No. 20-__

IN THE
Supreme Court of the United States

JOHNNY GATEWOOD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether cause exists to excuse a habeas petitioner's procedural default when near-unanimous circuit precedent foreclosed the petitioner's claim.

2. Whether cause exists to excuse a habeas petitioner's procedural default when this Court explicitly overrules one of its precedents.

PARTIES TO THE PROCEEDING

Johnny Gatewood, petitioner on review, was the petitioner-appellant below.

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

RELATED PROCEEDINGS

To counsel's knowledge, all proceedings directly related to this petition include:

Gatewood v. *United States*, No. 01-7283 (U.S. Jan. 14, 2002) (reported at 534 U.S. 1107); *United States* v. *Gatewood*, No. 98-5138 (6th Cir. Oct. 10, 2000) (en banc) (reported at 230 F.3d 186); *United States* v. *Gatewood*, No. 98-5138 (6th Cir. July 6, 1999) (reported at 184 F.3d 530); *United States* v. *Gatewood*, No. 2:95-cr-20183-JPM (W.D. Tenn. Dec. 29, 1997)

In re Gatewood, No. 13-6541 (6th Cir. June 11, 2014); *In re Gatewood*, No. 07-5478 (6th Cir. May 31, 2007); *Gatewood* v. *United States*, No. 2:03-cv-02748-JPM-tmp (W.D. Tenn. Oct. 30, 2003); *Gatewood* v. *Smith*, No. 3:05-cv-1894 (M.D. Pa. Sept. 28, 2005)

Gatewood v. *United States*, No. 19-6297 (6th Cir. Oct. 29, 2020) (reported at 979 F.3d 391); *Gatewood* v. *United States*, No. 2:17-cv-02040-JPM-jay (W.D. Tenn. Oct. 31, 2019); *In re Gatewood*, No. 16-6074 (6th Cir. Jan. 19, 2017)

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Johnny Gatewood respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 979 F.3d 391. Pet. App. 1a-14a. The District Court's opinion is not reported. *Id.* at 15a-24a.

JURISDICTION

The Sixth Circuit entered judgment on October 29, 2020. On March 19, 2020, this Court by general order extended the deadline to petition for a writ of certio-

rari to 150 days from the date of the lower court judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. *See* Pet. App. 25a-27a.

INTRODUCTION

This Court rarely grants certiorari to repudiate unanimous circuit precedent. And it rarely grants certiorari to overturn one of its own precedents. But in some instances, the Court recognizes that the circuit courts—and even this Court—have made a "fundamental mistake," and it reverses course. *Janus* v. *Am. Fed. of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2480 (2018). When this Court announces a new substantive rule affecting criminal defendants, its decision in *Teague* v. *Lane*, 489 U.S. 288 (1989), permits those defendants to file a habeas petition to correct the error. *See Welch* v. *United States*, 136 S. Ct. 1257, 1265 (2016). This case is about whether those defendants who file a timely habeas petition are nonetheless barred from seeking relief under the procedural default rule.

The procedural default rule is a judge-made doctrine holding that "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." *Massaro* v. *United States*, 538 U.S. 500, 504 (2003). The purpose of that rule is to promote efficiency, finality, and fairness. *See Reed* v. *Ross*, 468 U.S. 1, 15 (1984). This Court has identified several circumstances in which it is neither efficient nor fair to prohibit a petitioner from

raising a new claim on collateral review, including when this Court 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 when "a decision of this Court * * * explicitly overrule[s] one of [its] precedents." *Id.* at 17 (internal quotation marks omitted).

That straightforward ruling in *Reed* ought to be the end of the matter. And it is, for the four courts of appeals that apply *Reed* and excuse procedural default when near-unanimous circuit precedent foreclosed a claim, when this Court overrules its own precedent, or both. *See, e.g.*, *United States* v. *Doe*, 810 F.3d 132, 153 (3d Cir. 2015); *Cross* v. *United States*, 892 F.3d 288, 295-296 (7th Cir. 2018); *English* v. *United States*, 42 F.3d 473, 479 (9th Cir. 1994); *United States* v. *Snyder*, 871 F.3d 1122, 1127 (10th Cir. 2017).

But three other courts of appeals, including the court below, refuse to follow *Reed*. *See* Pet. App. 8a-10a; *United States* v. *Moss*, 252 F.3d 993, 1002-03 (8th Cir. 2001); *McCoy* v. *United States*, 266 F.3d 1245, 1258-59 (11th Cir. 2001). According to those courts, this Court's decision in *Bousley* v. *United States*, 523 U.S. 614 (1998), abrogated *Reed sub silentio* when it stated that a petitioner cannot show cause to excuse procedural default "simply" because a particular legal claim was "unacceptable to [a] particular court at [a] particular time." *Bousley*, 523 U.S. at 623 (internal quotation marks omitted).

But *Bousley* did not say that it was overruling *Reed*. *See id.* at 622 (citing *Reed*). And *Bousley* is not inconsistent with *Reed*. *Bousley* addressed the completely different situation in which a petitioner failed to raise

a claim on direct review that was the subject of a circuit split. *See infra* p. 26. In those circumstances, the Court held that a petitioner could not show cause to overcome procedural default. *See Bousley*, 523 U.S. at 623. But that holding does not affect *Reed*'s discussion of *other* circumstances in which a petitioner can show cause to overcome procedural default. *See Reed*, 468 U.S. at 17. The court below, and the circuits that join it, erred by holding that *Bousley* somehow overruled *Reed* by implication. *See Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) ("[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (internal quotation marks omitted)).

The Court should intervene to resolve this acknowledged circuit split, and this case is an ideal vehicle to do so. The questions presented are cleanly presented and outcome-determinative. Petitioner Johnny Gatewood was sentenced to life in prison under the federal three-strikes statute. After this Court's decision in *Johnson* v. *United States*, 576 U.S. 591 (2015), he filed a timely habeas petition claiming that the residual clause of the three-strikes statute is unconstitutionally vague, and that he is entitled to resentencing. *See* Pet. App. 5a. There is no dispute that at the time of his direct criminal proceedings, longstanding practice and unanimous circuit precedent foreclosed Gatewood's residual-clause challenge to his sentence. And there is no dispute that *Johnson* overturned this Court's precedent upholding residual-clause sentences. Under *Reed*, Gatewood—and many other similarly situated habeas petitioners—are entitled to an adjudication of the merits of their habeas petitions.

The questions presented here are recurring, affecting hundreds if not thousands of habeas petitioners across the country. It is up to this Court to clarify the scope of the judge-made procedural default rule and to interpret its decisions in *Reed* and *Bousley*. The Court should grant the petition and reverse.

STATEMENT

A. This Court's Residual Clause Jurisprudence.

Several federal criminal statutes impose heightened punishment based on prior criminal conduct. These statutes may include a "residual clause," a catch-all that defines prior criminal conduct in vague terms. The Armed Career Criminal Act, for instance, sets a minimum 15-year prison term—and maximum life sentence—for felons who possesses firearms and have three or more prior convictions for "serious drug offense[s]" or "violent felon[ies]." 18 U.S.C. § 924(e)(1). The statue defines a violent felony to include "any crime" that "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*." *Id.* § 924(e)(2)(B) (residual clause emphasized).

The federal three-strikes statute, which is the statute at issue in this case, similarly empowers the government to seek a mandatory life sentence for defendants previously convicted of two "or more serious violent felonies" or "one or more serious violent felonies and one or more serious drug offenses." *Id.* § 3559(c)(1). Under the federal three-strikes statute, a "serious violent felony" is defined to include a number of crimes, including murder and manslaughter, as

well as "any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another" or that "*by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense*." *Id.* § 3559(c)(2)(F) (residual clause emphasized). A similar residual clause imposes a mandatory sentencing enhancement whenever a defendant uses a firearm "during and in relation to any crime of violence or drug trafficking crime." *Id.* § 924(c)(1)(A).

For many years, the courts of appeals routinely upheld sentences imposed under the residual clauses of federal criminal statutes. *See, e.g.*, *United States* v. *Veasey*, 73 F.3d 363 (6th Cir. 1995) (per curiam) (table opinion) ("This constitutional argument has been rejected by every Circuit that has considered it."); *see also United States* v. *Presley*, 52 F.3d 64, 68 (4th Cir. 1995); *United States* v. *Childs*, 403 F.3d 970, 972 (8th Cir. 2005); *United States* v. *Sorenson*, 914 F.2d 173, 175 (9th Cir. 1990). This Court, moreover, repeatedly interpreted statutes and guidelines containing residual clauses without comment about their constitutionality. *See, e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004); *Stinson* v. *United States*, 508 U.S. 36, 38 (1993).

In *James* v. *United States*, 550 U.S. 192 (2007), the Court for the first time explicitly addressed—and ultimately rejected—a challenge to the residual clause of a criminal statute. There, the habeas petitioner argued that his prior conviction under Florida's attempted burglary statute did not qualify as a "violent felony" under the Armed Career Criminal Act. *See id.*

at 196. According to the petitioner, "attempted burglary" did not fall under the residual clause "unless *all* cases" of attempted burglary under Florida law present "a risk of physical injury to others." *Id*. at 207. This Court disagreed. So long as "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another," the Court explained, the offense fell within the residual clause. *Id*. at 208.

In dissent, Justice Scalia argued that the Armed Career Criminal Act's residual clause was unconstitutional because it required courts to apply "vague language" with "highly unpredictable" results. *Id.* at 230 (Scalia, J., dissenting). A majority of this Court rejected that argument, citing other federal and state criminal statutes that employ "[s]imilar formulations," and concluding that the residual clause "is not so indefinite as to prevent an ordinary person from understanding what conduct it prohibits." *Id.* at 210 n.6. The Court noted, moreover, that neither the petitioner nor amici in support of petitioner had challenged the residual clause on vagueness grounds. *See id.*

Over the next several Terms, this Court addressed several challenges to the Armed Career Criminal Act's residual clause. In *Begay* v. *United States*, 553 U.S. 137 (2008), the Court held that driving under the influence did not qualify as a violent felony under the residual clause of the Armed Career Criminal Act. *See id.* at 148. In *Chambers* v. *United* States, 555 U.S. 122 (2009), the Court held that a felony failure to report to incarceration did not qualify as a violent felony under the residual clause. *See id.* at 130. And in *Sykes* v. *United States*, 564 U.S. 1 (2011), the Court

held that a state statute making it a crime for a driver to flee from police *was* a violent felony under the residual clause. *See id.* at 4. Justice Scalia again dissented, arguing that the Court should "admit that ACCA's residual provision is a drafting failure and declare it void for vagueness." *Id.* at 28 (Scalia, J., dissenting).

In *Johnson* v. *United States*, 576 U.S. 591 (2015), this Court finally adopted Justice Scalia's position. The Court acknowledged that its "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Id.* at 598. "All in all," the Court explained, "*James*, *Chambers*, and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition." *Id.* at 600. The Court concluded that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 602.

In *Welch* v. *United States*, 136 S. Ct. 1257 (2016), the Court held that *Johnson* announced a substantive constitutional rule that applies retroactively to cases on collateral review, permitting criminal defendants to seek habeas review of their sentences under *Johnson*. *Id.* at 1268. Following *Welch*, this Court has applied *Johnson*'s reasoning to other statutes, including a residual clause incorporated into the Immigration and Nationality Act, *see Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and the residual clause governing the use of a firearm during crimes of violence or drug trafficking crimes, *see United States* v. *Davis*, 139 S. Ct. 2319 (2019). The Court has struck down those residual

clauses, too, as unconstitutionally vague. *See Dimaya*, 138 S. Ct. at 1223; *Davis*, 139 S. Ct. at 2336.[1]

The residual clause at issue in *Davis* is nearly identical to the residual clause of the federal three-strikes statute. *Compare* 18 U.S.C. § 924(c)(1)(A), *with id.* § 3559(c)(2)(F)(ii). In the court below, the government conceded that, "under *Davis*, the residual clause in the three-strikes statute is unconstitutionally vague." Brief of Respondent-Appellee United States at 12, *Gatewood* v. *United States*, 979 F.3d 391 (6th Cir. 2020) (No. 19-6297).

B. Procedural Default And The Cause-And-Prejudice Standard.

A federal prisoner may challenge the legality of a sentence or conviction in federal court under the federal habeas statute, 28 U.S.C. § 2255. A state prisoner may do the same under 28 U.S.C. § 2254. Petitioners must normally file a habeas petition within one year of conviction. *See id.* § 2255(f)(1). But if this Court recognizes a new right "made retroactively applicable to cases on collateral review," the petitioner may file a petition within one year from the date on which the Court first recognizes the new right. *Id.* § 2255(f)(3); *see id*. § 2244(d)(1).

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[1] In *Beckles* v. *United States*, 137 S. Ct. 886 (2017), the Court rejected a vagueness challenge to a residual clause of the sentencing guidelines, but the Court did not address whether defendants sentenced prior to *United States* v. *Booker*, 543 U.S. 220 (2005)—when the sentencing guidelines were mandatory—could raise such a challenge. *See* 137 S. Ct. at 894; *id*. at 903 n.4 (Sotomayor, J., concurring in the judgment).

If a new right is retroactive, and a habeas petition is timely, the petitioner must often meet yet another requirement to obtain relief. If the petitioner procedurally defaulted the claim at issue—by failing to raise it at the appropriate stage of the criminal proceedings in state or federal court—the federal habeas court "will not entertain" that claim "absent a showing of cause and prejudice." *Dretke* v. *Haley*, 541 U.S. 386, 388 (2004). This "cause and prejudice" standard "is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro*, 538 U.S. at 504.

In *Reed*, this Court held that "the cause requirement may be satisfied under certain circumstances" when "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" and the "procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests." 468 U.S. at 14, 16. As relevant here, *Reed* identified two such circumstances.[2] First, there is cause to excuse procedural default when a decision of this Court "explicitly overrule[s] one of [its] precedents." *Id.* at 17. Second, there is cause to excuse procedural default when a decision of this Court overturns "a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority expressly approved." *Id.* (internal quotation marks omitted). In those circumstances, "[c]ounsel's failure to raise a claim for which

[2] *Reed* also identified a third circumstance, when a decision of this Court disapproves of "a practice this Court arguably has sanctioned in prior cases." 468 U.S. at 17.

there was no reasonable basis in existing law does not seriously implicate any of the concerns" that justify enforcing the procedural bar. *Id.* at 15.

The Court has identified circumstances in which a habeas petitioner cannot show cause for failure to raise a claim on direct review. In *Bailey* v. *United States*, 516 U.S. 137 (1995), the Court resolved a circuit split over what constitutes "using" a firearm "during and in relation to a drug trafficking crime" under 18 U.S.C. § 924(c)(1), holding that mere possession does not qualify as "use." *Bailey*, 516 U.S. at 142-143. In *Bousley* v. *United States*, 523 U.S. 614 (1998), a habeas petitioner sought to benefit from this Court's decision in *Bailey*. *See id.* at 616. The petitioner did not raise a *Bailey* claim at the time of his sentencing, but argued there was cause to excuse his procedural default because circuit precedent would have foreclosed his claim at that time. *See id.* at 623. This Court disagreed, stating that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." *Id.* (quoting *Engle* v. *Isaac*, 456 U.S. 107, 130 n.35 (1982)).

In *Smith* v. *Murray*, 477 U.S. 527 (1986), this Court reached a similar conclusion. There, a habeas petitioner challenged his conviction on the ground that the state court had improperly elicited testimony from a psychiatrist. *See id.* at 529-530. The petitioner had challenged the improper testimony at trial, but did not preserve that claim on appeal. *See id.* at 534-535. This Court held that the petitioner could not show cause to excuse his procedural default. A "deliberate, tactical decision not to pursue a particular claim," the Court explained, "is the very antithesis of the kind of

circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases." *Id.* at 534. The Court rejected petitioner's argument that state-court precedent foreclosing his claim provided cause to excuse his procedural default, stating that petitioner's constitutional claim "had been percolating in the lower courts for years at the time of his original appeal." *Id*. at 537; *see id.* at 534 (citing *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978); *see also Gibson*, 581 F.2d at 78-79 (citing seven other circuit courts that would have ruled in petitioner's favor at the time of his direct appeal).

C. Procedural History.

In 1997, a jury convicted petitioner Johnny Gatewood of two counts of kidnapping and one count of robbery affecting interstate commerce. *See* Pet. App. 2a. Gatewood had four previous Arkansas convictions for robbery offenses. Based on those prior convictions, the government sought, and the Court imposed, a mandatory life sentence under the federal three-strikes statute. *See id*. In the absence of that mandatory life sentence, Gatewood's presentence report calculated his sentencing guidelines range at 188 to 235 months, or 15 to 19 years. *See* Appellant's Reply Brief at 7-8, *Gatewood* v. *United States*, 979 F.3d 391 (6th Cir. 2020) (No. 19-6297). As of the filing of this petition, Gatewood has served over two decades in prison.

Gatewood appealed his initial conviction, and this Court denied certiorari in 2002. *See Gatewood* v. *United States*, 534 U.S. 1107 (2002). Gatewood also sought post-conviction relief, which was denied.

Gatewood filed this habeas petition in 2016, following the Court's decision in *Johnson*. He argued that

under *Johnson*, the federal three-strikes statute's residual clause was unconstitutionally vague and that he was entitled to resentencing. *See* Pet. App. at 3a. While Gatewood's habeas petition was pending in the district court, this Court decided *Davis*, which held that the residual clause of 18 U.S.C. § 924(c) is unconstitutionally vague. *See Davis*, 139 S. Ct. at 2336. The residual clause of the federal three-strikes statute is nearly identical. *See* 18 U.S.C. § 3559(c)(2)(F)(ii). Gatewood cited *Davis* in his district court briefing as further support for his petition. *See* Reply in Support of § 2255 Motion, *Gatewood* v. *United States*, No. 2:17-cv-02040 (W.D. Tenn. July 23, 2019), ECF 17, at 4. The district court denied Gatewood's petition as untimely, concluding that *Johnson* was limited to the Armed Career Criminal Act and did not govern Gatewood's sentence under the federal three-strikes statute. *See* Pet. App. at 21a. The district court issued a certificate of appealability. *See id.* at 23a.

On appeal to the Sixth Circuit, the government conceded that Gatewood's petition was timely following this Court's decision in *Davis*. *See* Brief of Respondent-Appellee United States at 12, *Gatewood* v. *United States*, 979 F.3d 391 (6th Cir. 2020) (No. 19-6297). The government contended, however, that Gatewood procedurally defaulted his *Davis* claim by failing to raise it on direct review. *See id*. The Sixth Circuit agreed, denying Gatewood's motion for habeas relief.

The Sixth Circuit first examined Gatewood's argument that "his vagueness claim is 'novel' " under *Reed*—providing cause to excuse his procedural default—"because at the time of his sentencing it was foreclosed by a near-unanimous body of lower court authority." Pet. App. 8a. (internal quotation marks

omitted). The Sixth Circuit acknowledged that "*Reed* did suggest that this species of 'novelty,' later described by the Court as 'futility,' could excuse procedural default." *Id.* (quoting *Reed*, 468 U.S. at 16). But the Sixth Circuit concluded that *Bousley* "limited the breadth of *Reed*'s holding," and it refused to find cause based on the uniform circuit precedent foreclosing Gatewood's residual-clause claim at the time of his sentencing. *Id.* (internal quotation marks omitted). The Sixth Circuit acknowledged that the Seventh Circuit had reached the opposite conclusion. *See id.* at 10a n.2 (citing *Cross*, 892 F.3d at 296 (7th Cir.)).

The Sixth Circuit next examined Gatewood's argument that this Court's decision in *Johnson*—which overruled the Court's prior residual-clause precedent—provided cause to excuse his procedural default. *See id.* at 10a-14a. The Sixth Circuit rejected that argument, too.

The court acknowledged that under *Reed*, there is cause to excuse procedural default when this Court overrules an earlier precedent. *See id.* at 11a. But the Sixth Circuit limited *Reed* to cases of "actual futility," where "at the time of default, the claim had been expressly foreclosed by a precedent of the Supreme Court that the Court later explicitly overrules." *Id.* (internal quotation marks and alterations omitted). Because this Court did not *expressly* uphold a residual-clause sentence until its 2007 decision in *James*, the Sixth Circuit reasoned, Gatewood was not foreclosed at the time of his 1997 sentencing from raising a residual-clause challenge. *See id.* at 12a-13a. The Sixth Circuit recognized that "[i]n so holding, we part ways with the Seventh and Tenth Circuits, which have concluded that under *Reed*, *Johnson*'s overruling

of *James* and *Sykes* creates cause even for petitioners whose convictions became final before *James* was decided." *Id.* at 13a (citing *Cross*, 892 F.3d at 295-296 (7th Cir.); *Snyder*, 871 F.3d at 1127 (10th Cir.)).

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW ACKNOWLEDGED TWO CIRCUIT SPLITS.

This petition presents two clear splits, both acknowledged by the court below.

First, *Reed* states that there is cause to excuse procedural default when "a near-unanimous body of lower court authority has expressly approved" of a "longstanding and widespread practice" that the Court later holds is unconstitutional. 468 U.S. at 17. (internal quotation marks omitted). The Third, Seventh, and Ninth Circuits continue to apply *Reed*, finding cause to excuse procedural default in those circumstances. *See Doe*, 810 F.3d at 153 (3rd Cir.); *Cross*, 892 F.3d at 296 (7th Cir.); *English*, 42 F.3d at 479 (9th Cir.). The Sixth, Eighth, and Eleventh Circuits disagree, concluding that under *Bousley*, circuit precedent foreclosing a claim cannot excuse procedural default. *See* Pet. App. 8a-10a; *Moss*, 252 F.3d at 1002-03 (8th Cir.); *McCoy*, 266 F.3d at 1258-59 (11th Cir.).

Second, *Reed* states that there is cause to excuse procedural default when this Court overturns its own precedent, indicating "a clear break with the past." 468 U.S. at 17 (internal quotation marks omitted). The Seventh and Tenth Circuits hold that under *Reed*, this Court's decision in *Johnson* was a clear break from the past, providing cause to excuse procedural

default—including for petitioners like Gatewood, who were sentenced prior to *James*. *See Cross*, 892 F.3d at 296 (7th Cir.); *Snyder*, 871 F.3d at 1127 (10th Cir.). The Sixth Circuit disagrees, finding cause to excuse procedural default *only* in cases of "actual futility" where a petitioner was expressly foreclosed by this Court's precedent from raising a residual-clause challenge. *See* Pet. App. 11a.

This Court should intervene to address these two clear splits.

A. The Circuits Are Divided Over Whether Near-Unanimous Circuit Precedent Is Cause To Excuse Procedural Default.

1. Three circuits—the Third, Seventh, and Ninth—hold that under *Reed*, defendants like Gatewood need not present on direct review an argument foreclosed by near-unanimous circuit precedent to later raise that argument on habeas review.

In *Cross*, the Seventh Circuit considered *Johnson* challenges brought by two habeas petitioners to their residual-clause sentences. *See* 892 F.3d at 291. As in this case, the petitioners had not raised a residual-clause challenge on direct review and had thus defaulted that claim. *See id.* 291, 294. The Seventh Circuit held that under *Reed*, the petitioners could show cause to excuse their procedural default. *Id.* at 296.

The court rejected the government's argument that *Reed* is no longer good law, explaining that the "Supreme Court has since relied on *Reed*, * * * as have we." *Id.* at 295. The Seventh Circuit held that under *Reed*, the petitioners "could not reasonably have challenged" their residual-clause sentences "when the dis-

trict court sentenced them" because "no one—the government, the judge, or the defendant—could reasonably have anticipated *Johnson*." *Id.* (alterations omitted). The Seventh Circuit concluded that the scenario described by *Reed*—where an argument is foreclosed by near-unanimous circuit precedent—presented "compelling grounds to excuse" petitioners' procedural default, given that "*Johnson* abrogated a substantial body of circuit court precedent upholding the residual clause against vagueness challenges." *Id.* at 296. The court permitted the petitioners' habeas suits to proceed, holding that "the parties' inability to anticipate *Johnson* excuses their procedural default." *Id.*

The Third Circuit has reached the same conclusion. In *Doe*, the petitioner filed a Section 2255 petition seeking relief under *Begay*, which had interpreted the phrase "violent felony" in the Armed Career Criminal Act to require "purposeful, violent, and aggressive conduct." 810 F.3d at 139. The petitioner had not raised a *Begay* claim on direct review, and circuit precedent had foreclosed such a claim at that time. *See id.* at 140. In those circumstances, the Third Circuit found cause to excuse the petitioner's procedural default, explaining that the "failure to object in the face of a 'solid wall of circuit authority' contrary to" the petitioner's "position did not work a default." *Id.* at 153 (quoting *English*, 42 F.3d at 479). The court concluded that under *Reed*, "[w]hen the legal basis for a claim was not reasonably available to counsel, there is 'cause' for a procedural default." *Id.* (internal quotation marks and citation omitted).

Likewise, the Ninth Circuit has held that a petitioner does not procedurally default when he fails to

raise a "futile" claim foreclosed by "a solid wall of circuit authority." *English*, 42 F.3d at 479 (internal quotation marks omitted). There, the petitioner had failed to object at trial to a voir dire procedure later held unconstitutional in *Gomez* v. *United States*, 490 U.S. 858 (1989). The Ninth Circuit concluded that "it would be pointless (and indeed wasteful) to require a defendant to raise such a futile objection in the district court," and that the defendant accordingly "did not forfeit a *Gomez* claim merely by failing to raise an objection in the trial court." *English*, 42 F.3d at 479. Courts in the Ninth Circuit continue to follow that approach. *See, e.g.*, *United States* v. *Peralta-Romero*, 83 F. App'x 872, 874 (9th Cir. 2003) (table opinion); *United States* v. *Oliverio*, 198 F.3d 255 (9th Cir. 1999) (table opinion); *United States* v. *Chea*, Nos. 98-CR-20005-1 CW, 98-cr-40003-2 CW, 2019 WL 5061085, at *6 (N.D. Cal. Oct. 2, 2019) (holding that petitioner showed cause to excuse procedural default on *Johnson* claim); *United States* v. *Howard*, Nos. 93cr943 JM, 16cv1538 JM, 16cv2709 JM, 2017 WL 634674, at *3 (S.D. Cal. Feb. 16, 2017) (same); *McFarland* v. *United States*, Nos. CV 16-7166-JFW, CR 00-1025-JFW, 2017 WL 810267, at *4 (C.D. Cal. Mar. 1, 2017) (same).

2. The Sixth, Eighth, and Eleventh Circuits, in contrast, hold that near-uniform circuit precedent foreclosing an argument is *not* sufficient cause to overcome procedural default.

In the Sixth Circuit proceedings below, Gatewood sought to vacate his sentence under *Johnson* and *Davis*, arguing that the residual clause of the federal three-strikes statute was unconstitutionally vague. *See* Pet. App. 3a. Gatewood did not raise that challenge on direct review, but he argued that there was

cause to excuse his default, because "at the time of his sentencing it was foreclosed by a near-unanimous body of lower court authority." *Id.* at 8a (internal quotation marks omitted). The Sixth Circuit rejected that argument. The court acknowledged that "*Reed* did suggest that this species of 'novelty,' later described by the Court as 'futility,' could excuse procedural default." *Id.* (quoting *Reed*, 468 U.S. at 16). The Sixth Circuit nevertheless held that "the Court subsequently narrowed the broad *Reed* 'novelty' test in *Bousley*." *Id.* (internal quotation marks omitted).

The Sixth Circuit interpreted *Bousley* and *Smith* "to mean that futility cannot be cause" to excuse procedural default "where the source of the perceived futility is adverse state or lower court precedent." *Id.* at 9a (internal quotation marks omitted). The court expressly rejected the Seventh Circuit's position in *Cross*, *see id.* at 10a n.2, stating that "[e]ven the alignment of the circuits against a particular legal argument does not equate to cause for procedurally defaulting it." *Id.* at 9a-10a (internal quotation marks omitted). According to the Sixth Circuit, Gatewood "cannot establish cause by showing that his vagueness claim cut against the current federal circuit precedent at the time of his direct appeal." *Id.* at 10a. The court ruled that a habeas petitioner has cause to overcome procedural default *only* when "the Supreme Court has decisively foreclosed an argument." *Id.* (internal quotation marks omitted).

The Eleventh Circuit concurs. In *McCoy*, the petitioner alleged that his drug conviction was unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). The petitioner had not raised that claim on direct review, and a divided Eleventh Circuit panel

found no cause to excuse the default. The panel majority acknowledged that "reasonable defendants and lawyers could well have concluded it would be futile to raise the issue" given that "every circuit which had addressed the issue had rejected" it. 266 F.3d at 1258. Nevertheless, the panel majority held that "perceived futility does not constitute cause to excuse a procedural default," citing *Bousley* and *Smith*. *Id*.

The third member of the panel concurred in the judgment, concluding that the defendant's claim failed on the merits. In a separate opinion, however, the concurrence criticized the majority's reading of *Bousley*, stating that "the majority's reasoning leads to the improbable conclusion that the rejection of a claim by every circuit in the country can never be considered relevant to whether the claim is or is not reasonably available." *Id.* at 1273 (Barkett, J., concurring in the judgment). The concurrence would have read *Reed* and *Bousley* to hold that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time," but that a petitioner *could* show cause based on "the nationwide rejection, by every court, of the claim at issue." *Id.* As the concurrence put it, to "penalize a petitioner for failing to make a claim on appeal that had been explicitly rejected by every circuit in the country would be patently unfair." *Id.* at 1274.

The Eighth Circuit has joined the Sixth and the Eleventh. In *Moss*, the petitioner sought to raise an *Apprendi* claim for the first time on habeas review. *See* 252 F.3d at 1001. A divided panel of the Eighth Circuit acknowledged that the circuit courts had "unanimously rejected" such claims prior to this Court's decision in *Apprendi*. *Id.* at 1002. But the

Eighth Circuit nonetheless held, citing *Bousley*, that procedural default "cannot be overcome because the issue was settled in the lower courts." *Id.* at 1002. Judge Arnold dissented and would have held that under *Reed*, " 'cause' arises where a new constitutional rule 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.' " *Id*. at 1005 (Arnold, J., dissenting) (quoting *Reed*, 468 U.S. at 16).[3]

Given this clear split, the Court should grant certiorari.

B. The Circuits Are Divided Over Whether *Johnson* Provides Cause To Excuse Procedural Default For Petitioners Sentenced Prior To *James*.

This case presents yet another acknowledged split over whether *Johnson* provides cause to excuse procedural default for petitioners raising a residual-clause challenge who were sentenced prior to *James*.

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[3] Other circuits have suggested that *Bousley* narrowed *Reed* in certain respects, but have not addressed whether near-unanimous circuit precedent provides cause to excuse procedural default. *See, e.g.*, *Simpson* v. *Matesanz*, 175 F.3d 200, 211 (1st Cir. 1999); *United States* v. *Sanders*, 247 F.3d 139, 146 (4th Cir. 2001); *Daniels* v. *United States*, 254 F.3d 1180, 1191 (10th Cir. 2001) (en banc). The Seventh Circuit agrees that under *Bousley*, "that a legal argument would have been unpersuasive to a given court does not constitute 'cause' for failing to present that argument." *United States* v. *Smith*, 241 F.3d 546, 548 (7th Cir. 2001). It continues to find cause to excuse procedural default, however, in the circumstances identified in *Reed*. *See Cross*, 892 F.3d at 295.

1. In *Cross*, two habeas petitioners filed a residual-clause challenge to their sentences, which became final in 1992 and 2001—several years prior to this Court's 2007 decision in *James*, which explicitly rejected Justice Scalia's argument that the residual clause of the Armed Career Criminal Act was unconstitutionally vague. *See* 892 F.3d at 291-292. According to the Seventh Circuit, both petitioners could show cause to excuse procedural default because "the *Johnson* Court expressly overruled its own precedent and so satisfied * * * *Reed*." *Id*. at 295 (citations omitted).

The Seventh Circuit "acknowledge[d] that the cases overruled by *Johnson* were not decided until 2007 and 2011—after the petitioners' sentencing—and thus could not themselves have influenced petitioners' failure to object at trial." *Id*. at 295-296. But the court held that "when the Supreme Court reverses course, the change generally indicates an abrupt shift in law." *Id*. at 296. And the Seventh Circuit found that *Johnson* represented such a shift from earlier precedent, stating that the Court "took the position" in *James* "that the validity of the residual clause was so clear that it could summarily reject Justice Scalia's contrary view in a footnote." *Id*.

The Tenth Circuit has reached the same conclusion. In *Snyder*, the petitioner had been sentenced under the Armed Career Criminal Act in 2005, two years before this Court's decision in *James*. *See* 871 F.3d at 1125. The petitioner did not challenge his residual-clause sentence on direct appeal, but later filed a habeas petition raising that claim. *See id.* Quoting *Reed*, the Tenth Circuit explained that "[c]ause excusing procedural default is shown if a claim 'is so novel that its legal basis [wa]s not reasonably available to

counsel' at the time of the direct appeal." *Id.* at 1127. And the Tenth Circuit held that under *Reed*, when this Court " 'explicitly overrule[s]' prior precedent * * * 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 (quoting *Reed*, 461 U.S. at 17). The Tenth Circuit permitted the petitioners' habeas suit to proceed on that basis.

District courts in nearly every circuit have similarly found cause—on a variety of grounds—to excuse procedural default on habeas review of *Johnson* claims challenging sentences that became final prior to *James*. *See, e.g.*, *United States* v. *Goodridge*, 392 F. Supp. 3d 159, 168 (D. Mass. 2019); *Speed* v. *United States*, No. 16 CV 4500 (PKC), 2020 WL 7028814, at *4 (S.D.N.Y. Nov. 30, 2020); *United States* v. *Harris*, 205 F. Supp. 3d 651, 658 (M.D. Pa. 2016); *Royer* v. *United States*, 324 F. Supp. 3d 719, 735 (E.D. Va. 2018); *Johnson* v. *United States*, No. 4:16-CV-00649-NKL, 2016 WL 6542860, at *2 (W.D. Mo. Nov. 3, 2016); *Chea*, 2019 WL 5061085, at *6 (N.D. Cal.); *Herron* v. *United States*, No. 19-24313-CIV, 2020 WL 7074640, at *5 (S.D. Fla. Dec. 3, 2020); *United States* v. *Taylor*, 272 F. Supp. 3d 127, 136 (D.D.C. 2017).[4]

2. In the decision below, the Sixth Circuit "part[ed] ways with the Seventh and Tenth Circuits, which have concluded that, under *Reed*, *Johnson*'s overruling of *James* and *Sykes* creates cause even for petitioners whose convictions became final before *James*

[4] Where district courts have found cause to excuse procedural default and granted habeas relief, the government has repeatedly declined to appeal, preventing a deeper circuit split from developing.

was decided." Pet. App. 13a (citing *Cross*, 892 F.3d at 295-296 (7th Cir.), and *Snyder*, 871 F.3d at 1127 (10th Cir.)). The Sixth Circuit did not find those cases "persuasive." *Id.*

Instead, the Sixth Circuit held that Gatewood could show cause only if this Court's precedent *expressly* foreclosed his residual-clause challenge at the time of his sentencing. *See* Pet. App. 14a. The Court did not explicitly uphold the residual clause of the Armed Career Criminal Act until its 2007 decision in *James*. At that point, the Sixth Circuit agreed that "every court in the country would have been bound to reject" a residual-clause challenge. Because the "Supreme Court had not yet foreclosed" such a challenge prior to 2007, however, the Sixth Circuit concluded that it was "not 'by definition' futile" to raise a residual-clause challenge "because at that time state courts, lower federal courts, and the Supreme Court itself still remained free to adopt it." *Id*. (alteration omitted).

Because Gatewood's direct criminal proceedings took place prior to *James*, the Sixth Circuit held that he "has not shown cause for the procedural default of his vagueness claim" and he "therefore may not raise it on collateral review." *Id.*

This Court's intervention is equally warranted to resolve this second circuit split, which similarly affects habeas petitioners across the country.

II. THE DECISION BELOW IS WRONG.

The decision below is wrong twice over. First, it departs from this Court's precedent in *Reed*, which states that there is cause to excuse procedural default in specific circumstances—including the circumstances here. *See* 468 U.S. at 17. The Sixth Circuit

was not at liberty to ignore this Court's rulings. Second, the decision below departs from the fundamental purposes of the procedural default rule. That judge-created doctrine is intended to conserve judicial resources while promoting fairness; the decision below does neither.

A. The Decision Below Departs From *Reed*.

1. *Reed* plainly states that there is cause to excuse procedural default when this Court 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." *Id*. (internal quotation marks omitted). There is no dispute that longstanding practice and a unanimous body of lower court precedent at the time of Gatewood's sentencing approved of residual-clause sentences; as the D.C. Circuit put it, "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). The Sixth Circuit thus should have found cause under *Reed* to excuse Gatewood's procedural default. *See Cross*, 829 F.3d at 295.

Instead, the Sixth Circuit concluded that "[s]ubsequent case law * * * has limited the breadth of *Reed*'s holding," citing a First Circuit decision "questioning whether 'the familiar *Reed* unavailability standard is still good law' after *Bousley*." Pet. App. 8a-9a (quoting *Simpson*, 175 F.3d at 212). But it is not up to the Sixth Circuit to decide whether this Court's precedents are "still good law." As the Court warned in *Agostini*, lower courts should not conclude that "more recent cases have, by implication, overruled an earlier

precedent." 521 U.S. at 237. Rather, "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* (internal quotation marks omitted).

Reed—and not *Bousley* or *Smith*—directly controls the outcome here. *Reed* addresses whether a defendant can show cause to excuse procedural default when longstanding practice and near-unanimous circuit precedent forecloses a claim. *See* 468 U.S. at 17-18. In *Bousley*, in contrast, the lower courts had previously *split* over the petitioner's legal claim. *See Bailey*, 516 U.S. at 142 ("The Circuits are in conflict both in the standards they have articulated and in the results they have reached." (citations omitted)). And in *Smith*, the petitioner's counsel simply failed to raise a claim on appeal that he had raised at trial. *See* 477 U.S. at 534-535. That claim, moreover, was not foreclosed by unanimous circuit precedent; indeed, at the time of petitioner's direct criminal appeal, it would have prevailed in *eight circuits*. *See Gibson*, 581 F.2d at 78-79 (4th Cir.) (collecting cases).

Reed governs the circumstances here, as three circuits hold. *See supra* pp. 16-18. And *Reed* is plainly good law; this Court cited it approvingly in *Bousely* and *Smith*. *See Bousley*, 523 U.S. at 622; *Smith*, 477 U.S. at 533-534. The Sixth Circuit's decision to ignore *Reed*'s straightforward holding was error.

2. The decision below departed from *Reed* in a second respect. In that case, the Court stated that when "a decision of this Court * * * explicitly overrule[s] one of our precedents," signaling a "clear break with the past," cause exists to excuse procedural default. *Reed*, 468 U.S. at 17 (internal quotation marks omitted). In

those circumstances, "there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted." *Id.*

The decision below did not apply that straightforward holding of *Reed*, either. Instead, the Sixth Circuit limited *Reed* to cases of "actual futility," where "at the time" of default, "the Supreme Court ha[d] decisively foreclosed [the] argument." Pet. App. 10a. But "actual futility" is not the test this Court set forth in *Reed*. That decision describes multiple scenarios where cause exists to overcome procedural default; it does not limit cause to cases involving "actual futility." *See* 468 U.S. at 17.

Reed instructs the lower courts to determine whether a decision of this Court signals "a clear break with the past," such that defense counsel could not have reasonably anticipated the legal argument at bar. *Id.* (internal quotation marks omitted). If the Sixth Circuit had conducted that analysis, it would have concluded that a clear break occurred here. Prior to *James*, this Court had not addressed whether the residual clauses of federal sentencing statutes were unconstitutionally vague, because the circuit courts had universally accepted residual-clause sentences as constitutional. Indeed, this Court had interpreted such statutes without comment on their constitutionality. *See supra* p. 6. It was Justice Scalia who brought that issue to the attention of the Supreme Court in *James*—and who ultimately convinced the Court to overturn longstanding practice in this area. *See James*, 550 U.S. at 230 (Scalia, J., dissenting); *Johnson*, 576 U.S. at 606. *Johnson* represented a clear break with the past practice of the circuit courts

and with this Court's longstanding view of the law, as stated in *James*. *See Cross*, 892 F.3d at 296.

Because no one could have anticipated *Johnson*—either before or after this Court's decision in *James*—petitioners who were sentenced prior to *James* have cause to excuse their failure to raise a residual clause challenge at sentencing. For this reason too, the decision below is wrong.

B. The Decision Below Wastes Judicial Resources And Is Fundamentally Unfair To Habeas Petitioners.

The procedural default rule is a judge-made doctrine intended to *conserve* judicial resources. *See Massaro*, 538 U.S. at 504. It "promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow." *Reed*, 468 U.S. at 10-11. "This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights" in habeas proceedings. *Id.* at 15.

When defense counsel makes a "tactical decision to forgo a procedural opportunity" in a criminal proceeding, the procedural default rule prohibits the defendant from "pursu[ing] an alternative strategy" in a federal habeas court. *Id.* at 14; *see Smith*, 477 U.S. at 534. If a "counsel has no reasonable basis upon which to formulate a constitutional question," however, the procedural default rule does not apply. *Reed*, 468 U.S. at 14-15. Otherwise, if "novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, [the Court] might actually disrupt

[criminal] proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id.* at 15-16.

This Court thus recognized in *Reed* that "[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 that might otherwise require deference" to a "procedural bar." *Id.* at 15. And it reaffirmed that conclusion in *Bousley*, stating that "a claim that is so novel that its legal basis is not reasonably available to counsel may constitute cause for a procedural default." 523 U.S. at 622 (internal quotation marks omitted). In *Reed*, the Court explained two circumstances where that novelty test is met—where near-unanimous circuit precedent forecloses a claim, and where this Court overturns prior precedent, indicating a clear break with the past. *See* 468 U.S. at 17.

Both of those exceptions to the procedural default rule make good sense: When nearly every circuit court has rejected a claim, a defendant's failure to raise it in a criminal proceeding is not gamesmanship; it is an efficient use of the court's resources. Requiring defense counsel "to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law" does not promote "the efficiency of the * * * criminal justice system." *Id.* at 15-16. It does the opposite—encouraging "pointless" and "wasteful" litigation. *English*, 42 F.3d at 479. Similarly, when a decision of this Court overturns longstanding precedent—including its own precedent—in an area of law that was previously settled, it demonstrates that an argument was

not reasonably available to counsel. *See Cross*, 892 F.3d at 295-296. In those circumstances too, the federal courts should not foreclose a petitioner from raising a claim on habeas review.

The approach adopted by the court below, however, is not only a waste of judicial resources. It is also fundamentally unfair to criminal defendants. At the time Gatewood was sentenced, uniform circuit precedent foreclosed his residual-clause claim. *See id.* at 296. And it took this Court *years* of internal debate—including in *James*, *Sykes*, and finally *Johnson*—to determine that the residual clause of the Armed Career Criminal Act was unconstitutionally vague. *See Johnson*, 576 U.S. at 597. The Court explicitly recognized that it was "this Court's *repeated attempts* and *repeated failures* to craft a principled and objective standard of the residual clause" that confirmed "its hopeless indeterminacy." *Id.* at 598 (emphases added). Requiring Gatewood's counsel to anticipate a claim that this Court could not itself anticipate to preserve that claim for collateral review is fundamentally unfair.

The Sixth Circuit's position, moreover, is particularly arbitrary. It permits defendants who were sentenced after this Court's decision in *James*—but who did not raise a residual-clause challenge to their sentence—to seek habeas relief under *Johnson*. *See* Pet. App. 10a-11a (citing *Raines* v. *United States*, 898 F.3d 680 (6th Cir. 2018) (per curiam)). Yet it was Justice Scalia's dissent in *James* that put the vagueness issue on the map, making it *more* likely that a defense attorney would have raised a vagueness challenge after *James*, not less. *See James*, 550 U.S. at 230 (Scalia, J., dissenting).

Gatewood's trial counsel was not Justice Scalia. Few criminal defendants have legal representation of that caliber. Most defense attorneys have neither the time nor the vision to anticipate which constitutional claims will be resuscitated by this Court years in the future, after being rejected by nearly every circuit court. *See, e.g.*, *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards*, AM. BAR ASS'N 2 (Feb. 2017) (noting that in one state, 363 public defenders carried a workload for which 1,769 were required).[5] Only those defendants who are particularly fortunate—or who can pay for particularly good legal representation—will end up preserving such claims for habeas review. Whether a defendant is entitled to resentencing, or to release, should not be a matter of luck of the draw, much less the defendant's financial resources.

Reed's approach to procedural default is eminently sensical. It is the law of this land. And the Court should enforce it in this case.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE IMPORTANT AND RECURRING QUESTIONS PRESENTED.

This case is a clean vehicle to address the important questions presented. Both questions were raised and passed on below. *See* Pet. App. 8a-10a, 10a-14a. And the Sixth Circuit acknowledged that its decision deepened one circuit split and created a second. *See id.* at 10a n.2, 13a.

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[5] *Available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf.

The questions presented here fall in the heartland of this Court's responsibility to oversee the federal judiciary. The procedural-default rule is a judge-made doctrine that is intended to promote efficiency, finality, and fairness. *See Massaro*, 538 U.S. at 504. Where the courts of appeals disagree on the contours of that rule—leading to different outcomes for similarly situated petitioners—this Court's intervention is warranted. Only this Court can clarify the meaning of its decisions in *Reed*, *Bousley*, and *Smith*. And only this Court can declare whether "recent cases have, by implication, overruled" its "earlier precedent"—or whether *Reed* remains good law. *Agostini*, 521 U.S. at 237; *see* Pet. App. 8a-9a.

The questions presented are indisputably recurring. This Court held that *Johnson* is retroactive on collateral review, allowing habeas petitioners to bring timely residual-clause challenges to their sentences. *See Welch*, 136 S. Ct. at 1268. As a result, the federal courts face hundreds or even thousands of habeas petitions from prisoners alleging that they were sentenced under the residual clause of the Armed Career Criminal Act, the federal three-strikes statute, Section 924(c)'s firearm enhancement, or the formerly mandatory sentencing guidelines. Whether those petitioners are barred by the procedural default rule from seeking resentencing, or may instead obtain adjudication of the merits of their constitutional claims, is a crucial question for petitioners, some of whom—including Gatewood—face life sentences as a result of sentencing enhancements. Had Gatewood been convicted just a few hundred miles north in the Seventh Circuit, he would be entitled to seek resentencing. In the Sixth Circuit, however, Gatewood is prohibited from pressing his *Johnson* claim.

The questions presented will continue to recur. They arose after *Apprendi*, *Begay*, and *Johnson*, *see supra* pp. 16-24, and they will undoubtedly arise again. Each time this Court overrules an earlier precedent or reverses near-unanimous circuit precedent—and then holds that a new constitutional rule applies retroactively on collateral review—the federal courts will have to address whether habeas petitioners can show cause to overcome procedural default. Given the two clear circuit splits on that issue, the Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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