No. 24-7240

IN THE

Supreme Court of the United States

LUIS FERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The government expressly concedes that the circuits are deeply divided on the question presented: in a second or successive 28 U.S.C. § 2255 proceeding, what must the movant show to establish that his ACCA enhancement or 18 U.S.C. § 924(c) conviction is invalid in light of *Johnson v. United States*, 576 U.S. 591 (2015) or *United States v. Davis*, 588 U.S. 445 (2019), respectively? BIO 10, 18–19. The government does not dispute that this question is recurring and important, affecting whether countless federal prisoners must serve sentences that *Johnson* and *Davis* rendered unlawful. *See* Pet. 19–21. And, beyond pointing out that the issue purportedly lacks practical significance for Petitioner, the government does not identify a single vehicle problem here. *See* Pet. 22–24. Instead, the government's primary argument for opposing review is that the circuits requiring movants to prove actual reliance on the residual clause are correct. BIO 11–18. But that merits argument is no reason to deny review of a circuit conflict on an important question of federal law. And that argument is wrong in any event. The Court should grant review.

I. THERE IS A DEEP AND ACKNOWLEDGED CIRCUIT CONFLICT

The government expressly concedes that there is "some circuit disagreement as to the standard for second or successive Section 2255 motions premised on *Johnson v. United States*." BIO 10; *see also* BIO 18 (repeating that "disagreement" exists "over whether prisoners bringing second or successive *Johnson* claims bear the burden to demonstrate that their sentence was based on the ACCA's residual clause"). The government also acknowledges a split in the *Davis* context, noting that, "[l]ike the

court below, the Fifth and Tenth Circuits have relied on *Johnson* cases to recognize that a prisoner bringing a *Davis* claim must show that he was most likely sentenced under Section 924(c)'s residual clause," while "the Third Circuit has permitted *Davis* claims to advance so long as the prisoner's conviction 'may have' been based on the residual clause." BIO 19. These concessions are correct, though they understate the depth and openness of the division.

As explained in the Petition, in the context of *Johnson*, the Third, Fourth, and Ninth Circuits do not require movants to prove that the sentencing court actually relied on the residual clause. Instead, they grant successive § 2255 motions based on *Johnson* where the ACCA enhancement "may have" been based on the residual clause, and the movant is no longer subject to the enhancement. *See* Pet. 9–13 (discussing *United States v. Winston*, 850 F.3d 677, 681–82 & n.4 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 894–96 & n.6 (9th Cir. 2017); and *United States v. Peppers*, 899 F.3d 211, 216, 220–24, 227–30 (3d Cir. 2018). And as the government acknowledges, the Third Circuit now applies this same approach to *Davis* claims. BIO 19 (citing *United States v. Jordan*, 96 F.4th 584, 589 (3d Cir. 2024)).

By contrast, the First, Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits require the movant to prove actual reliance on the residual clause in *Johnson* claims. *See* Pet. 14–19 (discussing *Dimott v. United States*, 881 F.3d 232, 240–43 (1st Cir. 2018); *United States v. Clay*, 921 F.3d 550, 557–58 (5th Cir. 2019); *Potter v. United States*, 887 F.3d 785, 787–89 (6th Cir. 2018); *Walker v. United States*, 900 F.3d 1012, 1013 (8th Cir. 2018); *United States v. Driscoll*, 892 F.3d 1127, 1135 &

n.5 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–25 (11th Cir. 2017); and *United States v. West*, 68 F.4th 1335,1338–39 (D.C. Cir. 2023). And as the government also acknowledges, in addition to the court below, two other circuits have now adopted this same approach in the context of *Davis* claims. BIO 19 (citing *United States v. Lott*, 64 F.4th 280, 283–284 (5th Cir. 2023); *United States v. Bowen*, 936 F.3d 1091, 1108–1109 (10th Cir. 2019)).

Given that the circuits are divided 7–3 on the question presented in the context of *Johnson*, and now 3–1 on precisely the same question in the context of *Davis*, the legal issues have been fully aired in the lower courts. There is no suggestion that further percolation would aid this Court's review. To the contrary, the circuits are now simply choosing sides. *E.g.*, *Walker*, 900 F.3d at 1014–15. And they are effectively inviting this Court's intervention by continuing to highlight the circuit conflict. *See, e.g.*, *id.* at 1014 ("Our sister circuits disagree on how to analyze this issue."); *Beeman v. United States*, 899 F.3d 1218, 1227 n.2 (11th Cir. 2018) (Martin, J., dissenting from the denial of rehearing en banc) ("The circuits are . . . split on this question."); *Peppers*, 899 F.3d at 228 ("Lower federal courts are decidedly split"); *Raines v. United States*, 898 F.3d 680, 684 (6th Cir. 2018) ("The cases cited by the government reflect a circuit split"). And now here, Judge Rosenbaum, author of the opinion below, wrote a separate concurrence recognizing the circuit split and explicitly stating that she "would rehear this case en banc" to revisit the Eleventh Circuit's precedent in *Beeman*. *See Fernandez v. United States*, 114 F.4th 1170, 1187 (11th Cir. 2024); *see also id.* at 1186 n.3 (acknowledging the split: certain "sister

circuits" have "adopted *Beeman*'s rule, while others "have adopted a more permissive rule"). As rehearing was denied below, Judge Rosenbaum would presumably welcome this Court addressing *Beeman* and resolving the split. In short, the circuit conflict here is not "nascent," as the government suggests. *See* BIO 19. Rather, it is mature, open, and intractable. Only this Court can resolve it.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

That conflict also warrants this Court's review. The government does not dispute that numerous federal prisoners sentenced under the ACCA and § 924(c) have brought § 2255 motions in the wake of *Johnson* and *Davis*. And even assuming *arguendo* the government's contention that *Johnson* claims – which must generally have been filed by June 26, 2016 – "have grown increasingly stale," *see* BIO 19, the same certainly cannot be said of *Davis* claims. These must have been filed by a much later date, June 24, 2020. And as illustrated by the instant case and the above-mentioned recent circuit decisions bringing *Davis* claims to the forefront of the same split, the issue is recurring and far from "stale." In fact, the government seems to want to have it both ways: *Johnson* claims are too "stale" at this point to warrant this Court resolving the split, and in *Davis* context, the "nascent disagreement" between the circuits is too "shallow." *See* BIO 19. But the reality is that the question presented in both contexts is identical and the perpetuation of the circuit conflict into the *Davis* realm merely underscores that it continues to recur.

Nor does the government dispute that, following *Johnson* and *Davis*, many of those prisoners are now serving what would today be unquestionably illegal

sentences. Pet. 25–26. Likewise, the government does not dispute that sentencing courts were not legally required to—and in fact rarely did—specify the clause upon which the ACCA enhancement or § 924(c) sentence depended. Thus, the question presented is a recurring one, as confirmed by the number of appellate cases around the country addressing it, as well as the number of petitions presenting it for review.[1]

The question presented is not only recurring but important. As Petitioner's case illustrates, the strict burden of proof imposed by the Eleventh Circuit is the only obstacle standing between him and an unlawful sentence. Countless other federal prisoners are in the same position. Yet geography alone now determines whether they can remedy their illegal sentences. Prisoners in Boston, Cleveland, St. Louis, Denver, Atlanta, and Miami will be barred from doing so where, as will almost always be the case, they cannot prove that the sentencing court actually relied on the residual clause. Meanwhile, prisoners with identical criminal records or § 924(c) predicates and silent sentencing transcripts in Philadelphia, Charlotte, Phoenix, and Los Angeles will have their sentences vacated. That disparity is untenable. The government fails to explain why this Court's review is not warranted to resolve a conflict affecting whether scores of federal prisoners can remedy illegal sentences.

[1] Regarding these petitions, the Government lists many of them in a lengthy footnote and asserts that "this Court has repeatedly denied certiorari of issues similar to the one presented here in the *Johnson* context." BIO 10 n.1 (collecting cases). But rather than being a reason to deny certiorari here, the sheer volume of these petitions over such an extended period of time only serves to underscore that the question has been recurring for many years and that this Court's intervention is needed to resolve it.

III. THIS CASE IS AN EXCELLENT VEHICLE

In an effort to shield this divisive and important question from review, the government points repeatedly to the life sentence Petitioner is serving in another case and argues that because of it, "the issue lacks practical significance for petitioner." BIO 19; *see also* BIO 4, 11, 15, 20. While it is true that Petitioner is serving such a sentence, that does not negate the fact that he is still serving an illegal 25-year consecutive sentence in the case below. Nor does it mean that he may not one day be entitled to some form of relief in the other case. And most importantly, the sentence in the other case does not alter the reality that *this case* remains an ideal vehicle for the Court to resolve the recurring and important question presented herein.

Notably, the government does not identify a single vehicle problem here. Thus, at no point does the government argue that this case would be a poor or unsuitable vehicle to resolve the question presented. There is a reason for that conspicuous omission: this case is an ideal vehicle. *See* Pet. 22–25. Notably this case is a successive, not an initial, § 2255 motion. And the government did not advance any affirmative defenses in the circuit court below. Rather, it argued only that Petitioner's § 2255 motion should be denied for failure to satisfy his burden to prove that the district court relied on the residual clause. *See* Pet. 6–7, 22; Gov't C.A. Br. 5-7. As a result, that was the only issue below and was the exclusive basis of the court of appeals' decision. Thus, there is no dispute that the question is squarely presented here. *See* Pet. 22.

Moreover, the government does not now dispute that Petitioner would prevail under the approach adopted in the Third, Fourth, and Ninth Circuits. *See* Pet. 23–25. Because it was uncertain which clause the district court relied upon, Petitioner was unable to meet his burden of proof under *Beeman*. But it is undisputed that the district court here "may have" relied on the residual clause, which would suffice in the Third, Fourth, and Ninth Circuits. At no time did the court of appeals conclude that the district court did not in fact rely on the residual clause. Rather, it merely explained that Petitioner could not meet his burden to prove by a preponderance of the evidence that the district court actually relied on the residual clause, as *Beeman* required. That is precisely why this case implicates the question on which the circuits have divided.

Finally, it is undisputed that Petitioner's sentence is illegal today. Here, neither of Mr. Fernandez's two predicate offenses, Hobbs Act conspiracy and Hobbs Act attempt, qualify as crimes of violence under section 924(c)'s elements clause—and, as the court of appeals below recognized, have never so qualified. *See Fernandez*, 114 F.4th at 1180-81 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994)). That point was so clear that the court of appeals went out of its way to recognize it. As Judge Rosenbaum, author of the court's opinion, wrote in the opening lines of her separate concurrence: "Luis Fernandez stands convicted of and will spend twenty-five years in prison for something that Congress did not make a crime." *Fernandez*, 114 F.4th at 1183 (Rosenbaum, J., concurring). That is so, she continued, "even though Congress enacted a mechanism by which [the Court] can correct this

error – 28 U.S.C. § 2255." *Id.* Despite that acknowledgment, the court of appeals refused to correct his illegal sentence. In a thorough published opinion, it explained that, under *Beeman*, Petitioner could not prove that the district court actually relied on the residual clause, and that it was bound by that decision. *Fernandez*, 114 F.4th at 1172-82. Thus, the decision below perfectly tees up the question presented. Indeed, given Judge Rosenbaum's admission that Petitioner's sentence is unlawful, this Court will not find a better vehicle.

IV. THE DECISION BELOW IS WRONG

As mentioned at the outset, the government's primary argument against review is that the majority approach is correct on the merits. *See* BIO 11–19. But that is no reason to deny review of an important federal question that has deeply divided the circuits. *See* Sup. Ct. R. 10. Indeed, if the government is right, then three circuits are prematurely releasing prisoners from custody. And, if the government is wrong, then seven circuits are improperly refusing to correct illegal sentences. Thus, regardless of which side is correct, this Court's review is warranted.

In any event, the government is wrong on the merits. The government's argument essentially elevates the interests in finality over all else, including the "equitable principles [that] have traditionally governed the substantive law of habeas corpus." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quotation omitted). A federal prisoner's eligibility for § 2255 relief under *Johnson* and *Davis*—new rules of constitutional law that this Court not only announced but expressly made retroactive—should not turn on the happenstance of what the sentencing judge said

years or (as here) more than a decade earlier. That method of adjudication is as arbitrary as it is inequitable: defendants with identical criminal histories or § 924(c) convictions will be treated differently based solely on what a sentencing judge happened to say at the hearing.

The government responds by effectively faulting prisoners for silent sentencing records. But this overlooks that the residual clauses themselves were the very reason why defendants failed to object to the ACCA enhancement at sentencing or challenge the basis for a § 924(c) conviction. Because of these clauses' all-encompassing breadth, any objection would have been futile before *Johnson* and *Davis*. It would be particularly unfair to now force prisoners to serve illegal sentences based on a silent record that was itself attributable to the very statutory provisions that have since been retroactively invalidated by this Court.

Not only does the government's position neglect those weighty equitable considerations, but it improperly forbids successive movants from "rely[ing] on post-sentencing case law" such as in *Descamps* and *Mathis* "to prove [their] *Johnson* claim." *Peppers*, 899 F.3d at 235 n.21. Or similarly, in the *Davis* context, from relying on decisions like *Taylor* or *Brown* to demonstrate that, as is the case here, Petitioner's predicate offenses "were not crimes of violence under the elements clause at *any* point—not when [Petitioner] was convicted in 2009, and not now. *Fernandez*, 114 F.4th at 1180-81 (citing *Rivers*, 511 U.S. at 312). In an instance such as this, the sentence necessarily *must* have rested upon the residual clause and should have been vacated. *See* Pet. 27; *see also Beeman*, 899 F.3d at 1227 (Martin, J., dissenting from

the denial of rehearing en banc) ("if a person serving an ACCA sentence can show that his prior conviction could not qualify as a 'violent felony' under either the enumerated offenses or the elements clauses of ACCA, the prior conviction must have been deemed a violent felony under the residual clause.")

The decision below and others on the wrong side of the split, however, refuse to apply these post-sentencing decisions because they did not announce "new rules of constitutional law," and thus do not independently satisfy the gatekeeping criteria in 28 U.S.C. § 2255(h)(2). But as Judge Rosenbaum pointed out in her concurrence below, "[n]one of [the] circuits [on that side of the split] appear to have consulted the text of § 2255(b)." *See Fernandez*, 114 F.4th at 1186 n.3. It states simply that, following certification, "the movant's second or successive § 2255 motion then goes before the district court for merits consideration under § 2255(b), [which] provides, in relevant part, that if the district court 'finds . . . that the sentence imposed was *not authorized by law* or otherwise open to collateral attack, . . . the court shall vacate and set the judgment aside . . . .'" *Id.* (citing 28 U.S.C. § 2255(b)) (emphasis in original). Applying this straightforward textual analysis, while post-sentencing statutory decisions, unlike *Johnson* and *Davis*, cannot themselves be the basis of a second or successive motion, there is no reason why federal courts must ignore them when asking whether the ACCA enhancement or § 924(c) conviction implicated the residual clause. The government's position, however, as illustrated by the decision below, requires federal courts to disregard rather than respect this Court's binding, retroactive ACCA precedents in *Descamps*/*Mathis* and decisions such as *Taylor* in the

§ 924(c) *Davis* context. And because those precedents merely clarified what the law always was, that position also requires federal courts to presume that the sentencing court misapplied the law. Where, as here, the record is silent, there is no basis for such a presumption. Meanwhile, doing so has the disturbing effect of forcing federal courts to condemn prisoners to serve sentences that they know to be unlawful. There is no justification for that outcome, which contravenes the very purpose of § 2255: to remedy sentences "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a).

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this **25TH day of September, 2025**, in accordance with SUP. CT. R. 29, copies of the (1) Reply Brief for Petitioner and (2) Certificate of Service were served by third party commercial carrier for delivery to the Court within three calendar days. A copy of the same was served via e-mail upon the Solicitor General of the United States, at SupremeCt.Briefs@usdoj.gov.

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