No. _____

IN THE
Supreme Court of the United States

THILO BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Welch v. United States,* 136 S. Ct. 1257 (2016), this Court held that *Johnson* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review. Petitioner was sentenced as a career offender under the identical residual clause of the mandatory guidelines before *United States v. Booker*, 543 U.S. 220 (2005). A 28 U.S.C. § 2255 motion is timely when filed within one year of "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). Petitioner filed a 28 U.S.C. § 2255 motion within one year of *Johnson*, asserting that his sentence was imposed in violation of the Constitution in light of *Johnson*. A divided Court of Appeals held that Petitioner's motion was untimely because this Court had not yet held that the mandatory guidelines' residual clause is void for vagueness, and declined to reach the merits of Petitioner's claim.

The questions presented are:

1. Whether a § 2255 motion filed within one year of *Johnson*, claiming that *Johnson* invalidates the residual clause of the pre-*Booker* career offender guideline, asserts a "right . . . initially recognized" in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3).

2. Whether the residual clause of the pre-*Booker* career offender guideline is unconstitutionally vague.

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Thilo Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's panel decision affirming the dismissal of Petitioner's 28 U.S.C. § 2255 motion is reported at 868 F.3d 297 (4th Cir. 2017), and included in the Appendix at A-1. The Fourth Circuit's unreported order denying rehearing and rehearing en banc is included in the Appendix at A-16.

JURISDICTION

The court of appeals issued its decision on August 21, 2017 (App. A-1), and denied Petitioner's timely motion for rehearing on February 26, 2018 (App. A-

16). This petition is being filed within 90 days of the denial of rehearing, so is timely under Rule 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

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

28 U.S.C. § 2255(f):

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . .
>
> > (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.

18 U.S.C. § 924(e)(2)(B):

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, . . . , that – . . .
>
> > (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . .

U.S.S.G. § 4B1.2(a) (2002):

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –- . . .
>
> > (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

INTRODUCTION

This Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that increasing a defendant's sentence under the ACCA's residual clause violates the Constitution's prohibition on vague laws, and in *Welch v. United States,* 136 S. Ct. 1257 (2016), that *Johnson* is retroactively applicable to cases on collateral review. Nearly every court, the Department of Justice, and the Sentencing Commission understood that *Johnson* directly invalidated the identical residual clause of the career offender guideline. Many prisoners diligently filed § 2255 motions within one year of *Johnson*, claiming that their career offender sentences were unconstitutional, and those motions were timely. This Court later held in *Beckles v. United States*, 137 S. Ct. 886 (2017), that the residual clause of the advisory career offender guideline is not subject to a vagueness challenge because, unlike the mandatory guidelines, the advisory guidelines do not fix the permissible range of sentences. Thus, § 2255 motions relying on *Johnson* in advisory guidelines cases were timely, but wrong on the merits.

In 2003, Petitioner was sentenced to 262 months for possessing with intent to distribute crack cocaine based on his designation as a career offender, a designation that depended on a prior conviction that qualified as a crime of violence under the residual clause of the career offender guideline. U.S.S.G. § 4B1.2 (2002). The district court was mandated by statute to follow the Guidelines. *See* 18 U.S.C. § 3553(b); *United States v. Booker*, 543 U.S. 220, 233-34, 245, 259 (2005). Petitioner filed his first and only § 2255 motion within one year of *Johnson*, arguing that his sentence

was imposed in violation of the Constitution in light of *Johnson*. A divided panel of the Fourth Circuit held that his motion had been filed too early because this Court had not yet expressly held that the mandatory guidelines' residual clause is void for vagueness, and declined to reach the merits.

The courts of appeals are now divided over whether a § 2255 motion filed within one year of *Johnson*, claiming that *Johnson* invalidates the residual clause of the pre-*Booker* career offender guideline asserts a "right . . . initially recognized" by this Court in *Johnson* within the meaning of 28 U.S.C. § 2255(f)(3). On one side of the divide, the Fourth, Sixth and Tenth Circuits have ruled that such motions do not assert any right recognized in *Johnson* because *Johnson* did not expressly hold that the mandatory guidelines' residual clause is void for vagueness. On the other side of the divide, the First and Third Circuits, as well as the dissenting judge in this case, have made clear that such motions assert the right recognized in *Johnson* because the invalidation of the mandatory guidelines' residual clause is a straightforward application of *Johnson*. The decisions of the Fourth, Sixth and Tenth Circuits conflict with this Court's relevant precedents, the statutory text, and Congress's purposes in enacting the statute of limitations. The courts are also divided on the merits, with only the Eleventh Circuit holding that the mandatory guidelines' residual clause is not void for vagueness, a position with which other courts and judges disagree, and which conflicts with this Court's interpretation of the Sentencing Reform Act of 1984. The questions presented impact numerous federal prisoners serving lengthy mandatory career offender sentences, and are urgently in need of resolution by this

Court. The issues are cleanly presented in this case, and their resolution is outcome-determinative.

STATEMENT OF THE CASE

A. Legal Background

1. On June 26, 2015, this Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that increasing a defendant's sentence under the residual clause of the Armed Career Criminal Act — "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii) — violates the Constitution's prohibition on vague laws. By combining uncertainty about how to identify the "ordinary case" of the crime with uncertainty about how to determine whether a risk is sufficiently "serious," the inquiry required by the clause "both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557-58. The Court held in *Welch v. United States,* 136 S. Ct. 1257 (2016), that *Johnson* applies retroactively to cases on collateral review.

2. The career offender provision of the Guidelines increases the guideline range by tying the offense level to the statutory maximum for the instant offense, and automatically placing the defendant in Criminal History Category VI. U.S.S.G. § 4B1.1 (2002). A defendant is a career offender if he was at least 18 years of age when he committed the instant offense, the instant offense is either a "crime of violence" or a "controlled substance offense," and he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." *Id.* § 4B1.1(a).

3. Until August 1, 2016, the term "crime of violence" was defined to include any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another," *id.* § 4B1.2(a)(2), and this clause, identical to the ACCA's, was interpreted using the same "ordinary case" analysis as the ACCA's. *See Johnson*, 135 S. Ct. at 2560 (analyzing several guidelines cases to demonstrate that the residual clause "has proved nearly impossible to apply consistently").

4. Nearly every court of appeals to consider the issue, the Department of Justice, and the Sentencing Commission understood that *Johnson* directly invalidated the identical residual clause of the career offender guideline.[1] Many prisoners sentenced under the guidelines' residual clause, including Petitioner, diligently filed § 2255 motions within one year of *Johnson*, asserting the right recognized in *Johnson*. Those motions were timely, and many prisoners were granted relief.[2]

5. On March 6, 2017, in *Beckles v. United States*, 137 S. Ct. 886 (2017), the Court created an exception to the rule announced in *Johnson,* ruling on the merits that because "the advisory Guidelines do not fix the permissible range of sentences," but "merely guide the exercise of a court's discretion," they "are not subject to a

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[1] *See Beckles*, 137 S. Ct. at 902 n.3 (collecting cases) (Sotomayor, J., concurring); U.S.S.G., Supp. App. C, Amend. 798 (Aug. 1, 2016) (Reason for Amendment) (striking the residual clause in light of *Johnson*).

[2] Reply Brief of Petitioner at App.1-14 (Re-Sentencings After Johnson), *Beckles v. United States*, 137 S. Ct. 886 (2017) (No. 15-8544) (60 prisoners sentenced under the guidelines' residual clause obtained relief under § 2255 as of October 28, 2016).

vagueness challenge under the Due Process Clause." *Id.* at 892.[3] The Court explained that the "advisory Guidelines do not implicate the twin concerns underlying vagueness doctrine." *Id.* at 894. The "'due process concerns that . . . require notice in a world of mandatory Guidelines no longer' apply." *Id.* (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)). The "advisory Guidelines also do not implicate the vagueness doctrine's concern with arbitrary enforcement," *id.* at 894, because district courts do not "enforce" the advisory guidelines, but rely on them "merely for advice in exercising [their] discretion," *id.* at 895. The pre-*Booker* Guidelines, in contrast, were "binding on district courts." *Id.* at 894 (citing *Booker*, 543 U.S. at 233). Accordingly, the Court held "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.

Justice Sotomayor commented in a footnote that the majority's "adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment . . . during the period in which the Guidelines *did* fix the permissible range of sentences, may mount vagueness attacks on their sentences," but "[t]hat question is not presented by this case." *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring) (internal citations and quotation marks omitted).

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[3] Beckles' motion, filed within one year of the date on which his conviction became final, *Beckles*, 137 S. Ct. at 891, was timely under § 2255(f)(1).

6. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court applied *Johnson* to a residual clause in a different statute, 18 U.S.C. § 16(b), with slightly different wording, subject to the same "ordinary case" analysis, resulting in virtually certain deportation. The Court explained that "*Johnson* is a straightforward decision, with equally straightforward application here," *id.* at 1213, and "tells us how to resolve this case," *id.* at 1223. Section 16(b)'s residual clause has the "same two features as ACCA's, combined in the same constitutionally problematic way," *id.* at 1213, viz., "an ordinary-case requirement and an ill-defined risk threshold," *id.* at 1223, and "with that reasoning, *Johnson* effectively resolved the case," *id.* at 1213.

B. Procedural Background

1. On March 19, 2003, Petitioner pled guilty to possession with intent to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A)(iii), and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). C.A.J.A. 80, 83.[4] The probation officer applied the career offender enhancement based on Petitioner's only two prior felony convictions: trafficking crack, S.C. Code § 44-53-375(C), and assault on a police officer while resisting arrest, S.C. Code § 16-9-320(B).[5] The enhancement increased Petitioner's offense level for the drug offense from 34 to 37 and his criminal history category from III to VI, resulting in a guideline range after a three-level reduction for

[4] "C.A.J.A." refers to the joint appendix filed in the court of appeals.

[5] Petitioner was arrested for the offenses at age 19 and 20, respectively, and was sentenced for both as a youthful offender on June 12, 1995. C.A.J.A. 90-92.

acceptance of responsibility of 262 to 327 months. C.A.J.A. 89-90, 96; U.S.S.G. § 4B1.1 (2002).

There were no objections to the presentence report. The district court sentenced Petitioner to 262 months for the drug offense, at the bottom of the mandatory career offender range, and 60 consecutive months for the § 924(c) offense, for a total of 322 months. Absent the career offender enhancement, Petitioner's maximum mandatory guideline sentence would have been 240 months for the drug offense,[6] and 300 months for both offenses combined.[7] Petitioner has served approximately 191 months.[8] His current release date is September 18, 2025.[9]

The district court entered judgment on July 21, 2003. C.A.J.A. 8. Petitioner did not appeal, and the judgment became final on August 4, 2003.

2. Petitioner filed his first and only § 2255 motion on January 28, 2016, within one year of *Johnson*, arguing that he was not a career offender in light of *Johnson* because his prior conviction for assault on a police officer while resisting arrest qualified as a "crime of violence" only under the residual clause. C.A.J.A. 19-22. The

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[6] With "relevant conduct" of 198.35 grams of crack cocaine, three points off for acceptance of responsibility, and a criminal history category III, C.A.J.A. 89-90, 96, the guideline range for the drug offense would have been 135-168 months, U.S.S.G. § 2D1.1(c)(3) (2002); *id.* § 3E1.1; *id.* Ch.5, Pt.A. Petitioner was sentenced before the Fair Sentencing Act of 2010. Because the government filed a "felony drug offense" enhancement, which increased his mandatory minimum from 10 to 20 years, 21 U.S.C. § 841(b)(1)(A)(iii) (2002); *id.* § 851, his non-career offender guideline "sentence" would have been 240 months. U.S.S.G. § 5G1.1(b) (2002).

[7] U.S.S.G. § 2K2.4(b) (2002).

[8] Petitioner has been in custody since July 3, 2002. C.A.J.A. 80.

[9] Federal Bureau of Prisons, Inmate Locator, https://www.bop.gov/inmateloc/.

district court dismissed the motion based on its view that the conviction qualified under the force clause. C.A.J.A 37-44.

3. Petitioner appealed. The court of appeals granted a certificate of appealability on whether his prior conviction qualified as a career offender predicate in light of *Johnson*.[10] While the appeal was pending, this Court decided *Beckles*. The government conceded that the conviction does not qualify under the force clause.[11] This was not fatal to affirmance, the government said, because *Beckles* foreclosed vagueness challenges to the mandatory guidelines, and even if it didn't, Petitioner's motion had been filed too early because it asserted "some as-yet unannounced future Supreme Court decision recognizing such a right."[12]

On August 21, 2017, a divided panel of the Fourth Circuit affirmed, holding the motion untimely under § 2255(f)(3). The majority acknowledged that the mandatory guidelines' residual clause "looks" and "operates like" the ACCA's, but said that it was "constrained by the Antiterrorism and Effective Death Penalty Act (AEDPA) jurisprudence from extrapolating beyond the Supreme Court's holding to apply what we view as its reasoning and principles to different facts under a different statute or sentencing regime." *Brown,* 868 F.3d at 299. Relying on caselaw interpreting inapplicable statutes, *id.* at 301, the majority ruled that *Johnson* "only

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[10] Order, *United States v. Brown*, No. 16-7056 (4th Cir.) (Doc. 14, Dec. 7, 2016).

[11] Letter from United States to Hon. Patricia S. Connor, Clerk, *United States v. Brown*, No. 16-7056 (4th Cir.) (Doc. 49, May 8, 2017).

[12] Brief of the United States at 8-13, 22-25, *United States v. Brown*, No. 16-7056 (4th Cir.) (Doc. 34).

recognized that ACCA's residual clause was unconstitutionally vague." *Id.* at 303. It said that *Beckles* "demonstrates that quacking like ACCA is not enough to bring a challenge within . . . *Johnson*'s binding holding." *Id.* Further, it said, *Beckles* "expressly left open" and "expressly declined to address" whether *Johnson* applies to the mandatory guidelines' residual clause, so "the right, *by definition*, has not been recognized." *Id.* at 299 n.1, 300. Hence, it said, "we must wait for the Supreme Court to recognize the right urged by Petitioner" in a "future case." *Id.* at 303.

Chief Judge Gregory dissented, finding nothing in § 2255(f)(3) to support the majority's conclusion that a right can only be recognized by a holding governing the precise facts of the case, and that *Beckles* did not disturb *Johnson*'s holding that vague sentencing provisions that fix sentences under the categorical approach violate due process. *Id.* at 304, 308 (Gregory, C.J., dissenting). He concluded that Petitioner "is asserting the right newly recognized in *Johnson*," *id.* at 310, reasoning as follows:

> Ultimately, that the residual clause at issue here is contained in the mandatory Sentencing Guidelines, rather than the ACCA, is a distinction without a difference for purposes of this Court's timeliness inquiry. The clauses' text is identical, and courts applied them using the same categorical approach and for the same ends—to fix a defendant's sentence. The right newly recognized in *Johnson* is therefore clearly applicable to Brown's claim, because the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enforcement as the ACCA's residual clause at issue in *Johnson*.

Id. Having concluded that Petitioner's motion was timely, Chief Judge Gregory would also have found that Petitioner is entitled to relief on the merits. *Id.* at 311.

On February 26, 2018, the Fourth Circuit denied rehearing and rehearing en banc, over Chief Judge Gregory's written dissent. App. A-16-21.

REASONS FOR GRANTING THE WRIT

The courts are divided over whether a § 2255 motion claiming that *Johnson* invalidates the mandatory career offender guideline's residual clause asserts the "right . . . initially recognized" by this Court in *Johnson*. On one side of the divide, the Fourth, Sixth and Tenth Circuits have ruled that such motions do not assert any right recognized in *Johnson* because this Court did not expressly hold in *Johnson* that the mandatory guidelines' residual clause is unconstitutionally vague. On the other side of the divide, the First and Third Circuits, as well as Chief Judge Gregory, have made clear that such motions assert the right recognized in *Johnson* because the invalidation of the mandatory guidelines' residual clause is a straightforward application of *Johnson*. The novel approach of the Fourth, Sixth and Tenth Circuits — that these motions were filed too early — conflicts with this Court's relevant precedents, is contrary to the statutory text, and contravenes Congress's purposes in enacting the statute of limitations. The courts are also divided over the merits, with only the Eleventh Circuit holding that the mandatory guidelines' residual clause cannot be void for vagueness. The First and Third Circuits, as well as judges within the Eleventh Circuit, disagree. The questions presented are of exceptional importance. If the mandatory guidelines' residual clause is indeed invalid, numerous prisoners serving lengthy unlawful sentences are being denied the opportunity to have any court reach the merits of their claims, including Petitioner. The issues are cleanly presented in this case, and the answers are outcome-determinative.

I. There Is an Entrenched Split Among and Within the Circuits.

A. Three circuits have ruled that § 2255 motions claiming that *Johnson* invalidates the mandatory guidelines' residual clause do not assert any right recognized in *Johnson*.

The Fourth, Sixth and Tenth Circuits have held that § 2255 motions filed within one year of *Johnson* claiming that *Johnson* invalidates the mandatory guidelines' residual clause are untimely because this Court did not expressly so hold in *Johnson*. They say that the only right *Johnson* recognized was its specific holding that the ACCA's residual clause is unconstitutionally vague. *See Brown*, 868 F.3d at 303; *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018).

All three circuits relied on caselaw interpreting inapplicable statutes to reach this conclusion. In its divided panel decision, the Fourth Circuit said that it was "constrained" by AEDPA jurisprudence "from extrapolating beyond the Supreme Court's holding to apply what we view as its reasoning and principles to different facts under a different statute or sentencing regime." *Brown,* 868 F.3d at 299. For this, it relied on (1) the statement in *Williams v. Taylor*, 529 U.S. 362 (2000), that the phrase "clearly established Federal law, as determined by the Supreme Court," in 28 U.S.C. § 2254(d)(1), means "the holdings, as opposed to the dicta" of this Court, and (2) the statement in *Tyler v. Cain*, 533 U.S. 656 (2001), that the phrase "made retroactive to cases on collateral review by the Supreme Court" in 28 U.S.C. § 2244(b)(2)(A), means "held" retroactive by this Court. *Brown*, 868 F.3d at 301. The Tenth Circuit adopted this passage, *Greer*, 881 F.3d at 1247, adding that "'interests

of finality and comity' underlying federal habeas review"—of state court judgments—precluded it from applying "the *reasoning* of *Johnson* in a different context." *Id.* at 1248 (quoting *Teague,* 489 U.S. at 308). The Sixth Circuit relied on *Tyler*'s statement that "made" means "held" and said that the language in § 2244(b)(2)(A) is "identical" to that in § 2255(f)(3). *Raybon*, 867 F.3d at 630.

Brown and *Raybon* also misinterpreted the majority opinion in *Beckles*, and Justice Sotomayor's footnote 4 in *Beckles*, to mean that this Court had not recognized a right invalidating any residual clause but the ACCA's. *See Brown*, 868 F.3d at 302-03; *id.* at 299 n.1, 300; *Raybon*, 867 F.3d at 629-30.

From these mistaken premises, the Fourth Circuit concluded that *Johnson* "only recognized that ACCA's residual clause was unconstitutionally vague," and that Petitioner's claim was untimely because it did not fall within the "narrow" confines of that "binding holding." *Brown*, 868 F.3d at 303; *see also Greer*, 881 F.3d at 1248 ("Greer has not raised a true *Johnson* claim because he was not sentenced under any clause of the ACCA."); *Raybon*, 867 F.3d at 630 ("Because it is an open question, it is *not* a 'right' that 'has been newly recognized by the Supreme Court.").

B. A divided Eleventh Circuit has ruled that the mandatory guidelines' residual clause is not unconstitutionally vague.

The Eleventh Circuit has also blocked consideration of *Johnson* claims by prisoners sentenced under the mandatory guidelines' residual clause, but in a different way. Shortly after *Welch* and ten months before *Beckles*, a panel of the Eleventh Circuit issued a published decision denying an application for authorization to file a successive § 2255 by a *pro se* prisoner, holding that "the Guidelines—whether

mandatory or advisory—cannot be unconstitutionally vague." *In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016). Griffin was barred from seeking rehearing or certiorari review, 28 U.S.C. § 2244(b)(3)(E), and *Griffin* became binding circuit precedent barring relief on the merits for any first or successive § 2255.

A different Eleventh Circuit panel sharply disagreed—"we believe *Griffin* is deeply flawed and wrongly decided" and that "*Johnson* applies with equal force to the residual clause of the mandatory career offender guideline." *In re Sapp*, 827 F.3d 1334, 1339 (11th Cir. 2016) (Jordan, Rosenbaum, and J. Pryor, JJ., concurring). A fourth judge agreed with the *Sapp* panel. *See United States v. Matchett*, 837 F.3d 1118, 1134 n.3 (11th Cir. 2016) (Martin, J., dissenting from denial of rehearing en banc).

C. Two other circuits, as well as circuit and district court judges, have made clear that § 2255 motions claiming that *Johnson* invalidates the mandatory guidelines' residual clause assert the right recognized in *Johnson*.

Other circuits, circuit judges, and district court judges disagree with the reasoning and conclusions of *Brown*, *Raybon*, *Greer*, and *Griffin*. In this case, Chief Judge Gregory examined whether there is any relevant distinction between the mandatory guidelines' and ACCA's residual clauses, found none, and concluded that Petitioner had asserted the right recognized in *Johnson* and that he is entitled to relief on the merits. *Brown*, 686 F.3d at 304-11 (Gregory, C.J., dissenting).

In *United States v. Moore*, 871 F.3d 72 (1st Cir. 2017), the First Circuit held that a § 2255 motion arguing that *Johnson* invalidates the pre-*Booker* career offender guideline's residual clause was timely because it was filed within one year of *Johnson*,

id. at 77 n.3, and authorized a successive motion. The court concluded that the right Moore "seeks to assert is exactly the right recognized by *Johnson*." *Id.* at 83. The court was "not . . . persuaded" by the government's argument that the rule upon which Moore relied had not been "recognized" by this Court. *Id.* at 81. The court did not "need to make new constitutional law in order to hold that the pre-*Booker* SRA fixed sentences" because this Court had already resolved that question of statutory interpretation in *Booker*. *Id.* (citing *Booker*, 543 U.S. at 233-34, 245; 18 U.S.C. § 3553(b)). The First Circuit expressly rejected the reasoning of *Brown* and *Raybon*. *Id.* at 82-83. It explained that in § 2255, Congress used words such as "rule" and "right" rather than "holding" because it "recognizes that [this] Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Id.* at 82. The pre-*Booker* guidelines' residual clause "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Id.* And "*Beckles* did not limit *Johnson II* to its facts. Rather, one can fairly and easily read *Beckles* as simply rejecting the application of *Johnson II* to the advisory guidelines because, as a matter of statutory interpretation, those guidelines do not fix sentences." *Id.* at 83.

Moore also disagreed with *Griffin*. Because this Court had "consistently held that the Guidelines [had] the force and effect of laws," and "the lower end of a guidelines range sentence often exceeds what would have otherwise been the statutory minimum," the court was "quite skeptical" of *Griffin*'s conclusion that the

mandatory guidelines "'did not alter the statutory boundaries for sentences set by Congress for the crime.'" *Moore*, 871 F.3d at 81 (quoting *Griffin*, 823 F.3d at 1355). "Nor does the fact that the Eleventh Circuit so concluded mean that a contrary conclusion would be a new rule," since the "all reasonable jurists standard is objective." *Id.* at 81 (internal citations and punctuation omitted).

The Third Circuit, in *In re Hoffner*, 870 F.3d 301 (3d Cir. 2017), authorized a successive § 2255 motion because it "relies on" *Johnson*. The court explained that "the way to determine" whether applying *Johnson* to the mandatory guidelines would create a "second new rule" is to "undertake a *Teague* analysis" to determine whether doing so "'breaks new ground,'" or instead "'[is] merely an application of the principle that governed' a prior decision to a different set of facts.'" *Id.* at 311-12 & n.15 (quoting *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013)).[13] The Third Circuit declined to follow *Griffin*, in substance or procedure. *Id.* at 310 & n.13.

The Second Circuit, in an unpublished opinion, recognized that *Beckles* held only that the advisory guidelines were not amenable to a vagueness challenge but did not foreclose such a challenge to the mandatory guidelines' residual clause. The court authorized the successive motion and instructed the district court to consider staying the case pending "relevant" decisions including *Dimaya*. *See Vargas v. United States*, No. 16-2112, 2017 WL 3699225, at *1 (2d Cir. May 8, 1017).

Before and after *Moore,* district courts within the First Circuit have found these motions timely and granted relief on the merits. *See United States v. Roy*, 282

[13] *Hoffner* did not expressly address the statute of limitations. It left to the district court to determine in the first instance "whether [the] petition has merit." *Id.* at 312.

F. Supp. 3d 421, 425-28 (D. Mass. 2017) (relying on *Moore* to hold that for purposes of timeliness, "the rule Roy relies on here is the rule announced in *Johnson II*," that rule "is retroactive to cases on collateral review," and the residual clause of the mandatory career offender guideline is void for vagueness); *United States v. Hardy*, No. 00-cr-10179 (D. Mass. Jan. 26, 2018) (oral ruling, Dkt. #69); *Reid v. United States*, 252 F. Supp. 3d 63 (D. Mass. 2017) (holding before *Moore* that the pre-*Booker* guidelines' residual clause violates the Due Process Clause under *Johnson*, and rejecting government's argument that *Beckles* applies to sentences imposed under the mandatory guidelines). After *Moore*, the government has not appealed or has abandoned its appeals of such rulings.

Other district courts have expressly disagreed with *Brown*, *Raybon* and *Greer.* A district court in the Sixth Circuit granted a certificate of appealability, reasoning that "the *right* vindicated in *Johnson* was the right to be free from unconstitutionally vague statutes that fail to clearly define 'crime of violence' or 'violent felony,' not simply the right not to be sentenced under the residual clause of the ACCA," and that *Raybon*'s "excessively narrow construction" of § 2255(f)(3) "invites Potemkin disputes about whether the Supreme Court has explicitly applied its precedents to a specific factual circumstance rather than asking whether the *right* the Supreme Court has newly recognized applies to that circumstance." *United States v. Chambers*, No. 01-cr-172, 2018 WL 1388745, at *2 (N.D. Ohio Mar. 20, 2018). A magistrate judge in the Western District of Texas recently recommended that relief be granted, rejecting the reasoning of *Brown*, *Raybon* and *Greer*, embracing that of *Moore* and Chief Judge

Gregory's dissent in *Brown*, and recognizing that *Dimaya* "adds significant weight to this position." *Zuniga-Munoz v. United States*, No. 16-cv-0732, slip op. at 8-10 (W.D. Tex. Apr. 26, 2018); *see also United States v. Meza*, No. 11-cr-00133, 2018 WL 2048899 (D. Mont. May 2, 2018) (rejecting government's argument based on *Greer* that *Johnson* announced only "a defendant's right not to have his sentence increased under the residual clause of the ACCA," as *Dimaya* confirms that the "right" established by *Johnson* is the "right not to be penalized under a clause that is applied by categorical analysis and has both an ordinary-case requirement and an ill-defined risk threshold").[14]

Meanwhile, appeals by § 2255 movants are pending in three circuits: *Cross v. United States*, No. 17-2282 (7th Cir.) (argued Jan. 10, 2018); *United States v. Blackstone*, No. 17-55023 (9th Cir.) (argued April 11, 2018); *United States v. Green*, No. 17-2906 (3d Cir.) (argument calendared for June 11, 2018).

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[14] *See also, e.g.*, *Brow v. United States*, No. 90-cr-00048, slip op. at 14-17 (D.V.I. Apr. 20, 2018) (finding that a "straightforward application of *Johnson* is appropriate," and recommending sentence be vacated); *Long v. United States*, No. 16-cv-4464, 2017 WL 6886299, at *2 (C.D. Cal. Sept. 15, 2017) (holding motion timely and granting relief on the merits); *United States v. Parks*, No. 03-cr-00490, 2017 WL 3732078, at **2-7, 11-12 (D. Colo. Aug. 1, 2017) (holding before *Greer* that mandatory guidelines' residual clause implicates the twin concerns of the vagueness doctrine, and motion was timely); *United States v. Walker*, No. 93-cr-00333, 2017 WL 3034445, at *5 (N.D. Ohio July 18, 2017) (holding before *Raybon* that "[b]ecause the pre-*Booker* mandatory Sentencing Guidelines are sufficiently statute-like to be subject to vagueness analysis, *Johnson* applies directly").

II. The Decision Below Conflicts With this Court's Relevant Precedents, the Statutory Text, and Congress's Purposes in Enacting the Statute of Limitations.

This Court has never said what it means to "recognize" a "right asserted," 28 U.S.C. § 2255(f)(3), but the lower courts have long applied this Court's "new rule" jurisprudence to the question. Under that jurisprudence, a right not to have one's sentence increased by the mandatory guidelines' residual clause is not *another* new right but simply an application of *Johnson*. *Brown*, *Raybon* and *Greer* have now taken an unprecedented approach, requiring that this Court first confirm that a motion is correct on the merits before the statute of limitations can be met. In doing so, they have relied on caselaw interpreting inapplicable statutes, in a way that does violence to the statutory text and Congress's purposes to prevent delay and encourage diligent pursuit of known claims. For movants like Petitioner, this means their claims can never be timely and can never be adjudicated on the merits. More broadly, it means arbitrariness, inconsistency, and delay, the opposite of what Congress intended.

A. The panel majority relied on the wrong jurisprudence.

The panel majority acknowledged that the mandatory guidelines' residual clause "looks like" and "operates like" the ACCA's, but said that it was "constrained by the [AEDPA] jurisprudence from extrapolating beyond the Supreme Court's holding to apply what we view as its reasoning and principles to different facts under a different statute or sentencing regime." *Brown,* 868 F.3d at 299.

For this, it relied on snippets of caselaw interpreting inapplicable statutes that actually disprove its point. First, it cited this Court's statement in *Williams v. Taylor*, 529 U.S. 362, 412 (2000), that the phrase "clearly established Federal law, as determined by the Supreme Court," in 28 U.S.C. § 2254(d)(1), means "the holdings, as opposed to the dicta" of this Court. *Brown,* 868 F.3d at 301. Section 2254(d)(1) bars state prisoners from relitigating federal claims that were already adjudicated on the merits in state-court proceedings unless the state-court decision was "contrary to" or an "unreasonable application" of "clearly established Federal law, as determined by the Supreme Court." Section 2254(d)(1) bars a state prisoner's claim *even though* his application was filed within one year of the date on which the "right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2244(d)(1)(C). Thus, the § 2254(d)(1) standard is *different from and more demanding* than the term "initially recognized by the Supreme Court." Indeed, the standard is "intentionally difficult to meet," according maximum deference to state courts in "the interests in comity and federalism." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). In contrast, a federal court deciding a § 2255 motion is not deferring to a coequal jurisdiction, and it is the federal prisoner's first opportunity to litigate a claim under a new, retroactive rule of federal law. No interest in "comity" or "federalism" exists. Accordingly, nothing in § 2255(f)(3) or elsewhere requires that a right asserted by a federal prisoner must be "clearly established by a Supreme Court holding."

Second, the panel majority cited this Court's statement in *Tyler v. Cain*, 533 U.S. 656 (2001), that the phrase "made retroactive to cases on collateral review by

the Supreme Court" in 28 U.S.C. § 2244(b)(2)(A), means "held" retroactive by this Court. 868 F.3d at 301. Both § 2244(b)(2)(A) and the analogous provision for federal prisoners at § 2255(h)(2) require for authorization of a second or successive motion, a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Tyler* did not address whether this Court had announced a "new rule" or "newly recognized" a "right." It addressed whether the Court had "made" an undisputedly new rule "retroactive," and decided that "made" means "held" in that context. 553 U.S. at 663-64. Moreover, an express holding is not required. This Court can implicitly "make" a rule retroactive through "multiple holdings that logically dictate the retroactivity of the new rule." *See id.* at 668-69 (O'Connor, J., concurring); *see also id.* at 666 (agreeing with this principle); *id.* at 672-73 (Breyer, J., dissenting) (same).

B. The panel majority's decision conflicts with this Court's relevant precedents.

The courts of appeals have long applied this Court's "new rule" jurisprudence to determine whether a "right asserted" in a § 2255 motion "has been newly recognized."[15] Under that jurisprudence, a case announces a "new rule" when it

[15] *See*, *e.g.*, *Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015) (relying on *Teague* and *Chaidez* to conclude that *Alleyne v. United States*, 133 S. Ct. 2151 (2013), is a "'newly recognized' right"); *United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013) (relying on *Teague* to conclude that the "right" recognized in *Fowler v. United States*, 131 S. Ct. 2045 (2011), "has been 'newly recognized' by the Supreme Court" under §2255(f)(3)); *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207-08 (11th Cir. 2012) ("In deciding retroactivity issues under §2255(f)(3), we have applied the rubric developed in *Teague*" to "first answer whether the Supreme Court decision in question announced a new rule."); *United States v. Hong*, 671 F.3d 1147, 1148, 1150 (10th Cir. 2011) (applying *Teague* "to decide whether *Padilla* announced a new rule" for purposes of §2255(f)(3), and concluding that it did); *Coleman v. United States*, 329 F.3d 77, 81-82 (2d Cir. 2003) (relying on *Teague* and *Stringer* to conclude

"breaks new ground," but "a case does *not* 'announce a new rule, when it is merely an application of the principle that governed' a prior decision." *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989). "To determine what counts as a new rule," courts must "ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by [existing] precedent." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, concurring in the judgment). If a "factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies," the rule is not new. *Id.*

For example, in *Stringer v. Black*, 503 U.S. 222 (1992), this Court held that *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Clemons v. Mississippi*, 494 U.S. 1074 (1990), were not new rules but instead applications of the principles that governed its prior decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980). In invalidating an aggravating factor with slightly different language in an Oklahoma statute, *Maynard* did not break new ground with *Godfrey*. *Id.* at 228-29. *Clemons*' invalidation of Mississippi's identical aggravating factor, which followed *a fortiori* from *Godfrey*, was not a "new rule" simply because it was previously "undecided." *Id.* at 229. *See also Penry v. Lynaugh*, 492 U.S. 302, 314, 318-19 (1989) (concluding that the rule Penry sought requiring instructions permitting the jury to "give effect" to evidence of mental disability was not a "new rule" but simply an application of

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that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was a "new rule" for purposes of timeliness under §2255(f)(3)).

principles established by prior cases to a "closely analogous" case), *abrogated on other grounds by Atkins v. Virginia,* 536 U.S. 304 (2002); *Yates v. Aiken*, 484 U.S. 211, 217 (1988)) (holding that *Francis v. Franklin*, 471 U.S. 307 (1985), was not a new rule but "merely an application of the principle that governed our decision in" *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which the question was "almost identical").

Applying the correct jurisprudence, a right not to have one's sentence increased by a residual clause that suffers from the same flaws that invalidated the ACCA's residual clause is not *another* new right that "breaks new ground" with *Johnson*, but is "merely an application of the principle that governed" *Johnson* to a closely analogous set of facts. *Chaidez*, 568 U.S. at 347-48; *Teague*, 489 U.S. at 307. The pre-*Booker* guidelines' residual clause "is not clearly different in any way that would call for anything beyond a straightforward application of *Johnson*." *Moore*, 871 F.3d at 81. The right asserted is "logically inherent" in *Johnson*, and "is exactly the right recognized by *Johnson*." *Id.* at 82-83. Because "the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enforcement as the ACCA's residual clause at issue in *Johnson*," Petitioner "is asserting the right newly recognized in *Johnson*." *Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

Because the right Petitioner asserted is a straightforward application of *Johnson*, the proper time for filing was within one year of *Johnson*. To illustrate, in *Descamps v. United States*, 570 U.S. 254 (2013), this Court first expressly held that "courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 258. In doing

so, it reasoned from existing precedent. *Id.* at 260-64 (discussing *Taylor v. United States*, 45 U.S. 575 (1990), and its progeny). Applying *Teague* and its progeny, courts of appeals held that § 2255 motions relying on *Descamps* were untimely because *Descamps* was merely an application of existing precedent. *See United States v. Morgan*, 845 F.3d 664, 668-69 (5th Cir. 2017) (holding motion untimely because *Descamps* "relied on existing precedent," and "a rule that applies a general principle to a new set of facts typically does not constitute a new rule"); *United States v. Headbird*, 813 F.3d 1092, 1095-97 (8th Cir. 2016) (same); *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016); *Ezell v. United States*, 778 F.3d 762, 764, 766 (9th Cir. 2015).

Dimaya further confirms that the proper time for filing was within one year of *Johnson*. *Dimaya* refutes the panel majority's assertion that "*Johnson* only recognized that ACCA's residual clause was unconstitutionally vague." *Dimaya* explained that "*Johnson* is a straightforward decision, with equally straightforward application here," 138 S. Ct. at 1213, and "tells us how to resolve this [§ 16(b)] case," *id.* at 1223. *Dimaya* tells us that *Johnson* recognized a right not to suffer serious consequences under a residual clause that, like the ones in the ACCA, § 16(b), and the career offender guideline, "ha[s] both an ordinary-case requirement and an ill-defined risk threshold." *Id.* at 1223. If *Johnson* "effectively resolved the case" before the Court in *Dimaya*, *id.* at 1213, involving a "similar" clause resulting in "virtual[ly] certain[]" deportation, *Johnson*'s application to a clause identical in its text and mode

of analysis to the ACCA's, mandating years longer in prison, resolves this case as well.

C. The panel majority's decision conflicts with the statutory text and Congress's purposes in enacting the statute of limitations.

A motion is timely under § 2255(f)(3) if filed within one year of the date on which the "right asserted was initially recognized" by this Court. The statute of limitations is a threshold inquiry, separate from the district court's subsequent determination of the merits. The panel majority's reading not only reverses the order of operations, but requires that this Court first confirm that the claim is correct on the merits before the statute of limitations can be met, setting a higher bar for the threshold statute-of-limitations inquiry than for courts to grant relief on the merits. This would render the statute of limitations redundant: a motion is timely only if this Court has already decided that it is correct on the merits, but if this Court has not already decided that it is correct on the merits, it is untimely.

The panel majority reads out of existence the term "asserted." To "assert" means to "state positively," or to "invoke or enforce a legal right." *Black's Law Dictionary* 139 (10th ed. 2014). There is no assumption in common usage or in law that one's assertions are necessarily correct. To the contrary. As this Court has put it, a § 2255 motion is timely if filed within one year of the date of the decision from which it "[seeks] to benefit." *Dodd v. United States*, 545 U.S. 353, 360 (2005)

Under the correct interpretation of § 2255(f)(3), motions filed within one year of *Johnson* by prisoners sentenced under the advisory guidelines were timely, but

were wrong on the merits.[16] Likewise, motions asserting a right within one year of a later case applying *Johnson*—such as the future case the panel majority posits or *Dimaya*—are unlikely to be timely because this Court "initially recognized" the right asserted in *Johnson*. Under this correct reading, courts held that motions filed within a year of *Descamps* were untimely because this Court had "initially recognized" the right asserted in previous cases.

Congress enacted the statute of limitations in the AEDPA to "curb lengthy delays in filing," while "preserving the availability of review when a prisoner diligently . . . applies for federal habeas review in a timely manner," including when this Court "recognizes a new right that is retroactively applicable." H.R. Rep. No. 104-23, at 9 (Feb. 8, 1995). Congress used the word "right" rather than "holding" because it "recognizes that [this] Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Moore*, 873 F.3d at 82. Reading § 2255(f)(3) to require prisoners to wait for this Court to decide a case exactly like theirs encourages delay and discourages diligent pursuit of known claims, contrary to Congress's purposes. *Cf. Johnson v. United States*, 544 U.S. 295, 309 (2005) ("explicit" requirement of "due diligence" in § 2255(f)(4) "reflects AEDPA's core purposes").

[16] If such a motion were filed after *Beckles*, it would be dismissed under Rule 4(b) of the Section 2255 Rules.

For prisoners like Petitioner, the panel majority's reading is a logical and practical impossibility. If the "right initially recognized by the Supreme Court" requires a precise holding by this Court, it would be impossible for this Court to ever recognize the right or any court to adjudicate the merits. None of these prisoners has an active direct appeal, and more than one year has passed since their convictions became final. 28 U.S.C. § 2255(f)(1). Section 2255 motions would always be premature because this Court hadn't precisely decided the issue, and this Court could never precisely decide the issue because it would always be too early, in "an infinite loop." *Zuniga-Munoz*, slip op. at 8 (rejecting this position and recommending that the district court grant the motion); *see also Chambers*, 2018 WL 1388745, at *2 (expressing skepticism of *Raybon* for this reason and granting certificate of appealability). There could be no "future case" to "wait for," *Brown*, 868 F.3d at 303.

D. The panel majority misinterpreted *Beckles*.

The panel majority reasoned that *Beckles* "confirms" that *Johnson* did not "invalidat[e] all residual clauses," and therefore "demonstrates that quacking like ACCA is not enough to bring a challenge within the purview of the right recognized by *Johnson*." *Brown*, 868 F.3d at 302-03. But a rule need not apply to every situation or not at all, and *Beckles* decided only that motions relying on *Johnson* in advisory guidelines cases were wrong on the merits. If anything, *Beckles* confirmed that *Johnson* "recognized" the right Petitioner asserts. *Beckles* created an exception to the rule announced in *Johnson* for advisory guidelines, not because the guidelines' residual clause is any less vague than the ACCA's, but because the advisory

Guidelines, unlike the ACCA or the mandatory Guidelines, do not "fix the permissible range of sentences." 137 S. Ct. at 894-95.

The panel majority also misstated Justice Sotomayor's footnote 4 to say that *Beckles* "expressly left open" and "expressly declined to address" whether *Johnson* applies to the mandatory-guidelines residual clause, and concluded from this that "the right, *by definition*, has not been recognized." *Brown*, 868 F.3d at 299 n.1, 300. *Beckles* did not and could not "expressly leave open" or "expressly decline to address" whether *Johnson* applies to the mandatory-guidelines residual clause because a mandatory guidelines case was not before the Court. *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring) ("That question is not presented by this case."). Accurately read, Justice Sotomayor noted that the Court's *reasoning* in reliance on the "distinction between mandatory and advisory rules" left open the *merits* question in a mandatory guidelines case not then before the Court.

III. This Court Should Reach the Merits and Hold That *Johnson* Invalidates the Mandatory Guidelines' Residual Clause.

This Court should reject the panel majority's reading of § 2255(f)(3), and reach the merits. The residual clause of the mandatory career offender provision is unconstitutionally vague for the same reasons that the residual clause of the ACCA is unconstitutionally vague. The text and mode of analysis are identical, and like the ACCA, the law under which Petitioner was sentenced "fix[ed] the permissible range of sentences." *Beckles*, 137 S. Ct. at 892.

That law, 18 U.S.C. § 3553(b), made the Guidelines "mandatory and impose[d] binding requirements on all sentencing judges." *United States v. Booker*, 543 U.S.

220, 259 (2005); *id.* at 245 (§ 3553(b) was the "provision of the federal sentencing statute that ma[de] the Guidelines mandatory"). By virtue of § 3553(b), the Guidelines "had the force and effect of laws." *Id.* at 234; *see also Mistretta v. United States*, 488 U.S. 361, 391 (1989) ("[T]he Guidelines bind judges and courts in . . . pass[ing] sentence in criminal cases."); *Stinson v. United States*, 508 U.S. 36, 42 (1993) ("[T]he Guidelines Manual is binding on federal courts."); *Dillon v. United States*, 560 U.S. 817, 820 (2010) ("As enacted, the SRA made the Sentencing Guidelines binding.").

Section 3553(b) required that "the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited circumstances." *Booker*, 543 U.S. at 234. Departure was not permitted unless the Commission had "not adequately" taken a circumstance into account, to be determined by considering "*only* the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission," 18 U.S.C. § 3553(b) (emphasis added), *all* of which were "binding." *Stinson*, 508 U.S. at 42-43. Thus, "[i]n 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." *Booker*, 543 U.S. at 234.

Accordingly, this Court repeatedly recognized that the guidelines fixed the permissible range of sentences. *Id.* at 226 ("binding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose"); *id.* at 227 ("mandated that the judge select a sentence" within the range); *id.* at 236 ("determined upper limits of sentencing"). Courts were not "bound only by the

statutory maximum," *id.* at 234, and there was no difference between the guideline maximum and "the prescribed statutory maximum," *id.* at 238.

Because the law under which Petitioner was sentenced "fixe[d] permissible sentences," it was required to "provide[] notice and avoid[] arbitrary enforcement by clearly specifying the range of penalties available." *Beckles*, 137 S. Ct. at 895. By combining an ordinary-case requirement and an ill-defined risk threshold, *Johnson*, 135 S. Ct. at 2557-58, the mandatory guidelines' residual clause failed to clearly specify the range of penalties available. *Beckles*, 137 S. Ct. at 894. As the Court reiterated in *Beckles*, "due process . . . require[d] notice in a world of mandatory Guidelines." *Id.* at 894 (quoting *Irizarry*, 553 U.S. at 713-14). The mandatory guidelines' residual clause also invited arbitrary enforcement. It left judges "free . . . to prescribe the sentences or sentencing ranges available," "without any legally fixed standards." *Id.* at 894-95 (internal citations omitted).

IV. The Questions Presented Are Exceptionally Important and Urgently in Need of Resolution By This Court.

If *Johnson* indeed invalidates the mandatory career offender guideline's residual clause, numerous federal prisoners are serving unlawful sentences. Approximately 1,200 prisoners sentenced as career offenders before *Booker* have pending § 2255 motions or appeals challenging their sentences in light of *Johnson*.[17] *See* Amicus Brief of Fourth Circuit Federal Defenders, Add. 1a-5a, *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017). Cases in the First Circuit are proceeding, but

[17] This does not include many prisoners whose applications to file a successive motion were denied, primarily by the Eleventh Circuit, as they have no case pending.

most others remain in limbo, awaiting definitive action by this Court. These prisoners have all served over thirteen years of potentially unlawful sentences, and many would be eligible for immediate release. As an indication, the career offender enhancement increased the average guideline minimum from 70 to 168 months for nearly half of defendants sentenced as career offenders in 2016, and from 84 to 188 months for another third.[18]

Meanwhile, prisoners with meritorious claims are receiving disparate treatment by different courts across the country. Cases in the Fourth Circuit are being held pending action by this Court.[19] In the Sixth Circuit, some district courts are denying motions and certificates of appealability, while others are granting certificates of appealability.[20] In the Eleventh Circuit, all possibility of relief has thus far been foreclosed. In the Third, Seventh and Ninth Circuits, most cases have been stayed pending resolution of appeals.[21] Meanwhile, in the First Circuit and in scattered cases elsewhere, movants are being resentenced.

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[18] U.S. Sent'g. Comm'n, *Quick Facts: Career Offenders* (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY16.pdf.

[19] *See*, *e.g.*, Order, *United States v. Rumph*, No. No. 17-7080 (4th Cir. Apr. 6, 2018) (Doc. 21); *Brown v. United States*, No. 01-cr-00377 (D. Md. Apr. 23, 2018) (Doc. 119).

[20] *See* Pet. for Writ of Cert. 31-32, *Raybon v. United States*, No. 17-8878 (U.S. May 7, 2018) (collecting cases).

[21] *See Cross v. United States*, No. 17-2282 (7th Cir.) (argued Jan. 10, 2018); *United States v. Blackstone*, No. 17-55023 (9th Cir.) (argued April 11, 2018); *United States v. Green*, No. 17-2906 (3d Cir.) (argument calendared for June 11, 2018).

V. This Case Provides an Ideal Vehicle for Deciding the Questions Presented.

This petition cleanly presents the issues, and their resolution is outcome-determinative. Petitioner was sentenced as a career offender in 2003, when the guidelines were binding on the sentencing judge as a matter of law. The career offender guideline mandated a sentence 22 months higher than what would otherwise have been the maximum permissible sentence. The enhancement depended on a prior conviction that qualified as a "crime of violence" only under the residual clause. Petitioner's appeal of the district court's denial of his § 2255 motion rose and fell on whether *Johnson* invalidated the residual clause. *Brown,* 868 F.3d at 300 n.5.

The panel majority decided that this Court had not yet recognized the right Petitioner asserted, while all but acknowledging that Petitioner would prevail on the merits. Chief Judge Gregory wrote a thorough dissent on both the statute of limitations and merits issues, and issued a written dissent from denial of rehearing.

If Petitioner were resentenced today without the career offender enhancement, his sentence would be significantly reduced. Finally, there is no possibility that the case would become moot, as Petitioner's current release date is September 18, 2025.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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