIO at 10-11 n.2 (noting that this Court has denied review of the issue on numerous previous occasions, including recently). All but a few of this Court's previous denials occurred before the First and Second Circuits definitively staked out their conflicting positions, which only widened an intractable split. And the petitions the Court has denied since have been poor vehicles for review. In any event, the issue is not limited to the guidelines' context, but affects how courts define the scope of *any* newly recognized retroactive right. *United States v. Rumph*, 824 F. App'x 165, 168 (4th Cir. 2020), *reh'g denied*, 2020 U.S. App. LEXIS 38943 (4th Cir. Dec. 11, 2020) (explaining that the Fourth Circuit's decision in *Brown* established an interpretive framework for determining whether Supreme Court has recognized a right under § 2255(f)(3),

holding that the Court has done so only if it has 'formally acknowledged th[e] right' in a holding." (emphasis and alteration in original)). Until this Court steps in to resolve the split, it will continue to receive petitions asking it to do so.

The fact that Mr. Jones *might* in the future obtain release from custody through his motion for a sentence reduction under section 404 of the First Step Act of 2018, Pub. L. No. 115-391, is no reason to deny review. As explained below, that result is not guaranteed. *See* Part III, *infra*. For that reason, and because Mr. Jones's legal circumstances would materially change should the Court rule in his favor on the questions presented, the Court should grant the petition and resolve the question as soon as practicable. At the very least, the Court should hold the petition until it is known whether First Step Act relief will actually be granted.

I. The circuit split is not "shallow."

When the First Circuit decided *Shea v. United States*, 976 F.3d 63 (1st Cir. 2020), at the end of September 2020, it further deepened the established conflict within the courts of appeals over whether *Johnson*'s rule applies to the residual clause of the mandatory guidelines, and thus whether a § 2255 motion filed within one year of *Johnson* is timely under 28 U.S.C. § 2255(f)(3). The government refers to this conflict as "shallow" because "only" the Seventh Circuit and the First Circuit have decided the issue differently. BIO at 12. "Shallow" is the same word the government used 18 months ago to describe the early conflict among fewer courts and when there remained the possibility that the Sixth and Fourth Circuits might change course after *Dimaya* and *Davis*. *E.g.*, Br. in Opp. at 4, *Douglas v. United States*, No.

19-6510. Since then, those circuits have reaffirmed their positions, and the division has become wider and more deeply cemented.

In light of the established circuit conflict, the deep disagreement within the circuits, the two recent additions to the disagreement one on each side of the split, and with little likelihood that any circuit will change course going forward, this conflict is certainly not shallow now. There is no good reason not to resolve it, just as the Court has in the contexts of 18 U.S.C. § 924(e)(2)(B), § 16(b), and § 924(c)(3). *See Johnson v. United States*, 135 S. Ct. 2551 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *United States v. Davis*, 139 S. Ct. 2319 (2019). The resolution of this issue is every bit as needed as was the resolution of the issues in *Johnson*, *Dimaya*, and *Davis*. Without resolution, prisoners suffer different fates based solely on geography. That arbitrariness should not be tolerated. Review is necessary.

II. The constitutionality of the mandatory guidelines' residual clause presents an issue of exceptional importance that urgently needs resolution by this Court.

The government claims that the issue is unimportant because "only a small number of federal prisoners would be entitled to relief" on the merits, and in any event, the importance of the issue "diminishes" as these defendants finish serving their sentences. BIO at 13. Citing three cases in which review was denied, the government says that "the substantial majority of defendants who received a career-offender enhancement under the formerly binding Sentencing Guidelines would have qualified for that enhancement irrespective of the residual clause." BIO at 12-13 (citing Br. in Opp. at 9-10, *Bronson v. United States*, No. 19-5316; Br. in Opp. at 10-11, *Wilson v. United States*, No. 17-8746); Br. in Opp. at 16, *Gipson v. United States*,

No. 17-8637). From the cases cited, the government appears to refer to those cases in which the defendant's career-offender status may have ultimately depended not on the vague residual clause, but on former guideline commentary identifying the offense at issue as a qualifying "crime of violence," which the government contends would remove any vagueness problem in those cases. Regardless of whether the government is correct about the power of the commentary in this criminal context, *see M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 622 (1946) (holding that in the criminal context, "not even [an agency's] interpretation of [its] own regulations can cure an omission or add certainty and definiteness to otherwise vague language"), the government provides zero proof that "the substantial majority" of those sentenced as career offenders under the mandatory guidelines were sentenced based on such commentary regardless of the residual clause. Undersigned counsel has personally filed five petitions for certiorari raising this issue, and all of them, including this one, involved a person whose career-offender status unquestionably depended at the time of the original sentencing solely on the residual clause, with no complicating commentary issue.[1]

The reality is that every year until the Sentencing Commission deleted the residual clause from § 4B1.2 in 2016, hundreds of offenders were sentenced as career

[1] *See Douglas v. United States*, No. 19-6510; *Simmons v. United States*, No. 19-6521; *Embry v. United States*, No. 19-7412; *Bateman v. United States*, 19-8030; *Rodriguez-Luca v. United States*, No. 19-8100. In one, *Simmons*, the defendant's career-offender status depended on a reckless prior offense, which when he was sentenced in 2001 qualified only under the residual clause. Pet. at 8, *Simmons*, No. 19-6521. While Simmons' § 2255 proceedings were ongoing, the Sixth Circuit changed course on that point, and the question whether reckless offenses still qualify under the so-called "force clause" is now pending in this Court in *Borden v. United States*, No. 19-5410.

offenders based solely on the residual clause. This can be seen in rough form simply by comparing the numbers of career offenders sentenced before and after the Commission deleted the clause in 2016. In fiscal year 2014, when the residual clause remained in force, there were 2,119 career offenders. U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Enhancement* 18 fig.1 (2016). In fiscal year 2020, with the residual clause deleted, there were just 1,216 career offenders—a number lower by 903 offenders and reflecting a generally downward trend in the wake of the 2016 amendment. *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offenders* 2 (2021). Because the Sentencing Commission also in 2016 moved the listed commentary offenses to the text of the guideline (so that those offenses continue to be qualifying predicates by way of proper guideline text), it may fairly be deduced that the 903 fewer career offenders in fiscal year 2020 would have previously qualified solely due to the residual clause. This is not an insignificant or small number, and there is no reason to think the number of residual-clause-only career offenders in the mandatory guidelines era were any less significant.

True, it is unknown exactly how many of those sentenced as career offenders before January 2005, when *Booker* was decided, remain in prison today, now sixteen years later. One data-based estimate puts the number at over 1,000 cases. *Brown v. United States*, 139 S. Ct. 14, 16 n.1 (2018) (Sotomayor, J., dissenting from the denial of certiorari). The government has not disputed that estimate, but suggests that because the number naturally diminishes as time goes by and more are released, review is unwarranted. BIO at 13. This argument is unpersuasive. Under its logic, if

the mandatory guidelines' residual clause is indeed void for vagueness, as two Circuits have held, then the Court should force everyone remaining in prison to suffer the same fate of those in the Circuits that have decided the issue wrongly. But no such cruel equality is required. Even if the issue plausibly affects the liberty of even a few hundred defendants, it is a question of exceptional importance. *Brown*, 139 S. Ct. at 16 (Sotomayor, J., dissenting).

Also unpersuasive is the fact that some claimants would ultimately be ineligible for relief. Again, this Court in *Welch* decided the question of *Johnson*'s retroactivity even though his eligibility for relief remained in dispute. *Welch v. United States*, 136 S. Ct. 1257, 1263-64 (2016). And it granted certiorari in *Johnson*, *Dimaya*, and *Davis*, cases involving identical or analogous residual clauses, also applied using a categorical approach. As shown by the systematic review of hundreds of cases in the Eastern District of Tennessee in the wake of those decisions, with which undersigned counsel is personally familiar, the large majority of defendants were not entitled to relief in those contexts as well. But the Court addressed the constitutionality of those analogous residual clauses because the issues were exceptionally important. The issue here is no different, and no less important.

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

The government contends that this case is an "unsuitable vehicle for addressing the question presented because it may well soon become legally and/or functionally moot." BIO at 13. This is so, it says, because it has recently changed its view of Mr. Jones's request for a sentence reduction under section 404 of the First

Step Act, the appeal of the denial of which is currently pending. BIO at 13. The government now supports a reduction to time served, and recently moved the Sixth Circuit for a remand so the district court can reconsider the motion it previously opposed in light of prevailing law and its changed position. *Id.* Today, the Sixth Circuit granted that motion. Order, *United States v. Jones*, No. 19-6008 (June 7, 2021).

While Mr. Jones welcomes the remand and would certainly welcome the sentence reduction the government now supports, it is unknown if or when that relief will materialize. There is no guarantee that the district court on remand will actually exercise its discretion to grant a reduction. In the Sixth Circuit, the district court is not required to apply intervening changes to the guideline calculation for eligible offenders, but is merely permitted to consider those changes in exercising its discretion under 18 U.S.C. § 3553(a). *United States v. Maxwell*, 991 F.3d 685, 689-92 (6th Cir. 2021), *pet. for certiorari filed*, S. Ct. No. 20-1653 (May 24, 2021). And a district court is likely to be affirmed if it elects not to reduce a sentence in light of those changes. *Id.* at 693-94. This is in stark contrast to a § 2255 resentencing should the residual clause be invalidated, where Mr. Jones would receive the benefit of current law and the district court would be legally required to adequately justify any deviation above the current, corrected range—which includes adequate consideration of that sentence as compared to national sentencing outcomes in similar cases under 18 U.S.C. § 3553(a)(6)—or else be reversed as procedurally and substantively unreasonable. *See, e.g.*, *United States v. Nichols*, 897 F.3d 729, 736-38 (6th Cir. 2018);

United States v. Perez-Rodriguez, 960 F.3d 748, 757-58 (6th Cir. 2020).

The district court might also delay acting on the motion after remand for longer than it could take to review the question presented here. In a similar First Step Act appeal, the government agreed to a remand in April 2020, three months after which the Sixth Circuit granted the request and the defendant filed a lengthy supplemental brief in the district court the same day the mandate issued. *See* Order, *United States v. Terry Jackson*, No. 19-6465 (6th Cir. July 13, 2020); Supplement, *United States v. Terry Jackson*, No. 1:09-cr-00071 (E.D. Tenn. Aug. 6, 2020). Nine months later, the district court *still* has not ruled on the motion, even after the defendant filed a *pro se* motion for bond in the hopes of a favorable ruling. This Court could resolve the question presented in less time, and finally end the uncertainty for all offenders in similar circumstances. *E.g.*, *Sanchez v. Mayorkas*, __ S. Ct. __, 2021 U.S. LEXIS 2960 (June 7, 2021) (No. 20-315) (decided five months after petition granted, with full merits briefing and oral argument); *Spears v. United States*, 555 U.S. 261 (2009) (per curiam) (decided five months after petition filed without oral argument).[2]

Finally, this case is unlike the recent petitions this Court has denied, which were far lesser vehicles. In *Mayes v. United States*, 141 S. Ct. 1506 (Mar. 1, 2021) (No. 20-6992), for example, the petitioner was convicted of carjacking and his career

[2] Nor can Mr. Jones or any similar offender in the Sixth Circuit obtain relief by way of a compassionate release motion under 18 U.S.C. § 3582(c)(1)(A) based on nonretroactive changes in the law. While other circuits permit district courts to consider relevant changes in the law in support of a finding of extraordinary and compelling reasons for a sentence reduction under § 3582(c)(1)(A), the Sixth Circuit does not. *See United States v. Tomes*, 990 F.3d 500, 505 (6th Cir. 2021); *United States v. Jarvis*, __ F.3d __, 2021 WL 2253235, at *2 (6th Cir. June 3, 2021).

offender status was based on Mississippi robbery convictions, and he made no attempt to explain in his petition how his sentence was based on the unconstitutional residual clause. Mr. Jones, in contrast, has shown without question that he was sentenced based solely on the residual clause.

In *Nunez v. United States*, 141 S. Ct. 941 (2020) (No. 20-6221), a Hobbs Act robbery case, the practical impact of the residual clause was not clear. There, the maximum of the non-career offender range overlapped with the minimum of the career offender range of 151 months, and in any event the district court departed upward to 360 months "under provisions of the guidelines that permit doing so when a defendant has caused extreme psychological injury in the victim and the conduct was extreme." *Nunez v. United States*, 954 F.3d 465, 468 (2d Cir. 2020).

Mr. Jones, in contrast, is the far more typical non-violent drug offender of unremarkable circumstances for whom the career offender guideline has a massive impact, resulting in a sentence twelve years above the top of the otherwise applicable guideline sentence. Pet. at 7-8, 31-32; *see* Br. of Fed. Pub. & Community Defenders & Nat'l Assoc. Fed. Defenders as Amici Curiae in Support of Petitioner, *Beckles v. United States*, 137 S. Ct. 886 (2017) (providing data showing that "[t]he average sentence imposed on career offenders was 2.3 times that imposed on non-career offenders convicted of the same offense types").

Archer v. United States, 141 S. Ct. 832 (2020) (No. 20-5928), was denied on October 5, 2020, before Justice Barrett joined the Court. It was also a second or successive petition complicated by a second question presented, which is whether

bank robbery qualifies under the guidelines' force clause at U.S.S.G. § 4B1.2(a) or the former commentary listing robbery as a "crime of violence." Petition at i, 19-27, *Archer*, *supra*. The petitioner in *Jenkins v. United States*, 141 S. Ct. 452 (2020) (No. 19-8924), denied on the same day, had a prior murder conviction and made no claim that his case was a suitable vehicle for review.

Here, Mr. Jones is the quintessential example of someone unfairly treated by the mandatory guidelines' harsh residual clause, and the questions presented are both simple and cleanly presented. And the issue is not moot. Because discretionary First Step Act relief is neither guaranteed nor immediately forthcoming for him (and never guaranteed in any case), the Court should grant the petition now and decide the questions presented as soon as possible.

IV. Alternatively, the Court should hold the petition in abeyance.

If, on the other hand, the possibility that Mr. Jones may obtain relief by way of the First Step Act of 2018 is a reason to deny review of the questions presented, *see* BIO at 13, then Mr. Jones asks the Court to hold his petition in abeyance until he is granted release from custody by way of section 404 of the First Step Act. If after his First Step Act appeal is remanded to the district court he does not immediately obtain the relief the government now supports, then this Court should grant the petition and decide the questions presented. Mr. Jones has already overserved what should be his correct guideline sentence by more than seven excruciating years. Every single day he must continue to sit in prison is a grave injustice. *Nunez*, 954 F.3d at 472 (Pooler, J., concurring).

CONCLUSION

For the reasons here and in the petition, the Court should grant the petition for a writ of certiorari.

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