No. 22-

IN THE

Supreme Court of the United States

JOSE VARGAS-SOTO,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of procedural default bars a court from granting relief to a defendant whose conviction and sentence were predicated on an unconstitutionally vague residual clause if the movant did not anticipate and raise the vagueness claim on direct appeal years before this Court's decision in *Johnson* v. *United States*, 576 U.S. 591 (2015)).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Jose Vargas-Soto, petitioner on review, was the movant-appellant below.

The United States of America, respondent on review, was the respondent-appellee below.

No party is a corporation.

LIST OF RELATED PROCEEDINGS

United States v. *Vargas-Soto*, No. 4:11-CR-00050-Y-1 (N.D. Tex. Aug. 30, 2011)

United States v. *Vargas-Soto*, No. 11-10835; 700 F.3d 180 (5th Cir. Oct. 24, 2012)

Vargas-Soto v. *United States*, No. 12-8402 (U.S. Feb. 25, 2013)

United States v. *Vargas-Soto*, No. 4:13-CV-00880-Y (N.D. Tex. April 30, 2014)

United States v. *Vargas-Soto*, No. 14-10456 (5th Cir. July 8, 2014)

Vargas-Soto v. *United States*, 4:14-CV-00442-Y (N.D. Tex. July 29, 2014)

In re Vargas-Soto, No. 14-11082 (5th Cir. Mar. 17, 2015)

In re Vargas-Soto, No. 16-10890 (5th Cir. Sep. 2, 2016)

Vargas-Soto v. *Rickard*, 2017 WL 1788662, 1:15-CV-07012 (S.D. W.Va. May 4, 2017)

Vargas-Soto v. *Rickard*, No. 17-6618 (4th Cir. Sep. 28, 2017)

In re Vargas-Soto, No. 18-10482 (5th Cir. Aug. 14, 2018)

Vargas-Soto v. *United States*, 4:18-CV-00680-P (N.D. Tex. Apr. 7, 2020)

United States v. *Vargas-Soto*, No. 20-10705 (5th Cir. June 2, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

Jose Vargas-Soto respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 35 F.4th 979. Pet. App. 1a–43a. The District Court's opinion is reported at 452 F. Supp. 3d 491. *Id.* at 44a–53a.

JURISDICTION

The court of appeals issued its opinion on June 2, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fifth Amendment to the U.S. Constitution; 28 U.S.C. § 2255(a), (b), (f), and (h); 8 U.S.C. § 1326(a), (b)(1), and (b)(2); 8 U.S.C. § 1101(a)(43)(F); and 18 U.S.C. § 16. Those statutes are reprinted in the Appendix. Pet App. 64a–69a.

STATEMENT OF THE CASE

A. Introduction

The Fifth Circuit split with at least eight other circuits in holding that a meritorious vagueness challenge to a residual clause had been procedurally defaulted because Mr. Vargas-Soto's counsel did not anticipate—during his direct appeal in 2012—that this Court would later reverse its own precedent in *Johnson* v. *United States*, 576 U.S. 591 (2015). In those other circuits, the novelty of *Johnson*'s vagueness holding would have excused the procedural default pursuant to this Court's square holding in *Reed* v. *Ross*, 468 U.S. 1 (1984). The Fifth Circuit reached the opposite conclusion by declaring key portions of this Court's decision in *Reed* to be dicta and thus sowing considerable confusion concerning the important doctrine of procedural default.

In 2011, the district court sentenced Mr. Vargas-Soto to fifteen years in prison for illegal reentry after removal in violation of 8 U.S.C. § 1326. That sentence assumed that Mr. Vargas-Soto had previously been removed after a conviction for an "aggravated felony," 8 U.S.C. § 1101(a)(43) & § 1326(b)(2). It is now undisputed that he has never been convicted of an aggravated felony, so the maximum lawful sentence is 10 years in prison under § 1326(b)(1). Yet Mr. Vargas-Soto remains in prison today, and will remain there until at least July 2024, as he serves out the balance of an unlawful sentence.

Mr. Vargas-Soto's constitutional claim—which is predicated on the new substantive rules announced in *Johnson* and *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018)—was "previously unavailable." 28 U.S.C. § 2255(h)(2). The Fifth Circuit was wrong to find pro-

cedural default prevented consideration of his constitutional claim because his attorneys failed to anticipate and raise the issue which was then-foreclosed by this Court's precedents during his 2012 direct appeal.

B. Legal Framework

1. The Constitutionality of Residual Clauses.

This case turns on the Immigration and Nationality Act's ("INA") definition of "aggravated felony," 8 U.S.C. § 1101(a)(43), one of several definitions in immigration and criminal law that unlock more severe consequences if the defendant committed, or was previously convicted of, a certain category of crime. "Aggravated felony" includes a long list of qualifying offenses, but the relevant provision here is § 1101(a)(43)(F): "a crime of violence (as defined in section 16 of title 18 . . . for which the term of imprisonment [is] at least one year.")

Title 18's general-purpose definition of "crime of violence" includes both an "elements clause" ("an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another") and a "residual clause" ("any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"). 18 U.S.C. § 16(a), (b). This definition closely resembles several other statutory definitions of violent crimes. See*, e.g.*, 18 U.S.C. § 924(e)(2)(B) ("violent felony"); § 924(c)(3) ("crime of violence"); § 3559(c)(2)(F) ("serious violent felony"). Each "residual clause" is a catch-all provisions capable of capturing a wide range of offenses.

All three types of clauses are interpreted under the "categorical approach," an interpretive framework that focuses on the abstract elements of the offense.

See *Taylor* v. *United States*, 495 U.S. 575, 575 (1990); see also *Mathis* v. *United States*, 579 U.S. 500, 519 (2016) (The categorical approach "does not care about" facts.). But the residual clauses were the hardest to apply consistently. The enumerated offense clauses and the elements clauses depend on the presence or absence of elements. In contrast, residual clauses required courts to evaluate the *risk* posed by conduct fulfilling abstract elements in the ordinary case.

In a series of decisions beginning with *Leocal* v. *Ashcroft,* 543 U.S. 1 (2004), this Court sought to provide direction to lower courts struggling to interpret these statutory residual clauses. *Leocal* assumed that § 16(b) was determinate and capable of predictable application. *Leocal* employed the categorical approach and held that a drunk-driving accident resulting in injury is not an aggravated felony, noting that "[i]n construing both parts of § 16, we cannot forget that we ultimately are determining the [ordinary] meaning of the term "crime of violence." *Id.* at 11.

The next four residual-clause rulings arose under the ACCA. See *James* v. *United States*, 550 U.S. 192, 208–09 (2007) (Attempted burglary is a residual-clause violent felony); *Begay* v. *United States*, 553 U.S. 137, 148 (2008) (Drunk driving is not a residual-clause violent felony.); *Chambers* v. *United States*, 555 U.S. 122, 129 (2009) (Failing to report to prison is not a residual-clause violent felony); *Sykes* v. *United States*, 564 U.S. 1, 13–15 (2011) (Evading arrest in a motor vehicle is a residual-clause violent felony.).

Despite criticisms about the unpredictability of these residual clauses, the Court twice rejected the argument that the statutory language was unconstitutionally vague. See *James*, 590 U.S. at 210 n.6 (The residual clause was "not so indefinite as to prevent an ordinary person from understanding what conduct it

prohibits."); *Sykes*, 564 U.S. at 15–16 ("Although this approach may at times be more difficult for courts to implement, it is within congressional power to enact."). Justice Scalia dissented from both decisions, decrying the majorities' rejection of vagueness concerns. *James*, 590 U.S. at 230; *Sykes*, 564 U.S. at 32–35 (Scalia, J., dissenting).

Then, in 2015, the Court reversed course. In *Johnson* v. *United States*, the Court concluded that its "repeated attempts and repeated failures to craft a principled and objective standard out of the [ACCA's] residual clause" confirmed that the clause was unconstitutionally vague. 576 U.S. at 598. The problem with the statute, according to the Court, was that it required judges to imagine the ordinary case of a crime and then decide whether that ordinary case presented enough risk to satisfy the clause. This was the very method the Court used to interpret § 16(b) in *Leocal* and § 924(e)(2)(B)(ii) in *James*, *Begay, Chambers*, and *Sykes*.

In *Welch* v. *United States*, 578 U.S. 120 (2016), the Court held that the new rule in *Johnson* was substantive and therefore retroactive on collateral review. After *Welch*, thousands of defendants filed 28 U.S.C. § 2255 motions challenging the constitutionality of convictions or sentences predicated on the ACCA's residual clause and similar provisions.

This Court has subsequently applied *Johnson*'s reasoning to strike other residual clauses, including § 16(b). See *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, the Court reasoned that "*Johnson* effectively resolved the case" because "§ 16's residual clause has the same [] features as [the] ACCA." *Id.* at 1213. And, "just like [the] ACCA's residual clause, § 16(b) 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Id.* at 1223.

Dimaya for the first time established that § 16(b) was unconstitutionally vague. Similarly, in *United States* v. *Davis*, 139 S. Ct. 2319 (2019), this Court extended the logic of *Johnson* and *Dimaya* to strike the residual clause in 18 U.S.C. § 924(c)(3)(B) as unconstitutionally vague.

2. The Doctrine of Procedural Default.

Procedural default is a "general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice" or actual innocence. *Massaro* v. *United States*, 538 U.S. 500, 504 (2003) . Most of the cases discussing the doctrine involved federal constitutional challenges to state-court convictions, and thus they are infused with concerns about federalism and comity. See *Engle* v. *Isaac,* 456 U.S. 107, 135 (1982); *Reed*, 468 U.S. at 14; *Smith* v. *Murray*, 477 U.S. 527, 534 (1986); *Murray* v. *Carrier*, 477 U.S. 478, 486 (1986). The doctrine applies in § 2255 cases, see *Bousley* v. *United States*, 523 U.S. 614, 622 (1998), but not where it would create "inefficiencies." *Massaro*, 538 U.S. at 507.

One way to overcome a procedural default is to show "'cause' and 'actual prejudice.'" *Engle*, 456 U.S. at 135. These "are not rigid concepts; they take their meaning from the principles of comity and finality." *Id.* In *Reed* v. *Ross*, this Court held that the "novelty of a constitutional issue" can constitute sufficient cause to excuse a procedural default. 468 U.S. at 13–14. In cases involving novel constitutional claims, "[c]ounsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns" motivating the procedural default doctrine. *Id.* at 15. There is some tension between the general rule—which requires a defendant to raise his constitutional claim at the first opportunity and allow the lower court to rule on it—and the "novelty" excuse,

which allows the defendant to raise a claim for the first time on collateral review. But *Reed* recognized that some constitutional claims are so "embryonic" or "far fetched" at the time of appeal that it would "disrupt" lower court proceedings to require them to be raised then. *Id.* at 15–16.

Focusing on new and retroactive constitutional rules, *Reed* identified three situations where such a rule could be sufficiently novel to constitute cause: (1) a decision of this Court that "explicitly overrule[s]" its own precedent, (2) a decision that overturns "a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved," and (3) a decision that disapproves "a practice this Court arguably has sanctioned in prior cases." *Id.* at 17.

Subsequent cases have clarified that "futility," or *perceived* futility of a claim in a particular lower court, does not give rise to cause. *Smith* v. *Murray*, 477 U.S. at 535 (citing *Engle*, 456 U.S. at 102 & 130 n. 36); *Bousley*, 523 U.S. at 623 (citing *Engle*, 456 U.S. at 102). By contrast, in order to establish true novelty, a defendant must show that his claim was not "'available' at all." *Smith*, 477 U.S. at 537. *Reed* is the prototypical example, because at the time of the direct appeal, this Court had not yet announced the new constitutional rule on which the claim was predicated. *Reed*, 468 U.S. at 19.

In 1996, Congress amended § 2255 and the statutes governing habeas corpus in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214 (1996). Despite a general purpose of "reduc[ing] delays in the execution of state and federal criminal sentences," *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003), AEDPA created exceptions to most of its most

stringent provisions for the types of novel constitutional rules described by *Reed*—rules that are truly novel, and therefore "previously unavailable" to the prisoner. Most relevant here is 28 U.S.C. § 2255(h)(2), described further below. But see also 28 U.S.C. § 2244(b)(2)(A), § 2244(d)(1)(C), § 2254(e)(2)(A)(i), and § 2255(f)(3).

C. Factual and Procedural History.

In August 2011, Mr. Vargas-Soto was convicted of illegal reentry after removal in violation of 8 U.S.C. § 1326. By default, that crime carries a statutory punishment range of 0–2 years in prison. § 1326(a)(2). If the defendant was previously removed after a conviction for a felony, the punishment range becomes 0–10 years in prison. § 1326(b)(1). If the defendant was previously removed after a conviction for an *aggravated* felony, the punishment could be as high as 20 years. § 1326(b)(2).

The district court here imposed a 15-year sentence, citing Mr. Vargas-Soto's "reprehensible behavior" during a tragic drunk-driving accident in 2003. Pet. App. 4a, 61a–62a. After that accident, Mr. Vargas-Soto was convicted in state court of reckless manslaughter,[1] intoxication assault, evading arrest with a vehicle, and two counts of failing to stop and render aid. *Id.* at 61a. The district court determined that the reckless manslaughter conviction was a "crime of violence" under 18 U.S.C. § 16(b) and therefore an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F). Pet. App. 4a. Without an aggravated felony conviction, the maximum lawful sentence would be 10 years in prison. 8 U.S.C. § 1326(b)(1).

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[1] In Texas, a defendant commits manslaughter "if he recklessly causes the death of an individual." Tex. Pen. Code § 19.04(a).

Mr. Vargas-Soto appealed, arguing that the sentence was unlawful because reckless manslaughter is not an aggravated felony. Pet. App. 59a–60a. The government responded that manslaughter was a residual-clause crime of violence under 18 U.S.C. § 16(b). The Fifth Circuit affirmed without resolving that dispute because it found that evading arrest with a vehicle was a residual-clause crime of violence and therefore an aggravated felony. Pet. App. 60a. This Court denied Mr. Vargas-Soto's petition for certiorari in February 2013. *Vargas-Soto* v. *United States*, 568 U.S. 1204 (2013).

Mr. Vargas-Soto did not argue—at sentencing or on direct appeal—that § 16(b) was unconstitutionally vague. At the time, that claim was foreclosed under *Leocal*, *James*, and *Sykes*. That was true when Mr. Vargas-Soto litigated his direct appeal in 2011–2012, Pet. App. 57a–63a, and it was true when he litigated his first, *pro se* motion to vacate in 2013–2014. See *Vargas-Soto* v. *United States*, No. 4:13-cv-880 (N.D. Tex. Mar. 27, 2014), *appeal dismissed*, No. 14-10456 (5th Cir. July 8, 2014).

After *Johnson* overruled the vagueness decisions in *James* and *Sykes*, however, Mr. Vargas-Soto sought permission to file a successive § 2255 motion challenging § 16(b)'s constitutionality. Pet. App. 5a. The Fifth Circuit denied that motion in light of *United States* v. *Gonzalez-Longoria*, 831 F.3d 670, 678–79 (5th Cir. 2016) (en banc), which held that *Johnson* did not overrule the Court's "earlier, unanimous *Leocal* decision," and that *Leocal* continued to foreclose a vagueness attack against § 16(b). See Pet. App. 55a–56a; *Gonzalez-Longoria*, 931 F.3d at 677 (denying authorization because "§ 16(b) is not unconstitutionally vague on its face").

Soon after, this Court invalidated § 16(b) in *Dimaya*, and Mr. Vargas-Soto again moved for permission to

file a vagueness challenge under 28 U.S.C. § 2255(h)(2). While that motion was pending, the Fifth Circuit held that *Dimaya* "commenced the one-year clock for defendants sentenced under" § 16(b). *United States* v. *Williams*, 897 F.3d 660, 662 (5th Cir. 2018) (discussing 28 U.S.C. § 2255(f)(3)). This time, the Fifth Circuit granted Mr. Vargas-Soto's request for authorization. Pet. App. 54a.

The district court agreed with Mr. Vargas-Soto that his vagueness claim was "'so novel that its legal basis was not reasonably available to him' until the Supreme Court decided *Dimaya*." Pet. App. 48a. The district court, however, agreed with the government on the merits that reckless manslaughter was a crime of violence (and therefore an aggravated felony) under the elements clause in § 16(a). Pet. App. 49a–52a.

Mr. Vargas-Soto appealed, and the Fifth Circuit granted a Certificate of Appealability. Pet. App. 6a. Once this Court decided *Borden* v. *United States*, 141 S. Ct. 1817 (2021), it was clear that the district court's merits decision was wrong—Texas's reckless manslaughter offense does *not* have "as an element the *use*, attempted use, or threatened use of physical force *against* the person or property of another." 18 U.S.C. § 16(a) (emphasis added); see *Borden*, 141 S. Ct. at 1824 (plurality), 1835 (Thomas, J., concurring). That means none of Mr. Vargas-Soto's convictions counts as an aggravated felony after *Dimaya*. Because he had already served more than ten years in prison, the Fifth Circuit expedited the appeal.

The government offered just one argument to defend the § 1326(b)(2) conviction and sentence: that Mr. Vargas-Soto's vagueness challenge was barred because he failed to anticipate the rulings in *Johnson* and *Dimaya* during his 2012 direct appeal. U.S. C.A. Br. 9–34. Mr. Vargas-Soto replied with the same three arguments

that prevailed in district court: that he satisfied § 2255(h)(2), and that was enough; he had cause under *Reed* and actual prejudice; and even if not, procedural default would not justify forcing him to finish serving a substantively unlawful fifteen-year sentence.

In a divided decision, the Fifth Circuit affirmed denial of relief. Pet. App. 1a–32a. The majority agreed with Mr. Vargas-Soto that his successive § 2255 motion satisfied the "gatekeeping" criteria found in 28 U.S.C. § 2255(h)(2) because "*Dimaya*'s new and retroactive rule was previously unavailable." Pet. App. 8a–11a. Yet, paradoxically, the majority also agreed with the government that Mr. Vargas-Soto procedurally defaulted this "unavailable" vagueness claim when he failed to raise it on direct appeal in 2012. *Id.* at 18a–32a. The Fifth Circuit's core rationale on procedural default was that this Court's decision in *Reed* had been abrogated: "[t]he first two *Reed* categories . . . were dicta," Pet. App. 25a, and are no longer applicable in light of AEDPA and other developments. *Id.* at 22a–28a.

Judge Davis dissented. He reasoned that Mr. Vargas-Soto had cause for any default because his constitutional vagueness challenge was foreclosed by this Court's 2007 decision in *James* throughout the time his direct appeal was pending and until this Court decided *Johnson*. Pet. App. 33a. "While *James* remained effective, Vargas-Soto's claim was not 'reasonably available.'" *Id.* Judge Davis also recognized that Mr. Vargas-Soto's prior manslaughter conviction was not a "crime of violence" under § 16(a), nor an aggravated felony under any part of 8 U.S.C. § 1101(a)(43). Pet. App. 33a & n.4. Thus, Judge Davis would have granted Mr. Vargas-Soto relief. *Id.* at 33a.

"The majority opinion stands in direct contradiction to Supreme Court authority and unanimous circuit authority." Pet. App. 43a. Judge Davis explained that at least seven other circuits had rejected the majority's belief that this Court had limited or overruled *Reed*; each had held that *Johnson* gave rise to a "novel" constitutional claim that was "not reasonably available" during the preceding years. Pet. App. 35a–36a & nn.15–16. He found the majority's reliance on *Smith* and *Bousley* "confounding"—those cases did not overrule or limit *Reed*; they held that futility in a "*particular*" lower court would not give rise to cause. *Id.* 39a–40a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED.

The circuits are divided over the question presented. Eight circuits have held that the vagueness principles first recognized in *Johnson* were novel and therefore give rise to cause. See *Lassend* v. *United States*, 898 F.3d 115, 122 (1st Cir. 2018); *United States* v. *Jackson*, 32 F.4th 278 (4th Cir. 2022); *Raines* v. *United States*, 898 F.3d 680 (6th Cir. 2018); *Cross* v. *United States*, 892 F.3d 288, 296 (7th Cir. 2018); *Jones* v. *United States*, 39 F.4th 523, 525–26 (8th Cir. 2022); *Ezell* v. *United States,* 743 F. App'x 784 (9th Cir. 2018); *United States* v. *Snyder*, 871 F.3d 1122, 1124 (10th Cir. 2017); *Rose* v. *United States*, 738 F. App'x 617 (11th Cir. 2018).

Two of those circuits have held that most vagueness challenges to residual clauses survive procedural default analysis, but some do not. See *Gatewood* v. *United States*, 979 F.3d 391, 397 (6th Cir. 2020) (refusing to excuse a defendant's failure to raise a vagueness challenge to the three-strikes law's residual clause,

§ 3559(c)(2)(F)(ii), because the direct appeal happened before *James* foreclosed vagueness challenges to ordinary case residual clauses; distinguishing pre-*James* procedural defaults from post-*James* procedural defaults); *Granda* v. *United States*, 990 F.3d 1272 (11th Cir. 2021) (refusing to excuse procedural default of *Davis* claim; distinguishing *Davis* claims from *Johnson* claims), and *Herron* v. *United States*, No. 21-10212, 2022 WL 987423, at *5 (11th Cir. Apr. 1, 2022) (same).

The Fifth Circuit was the first and only circuit to reject the *Reed* framework and hold that procedural default applies across-the-board if the defendant did not anticipate and raise an as-yet unavailable vagueness challenge on direct appeal. Pet. App. 25a–32a. And the Fifth Circuit is the only court to refuse to grant relief on a novel vagueness challenge *despite* recognizing that the claim satisfies § 2255(h)(2), and despite the fact that the defendant is substantively ineligible for his current prison sentence.

A. Six Circuits Have Held, Without Reservation, That Vagueness Challenges to Residual Clauses Were Not Reasonably Available Prior to *Johnson*.

Two years after *Johnson* was decided, the Tenth Circuit addressed a § 2255 motion and excused a defendant's procedural default of a *Johnson* claim, holding that the defendant had "timely asserted a *Johnson* claim and ha[d] established cause and prejudice to avoid procedural default." *Snyder*, 871 F.3d at 1124. Expressly relying on *Reed*, the Tenth Circuit concluded that "the *Johnson* claim was not reasonably available to Snyder at the time of his direct appeal [2005]." *Id.* at 1127. When the Supreme Court "'explicitly overrule[s]' prior precedent" while articulating "'a constitutional principle that had not been previously

recognized but which is held to have retroactive application,'" then, "prior to that decision, the new constitutional principle was not reasonably available to counsel, so a defendant has cause for failing to raise the issue." *Id.* at 1127 (alteration in original) (quoting *Reed*, 468 U.S. at 17). The Tenth Circuit therefore reached the merits of Snyder's constitutional claim. *Id.* at 1128.

In 2018, the Seventh Circuit held that two defendants had cause to excuse their failure to raise on direct appeal a vagueness challenge to the residual clause in the mandatory pre-2015 version of U.S.S.G. § 4B1.2. The Seventh Circuit held that the vagueness claim fell "under *Reed*'s first category" because *Johnson* expressly overruled this Court's own precedent: "*Johnson* represented the type of abrupt shift with which *Reed* was concerned." *Cross*, 892 F.3d 296. The Seventh Circuit also emphasized the continuing validity of *Reed*, noting that this Court has continued to rely on it. *Id*. at 295 (citing *Bousley*, 523 U.S. at 622). Both defendants prevailed on the merits of their constitutional claims, and the Seventh Circuit ordered resentencing. *Id.*at 307.

The First Circuit also held that *Johnson* was novel enough to excuse an earlier default, emphasizing the effect of this Court's prior precedent in dissuading attorneys from raising the claim: "[T]he Supreme Court's decisions in *James* and *Sykes* were still good law," both of which "had rejected challenges to the ACCA's residual clause on constitutional vagueness grounds." *Lassend*, 898 F.3d at 122. The First Circuit expressly relied on *Reed*, noting that it was "bound" by this Court's statements in that case, and held that Lassend's case fell within *Reed*'s first category because "*Johnson II* expressly overruled *James* and *Sykes* in relation to the ACCA." *Id.* The First Circuit rejected the government's

argument that *Bousley* changed the novelty analysis: "*Bousley* is no help to the government because the petitioner's argument in that case was not based on a constitutional right created by the Supreme Court's overruling of its own precedent." *Id.* at 123. *Reed* unequivocally held that a defendant has "cause" for failing to foresee a change in the law when that change overrules this Court's own precedent. "That is what happened" in Lassend's case, *id.*, so his vagueness claim was novel.

The Ninth Circuit also held that a *Johnson* claim was novel enough to give rise to cause. *Ezell,* 743 F. App'x at 785 ("Ezell had cause not to challenge because at that time, Supreme Court precedent foreclosed the argument."). The Ninth Circuit recently reiterated its recognition that *Reed* controls questions of novelty. See *United States* v. *Werle*, 35 F.4th 1195 (9th Cir. 2022) (regarding a new statutory rule). The defendant had "no reasonable basis" to raise a claim on direct appeal because, at that time, "at least six circuits had been unified on this issue for nearly seventeen years." *Id.* at 1200 (quoting *Reed*, 468 U.S. at 15). The Ninth Circuit expressly rejected the argument that prevailed below: "*Bousley* did not analyze, much less overrule, *Reed*." *Id.* at 1201.

The Fourth Circuit explained that if a vagueness decision announces a new and retroactive constitutional rule, then by definition a movant has cause for failing to raise the claim earlier. *Jackson*, 32 F.4th at 283 n.3. *Jackson* was a vagueness challenge predicated on *Davis*. The Fourth Circuit had already recognized that the rule in *Davis* satisfied § 2255(h)(2). *In re Thomas*, 988 F.3d 783 (4th Cir. 2021). That, it held, was enough to defeat procedural default. *Jackson*, 32 F.4th at 283 n.3*;* see also *United States* v. *Bennerman*, 785 F. App'x

958, 963 (4th Cir. 2019) (agreeing with the approach of *Lassend*, *Cross*, and *Snyder*).

The Eighth Circuit agreed that a defendant had cause "for failing to raise" a vagueness challenge to § 924(c)(3)(B) "on direct review, because the state of the law at the time of his appeal did not offer a reasonable basis upon which to challenge the guilty plea." *Jones*, 39 F.4th at 525 (citing *Reed*, 468 U.S. at 17). Jones's claim was not "reasonably available" before this Court overruled *James* and *Sykes*. *Id.* Like the other circuits, the Eighth Circuit adheres to the *Reed* analysis as the proper framework for analyzing cause. Jones prevailed on the merits because he was substantively ineligible for conviction and sentence under § 924(c) without the residual clause. *Id.* at 526. ("Applying *Davis*, it is apparent that Jones's sentence on Count Four was imposed in violation of law.").

B. Two Circuits Have Found Cause for Typical *Johnson* Cases, but Not for Unusual and Non-Meritorious Claims.

The state-of-the-law is only slightly more complex in the Sixth and the Eleventh Circuits.

In *Raines* v. *United States*, the Sixth Circuit followed its sister circuits in recognizing that Raines "had cause for failing to raise his *Johnson* claim on direct appeal" because "*Johnson* was not decided until June 26, 2015, well after Raines's direct appeal was decided on June 11, 2013." 898 F.3d at 687. The court went on to conclude that Raines was entitled to relief under *Johnson* and ordered resentencing. *Id.* at 690.

The court reaffirmed *Raines*'s reasoning in *Gatewood* v. *United States*, but limited the holding in *Raines* to cases (like Mr. Vargas-Soto's) where the direct appeal came after this Court foreclosed the vague-

ness challenge in *James*. Gatewood challenged a mandatory life sentence under the three-strikes law, arguing that the residual clause in the "serious violent felony" definition, 18 U.S.C. § 3559(c)(2)(F)(ii), was unconstitutionally vague under *Johnson*. *Gatewood*, 979 F.3d at 393. The government raised procedural default. The Sixth Circuit held that Gatewood could *not* show cause under *Reed* because, at the time of his 2002 direct appeal (before *James*), this Court had not yet foreclosed the vagueness principles later adopted in *Johnson*. The court emphasized, however, that cause would exist for any defendant who appealed after *James* "decisively foreclosed" the vagueness challenge that would later prevail in *Johnson*. *Id.* at 396–97.

By distinguishing between pre-*James* and post-*James* direct appeals, the Sixth Circuit "part[ed] ways with the Seventh and Tenth Circuits" *Id.* at 397–98 (citing *Cross*, 892 F.3d at 295–96 and *Snyder*, 871 F.3d at 1127). That division of authority is not implicated here, because Mr. Vargas-Soto's direct appeal occurred after *James* and *Sykes* but before *Johnson.* Notably, the Sixth Circuit's analysis in *Gatewood* continued to follow *Reed*: "*Reed* is the only Supreme Court decision to address whether cause exists when Supreme Court precedent itself forecloses an argument at the time of default. *Reed* therefore remains the controlling decision on that issue." *Id.* (citing *Lassend*, 898 F.3d at 123)

Like the Sixth Circuit, the Eleventh Circuit adheres to the *Reed* framework. Unlike the Sixth Circuit and apparently any of the other circuits, the Eleventh Circuit distinguishes *Johnson* challenges and *Davis* challenges.

In *Rose* v. *United States*, the Eleventh Circuit found cause for a defendant's failure to challenge the ACCA's residual clause prior to *James*. The case fell within

Reed's first category, because *Johnson* "'explicitly overrule[d]'" two precedents of this Court "on the exact same issue." *Rose*, 738 F. App'x at 626–27. Rose, "'[b]y definition'" did "not have a 'reasonable basis' upon which to raise a vagueness challenge to the residual clause when he filed his direct appeal in 2009." *Id.* (quoting *Reed,* 468 U.S. at 17). The Eleventh Circuit rejected the government's *Bousley* argument: "*Bousley* is not on point because it did not involve a holding that 'explicitly overrule[d]' Supreme Court precedent." *Id.* at 627 (quoting *Reed*, 468 U.S. at 17).

The Eleventh Circuit, however, sees *Davis* claims attacking § 924(c)(3)(B) differently. In *Granda* and subsequently in *Herron*, the Eleventh Circuit declined to excuse the defendants' procedural defaults of challenges to the residual clause in 18 U.S.C. § 924(c), which this Court found unconstitutionally vague in *Davis*. The court applied the *Reed* framework, but concluded that *Davis* defaults do not satisfy *Reed*'s first category because "[u]nlike the *Johnson* ACCA decision, *Davis* did not overrule any prior Supreme Court precedents holding that the § 924(c) clause was not unconstitutionally vague." *Granda*, 990 F.3d at 1287; see Pet. App. 36a (emphasizing that "the *Granda* court recognized the validity of *Reed*"). The Eleventh Circuit has not yet addressed a *Dimaya* claim, such as the one brought by Mr. Vargas-Soto. And, like the Sixth Circuit's decision in *Gatewood*, the Eleventh Circuit's decisions in *Granda* and *Herron* did *not* involve a defendant who was substantively ineligible for the statutory enhancement without the residual clause.

C. The Fifth Circuit Stands Alone.

The Fifth Circuit's decision and reasoning are a stark departure from that of its sister circuits. Mr. Vargas-Soto did not raise his void-for-vagueness challenge to § 16(b) during his direct appeal, which took

place after this Court's decisions in *James* and *Sykes* but prior to this Court's decision in *Johnson*. As shown above, the overwhelming majority of circuits would find that Mr. Vargas-Soto had "cause" for any procedural default under *Reed*'s first category because *Johnson* subsequently overruled *James*, and *Dimaya* overruled and abrogated *Leocal*. If Mr. Vargas-Soto had filed his § 2255 motion in these other circuits, the courts would have held that he had cause for failint to raise his vagueness claim on direct appeal. It is undisputed that he suffered actual prejudice: he is substantively ineligible for conviction and sentence under 8 U.S.C. § 1326(b)(2). In stark contrast, the Fifth Circuit refused to find "cause," breaking with its sister circuits.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG.

The Fifth Circuit's core rationale was that "[t]he first two *Reed* categories . . . were dicta," Pet. App. 25a, and are no longer applicable in light of AEDPA and other developments. *Id.* at 22a–28a. The court effectively eliminated "novelty" as grounds for cause. *Id.* And the court even introduced a distinction between what it means for a claim to be "new" and "previously unavailable" for purposes of 28 U.S.C. § 2255(h)(2), and what it means for a claim to be novel and not reasonably available for purposes of procedural default. *Contra McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991) (holding that the same cause-and-prejudice standard should govern in both contexts). No other circuit has offered such a radical re-interpretation of *Reed*. To the contrary, as the dissent below noted, all other circuits hold that "[t]he logic behind *Reed* . . . remains sound," Pet. App. 37a, and have found cause for failing to anticipate and raise *Johnson* claims under *Reed*. That the Fifth Circuit has now declared the first two *prongs* of *Reed*'s

carefully articulated test to be "dicta" defies reason. Any court's articulation of various criteria (or prongs or categories) as part of a legal test is an exercise of conferring meaning upon those criteria so that the test will be a workable and effective one. Nor is it within the Fifth Circuit's purview to abrogate a decision of this Court on the basis of unrelated legal developments. The Fifth Circuit might suggest that outcome to this Court, but it cannot overrule *Reed* via fiat.

To boot, this Court has neither "limited" nor "quashed" *Reed*'s recognition of novelty-as-cause. Pet. App. 19a, 25a. Quite the opposite—the Court has repeatedly relied on and reaffirmed *Reed*'s discussion of cause. *E.g.*, *Murray* v. *Carrier*, 477 U.S. at 489–90; *Smith* v. *Murray*, 477 U.S. at 527, 533–535; *Bousley*, 523 U.S. at 622–23; *Dugger* v. *Adams*, 489 U.S. 401, 409–10 (1989). Every circuit but the Fifth recognizes that *Reed*'s discussion of novelty-as-cause remains binding, rejecting any suggestion that *Bousley* or *Smith* overruled *Reed*. See *Jones*, 39 F.4th at 525–26; *Werle*, 35 F.4th at 1199–1201; *Granda*, 990 F.3d at 1285–88; *Raines*, 898 F.3d at 687; *Lassend*, 898 F.3d at 122–23; *Cross*, 892 F.3d at 295; *Snyder*, 871 F.3d at 1127. And the Fifth Circuit is the only court to refuse to grant relief on a novel vagueness challenge *despite* recognizing that the claim satisfies § 2255(h)(2), and despite the fact that the defendant is substantively ineligible for his current prison sentence.

The Fifth Circuit perceived some tension between *Reed*'s recognition of novelty-as-cause and another equally well established principle of procedural default: that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Engle*, 456 U.S. at 130 n.35 (quoting *Myers* v. *Washington*, 646 F.2d 355, 364 (9th Cir. 1981) (Poole, J., dissenting)). To put it

another way: a defendant may not "bypass" the lower appellate courts "simply because he thinks they will be unsympathetic to the claim." *Id.* at 130. He must give those courts a chance to reconsider adverse precedent "upon reflection." *Id*. Procedural default does *not* insist that the defendant give *this Court* a chance to overrule itself. Cf. *Fay* v. *Noia*, 372 U.S. 391, 435 (1963)

A "comparison of *Reed* and *Engle* makes plain" why the outcomes were different. *Smith* v. *Murray*, 477 U.S. at 537. Both cases arose from the new constitutional rule announced in *In re Winship*, 397 U.S. 358 (1970). See *Engle*, 456 U.S. at 131; *Reed*, 468 U.S. at 19. In both cases, the defendants sought to raise a *Winship* claim that they failed to raise in earlier litigation.

In *Engle*, the defendants were tried *after Winship*, so they had no excuse for failing to raise the claim during the normal course of litigation. *Reed*, 468 U.S. at 19. In *Reed*, the direct appeal happened before *Winship*. The meant that the *Winship* claim was "not available at all." *Smith* v. *Murray*, 477 U.S. at 537.

Mr. Vargas-Soto's case has obvious parallels to *Reed*. His direct appeal was decided three years before *Johnson* and six years before *Dimaya*. Like the defendant in *Reed*, but unlike the defendants in *Engle*, his constitutional claim was not "available at all" at the time of the alleged default, and it remained unavailable until this Court overruled and abrogated *Leocal*, *James*, and *Sykes*. *Lassend*, 898 F.3d at 123 (quoting *Smith*, 477 U.S. at 537).

For this same reason, "*Reed* and *Bousley* co-exist comfortably." *Werle*, 35 F.4th at 1201. The constitutional rule giving rise to Bousley's claim "was most surely not a novel one" because it had been announced many years before his guilty plea. See *Bousley*, 523 U.S. at 622 (citing *Henderson* v. *Morgan*, 426 U.S. 637,

645–46 (1976)). Bousley argued that a recent *statutory interpretation* decision changed the analysis, but that decision—*Bailey* v. *United States*, 516 U.S. 137 (1995)— was not "novel" under *Reed*'s criteria. *Bailey* did not overrule any Supreme Court decisions, constitutional or otherwise; the lower courts had not adopted a uniform or even "near-unanimous" interpretation of the statute; and this Court had never "arguably sanctioned" the interpretation adopted below. *Reed*, 468 U.S. at 17.

In any § 2255 proceeding involving a new *substantive* rule, finality takes a back seat. See *Welch*, 578 U.S. at 131 ("There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." (quotation omitted)).

The only other purpose procedural default serves in a § 2255 proceeding is "to conserve judicial resources." *Massaro*, 538 U.S. at 504. But it would not conserve judicial resources to require a direct-appeal attorney to anticipate all the game-changing constitutional rules that might be announced in the future and preserve them for later collateral review. *Massaro*, 538 U.S. at 506. On the contrary, that would create "perverse incentives for counsel on direct appeal" to raise all possible claims to avoid a waiver. *Id*.; see also *Reed*, 468 U.S. at 16 (refusing to "disrupt[ ]" lower court proceedings by "encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition"); *(Joyce) Johnson* v. *United States*, 520 U.S. 461, 468 (1997) ("[S]uch a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to

rulings that were plainly supported by existing precedent.").[2]

III. THE COURT OF APPEALS' RULING PRESENTS A RECURRING AND IMPORTANT QUESTION OF FEDERAL LAW.

The scope of the procedural default doctrine—including excuses for a default—is a recurring and "important question" of federal law that warrants this Court's review. See Sup. Ct. R. 10(c). Because the procedural default rule is a court-made doctrine, it is particularly vital that this Court exercise its responsibility to oversee the federal judiciary and ensure that similarly situated defendants do not serve unequal sentences.

This case is an ideal vehicle for addressing the question presented. Mr. Vargas-Soto's sentencing and direct appeal took place after *Leocal*, *James*, and *Sykes* but prior to *Johnson* and *Dimaya*. This case therefore squarely presents the question whether a criminal defendant defaults a void-for-vagueness challenge by not

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[2] In fact, the Fifth Circuit itself has repeatedly warned defense counsel *not* to burden that court with hopeless preservation claims: such appeals represent a "roadblock in the way of expeditious conviction or punishment." *United States* v. *Pineda-Arrellano*, 492 F.3d 624, 625–26 (5th Cir. 2007). While Mr. Vargas-Soto's case was pending below, the Fifth Circuit reiterated the earlier warning from *Pineda-Arrellano*: appeals seeking to preserve a constitutional challenge to *Almendarez-Torres* "are virtually all frivolous." *United States* v. *Contreras-Rojas*, 16 F.4th 479, 480 (5th Cir. 2021); but see *United States* v. *Garza-De La Cruz*, 16 F.4th 1213, 1214 (5th Cir. 2021) (Costa & Ho, JJ., concurring) ("We write separately today to make clear that we do not join in these admonitions.").

raising it during the period when this Court's (subsequently overruled) precedent foreclosed the challenge. The Fifth Circuit held—and the government does not dispute—that Mr. Vargas-Soto's motion was properly authorized under 28 U.S.C. § 2255(h)(2), because "*Dimaya*'s new and retroactive rule was previously unavailable" to him. Pet. App. 11a. In addition, the residual clause issue is dispositive because Mr. Vargas-Soto's conviction and sentence under § 1326(b)(2) cannot be upheld on any alternative basis, such as the "elements" clause of 18 U.S.C. § 16(a). See Pet. App. 33a n.4 (explaining that the prior reckless manslaughter conviction that was the predicate for Mr. Vargas-Soto's enhanced sentence does not qualify as a "crime of violence" under § 16(a)'s elements clause because in *Borden*, 141 S. Ct. at 1825, this Court held that an offense involving "reckless conduct" does not satisfy the elements clause).

The government does not dispute that Mr. Vargas-Soto has established actual prejudice: without the unconstitutional residual clause in 18 U.S.C. § 16(b), Mr. Vargas-Soto would never be sentenced to more than 10 years in prison. The Court's precedents have confirmed that he was never convicted of an "aggravated felony," so he is substantively ineligible for a conviction and sentence under 8 U.S.C. § 1326(b)(2). He did not raise the claim on direct appeal because this Court had not yet made available the constitutional principles giving rise to his claim. At the time of Mr. Vargas's direct appeal, "no one—the government, the judge, or the appellant—could reasonably have anticipated *Johnson*." *United States* v. *Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016) (discussing a 2014 sentencing). *Reed*, 468 U.S. at 17.

Mr. Vargas-Soto should be home with his family today. See Pet. App. 33a n.3. If Mr. Vargas-Soto's sentence were reduced to 10 years, he would be entitled to immediate release. If the decision below is allowed to stand, Mr. Vargas-Soto will remain incarcerated solely because of an unconstitutional residual clause.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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