No. 15-6418

IN THE

Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
(650) 849-5384

HELGI C. WALKER
Counsel of Record
JESENKA MRDJENOVIC
RUSSELL B. BALIKIAN
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
hwalker@gibsondunn.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether the district court erred when it denied petitioner's Section 2255 motion to vacate, which alleged that his prior conviction for robbery under Fla. Stat. § 812.13(1) did not qualify as a violent felony under the Armed Career Criminal Act of 1984 ("ACCA").

2. Whether *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)—which held that the residual clause of ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), is void for vagueness based on principles of procedural due process—nonetheless announced a new "substantive" rule of constitutional law that is retroactively applicable on collateral review under *Teague* v. *Lane*, 489 U.S. 288 (1989).

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Helgi C. Walker was appointed by the Court to brief and argue this case in support of the judgment below.

INTRODUCTION

This Court's landmark decision in *Teague* v. *Lane* established that new constitutional rules "generally ... should not be applied retroactively to criminal cases on collateral review." 489 U.S. 288, 303 (1989) (plurality opinion). That is so because the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id*. at 309. For the past quarter century, the Court has recognized only two narrow exceptions to this prohibition against retroactivity: substantive rules that "plac[e] 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe,'" and procedural rules that "requir[e] the observance of 'those procedures that ... are implicit in the concept of ordered liberty.'" *Id.* at 307, 310-11 (ellipsis in original) (quoting

Mackey v. *United States*, 401 U.S. 667, 692-93 (1971)).[1]

Johnson v. *United States*, 135 S. Ct. 2551 (2015), fits into neither of these exceptions. It held that the residual clause of the Armed Career Criminal Act ("ACCA") is void for vagueness. As this Court's precedents and hornbook law show, that holding is firmly rooted in the *procedural* guarantees of the Due Process Clause. It is thus impossible to say, with any fair use of language or logic, that the new rule announced in *Johnson* falls within the unique category of "'*substantive* due process' rules," *Mackey*, 401 U.S. at 692 (emphasis added), that Justice Harlan explained and the Court in *Teague* agreed could suffice to upset otherwise final criminal judgments.

Petitioner's argument to the contrary rests on a superficial analysis of *Johnson* that focuses on the *effects* of its holding and loosely describes them as "substantive." But this Court's retroactivity cases look to the nature of the constitutional right underlying the new rule—in particular, whether the rule is based on a procedural or substantive guarantee—not its consequences. And the term "substantive" must be understood in light of Justice Harlan's exception for "substantive due process" rules. Remarkably, petitioner never cites—much less grapples with—the examples of such conduct-protecting rules that Justice Harlan specifically identified. Presumably, that is because *Johnson*, unlike those cases, plainly does

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[1] Citations of *Mackey* refer to Justice Harlan's opinion concurring in part and dissenting in part. Citations of *Teague* refer to the plurality opinion.

not immunize any conduct from punishment. Instead, petitioner points to various snippets from this Court's habeas cases, but no feat of legal alchemy can transform *Johnson* from a decision based on procedural rights into a substantive one. He simply cannot squeeze *Johnson* into the category of substantive rules.

Petitioner thus resorts to the extreme claim that, because *Johnson* declared the residual clause unconstitutional, this Court must pretend that it never existed at all. This argument ignores *Teague*'s seismic shift in retroactivity jurisprudence. In *Teague*, the Court wisely abandoned a regime under which all new constitutional rules applied retroactively, irrespective of the fundamental difference between direct appeal and collateral review, in order to ensure a basic degree of finality in criminal law. It should resist petitioner's invitation to return to that failed jurisprudence.

Under this Court's modern retroactivity precedents, *Johnson* automatically applies to all cases pending on direct review. Those sentenced under ACCA's residual clause will reap its benefits on appeal. But applying *Johnson*'s new rule retroactively in post-conviction proceedings as well would impose undue societal costs: It would result in the release of hundreds or thousands of dangerous criminals, including many who were without doubt properly sentenced under the residual clause given this Court's repeated recognition that Congress intended to require enhanced sentences for violent recidivists and possessed the constitutional authority to do so. That this Court later decided that Congress had exercised that undisputed authority in insufficiently clear

terms does not make these final residual clause sentences "somehow forever erroneous." *Mackey*, 401 U.S. at 667-68.

In all events, petitioner is not entitled to relief under 28 U.S.C. § 2255, because his sentence was plainly valid under the elements clause of ACCA, and he triply defaulted any claim under *Johnson*.

STATEMENT

In 2010, Petitioner Gregory Welch pleaded guilty to being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g)(1). Based on his three prior convictions for violent felonies, the district court sentenced him to imprisonment for 180 months, the statutory minimum under ACCA, 18 U.S.C. § 924(e). On appeal, he argued that his conviction for Florida strong-arm robbery did not qualify as a violent felony. The Eleventh Circuit affirmed, and this Court denied review. *See United States* v. *Welch*, 683 F.3d 1304 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 913 (2013).

Roughly one year later, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. He reasserted that his robbery conviction did not constitute a violent felony. The district court denied his motion, and the Eleventh Circuit denied his request for a certificate of appealability ("COA"). Several weeks later, this Court held in *Johnson* that ACCA's residual clause is void for vagueness. Petitioner sought a writ of certiorari, arguing that his sentence was unlawful because the residual clause is unduly vague.

A. STATUTORY BACKGROUND

Finding that many violent crimes "are committed by a very small percentage of repeat offenders," Congress enacted ACCA to "increase the participation of the federal law enforcement system in efforts to curb armed, habitual (career) criminals." H.R. Rep. No. 98-1073, at 1 (1984). Based on its determination that robberies and burglaries were among "the most damaging crimes to society," *id.* at 3, Congress imposed an enhanced 15-year mandatory minimum sentence on those felons convicted of possessing a firearm "who ha[d] three previous convictions ... for robbery or burglary, or both," Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185 (1984).

Two years later, Congress determined that "the time ha[d] come to broaden [the definition of career criminal] so that we may have a greater sweep and more effective use of this important statute." *Taylor* v. *United States*, 495 U.S. 575, 583 (1990) (quotation marks omitted). Congress thus expanded "the range of predicate offenses" under ACCA, *id.* at 584, to cover any "violent felony" or "serious drug offense," Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39.

The amended ACCA defined "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause); (2) "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated-crimes clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical in-

jury to another" (the residual clause). 18 U.S.C. § 924(e)(2)(B)(i)-(ii).

"In *Taylor* … , this Court held that [ACCA] requires courts to use a framework known as the categorical approach … [to] asses[s] whether a crime qualifies as a violent felony." *Johnson* v. *United States*, 135 S. Ct. 2551, 2557 (2015). Under this approach, a court examines "how the law defines the offense and not … how an individual offender might have committed it on a particular occasion." *Ibid.* (quotation marks omitted).

Applying this framework in *James* v. *United States*, 550 U.S. 192 (2007), this Court held that attempted burglary under Florida law qualified as a violent felony because it "poses a risk of violence similar to that presented by the completed offense." *Id.* at 203-07. The Court rejected Justice Scalia's suggestion in dissent that the "residual provision is unconstitutionally vague." *Id.* at 210 n.6.

The Court subsequently decided that driving under the influence and the Illinois offense of failure to report to prison did not qualify as violent felonies, whereas the Indiana offense of vehicular flight from a law enforcement officer did. *Begay* v. *United States*, 553 U.S. 137 (2008); *Chambers* v. *United States*, 555 U.S. 122 (2009); *Sykes* v. *United States*, 131 S. Ct. 2267 (2011). In *Sykes*, the Court again rejected the notion that the residual clause was void for vagueness, holding that the provision "provides guidance that allows a person to conform his or her conduct to the law." 131 S. Ct. at 2277 (quotation marks omitted).

Nearly 30 years after enactment of the residual clause, this Court reversed course and declared it impermissibly vague, expressly "overrul[ing]" the "contrary holdings in *James* and *Sykes*." *Johnson*, 135 S. Ct. at 2563. Because *Johnson* arose on direct appeal, the Court did not confront the question whether its holding applies retroactively on collateral review.

B. POST-CONVICTION RELIEF

"The principle that collateral review is different from direct review resounds throughout [this Court's] habeas jurisprudence." *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993). Once direct review—"the principal avenue for challenging a conviction"—is complete, "'a presumption of finality and legality attaches to the conviction and sentence.'" *Ibid.* (citation omitted). "In keeping with this distinction," "the writ of habeas corpus has historically been regarded as an extraordinary remedy" available only to those few "'persons whom society has grievously wronged.'" *Id.* at 633-34 (citation omitted).

Issuance of the writ involves "profound societal costs." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quotation marks omitted). Most significantly, "the writ strikes at finality," *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991), which is "a crucial element" of "the effectiveness of the substantive commands of the criminal law," Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963).

Accordingly, both this Court and Congress "have found it necessary to impose significant limits" on its use. *Calderon*, 523 U.S. at 554-55 (collecting cases).

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 "to advance the finality of criminal convictions." *Mayle* v. *Felix*, 545 U.S. 644, 662 (2005). And this Court has "taken care in [its] habeas corpus decisions to reconfirm the importance of finality." *McCleskey*, 499 U.S. at 491.

C. FACTUAL BACKGROUND

1. At the time of petitioner's arrest in 2009 for unlawful possession of a firearm by a convicted felon, he had already amassed an extensive criminal record, including convictions for three violent felonies and numerous drug offenses. U.S. C.A. Br. 18, 21.

In 1996, petitioner was arrested and charged with robbery, carrying a concealed firearm, and resisting arrest. Presentence Report (PSR) ¶ 26. Approximately two weeks later, he was arrested again, *id.* ¶ 27, and charged with one count of "strong-arm robbery" under Fla. Stat. § 812.13(1) for unlawfully taking "jewelry" from his victim "by the use of force, violence, assault, or putting the said [victim] in fear," JA.187a. "[A]ccording to the victim, [petitioner] punched him in the mouth, fought with him, and grabbed his gold bracelet from his wrist, while another robber took the gold chain from the victim's neck." JA.111a. Petitioner pleaded guilty to these charges and was sentenced to 19 months in prison. PSR ¶¶ 26-27.

In the six years following his release from custody, petitioner was convicted of five other criminal offenses—ranging from driving without a license, to trespass, to drug possession. PSR ¶¶ 28-32.

Then, in 2003, petitioner was charged with one count of felony battery under Fla. Stat. § 784.041 for

"unlawfully actually and intentionally touch[ing] or strik[ing] [a victim] against his will and caus[ing] great bodily harm, permanent disability or permanent disfigurement, to-wit: by striking [the victim] on the head with a hammer or other blunt object." JA.166a. The State withdrew an initial plea deal after petitioner verbally threatened the victim in court. JA.173a ("The victim just represented to me that the defendant looked at him and told him, 'It's not over.' Based on that, there is no deal on the table. The victim just expressed to me that he is afraid for his life."). Ultimately, petitioner entered a plea of nolo contendere and was sentenced to 364 days of imprisonment. JA.167a-169a.

Between 2004 and 2007, petitioner was convicted of three additional drug possession charges. PSR ¶¶ 34, 36, 38.

2. In 2009, as part of an investigation into the shooting of two robbery victims at a nearby convenience store, police searched petitioner's apartment and found an automatic pistol and ammunition hidden in the attic. JA.103a. Petitioner, by then a convicted felon several times over, admitted that the weapon and bullets belonged to him. A federal grand jury indicted him on one felon-in-possession count under 18 U.S.C. § 922(g)(1). *See* JA.194a.

Petitioner pleaded guilty, reserving his right to appeal the denial of his motion to suppress the physical evidence. JA.104a, 141a-142a. The PSR "categorized [him] as an armed career criminal because of three prior violent felony convictions, and concluded that [ACCA] required that he be sentenced to a minimum of fifteen years in prison." JA.104a. Because

neither party (for reasons the record does not reveal) had contemplated that he would be subject to ACCA, the parties agreed to vacate his initial plea and enter into an amended plea agreement that preserved his right to challenge his classification under ACCA. JA.141a-142a.

Petitioner filed several objections to the PSR, arguing that his felony battery and strong-arm robbery convictions "should not be considered crimes of violence." JA.191a. He also sought to preserve the argument that it was a "violation of the Fifth and Sixth amendments for this enhancement to apply without being charged in the indictment, and determined by a jury." JA.162a-163a. He did not assert that the residual clause was unconstitutionally vague.

The district court ruled that "both of the challenged convictions do qualify" as violent felonies under ACCA. JA.157a. The court held that the felony battery conviction "certainly … meets the standards for a violent felony," JA.154a, 158a, and further ruled that strong-arm robbery "meets *both* tests" for a crime of violence under ACCA: "the elements test" *and* "the residual test," JA.158a (emphasis added).

On appeal, petitioner maintained that strong-arm robbery did not count as a crime of violence "under either [test]" because the Florida statute encompassed "mere snatching." JA.104a, 113a. He argued that "the degree of 'force' required to violate the state statute at the time of his conviction was too slight to satisfy [ACCA]." JA.113a. He again failed to raise a void-for-vagueness challenge. The Eleventh Circuit concluded that it "need not decide whether snatching is sufficiently violent under the elements clause"

because strong-arm robbery "ordinarily involves a substantial risk of physical injury to the victim" and thus satisfied the residual clause. JA.117a, 119a. This Court denied review.

3. Petitioner filed a motion seeking to vacate his sentence under Section 2255. He again argued that he "was not charged as [an armed career offender] in his indictment" in purported violation of the Fifth and Sixth Amendments. JA.94a. He also claimed that he "was not an armed career offender" because his strong-arm robbery conviction was "ambiguous, vague, and was without any violence and or physical force." JA.94a, 96a. This argument was not premised on any void-for-vagueness challenge to the residual clause, but on petitioner's belief that the Florida robbery statute was "ambiguous." JA.96a-97a. He maintained that the district court lacked "proper state documentation" to make an ACCA determination. JA.97a.

He also raised ineffective-assistance claims based on his counsel's failure to "objec[t] to the second plea agreement." JA.94a-96a. He argued that the government violated his "due process" rights because it "renege[d]" on his first plea agreement by asserting that he was subject to ACCA. JA.94a.

The government opposed the motion, and the district court denied it and declined to issue a COA. JA.25a-27a. Petitioner then requested a COA from the Eleventh Circuit. JA.17a-22a. He subsequently asked the court of appeals to hold his request in abeyance pending a decision from this Court in *Johnson* "based on the fact [that] he was sentenced under the 'Residual Clause' of the ACCA." JA.15a-

16a. The Eleventh Circuit denied his requests because he "failed to make a substantial showing of the denial of a constitutional right." JA.14a.

After this Court decided *Johnson*, petitioner asked for "more time to prepare a motion to reconsider." JA.12a. The Eleventh Circuit returned the request unfiled because it was "untimely." JA.13a. Petitioner then filed a petition for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

I. *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), announced a procedural rule that does not apply retroactively on collateral review.

A. Justice Harlan believed that habeas courts need not and should not "apply current constitutional law to habeas petitioners before them" outside of limited circumstances. *Mackey* v. *United States*, 401 U.S. 667, 686 (1971). This Court's groundbreaking decision in *Teague* v. *Lane* adopted this view, establishing that new constitutional rules "generally … should not be applied retroactively to criminal cases on collateral review." 489 U.S. 288, 303 (1989).

Following Justice Harlan's lead, the Court crafted two narrow exceptions to this general principle of nonretroactivity. *First*, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692). In applying this exception, the Court has given retroactive effect to only three particular types of new "substantive" constitutional rules: (1) rules that "place particular conduct or persons covered by [a

criminal] statute beyond the State's power to punish," *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004); (2) rules that "prohibi[t] a certain category of punishment for a class of defendants because of their status or offense," *Saffle* v. *Parks*, 494 U.S. 484, 494 (1990) (quotation marks omitted); and (3) "decisions that narrow the scope of a criminal statute" or "modif[y] the elements of an offense" "by interpreting [the statute's] terms," *Summerlin*, 542 U.S. at 351, 354 (citing *Bousley* v. *United States*, 523 U.S. 614, 620-21 (1998)). Taken together, these precedents assess whether Congress had the constitutional *power* to proscribe and punish particular conduct, and whether it *intended* to do so.

Second, "a new rule should be applied retroactively if it requires the observance of 'those procedures that … are implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 311 (ellipsis in original) (quoting *Mackey*, 401 U.S. at 693). Since *Teague*, this Court has identified the right to counsel as the only rule that "qualif[ies] under this exception." *Whorton* v. *Bockting*, 549 U.S. 406, 419 (2007).

B. The new rule announced in *Johnson* is grounded in principles of procedural—not substantive—due process. *Johnson* held that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges" in violation of "due process of law." 135 S. Ct. at 2557. The "'foundation stone' for [*Johnson*'s] analysis," *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 732 (2016), thus was the void-for-vagueness doctrine.

That doctrine vindicates the procedural guarantees of the Due Process Clause. As this Court has long held, the Constitution "erect[s] procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished." *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). As numerous decisions of this Court and hornbook law explain, fair notice and consistency of enforcement are process-based values that fall under the rubric of procedural due process, not any substantive component of due process. Indeed, the "right to notice" has been part of "the central meaning of procedural due process" for "more than a century." *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972).

It matters not that the application of *Johnson*'s holding "affect[s] substantive criminal law." Pet. Br. 17; *see also* U.S. Br. 13-14. This Court has consistently focused on the constitutional source of a new rule, not its effects, in determining whether it is substantive or procedural. Because *Johnson* is founded on principles of procedural due process, the rule it announced cannot be anything but procedural.

Johnson's procedural rule is also not a "'watershed rul[e] of criminal procedure,'" *Summerlin*, 542 U.S. at 352 (citation omitted), and no party or *amicus* claims otherwise.

C. Petitioner cannot squeeze *Johnson* into *Teague*'s narrow exception for substantive rules.

Justice Harlan's first exception covers "'substantive due process' rules" that cabin Congress's "lawmaking authority," *Mackey*, 401 U.S. at 692, which he illustrated with specific cases that petitioner

never mentions, *see id.* at 692 n.7. *Johnson* has nothing to do with the Constitution's substantive guarantees. It did not announce a substantive right to engage in conduct that "presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Nor did it hold that the Constitution "prohibit[s] a certain category of punishment for a *class* of defendants *because of* their status or offense." *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989) (emphasis added), *abrogated on other grounds by Atkins* v. *Virginia*, 536 U.S. 304, 312-13 (2002). Rather, *Johnson* faulted Congress for using insufficiently clear terms in the *execution* of its undisputed power to provide enhanced sentences for certain federal crimes. Thus, "[i]f Congress wanted" to "subjec[t] *all* repeat offenders to a 15-year mandatory minimum prison term," it could constitutionally—and "very easily"—do so. *James* v. *United States*, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting).

Petitioner and the government contend that *Johnson* prohibited an enhanced sentence for those defendants "whose ACCA sentence depended on the residual clause," U.S. Br. 26; *see also* Pet. Br. 19, but that artificial construction of a protected "class" has no basis in this Court's precedents. *Johnson* differs fundamentally from cases holding that the Constitution "plac[es] a substantive restriction on the State's power" to impose particular punishments on a class of offenders as defined by their shared personal identity or common conduct, all of which are rooted in the substantive guarantees of the Eighth Amendment. *See*, *e.g.*, *Atkins*, 536 U.S. at 321 (quotation marks omitted); *see also*, *e.g*, *Kennedy* v. *Louisiana*, 554 U.S. 407 (2008).

Johnson also did not "narrow the scope of [ACCA's residual clause] by interpreting its terms." *Summerlin*, 542 U.S. at 353 (citing *Bousley*, 523 U.S. at 620-21). Instead, the Court held that the residual clause "defies" construction and is "hopeless[ly] indetermina[te]." *Johnson*, 135 S. Ct. at 2558, 2562. Thus, unlike *Chambers* and *Begay*, *Johnson* did not find that Congress intended that any particular conduct should fall "outside the scope of ACCA's definition of 'violent felony.'" *Chambers* v. *United States*, 555 U.S. 122, 130 (2009). As a result, it did not implicate the separation-of-powers concerns underlying this Court's decision in *Bousley*.

Unable to fit *Johnson* into the category of "substantive" rules, petitioner contends that this Court necessarily declares a retroactively applicable rule *whenever* it deems a law "unconstitutional." Pet. Br. 1, 2, 26 n.11. But a statute can be unconstitutional for both substantive and procedural reasons, and this Court has distinguished between the two types of flaws. Moreover, the pre-*Teague* cases upon which petitioner so heavily relies—such as *Ex parte Siebold*, 100 U.S. 371 (1880)—each addressed the scope of the legislature's power to proscribe and arose during a time when all new rules applied retroactively on habeas review. Indeed, for most of the 19th century, the Supreme Court lacked any authority to review federal criminal convictions except by means of an original writ of habeas corpus. When the Court exercised its habeas authority, it thus was reviewing the judgment of conviction *itself*. This Court's habeas cases from that era consequently have little relevance to the question presented here.

D. Applying *Johnson* retroactively to otherwise-final judgments would have significant disruptive consequences. Foremost, such a holding would lead to the early release of hundreds and possibly thousands of violent felons, including those with "straightforward cases under the residual clause," *Johnson*, 135 S. Ct. at 2560, who unquestionably had sufficient notice that their predicate offenses subjected them to enhanced sentences. That would provide a dangerous windfall that the Constitution does not require and Congress plainly did not intend.

Moreover, lower courts have *already* begun to invalidate other federal laws, ranging from Sentencing Guidelines provisions to immigration statutes, under *Johnson*. Applying *Johnson* retroactively would thus invite an avalanche of collateral attacks on otherwise final convictions in a wide variety of contexts.

II. Regardless of whether *Johnson* should be applied retroactively on collateral review, the Eleventh Circuit's denial of a COA should be affirmed.

A. Petitioner's conviction for Florida strong-arm robbery qualifies as a violent felony under the elements clause because it required "the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1). Although the Eleventh Circuit assumed, without deciding, that petitioner "pleaded guilty to robbery at a time when mere snatching sufficed," JA.115a, the Florida Supreme Court explained nearly a century ago that "[t]here can be no robbery without violence." *Montsdoca* v. *State*, 93 So. 157, 159 (Fla. 1922).

B. Petitioner also triply defaulted his void-for-vagueness claim by failing to raise it at sentencing,

on direct review, or even in his Section 2255 motion. Because petitioner has made no attempt to establish "cause" for this procedural default, *see Reed* v. *Farley*, 512 U.S. 339, 354 (1994), and indeed cannot do so, the district court did not err in denying his motion.

ARGUMENT

I. *JOHNSON* DOES NOT APPLY RETROACTIVELY ON COLLATERAL REVIEW.

Under this Court's modern retroactivity jurisprudence, the new constitutional rule announced in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), applies to all cases pending on direct appeal when *Johnson* was announced. That same precedent precludes its retroactive application on collateral review to topple otherwise final criminal judgments.

A. *TEAGUE* AND ITS PROGENY LIMIT THE APPLICABILITY OF NEW RULES ON COLLATERAL REVIEW.

Petitioner treats *Teague* v. *Lane*, 489 U.S. 288 (1989), as a mere continuation of this Court's past retroactivity doctrine. Pet. Br. 1, 15. But *Teague* announced a sharp break from historical practice, establishing that new constitutional rules generally should not apply retroactively on collateral review, subject to two narrow exceptions for certain "substantive" rules of constitutional law and watershed rules of criminal procedure.

1. Before 1965, new constitutional rules "were, without discussion or analysis, routinely applied to cases on habeas review." *Danforth* v. *Minnesota*, 552 U.S. 264, 272 (2008). With new constitutional rules

being announced at "an accelerating pace in the 1950's and 1960's," *id.* at 270, the Court in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), first recognized that all new rules need not, and indeed should not, apply retroactively on collateral review. *Linkletter* held that retroactivity should instead be determined through a case-by-case evaluation of "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 629.

Linkletter's policy-based balancing approach soon proved unworkable, "produc[ing] strikingly divergent results" for similarly situated defendants. *Danforth*, 552 U.S. at 273. Justice Harlan, in a series of opinions, sought to find a better way. *See Desist* v. *United States*, 394 U.S. 244 (1969); *Mackey* v. *United States*, 401 U.S. 667 (1971); *United States* v. *U.S. Coin & Currency*, 401 U.S. 715 (1971).[2]

2. Justice Harlan believed that "[f]inality in the criminal law is an end which must always be kept in plain view," *Mackey*, 401 U.S. at 690, and he identified the "conflict between retroactivity and finality" as "a matter of the greatest importance if the integrity of the federal judicial process [was] to be maintained in [an] era of increasingly rapid constitutional change," *Desist*, 394 U.S. at 261, 262. He also explained that the role of federal courts on collateral review "is, and always has been, significantly different from [their] role in reviewing on direct appeal the

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[2] Citations of *Desist* and *U.S. Coin & Currency* refer to Justice Harlan's opinions.

validity of nonfinal criminal convictions." *Mackey*, 401 U.S. at 682.

After considering the "competing policies" of finality, fundamental fairness, and deterrence, Justice Harlan concluded that "new constitutional rules" should apply to "all cases arising on direct review" "as a correlative" of the Court's duty to apply the Constitution to pending cases. *Mackey*, 401 U.S. at 678-80, 690. But it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation." *Id.* at 688-89.

Having established a "general principle" against retroactivity on collateral review, Justice Harlan acknowledged that the writ's central purpose as a guard against the incarceration of the innocent, *Desist*, 394 U.S. at 262, warranted a "few exceptions," *Mackey*, 401 U.S. at 688, 692.

First, "[n]ew 'substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe," "represent[ed] the clearest instance where finality interests should yield." *Mackey*, 401 U.S. at 692-93; *see id*. at 692 n.7 (providing specific examples). "[T]he obvious interest in freeing individuals from punishment for conduct that is constitutionally protected" is "sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus." *Id*. at 693.

Second, Justice Harlan suggested that "the writ ought always to lie for claims of nonobservance of those procedures that ... are implicit in the concept of ordered liberty." *Mackey*, 401 U.S. at 693 (quotation marks omitted). He therefore advocated the retroactive application of rules changing the "bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Ibid*.

3. In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), the Court took the first step toward implementing Justice Harlan's vision, holding that new rules should apply to all cases pending on direct review. In 1989, the *Teague* plurality fully "adopt[ed] Justice Harlan's view of retroactivity," concluding "that new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review." 489 U.S. at 303, 310.

Teague also followed Justice Harlan in recognizing "only two exceptions" to the "general rule of nonretroactivity for cases on collateral review"—rules that place certain conduct "'beyond the power of the criminal law-making authority to proscribe,'" and "watershed rules of criminal procedure." 489 U.S. at 307, 311 (quoting *Mackey*, 401 U.S. at 692).

4. In applying *Teague*, this Court has faithfully adhered to Justice Harlan's approach by holding that substantive constitutional rules are, by definition, those rooted in the Constitution's "substantive guarantees." *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 731 (2016); *see also*, *e.g.*, *Lambrix* v. *Singletary*, 520 U.S. 518, 539 (1997) (a substantive rule "addresses a 'substantive categorical guarantee accorded by the

Constitution'" (alteration omitted) (quoting *Saffle* v. *Parks*, 494 U.S. 484, 494 (1990))). Thus, retroactivity on collateral review follows "where 'the conduct being penalized is *constitutionally immune* from punishment.'" *Montgomery*, 136 S. Ct. at 730 (emphasis added) (quoting *U.S. Coin & Currency*, 401 U.S. at 724).

This focus on substantive guarantees led the Court to retroactively apply rules "prohibiting a certain category of punishment for a class of defendants *because of their status or offense*." *Saffle*, 494 U.S. at 494 (emphasis added) (quotation marks omitted). Although *Teague* "focus[ed] solely on new rules according constitutional protection to an actor's primary conduct," the Court reasoned that Justice Harlan had spoken "in terms of *substantive categorical guarantees* accorded by the Constitution." *Penry* v. *Lynaugh*, 492 U.S. 302, 329 (1989) (emphasis added) (involving proposed rule under Eighth Amendment "prohibit[ing] the execution of mentally retarded persons"). A "new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all" because, "[i]n both cases, *the Constitution itself deprives the State of the power to impose a certain penalty*." *Id.* at 330 (emphasis added).

Applying the same logic, this Court has also given retroactive effect to "decisions that narrow the scope of a criminal statute" or "modif[y] the elements of an offense" "by *interpreting* [the statute's] terms." *Schriro* v. *Summerlin*, 542 U.S. 348, 351, 354 (2004) (emphasis added). The Court has reasoned that "[d]ecisions of this Court holding that a substantive

federal criminal statute does not reach certain conduct" are "like decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe'"—they both involve "act[s] that the law does not make criminal." *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) (citation omitted).

5. The nonretroactivity exception for certain rules of criminal procedure is yet more stringent. Only an "extremely narrow" set of "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding'" may be given retroactive effect on collateral review. *Summerlin*, 542 U.S. at 352 (quoting *Saffle*, 494 U.S. at 495). "[I]n order to meet this requirement, a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Whorton* v. *Bockting*, 549 U.S. 406, 421 (2007).

Given this demanding standard, the Court has cautioned that "it is unlikely that any" new watershed rule of criminal procedure "'ha[s] yet to emerge.'" *Tyler* v. *Cain*, 533 U.S. 656, 666 n.7 (2001) (alteration in original) (quoting *Sawyer* v. *Smith*, 497 U.S. 227, 243 (1990)). Since *Teague*, this Court has identified the right to counsel under *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), as the "only case" that "qualif[ies] under this exception." *Whorton*, 549 U.S. at 419.

B. *JOHNSON* IS GROUNDED IN PRINCIPLES OF PROCEDURAL—NOT SUBSTANTIVE—DUE PROCESS AND THUS ANNOUNCED A NEW "PROCEDURAL" RULE.

Johnson held that the residual clause is void for vagueness under the Due Process Clause of the Fifth Amendment. That holding is grounded in principles of procedural—not substantive—due process. *Johnson* thus announced a new "procedural" rule within the meaning of *Teague* and its progeny. No party or *amicus* argues that it is a "watershed" rule subject to retroactive application, and indeed it is not.[3]

1. This Court recently applied Justice Harlan's framework to decide whether the new rule announced in *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), applied retroactively on collateral review. *Montgomery*, 136 S. Ct. at 725. Reasoning that the "'foundation stone' for *Miller*'s analysis" was "this Court's line of precedent holding certain punishments disproportionate when applied to juveniles," the Court held that *Miller* announced a new substantive rule because "[p]rotection against disproportionate punishment is the central *substantive* guarantee of the Eighth Amendment." *Id*. at 732 (emphasis added). The same analysis yields the opposite result here.

Johnson held that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557.

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[3] It is undisputed that *Johnson* announced a new rule. *See* Pet. Br. 19-27; U.S. Br. 24.

Thus, "[i]ncreasing a defendant's sentence under the clause denies due process of law." *Ibid.* The foundation stone for this new rule was the Court's precedent holding that due process is violated by "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Id.* at 2556 (citing *Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983)).

This line of precedent is firmly rooted in procedural due process. "[T]he due process doctrine of vagueness ... incorporates notions of fair notice or warning ... [and] requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Smith* v. *Goguen*, 415 U.S. 566, 572 (1974) (quotation marks omitted); *see also United States* v. *Batchelder*, 442 U.S. 114, 123 (1979) (due process requirement of fair notice extends to vague sentencing provisions); *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that a statute is impermissibly vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application").

The right to fair notice and protection against arbitrary enforcement are the key "procedural safeguards" of the Due Process Clause. *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). As this Court has explained, the "right to notice" has been part of "the central meaning of procedural due process" for "more than a century" and "protect[s] [life, liberty, and property] from arbitrary encroachment." *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81 (1972); *see also Philip Morris USA* v. *Williams*, 549 U.S. 346, 353-54 (2007)

(explaining that the "fundamental due process concerns" of "risks of arbitrariness, uncertainty, and lack of notice" are essential parts of the Due Process Clause's "procedural limitations").

Indeed, it is hornbook law that the void-for-vagueness doctrine stems directly from the "core content of procedural due process," which "place[s] upon government the duty to give notice." Laurence H. Tribe, *American Constitutional Law* § 10-8, at 683 (2d ed. 1988); *see also* 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 17.8(h), at 151 (5th ed. 2012) (listing among requirements of procedural due process that "[s]tatutes must be reasonably clear, so that individuals have adequate notice"); 73 C.J.S. *Public Administrative Law and Procedure* § 219 (updated Dec. 2015) ("The void-for-vagueness doctrine, which is a procedural due process concept, embodies two central precepts: the right to fair warning of the effect of a governing statute or regulation and the guarantee against standardless law enforcement.").

The void-for-vagueness doctrine is thus concerned not with the "*substantive* authority and content" of the law, but with ensuring its "definiteness or certainty of expression." *Kolender*, 461 U.S. at 357 (emphasis added); *see also* Rex A. Collings, Jr., *Unconstitutional Uncertainty—An Appraisal*, 40 Cornell L. Rev. 195, 196-97 (1955) (explaining that "procedural due process cases" based on "uncertainty" and "obscure" statutory language "involve no question of whether the legislative body had a right to make the prohibition; the question is whether it so expressed the prohibition that the prospective defendant and the court which would try him can

understand the statute"). In other words, independent of what conduct the legislature may punish, the void-for-vagueness doctrine is "concerned with the *procedures* by which the [punishment] is determined." *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 52 (1991) (O'Connor, J., dissenting).

In short, the Constitution's procedural guarantees—not any substantive rights—are the exclusive source of the void–for-vagueness doctrine. Accordingly, as this Court has long held, vague criminal statutes "violat[e] an accused's rights under *procedural* due process." *Winters* v. *New York*, 333 U.S. 507, 509-10 (1948) (emphasis added); *Petrillo*, 332 U.S. at 7 (holding that the Constitution "has erected procedural safeguards" requiring laws to "clearly defin[e] [criminal] conduct"); *see also*, *e.g.*, *City of Chicago* v. *Morales*, 527 U.S. 41, 64 & n.35 (1999) (plurality opinion) (finding it "*unnecessary* to reach the question whether … [loitering ordinance] [wa]s invalid as a deprivation of substantive due process" because it violated procedural "due process" by "afford[ing] too much discretion to the police and too little notice to citizens" (emphasis added)).

2. Because "[t]hese [process-based] considerations underlay the Court's holding," *Montgomery*, 136 S. Ct. at 733, the rule announced in *Johnson* is a quintessential "procedural due process" rule, *Mackey*, 401 U.S. at 692.

Johnson did not focus on "whether the residual clause covers this or that crime," but turned on the "pervasive disagreement about the nature of the *inquiry* one is supposed to conduct and the *kinds of factors* one is supposed to consider." 135 S. Ct. at 2560

(emphasis added). The residual clause was fatally flawed because it failed to establish a determinate principle for courts to apply in deciding what qualified as a violent felony. Its "abstract inquiry" "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates" and thereby deprived defendants of "fair notice" of what the law proscribes. *Id*. at 2557-58, 2561.

As demonstrated above, these concerns about the lack of clarity in the residual clause are well-established principles of procedural due process. Because they provided the doctrinal basis for the Court's holding, *Johnson* necessarily established a procedural rule within the meaning of *Teague*.[4]

The conclusion that new rules based on principles of vagueness are procedural is hardly groundbreaking. In *Espinosa* v. *Florida*, the Court invalidated an aggravating factor (whether a murder was "especially wicked, evil, atrocious or cruel") used to determine whether a defendant should be sentenced to death under Florida's capital sentencing statute because it was "unconstitutionally vague" under the Eighth Amendment. 505 U.S. 1079, 1081-82 (1992) (per curiam). Due to lack of "sufficient guidance," no

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[4] *Johnson* did not purport to rest on the substantive component of the Due Process Clause. *Cf. Johnson*, 135 S. Ct. at 2567, 2570 (Thomas, J., concurring in judgment) ("vagueness doctrine is distinct from substantive due process"). And because *Johnson* expressed no concern that the residual clause swept in constitutionally protected conduct, the substantive due process concerns animating the overbreadth doctrine were not implicated. *See Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 497 & n.9 (1982) (distinguishing vagueness and overbreadth).

one could be sentenced to death based on this "invalid" factor, whether it was directly weighed by the jury or indirectly by the judge in deferring to the jury's recommendation. *Id.* at 1081-82. The Court subsequently concluded that *Espinosa*'s new rule should not be applied retroactively on collateral review. *Lambrix*, 520 U.S. at 526-27, 539-40. *Teague*'s exception for substantive rules "[p]lainly" had "no application" because *Espinosa* "'neither decriminalize[d] a class of conduct nor prohibit[ed] the imposition of capital punishment on a particular class of persons.'" *Id.* at 539 (quoting *Saffle*, 494 U.S. at 495); *see also Gray* v. *Netherland*, 518 U.S. 152, 170 (1996) (holding that petitioner's due-process-based "notice-of-evidence" claim was not a watershed procedural rule).[5]

In fact, since *Teague*, this Court has *never* held that a new constitutional rule based on the procedural due process guarantees of either the Fifth or Fourteenth Amendments constitutes a "substantive" rule subject to retroactivity on collateral review. To

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[5] Petitioner contends that *Johnson* must be "substantive" because the Court has previously "recognized claims for habeas relief on the basis that the statute of conviction was unconstitutionally vague." Pet. Br. 20 (citing *Goguen*, 415 U.S. 566; *In re Gregory*, 219 U.S. 210 (1911)). That the Court considered such claims in habeas cases predating *Teague* tells us nothing about the proper classification of *Johnson* today. In fact, neither *Goguen* nor *Gregory* even mentioned—much less "squarely addressed"—retroactivity. *Brecht* v. *Abrahamson*, 507 U.S. 619, 630-31 (1993). Moreover, *Goguen* announced no new rule, 415 U.S. at 572 (applying "settled principles"), and *Gregory denied* the vagueness claim, 219 U.S. at 214. In any event, neither case suggested that void-for-vagueness doctrine rests on *substantive* constitutional guarantees.

do so now would create a Frankenstein's monster, alienated from the constitutional roots of void-for-vagueness doctrine and the aims of this Court's retroactivity precedents. *See* Mary W. Shelley, *Frankenstein* 95 (Sever, Francis & Co. 1869) (1818) ("When I looked around I saw and heard of none like me.").

3. Petitioner and the government nonetheless contend that *Johnson* cannot be procedural because it "affect[s] substantive criminal law." Pet. Br. 17; U.S. Br. 13-14 (arguing that *Johnson* works a "substantive change in the law").[6] This effects-based analysis finds no support in *Teague* or this Court's subsequent application of its retroactivity framework. The Court, instead, has consistently focused on the constitutional *source* of the legal right vindicated by the new rule—not on whether its application produces a substantive or procedural *outcome*.

In *Montgomery*, this Court analyzed whether the new rule at issue was rooted in one of the Constitution's "substantive guarantees." 136 S. Ct. at 731. In so doing, the Court explicitly distinguished "a procedural requirement necessary to implement a substantive guarantee" from a "rule that regulates only

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[6] Most of the circuit cases petitioner cites (Pet. Br. 10-11 & n.3) are of no help to him, and hardly represent a "unanimous" view that *Johnson* established a "substantive" rule. *See*, *e.g.*, *In re Williams*, 806 F.3d 322, 325 (5th Cir. 2015) (rejecting argument that *Johnson* is substantive); *In re Gieswein*, 802 F.3d 1143, 1148-49 (10th Cir. 2015) (per curiam) (declining to consider whether *Johnson* has been made retroactive); *see also Woods* v. *United States*, 805 F.3d 1152, 1154 (8th Cir. 2015) (per curiam) (accepting government's concession without analysis); *Pakala* v. *United States*, 804 F.3d 139, 139-40 (1st Cir. 2015) (per curiam) (same).

the *manner of determining* the defendant's culpability." *Id.* at 734-35 (citation and alteration omitted). Ancillary procedural requirements, the Court explained, "d[o] not replace but rather giv[e] effect to … substantive holding[s]." *Id*. at 735. The inverse is also true: The potential substantive effect of a procedural rule does not transform it into a substantive guarantee.

To be sure, a new procedural rule may "raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. at 352. But virtually every rule prohibiting the government from "utiliz[ing] certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior," *Mackey*, 401 U.S. at 692, has the *potential* to be outcome-determinative in at least some, if not many, cases. That is precisely why our legal system includes these procedural protections. This Court has nonetheless held that "[n]ew rules of procedure ... generally do not apply retroactively" on collateral review. *Summerlin*, 542 U.S. at 352.

The Court has applied the same logic to procedural rules affecting the accuracy of sentencing. For instance, the Court has categorized rules designed to "avoi[d] ... potentially arbitrary impositions of the death sentence," *Beard* v. *Banks*, 542 U.S. 406, 416-20 (2004), and rules "designed" to "enhanc[e] ... the accuracy of capital sentencing," *Sawyer*, 497 U.S. at 241-45, as procedural rules despite their obvious effects on a defendant's ultimate sentence. As these cases teach, a rule regulating the manner of determining a defendant's sentence is every bit as "procedural" as a rule regulating "the manner of determin-

ing the defendant's culpability." *Summerlin*, 542 U.S. at 353 (emphasis omitted).

By invalidating the residual clause, *Johnson* merely regulated the manner of determining whether a defendant's prior conviction qualifies as a violent felony under ACCA. That is, *Johnson* requires the use of a framework that adequately specifies "the nature of the *inquiry* one is supposed to conduct and the *kinds of factors* one is supposed to consider." 135 S. Ct. at 2560 (emphasis added). Although *Johnson*'s new rule may well have the practical "*effect* of narrowing the scope of a criminal sentencing statute," U.S. Br. 14 (emphasis added), so too do many other procedural decisions insofar as they strike down criminal sentencing provisions—but that does not make them "substantive" within the meaning of *Teague*. *See infra* 42-43.

The government, in fact, admits that the rule announced in *Johnson* would be procedural if applied to *identical* language in the Sentencing Guidelines "because the Guidelines are part of the process for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries of sentencing." U.S. Br. 38 n.9. But the residual clause is equally "part of the process for imposing [a] sentence," *ibid.*, and thus cannot be distinguished from the Guidelines on that basis. Moreover, even though the Guidelines are advisory, this Court has held that they nevertheless alter the default "boundaries of sentencing." *Ibid.*; *cf. Peugh* v. *United States*, 133 S. Ct. 2072, 2085-88 (2013) (holding that the Guidelines have "sufficient legal effect to attain the status of a 'law' within the meaning of the *Ex Post Facto* Clause"). The government cannot have it

both ways. As one of petitioner's *amici* forthrightly concedes, under the government's "definition of a rule of criminal procedure, *Johnson* would be such a rule in both ACCA cases and Guidelines cases." Br. of Fed. Pub. Cmty. Defs. 14, 16 (quotation marks omitted).

4. Because the new rule announced in *Johnson* is procedural, it can be applied retroactively only if it is a "watershed rul[e] of criminal procedure." *Teague*, 489 U.S. at 311. *Johnson* "plainly" does not meet this standard, *Williams*, 806 F.3d at 325, and neither petitioner nor the government (nor any of their *amici*) contends otherwise.

Johnson does not "'alter our understanding of the *bedrock procedural elements* essential to the fairness of [the sentencing] proceeding.'" *Tyler*, 533 U.S. at 665 (citation omitted). "Whatever one may think of the importance of [*Johnson*'s new] rule, it has none of the primacy and centrality of the rule adopted in *Gideon*[.]" *Saffle*, 494 U.S. at 495. *Johnson* is "much more limited in scope [than *Gideon*], and the relationship of that rule to the accuracy of the factfinding process is far less direct and profound." *Whorton*, 549 U.S. at 419.

C. THIS COURT SHOULD REJECT PETITIONER'S INVITATION TO VASTLY EXPAND THE DEFINITION OF "SUBSTANTIVE" RULES.

Rather than focusing on the constitutional basis of *Johnson*, petitioner pastes together isolated snippets from this Court's habeas cases and uses the term "substantive" loosely in an attempt to expand that category of rules far enough to include *Johnson*. But "substantive" is a legal term of art that derives

directly from Justice Harlan's exception for "substantive due process rules," a group of conduct-protecting rules conspicuously absent from the analysis of petitioner, his *amici*, and the government. Petitioner simply cannot squeeze *Johnson* into the narrow exception for substantive rules.

Petitioner thus resorts to the extreme view that *any* decision of this Court holding "a law … unconstitutional" must be retroactively applicable on collateral review because it is as if the provision never really existed at all. Pet. Br. 1. That theory not only blinks reality, it would vastly expand the realm of new constitutional rules retroactively applicable in post-conviction proceedings and erode the distinction between direct appeal and collateral review.

1. "The category of substantive rules discussed in *Teague* originated in Justice Harlan's approach to retroactivity." *Montgomery*, 136 S. Ct. at 729. Justice Harlan believed that only "[n]ew 'substantive due process' rules" should apply retroactively on collateral review, *Mackey*, 401 U.S. at 692, and he illustrated this category of rules with specific "example[s]," *id.* at 692 n.7, citing *Street* v. *New York*, 394 U.S. 576, 578 (1969) (right to "free expression" requires decriminalizing flag burning); *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969) ("personal liberties" of free speech and privacy require decriminalizing possession of obscene matter); *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965) ("right of privacy" requires decriminalizing use of contraceptives by married individuals); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) ("freedom to marry" and right to equal protection of the laws requires decriminalizing interracial marriage). Petitioner and his *amici* do not even

mention these cases, which lie at the heart of Justice Harlan's theory.[7]

Unlike these substantive due process cases, *Johnson* did not "set forth categorical constitutional guarantees that place certain criminal laws and punishments *altogether beyond* the State's power to impose." *Montgomery*, 136 S. Ct. at 729 (emphasis added); *see also* U.S. Br. 20-21 (acknowledging this standard). *Johnson* declared ACCA's residual clause unconstitutionally vague but never doubted Congress's authority to enhance the sentences of felons convicted of illegal possession of a firearm based on the commission of prior violent felonies. *See* 135 S. Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). To the contrary, the Court suggested that Congress could do so with a statute that "require[s] gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Id.* at 2561; *see also id.* at 2578 (Alito, J., dissenting) (observing that reading the residual clause to apply to "real-world conduct" would "avoid the constitutional problem").

Therefore, *Johnson* did not announce a substantive individual *right* to engage in the conduct punishable under the residual clause. *But see* Pet. Br. 13, 19. Nor did it declare such conduct "constitutionally immune from punishment." *U.S. Coin &*

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[7] The government cites *Griswold* and *Loving*, but only in discussing the background of *Teague*. *See* U.S. Br. 21.

Currency, 401 U.S. at 724.[8] Under *Johnson*, Congress "retains the power to increase punishments by prior felonious conduct." *Williams*, 806 F.3d at 325; *see also In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015) ("*Johnson* did not hold that Congress *could not* impose a punishment for [the] same prior conviction[s] in a statute with less vague language."). As Justice Scalia explained in *Sykes*, Congress could "quickly add what it wishes" to ACCA, so long as it does so with sufficient clarity. *Sykes* v. *United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

In this regard, *Johnson* is similar to other decisions striking down laws for vagueness. In *FCC* v. *Fox Television Stations, Inc.*, the Court held that the FCC "gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent," but created no constitutional right to broadcast indecency or nudity free from regulation. 132 S. Ct. 2307, 2318 (2012). Rather, the Court expressly stated that its "opinion leaves the [FCC] free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements." *Id.* at 2320. Likewise, in *Kolender*, the Court invalidated a criminal statute that required individuals to provide "credible and reliable identification" to the police upon being subjected to *Terry* stops, because the statute "encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order

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[8] Likewise, "possessing a firearm as a felon" is "unequivocally criminal conduct," Supp. U.S. Br. 18, *Johnson*, 135 S. Ct. 2551 (No. 13-7120), and remains so after *Johnson*.

to satisfy the statute." 461 U.S. at 360-61. But *Kolender* did not establish a constitutional right to withhold identification from the police when lawfully stopped. *Id.* at 361 n.10.

Petitioner and the government both admit, as they must, that *Johnson* does not "plac[e] a specific criminal punishment beyond Congress's power to impose." U.S. Br. 14, 30-31; Pet. Br. 24. They argue, however, that this inquiry is irrelevant because the *Ex Post Facto* Clause would prevent Congress from sentencing petitioner under a future amendment to ACCA. Pet. Br. 27; U.S. Br. 37-38. This is a distraction. The question is not whether a future amendment to ACCA could constitutionally apply to petitioner, but whether the new rule announced in *Johnson must* apply retroactively in post-conviction proceedings under *Teague*. Since *Teague*, the Court has consistently asked whether a new rule constrains Congress's power to punish certain "'primary, private individual conduct.'" *Teague*, 489 U.S. at 307 (citation omitted). *Johnson* did nothing of the sort.

2. *Johnson* similarly did not hold that the Constitution "prohibit[s] a certain category of punishment for a *class* of defendants *because of* their status or offense." *Penry*, 492 U.S. at 330 (emphasis added).

As the government recognizes, "[s]ubstantive penalty-restricting constitutional rules include decisions holding that the Eighth Amendment bars life without parole or the death penalty for certain classes of offenders." U.S. Br. 21. *Johnson* is entirely unlike these decisions, which held that certain punishments may *never* be constitutionally imposed on a particular class of individuals as defined by their

shared personal identity or common conduct. *See*, *e.g.*, *Roper* v. *Simmons*, 543 U.S. 551 (2005) (Eighth Amendment prohibits execution of juveniles); *Kennedy* v. *Louisiana*, 554 U.S. 407 (2008) (Eighth Amendment prohibits execution of child rapists). The "foundation stone" for these decisions is "[p]rotection against disproportionate punishment"—"the central *substantive* guarantee of the Eighth Amendment." *Montgomery*, 136 S. Ct. at 732 (emphasis added) (quotation marks omitted). These cases therefore "plac[e] a *substantive* restriction on the State's power." *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002) (emphasis added) (quotation marks omitted).

Johnson, by contrast, did not prohibit any category of punishment *at all*. "If Congress wanted" to "subjec[t] *all* repeat offenders to a 15-year mandatory minimum prison term," it could constitutionally—and "very easily"—do so. *James* v. *United States*, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting).

Still trying to force a square peg into a round hole, petitioner and the government contend that *Johnson* prohibited an enhanced sentence for defendants "whose ACCA sentences depended on the residual clause." U.S. Br. 26; *accord id.* at 25-27; Pet. Br. 19. But that artificial definition of a protected "class"—which simply consists of those to whom the residual clause was applied, not a group of individuals who share an identity or engaged in the same conduct—distorts the meaning of this term. Indeed, under the government's circular definition, *every* new rule of constitutional law would apply to the "class" of defendants whose rights—whether procedural or substantive—would have been violated had the new rule applied at the time of their convic-

tion. That would render all new rules retroactive on collateral review. That is not the law, nor should it be.

3. Finally, *Johnson* did not "narrow the scope of [ACCA's residual clause] by interpreting its terms." *Summerlin*, 542 U.S. at 351 (citing *Bousley*, 523 U.S. at 620-21). In *Bousley*, the Court held that *Teague*'s bar to retroactive application of new rules on collateral review "is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." 523 U.S. at 620. Because that holding has no application here, petitioner's and the government's extensive reliance on *Bousley* is misplaced.

In *Bailey* v. *United States*, this Court construed 18 U.S.C. § 924(c)(1) to determine the scope of "conduct [Congress] wished to reach," and concluded "that Congress intended 'use'" of a firearm to mean "active employment," rather than mere "proximity and accessibility." 516 U.S. 137, 143, 148, 150 (1995). Because *Bailey* determined that the "federal criminal statute [did] not reach certain conduct," anyone convicted under the broader definition of "use" was innocent of any conduct that Congress had intended to "make criminal." *Bousley*, 523 U.S. at 620-21.

Petitioner and the government correctly observe that *Bousley* "did not deem relevant the fact that Congress could later pass a law proscribing such possession." Pet. Br. 26; U.S. Br. 15. But this does not mean, as they suggest, that the question whether a rule "immunize[d] particular conduct from punishment or categorically prohibit[ed] particular penal-

ties," is irrelevant to the retroactivity analysis under *Teague*. Pet. Br. 25; *Williams*, 806 F.3d at 326 (rejecting this argument). As this Court explained in *Summerlin*, *Bousley* recognized a separate subcategory of substantive rules that are retroactively applicable on collateral review. 542 U.S. at 351-52.

Retroactivity in cases where the Court interprets the terms of the statute in furtherance of congressional intent is necessary because in "our federal system," "it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 523 U.S. at 620-21. Under this system, judicial decisions merely "explai[n] [the Court's] understanding of what the statute has meant continuously since the date when it became law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994); *accord Bousley*, 523 U.S. at 625 (Stevens, J., concurring in part and dissenting in part) (*Bailey* "did not change the law" but "merely explained what § 924(c) had meant ever since the statute was enacted"). As a result, when the Court gives a narrowing construction to a statute, it does not declare that previously unlawful conduct is *now* lawful; it has no such power. The Court declares that such conduct was *never* unlawful because Congress *never* intended it to be. As the government recognizes, "separation-of-powers concerns" therefore arise when "judicial error in applying a statute" results in a "greater sentence than the legislature has authorized." U.S. Br. 30 (quotation marks omitted).

Johnson, by contrast, "did not interpret the ACCA in service of Congressional intent" and thus does not come within either the language or the separation-of-powers rationale of *Bousley*. *Williams*, 806 F.3d at 326. In fact, *Johnson* did not purport to

interpret the residual clause *at all*, but held instead that the clause "defies" construction because it is "hopeless[ly] indetermina[te]." 135 S. Ct. at 2558, 2562.

Johnson thus did not narrow the scope of the residual clause to cover only those predicate offenses that Congress intended to punish. To the contrary, *Johnson* recognized that there were "clearly risky crimes" that Congress obviously intended to "fal[l] within the provision's grasp," 135 S. Ct. at 2561; *see id.* at 2560 ("[S]ome crimes clearly pose a serious potential risk of physical injury to another."), yet it nevertheless invalidated the residual clause even as to those offenses. Indeed, this Court has explained that Congress, in amending ACCA to include the residual clause, sought "'a greater sweep and more effective use of this important statute.'" *Taylor* v. *United States*, 495 U.S. 575, 583 (1990) (citation omitted). And *Johnson* certainly did not hold that petitioner's predicate offenses—or those of the numerous other prisoners whose ACCA sentences would be set aside if he prevails—fell outside the range of conduct Congress meant to penalize. *See supra* 24-28. In short, *Johnson* recognized Congress's intent but *overrode* it based on the procedural requirements of the Due Process Clause.[9]

For these reasons, there is nothing "incongruous" about treating "statutory-construction decisions like

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[9] Implicitly conceding that *Johnson* did not "narro[w] the scope of ACCA as a matter of statutory construction," the government contends that *Johnson*'s "effect is comparable." U.S. Br. 31. As explained above, this effects-based analysis is inappropriate. *Supra* 30-33.

Begay and *Chambers*" differently from *Johnson*. *Contra* U.S. Br. 32-33; Pet. Br. 26 n.11. Those cases, unlike *Johnson*, directly implicated the separation-of-powers concerns underlying *Bousley* because lower courts had applied the residual clause to conduct that was "simply too unlike the provision's listed examples for [the Court] to believe that Congress intended the provision to cover it." *Begay* v. *United States*, 553 U.S. 137, 142 (2008); *accord Chambers* v. *United States*, 555 U.S. 122, 130 (2009) (conduct fell "outside the scope of ACCA's definition of 'violent felony'").

Because *Johnson* does not come within the bounds of *Bousley*'s framework, petitioner and the government seek to expand *Bousley* to encompass "any rule" that might be said to "'alte[r] the range of conduct or the class of persons that the law punishes,'" *regardless* of whether it was adopted to conform to congressional intent, based on out-of-context fragments from *Summerlin*. Pet. Br. 25 (quoting *Summerlin*, 542 U.S. at 353); U.S. Br. 25 (same). But nothing in *Summerlin* purported to extend the reach of *Bousley*. Quite the opposite: The Court explicitly recognized that *Bousley* concerned rules holding that "a 'statute does not reach certain conduct' or 'mak[e] conduct criminal,'" and thus is limited to "decisions that narrow the scope of a criminal statute *by interpreting its terms*." *Summerlin*, 542 U.S. at 351, 353 (alteration omitted) (emphasis added) (quoting *Bousley*, 523 U.S. at 620-21).

Summerlin actually proves that *Johnson*'s new rule is not "substantive." There, the Court held that *Ring* v. *Arizona*, 536 U.S. 584 (2002)—which invalidated a capital sentencing statute based on the Sixth

Amendment jury trial right—was "properly classified as procedural." *Summerlin*, 542 U.S. at 353. *Ring*, like other procedural decisions, had "substantive" effects in the general sense that it invalidated state capital sentencing statutes. *See* 536 U.S. at 607-08 & n.6 (citing capital sentencing statutes); *id.* at 620 (O'Connor, J., dissenting) ("The Court effectively declares five States' capital sentencing schemes unconstitutional."). Yet *Ring* "could not have" "alter[ed] the range of conduct … subjected to the death penalty" because "it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize." *Summerlin*, 542 U.S. at 353. The procedural component of due process upon which *Johnson* rests likewise places no limits on the range of punishable conduct.

4. Unable to wedge *Johnson* into any of the recognized subcategories of "substantive" rules, petitioner and his supporters insist that this Court necessarily declares a new substantive rule that applies retroactively on collateral review *whenever* it holds a law to be "unconstitutional," because it is as if the relevant law never existed at all. Pet. Br. 1, 2, 26 n.11; U.S. Br. 28 & n.6; *see also* Br. of Scholars of Fed. Courts & Sentencing 11 ("Justice Harlan's exception for substantive rules includes *all* rules invalidating criminal statutes[.]"). That astounding assertion, if accepted, would vastly expand the scope of retroactivity on collateral review.

To be sure, Justice Harlan acknowledged that the "writ has historically been available for attacking convictions" on constitutional grounds. *Mackey*, 401 U.S. at 692-93 & n.8 (citing *Ex parte Siebold*, 100

U.S. 371 (1880); *Crowley* v. *Christensen*, 137 U.S. 86 (1890); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)). But there are several reasons why this historical reference does not support petitioner's radical theory.

First, Justice Harlan fundamentally disagreed with the assumption, almost universally accepted at the time of these decisions, that "habeas courts should apply current constitutional law to habeas petitioners before them." *Mackey*, 401 U.S. at 686. In this critical respect, his opinions, adopted in *Teague*, intentionally "charted a different approach to the retroactivity of 'new rules'" than had traditionally been applied. U.S. Br. 19.

Second, Justice Harlan did not reference historical habeas practice on a standalone basis; he explicitly tied it to his exception for rules placing conduct "beyond the power of the criminal law-making authority to proscribe," explaining that the writ had traditionally been available "on *such* grounds." *Mackey*, 401 U.S. at 692-93 (emphasis added).

The cases cited in (or arguably encompassed by) footnote eight of *Mackey* fit comfortably within that model. *See* Pet. Br. 26, 29-32; Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 384 n.30 (1964) (discussing cases involving "constitutionally *unauthorized* statute[s]" (emphasis added)). Each considered whether the underlying conduct was protected by a substantive constitutional guarantee or "within the power of Congress to prescribe punishment." *Gregory*, 219 U.S. at 217. The government's authority to proscribe was the central issue in *Siebold*, where the Court considered whether federal election-fraud statutes

were within Congress's power to regulate under Article I, § 4. 100 U.S. at 382, 383. And the scope of legislative authority was front and center in *Ex parte Yarbrough*, which held that, under the Fifteenth Amendment, Congress possessed the "power by appropriate laws to secure [congressional] election[s] from the influence of violence, of corruption, and of fraud." 110 U.S. 651, 657 (1884).

Both *Yick Wo* and *Crowley* assessed whether the legislature had the power to enact criminal laws that allegedly violated petitioners' *substantive* right to equal protection under the Fourteenth Amendment. *See Yick Wo*, 118 U.S. at 374 (right to equal protection prohibits imprisonment based on "hostility to the race and nationality to which the petitioners belong"); *Crowley*, 137 U.S. at 94 (equal protection not violated by licensing regime for liquor store). Indeed, the essential distinction between the differing outcomes in these cases was the fact that the regulated business in *Crowley* was "one that may be entirely prohibited." 137 U.S. at 94.

Petitioner misleadingly suggests that the government's power to proscribe was not at issue in *Gregory* (Pet. Br. 34), but there the Court denied habeas review precisely because the challenged statute did *not* "include conduct which lies outside the range of legislative … power" but instead "embrac[ed] a class of transactions which the legislature is competent to condemn." 219 U.S. at 214. This critical aspect of *Gregory* is not erased by the fact that the Court *also* rejected petitioner's argument that the

statute was "so uncertain as to make the prohibition nugatory." *Ibid.*[10]

Third, these cases must be read within their historical context, which counsels strongly against petitioner's broader understanding of their significance. "[T]hroughout most of this period *federal criminal convictions were not appealable*." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 473 (1963). Congress did not give this Court jurisdiction to review such convictions until 1891. *See* Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 201 & n.220 (1960). Indeed, with the exception of a one-year interlude during Reconstruction, the Court also lacked jurisdiction to hear appeals from habeas decisions of the lower courts until 1885. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512-15 (1868) (explaining congressional grant and subsequent revocation of appellate habeas jurisdiction); Act of Mar. 3, 1885, ch. 353, 23 Stat. 437 (restoring such jurisdiction). Thus, for most of the 19th centu-

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[10] Petitioner also implies that Justice Harlan cited *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), favorably as a case involving a "substantive" rule. *See* Pet. Br. 29, 34-35. But Justice Harlan identified that case as an "example" of a decision that "subjected" the "concept of jurisdiction" in habeas law to "considerable strain." *Fay* v. *Noia*, 372 U.S. 391, 450-51 (1963) (Harlan, J., dissenting). In any event, *Lange* found that the trial court exceeded its authority by imposing a penalty beyond what Congress intended, in violation of the Double Jeopardy Clause. *See* 85 U.S. (18 Wall.) at 170, 178; *see also* Pet. Br. 32 (collecting similar cases). Its retroactive application thus comports with *Bousley*.

ry, the Court lacked any authority to review federal criminal convictions except by means of an *original* writ of habeas corpus. *See* Bator, *supra*, at 473 (noting resultant "tremendous expansive pressure on the [Court's] habeas corpus jurisdiction").

The habeas cases from this era had no occasion to address retroactivity on direct appeal versus collateral review because there *was* no such distinction in this Court's jurisdiction; when the Court exercised its habeas authority, it was reviewing the judgment of conviction *itself*. These cases inquired instead whether the petitioner could be "discharged from imprisonment by this court on *habeas corpus*, although it ha[d] no appellate jurisdiction by writ of error over the judgment." *Siebold*, 100 U.S. at 374; *see also*, *e.g.*, *Yarbrough*, 110 U.S. at 653. The Court resolved that question by declaring its habeas review "appellate in its character," *Siebold*, 100 U.S. at 374, and not an exercise of "original jurisdiction" under Article III, § 2. For these reasons, any retroactive application of new constitutional rules in these "appellate" cases is more analogous to the modern practice of retroactive application of new rules on direct review, not retroactivity on collateral review under *Teague*'s first exception.

Petitioner nonetheless repeats the refrain that "'[a]n unconstitutional act is not a law,'" Pet. Br. 26 n.11 (quoting *Norton* v. *Shelby Cty.*, 118 U.S. 425, 442 (1886)), and "'is as no law,'" *id.* at 1, 13, 19-20, 22 n.7, 27 n.11, 30 (quoting *Montgomery*, 136 S. Ct. at 731 (quoting *Siebold*, 100 U.S. at 376)). But this Court warned more than 75 years ago, specifically referring to *Norton*, that these "broad statements as to the effect of a determination of unconstitutionality

must be taken with qualifications" because "it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Chicot Cty. Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940); *see also Montgomery*, 136 S. Ct. at 731 (*Siebold* does not "directly control"); Bator, *supra*, at 473-74 & n.77 ("[A]fter appeal in federal criminal cases was authorized the Court repudiated the doctrine of *Siebold*[.]") (collecting cases). Indeed, Justice Harlan himself rejected this argument: "To argue that a conclusion reached by … 'inferior' courts is somehow forever erroneous because years later this Court took a different view of the relevant constitutional command carries more emotional than analytic force." *Mackey*, 401 U.S. at 689-90.

Petitioner next suggests that, under *Montgomery*, any "'penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional.'" Pet. Br. 21 (quoting *Montgomery*, 136 S. Ct. at 731). But petitioner takes this statement entirely out of context. The Court continued: "There is no grandfather clause that permits States to enforce *punishments the Constitution forbids*. To conclude otherwise would undercut the Constitution's *substantive guarantees*." *Montgomery*, 136 S. Ct. at 731 (emphasis added). Lest there be any doubt, the Court made clear that this passage merely restates Justice Harlan's "point … that '[no] circumstances call more for the invocation of a rule of complete retroactivity' than when 'the conduct being penalized is constitutionally *immune* from punishment.'" *Ibid*. (second alteration in original) (empha-

sis added) (quoting *U.S. Coin & Currency*, 401 U.S. at 724). Because *Johnson* did not render any conduct constitutionally immune from punishment, that exception has no application here.

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Stretching the definition of a substantive rule beyond its current boundaries to encompass *Johnson*, as petitioner, his *amici*, and the government advocate, would erode the important principles underlying *Teague*, which struck a careful balance between the need for finality in our criminal justice system and the legitimate purposes of habeas review. This Court has long held that a new rule should not apply on collateral review if it does not squarely "fal[l] within one of the two narrow exceptions to the nonretroactivity principle" in *Teague*. *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994). *Johnson* fits into neither. The Court should remain true to Justice Harlan's vision and hold that *Johnson* announced a new procedural rule that may not be applied in post-conviction proceedings.

D. RETROACTIVE APPLICATION OF *JOHNSON* ON COLLATERAL REVIEW WOULD BRING SWEEPING AND PROBLEMATIC CONSEQUENCES.

Aside from contradicting this Court's *Teague* jurisprudence, retroactive application of *Johnson* on collateral review would impose substantial costs on the criminal justice system and society at large. Foremost, such a holding would produce an unjustified windfall for the many violent offenders sentenced under the residual clause whose conduct "clearly [fell] within the [residual clause's] grasp."

Johnson, 135 S. Ct. at 2561. Further, to the extent *Johnson*'s analysis foreshadows the fate of similarly worded Sentencing Guidelines and statutes, a determination that it applies retroactively would soon generate even more disruption.

1. From 2008 to 2014 alone, more than 4,000 defendants were sentenced under ACCA. U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl. 22 (2008-2014). The proportion of these offenders who have at least one residual-clause predicate offense "is unlikely to be a trivial number in light of the many reported appellate decisions on residual-clause issues." Supp. U.S. Br. 49, *Johnson*, 135 S. Ct. 2551 (No. 13-7120). Many of these predicates do not implicate the notice problems at issue in *Johnson*. *See* 135 S. Ct. at 2560 (recognizing that "there will be straightforward cases under the residual clause"); *Begay*, 553 U.S. at 154 (Scalia, J., concurring in judgment) ("For some crimes, the severity of the risk will be obvious."). Indeed, before declaring the residual clause impermissibly vague, *this Court* held that the clause gave fair notice that vehicular flight from law enforcement, *Sykes*, 131 S. Ct. at 2274, and attempted burglary, *James*, 550 U.S. at 209, were violent felonies. Applying *Johnson* retroactively on collateral review would nonetheless free the significant number of career offenders who unquestionably had sufficient notice that their prior convictions subjected them to enhanced sentences—including those who committed the very crimes at issue in *Sykes* and *James*.

That is not only unjust but deeply troubling, given the types of crimes that courts have found to qualify as "violent felon[ies]" under the residual clause.

Criminals with predicate felonies for "attempted arson, attempted kidnapping, solicitation to commit aggravated assault, possession of a loaded weapon with the intent to use it unlawfully against another person, possession of a weapon in prison, [and] compelling a person to act as a prostitute" would be eligible for significant sentence reductions. *Johnson*, 135 S. Ct. at 2581 & nn.3-8 (Alito, J., dissenting) (footnotes omitted). [11] Retroactive application of *Johnson* would not only release these dangerous criminals from prison sooner than Congress intended, but simultaneously impose considerable strain and costs on the criminal justice system by requiring hundreds or even thousands of new sentencing hearings. The "release [of] criminals from jail" is a "serious interference with the corrective process" "justified only by necessity," which is absent here. *Mackey*, 401 U.S. at 679.

Resentencing these violent felons would be far from straightforward. *Contra* Br. of Scholars of Fed. Courts & Sentencing 27-33. Many cases, like this one, would require supplemental briefing to determine whether the *Johnson* claim has been preserved and whether an enhanced sentence is independently warranted under the elements clause. *See infra* 55-60. Even after those questions are resolved, courts must recalculate the Guidelines range and determine

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[11] Other serious crimes held to qualify under the residual clause include: assault with intent to commit murder, *United States* v. *Jones*, 673 F.3d 497, 506 (6th Cir. 2012); child molestation, *United States* v. *Scudder*, 648 F.3d 630, 634 (8th Cir. 2011); sexual assault, *United States* v. *Terrell*, 593 F.3d 1084, 1091 (9th Cir. 2010); and attempted rape, *Dawson* v. *United States*, 702 F.3d 347, 352-53 (6th Cir. 2012).

an appropriate sentence. *See*, *e.g*, Testimony of Hon. Irene M. Keeley on Retroactivity of Drug Guideline Amendment, U.S. Sentencing Comm'n (June 10, 2014), at 11, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/Testimony_Keeley.pdf (explaining "extremely serious administrative problems" and costs of retroactive application of crack-cocaine sentencing amendments).[12]

2. Applying *Johnson* retroactively would also undermine the decisions of countless prosecutors who "reli[ed] on this Court's [ACCA] holdings." *See* Supp. U.S. Br. 50, *Johnson*, 135 S. Ct. 2551 (No. 13-7120). Before *Johnson*, "a prosecutor who had an open-and-shut case on a Section 922(g)(1) violation for a three-time felon believed to have committed more serious crimes might have been content to accept a guilty plea on the Section 922(g)(1) charge in light of the ACCA's 15-year minimum sentence," rather than expending additional time and taxpayer money prosecuting the more serious crimes. *Ibid.* These "charging decisions" would be irreparably "unravel[ed]" if *Johnson* were applied retroactively. *Ibid.*

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[12] Policy judgments about the wisdom of mandatory minimum sentences should be left to Congress, which is currently considering legislation to retroactively lower ACCA's minimum sentence to 10 years, and which can provide sufficient resources to allow courts to effectively manage the release of thousands of offenders. *See* Sentencing Reform and Corrections Act, S. 2123, 114th Cong. § 105 (2015); Sentencing Reform Act, H.R. 3713, 114th Cong. § 6 (2015).

It would also have a profound impact going forward. Unconstitutional vagueness may take years to "manifes[t] itself" through "the inability of later [judicial] opinions to impart … predictability." *Johnson*, 135 S. Ct. at 2562. In the meantime, judges and prosecutors will be forced to make sentencing and charging determinations by guessing whether their decisions might decades later be upended by a void-for-vagueness ruling—even when the conduct at issue is plainly within the scope of the statute and the substantive power of the legislature to punish.

3. Although *Johnson* rejected the suggestion that its holding put other federal and state laws on the chopping block, *see* 135 S. Ct. at 2561, lower courts have *already* applied *Johnson* to invalidate similar provisions. Applying *Johnson* retroactively could thus undermine countless other convictions and sentences for dangerous conduct that Congress clearly intended to punish.

For instance, several lower courts have ruled that, under *Johnson*, the residual clause of Section 4B1.2(a) of the Sentencing Guidelines, which defines "crime of violence" for purposes of (among other things) the Guidelines' career-offender enhancement, is unconstitutional. *See*, *e.g.*, *United States* v. *Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015) ("If one iteration of the clause is unconstitutionally vague, so too is the other."); *cf.* Br. of Fed. Pub. Cmty. Defs. 14, 16 (arguing that this Court's decision on *Johnson* retroactivity should apply equally to the Guidelines). The retroactive application of a rule striking down Section 4B1.2(a) on vagueness grounds could have extensive disruptive effects: Between 2008 and 2014, more than *16,000* defendants were sentenced

as career offenders under the Guidelines. *Sourcebook of Federal Sentencing Statistics*, tbl. 22 (2008-2014).

The same story could play out with other federal and state statutes. For example, two district courts have ruled that a similar residual clause in 18 U.S.C. § 924(c)(3)(B), which prohibits the use, carrying, or possession of a firearm during a crime of violence, is void for vagueness. *United States* v. *Bell*, No. 15-cr-00258-WHO, 2016 WL 344749, at *12 (N.D. Cal. Jan. 28, 2016); *United States* v. *Edmundson*, No. PWG-13-15, 2015 WL 9311983, at *5 (D. Md. Dec. 23, 2015), as amended Dec. 30, 2015.

Two courts of appeals have likewise relied on *Johnson* to invalidate 18 U.S.C. § 16(b), which defines "crime of violence" for purposes of numerous federal statutes. *See United States* v. *Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir. 2015); *Dimaya* v. *Lynch*, 803 F.3d 1110, 1120 & n.17 (9th Cir. 2015). In the immigration context, Section 16(b) supplies the definition of "crime of violence" used to determine what constitutes an "aggravated felony," 8 U.S.C. § 1101(a)(43)(F), rendering an alien deportable and ineligible for certain forms of deportation relief, *id.*

§§ 1227(a)(2)(A)(iii), 1158(b)(2)(B)(i), 1229b(a)(3).[13] Applying *Johnson* retroactively could thus invite a host of collateral attacks on many other types of final criminal judgments, as well as immigration removal orders.

II. THE DISTRICT COURT DID NOT ERR IN DENYING PETITIONER'S SECTION 2255 MOTION.

This Court also granted certiorari on the question whether the district court erred in denying petitioner's Section 2255 motion. Because petitioner's conviction for robbery qualifies as a violent felony under ACCA's elements clause, and because his *Johnson* claim is procedurally defaulted thrice over, petitioner is not eligible for post-conviction relief. This Court should affirm the Eleventh Circuit's denial of a COA on these grounds, thus avoiding any constitutional issues. *See Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) (noting "'well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case'" (citation omitted)); *cf. Montgomery*, 136 S. Ct.

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[13] In *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987), the Court held that an alien prosecuted for illegal reentry may collaterally attack the validity of the underlying removal order. *Id.* at 839. Lower courts have applied *Teague* to such attacks. *See*, *e.g.*, *United States* v. *Martinez*, 843 F. Supp. 2d 136, 137-38 (D. Mass. 2012); *United States* v. *Ortega-Cordero*, No. 10cr2914, 2011 WL 6012596, at *2 (S.D. Cal. Dec. 1, 2011); *see also Alvarenga-Villalobos* v. *Ashcroft*, 271 F.3d 1169, 1172-73 (9th Cir. 2001) (applying *Teague* to collateral attack of removal order in habeas proceeding).

at 729 (retroactivity for substantive rules is a "constitutional command").

A. PETITIONER'S ROBBERY CONVICTION QUALIFIES AS A VIOLENT FELONY UNDER THE ELEMENTS CLAUSE.

In urging reversal, petitioner maintains that his conviction for Florida strong-arm robbery does not qualify as a violent felony under the elements clause. Pet. Br. 36-37. The government seeks a remand for the Eleventh Circuit to decide whether the conviction satisfies that test (intimating that it does). U.S. Br. 43. The Court can affirm without remanding, however, because Florida law shows that strong-arm robbery (as its name suggests) plainly constitutes a violent felony under the elements clause.

The elements clause defines a violent felony as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). "[P]hysical force" means "*violent* force"—that is, "force capable of causing physical pain or injury to another person." *Curtis Johnson* v. *United States*, 559 U.S. 133, 140 (2010).

At the time of petitioner's conviction in 1996, robbery under Florida law readily satisfied these requirements. A necessary element of the relevant Florida statute is "the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1); *see* U.S. Br. 44 (explaining petitioner was not convicted under "sudden snatching" statute). As the Florida Supreme Court explained nearly a century ago, the "criterion which distinguishes" robbery from larceny "is the violence which precedes the taking." *Montsdoca* v.

State, 93 So. 157, 159 (Fla. 1922); *see also* U.S. Br. 45-46. In Florida, "[t]here can be no robbery *without* violence." *Montsdoca*, 93 So. at 159 (emphasis added). "[T]he force that is required to make the offense a robbery is such force as is actually sufficient *to overcome the victim's resistance*." *Ibid.* (emphasis added); *Robinson* v. *State*, 692 So. 2d 883, 886 (Fla. 1997) ("[T]o amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person[.]"); *see also McCloud* v. *State*, 335 So. 2d 257, 258-59 (Fla. 1976) (holding that defendant committed robbery, not larceny, because taking was accompanied by "a contemporaneous or precedent force, violence, or ... inducement of fear for one's physical safety").

The Eleventh Circuit assumed, without deciding, that petitioner "pleaded guilty to robbery at a time when mere snatching sufficed," JA.115a, because it believed that the Florida Supreme Court did not make clear that robbery requires the use of significant physical force until *Robinson* was decided in 1997. The Florida Supreme Court, however, established that principle in *Montsdoca*—more than 70 years before petitioner's conviction. *Robinson* merely corrected intervening lower court decisions that "misconstrued *McCloud*," U.S. Br. 45-46, and those decisions did not even apply in the judicial district in which petitioner was convicted.

Petitioner's alternative argument—that "putting in fear" does not require use or threat of violent force—does not withstand analysis either. *See Montsdoca*, 93 So. at 159 ("It is robbery to create in the person to be despoiled a reasonable apprehension of violence[.]"); U.S. Br. 45 ("[T]he fear contemplated

by the Florida robbery statute is the fear of death or great bodily harm." (quotation marks omitted)). Petitioner cites the *dissent* in *Montsdoca* for the proposition that a threat to accuse the victim of sodomy would fall within the statute. Pet. Br. 37 (citing 93 So. at 162 (Browne, C.J., dissenting)). The *majority*, however, denounced that theory as "an excrescence on the law" with "no foundation of principle." *Montsdoca*, 93 So. at 159.

Because Florida strong-arm robbery was a violent felony under the elements clause when petitioner pleaded guilty to that crime, the denial of a COA—and, ultimately, petitioner's sentence—was correct.

B. PETITIONER PROCEDURALLY DEFAULTED HIS *JOHNSON* CLAIM.

Even if this Court were to decide that *Johnson* applies retroactively on collateral review, it should affirm the Eleventh Circuit's denial of a COA because petitioner "doubl[y] ... default[ed]" any void-for-vagueness challenge to his sentence by failing to raise it either at sentencing or on direct review. *United States* v. *Frady*, 456 U.S. 152, 162, 167 (1982). Petitioner did not even raise a vagueness challenge in his Section 2255 motion, *see* U.S. Br. 39, which is a further, independent procedural bar, *see United States* v. *Durham*, 795 F.3d 1329, 1331 (11th Cir. 2015) (en banc) (per curiam) (allowing supplemental briefing based on intervening Supreme Court decisions on direct appeal, but not on collateral review). He has made no attempt to "establis[h] 'cause' for the waiver." *Reed* v. *Farley*, 512 U.S. 339, 354

(1994) (quoting *Wainwright* v. *Sykes*, 433 U.S. 72, 84 (1977)).[14]

A procedurally defaulted "claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, ... or that he is actually innocent." *Bousley*, 523 U.S. at 622 (quotation marks omitted); *see also Murray* v. *Carrier*, 477 U.S. 478, 494, 496 (1986); *Wainwright*, 433 U.S. at 87. Petitioner has not attempted to—and cannot—meet either standard.

First, petitioner cannot establish cause. "While [this Court has] held that a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default, petitioner's claim does not qualify as such." *Bousley*, 523 U.S. at 622 (citation omitted). "The claim's legal basis is hardly novel: Justice Scalia ha[d] been suggesting ACCA is unconstitutionally vague for the last eight years, and the void for

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[14] Petitioner does not dispute this. *See* Pet. Br. 6. Instead, he asserts that the government waived any procedural objections at the certiorari stage. Pet. Br. 36 n.13 (citing Sup. Ct. R. 15). Not so. *First*, Rule 15 is "permissive rather than mandatory." *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 (2011) (Scalia, J., dissenting). *Amicus* is thus free to raise petitioner's procedural default in defense of the judgment, and this Court is likewise free to consider it. *Second*, the government has not affirmatively forgone this argument. Although the United States opposed plenary review, it urged the Court to "grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Johnson*," at which point it could have raised procedural default. Mem. for the U.S. 3. *Third*, procedural default is "fairly included," Sup. Ct. R. 14.1(a), within the first question presented. Pet. i.

vagueness doctrine is nothing new." Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 Colum. L. Rev. Sidebar 55, 66 (2015). Nor is the claim "so obvious that counsel was inept and thus constitutionally ineffective for not making it." *Id.* at 67 n.62.

Second, petitioner has no claim of actual innocence. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency," *Bousley*, 523 U.S. at 623, and the Court has applied this exception only where the petitioner alleges actual innocence of the crime of conviction, *see Schlup* v. *Delo*, 513 U.S. 298, 321 (1995), or actual innocence of a capital sentence, *see Sawyer* v. *Whitley*, 505 U.S. 333, 336 (1992). Petitioner comes within neither category.[15]

Petitioner's triple procedural default is a complete bar to relief on the basis of *Johnson*. The question is not whether *Johnson*'s retroactivity is reasonably debatable, *cf.* Pet. Br. 35; U.S. Br. 40, but whether "the district court's assessment of the constitutional claims" before it was "debatable or wrong," *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner makes no argument that the disposition of those claims—which did *not* include a *Johnson* claim—was erroneous. As the government recognizes, the Eleventh Circuit's subsequent denial of the COA "was correct." U.S. Br. 39. The judgment can and should be affirmed on that ground.

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[15] The lower courts are split on whether this exception extends to non-capital sentences, *see Spence* v. *Superintendent*, 219 F.3d 162, 171 (2d Cir. 2000) (collecting cases), but this Court has never held that it does.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

HELGI C. WALKER
Counsel of Record
JESENKA MRDJENOVIC
RUSSELL B. BALIKIAN
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
hwalker@gibsondunn.com

ROBERT E. DUNN
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
(650) 849-5384

Counsel for Amicus Curiae

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