No. 15-6418

In the Supreme Court of the United States

GREGORY WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Amicus curiae in support of the judgment below contends that the classification of a new constitutional rule as "substantive" (and therefore retroactively applicable to cases on collateral review) or "procedural" (and therefore not retroactively applicable unless it is a "watershed" procedural rule), see *Teague* v. *Lane*, 489 U.S. 288, 310-314 (1989) (plurality opinion), depends on the constitutional source of the legal right underlying the new rule, rather than its effect. Brief of the Court-Appointed *Amicus Curiae* (Amicus Br.) 24-33. Applying that rationale, *amicus* contends (Br. 27-30) that the holding of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)—that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague—is procedural because the vagueness doctrine is rooted in concepts of *procedural* due process. *Amicus* further contends (Br. 33-43) that the holding of *Johnson*

does not fall within any category of substantive rules previously recognized by this Court.

Those contentions should be rejected. The classification of a new rule as substantive or procedural for purposes of *Teague*'s retroactivity bar depends upon whether the application of the new rule has a substantive or procedural effect. Because the holding of *Johnson* alters the statutory boundaries of authorized sentences that a court may lawfully impose, it is a substantive rule that is entitled to retroactive application.

I. *JOHNSON* ANNOUNCED A NEW SUBSTANTIVE RULE

A. The Status Of A New Rule As Substantive Depends On Whether Application Of The Rule Has A Substantive Or Procedural Effect

Amicus's argument (Br. 24-33) that the classification of a new constitutional rule as substantive or procedural depends upon the "*source* of the legal right vindicated by the new rule" misunderstands this Court's test for whether new rules are substantive or procedural for purposes of *Teague*.

1. To determine whether a new rule is substantive, and therefore exempt from *Teague*'s retroactivity bar, this Court has focused on the effect of applying the new rule: "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004); see *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989) (substantive rules include "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense"), abrogated on other grounds, 536 U.S. 304 (2002). Substantive rules—rules that "narrow the

scope of a criminal statute by interpreting its terms" and "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish"—apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 351-352 (citations and internal quotation marks omitted). Procedural rules, in contrast, "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352.

That analysis focuses on the *effect* of applying the new rule, not on the source of the constitutional right. That effects-based analysis traces back to Justice Harlan's concurrence in *Mackey* v. *United States*, 401 U.S. 667 (1971), in which he explained that, in determining whether a new rule should be applied retroactively, "[t]he relevant frame of reference * * * is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which the writ of habeas corpus is made available." *Id.* at 682 (Harlan, J., concurring in part and dissenting in part). Affording relief from "conviction and punishment * * * for an act that the law does not make criminal" is the central justification for collateral relief from a conviction or sentence. *Davis* v. *United States*, 417 U.S. 333, 346 (1974); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873) (granting habeas relief from a federal sentence exceeding statutory authorization); see 28 U.S.C. 2255(a).

The Court's decision in *Bousley* v. *United States*, 523 U.S. 614 (1998), illustrates the Court's effects-based analysis. The Court explained that a holding that narrows the scope of conduct covered by a federal criminal statute is substantive because it "necessarily carr[ies] a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Id.* at 620 (citations and internal quotation marks omitted). That is, the *effect* of the new narrowing rule of *Bailey* v. *United States*, 516 U.S. 137, 143 (1995) (holding that a violation of 18 U.S.C. 924(c) requires evidence of "active employment of the firearm by the defendant," rather than mere possession) (emphasis omitted)), was to establish that the prisoner had been convicted of acts that the law did not criminalize, and it would therefore "be inconsistent with the doctrinal underpinnings of habeas review" to preclude the prisoner from relying on *Bailey* in support of his claim for collateral relief. *Bousley*, 523 U.S. at 621. *Bousley* did not turn to the legal source of *Bailey*'s holding to determine that it was substantive; it relied on that decision's effect of placing conduct outside the reach of existing criminal law.

2. To support the contention that vagueness holdings are non-retroactive procedural rules, *amicus* cites (Br. 28-30) *Lambrix* v. *Singletary*, 520 U.S. 518 (1997), which concluded that the holding of *Espinosa* v. *Florida*, 505 U.S. 1079 (1992) (per curiam), was a new procedural rule. Far from supporting *amicus*'s position, *Lambrix* illustrates the distinction between a substantive rule making a defendant ineligible for a punishment and a procedural rule governing the process for imposing it.

In *Espinosa*, a capital sentencing jury recommended a sentence of death after it had been instructed on an aggravating factor (that the murder was "especially wicked, evil, atrocious, or cruel," 505 U.S. at 1080 (citing Fla. Stat. Ann. § 921.141(5)(h) (West 2015)), without the limiting construction necessary to cure its vagueness, *id.* at 1081; see *Lambrix*, 520 U.S. at 531-532 & n.4. *Espinosa* held that, even though the trial judge had also found the aggravating factor—*after* presumptively applying the curative limiting construction, *ibid.*—the judge's indirect weighing of the vague aggravating factor by giving deference to the jury's sentencing recommendation "create[d] the * * * potential for arbitrariness" and therefore violated the Eighth Amendment. 505 U.S. at 1082.

Lambrix held that the new rule announced in *Espinosa* was not retroactive because it "neither decriminalize[d] a class of conduct nor prohibit[ed] the imposition of capital punishment on a particular class of persons." 520 U.S. at 539 (citation and internal quotation marks omitted). *Lambrix*, however, did not ground its holding in a finding that the constitutional source of *Espinosa*'s rule was Eighth Amendment vagueness doctrine. Rather, the basis for *Lambrix*'s retroactivity holding lies in the procedural character of *Espinosa*'s rule: the indirect weighing of the invalid factor skewed the *process* for determining a penalty for which the defendant was made eligible by the court's aggravating-factor findings. Unlike here, the invalid factor did not form a necessary predicate for *eligibility* for an enhanced sentence.[1] Accordingly,

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[1] At the time of *Espinosa* and *Lambrix*, the sentencing jury rendered only an advisory recommendation and its findings of aggravating factors were not, under state law, sufficient to justify

the sentencing jury's consideration of one vague aggravating factor, without a proper limiting instruction under Florida law, simply resulted in that invalid factor being *indirectly* weighed in the ultimate decision by the trial judge whether to impose a capital sentence. *Espinosa*'s bar against such indirect weighing is a quintessential procedural rule. U.S. Br. 23; pp. 6-7, *infra.*

3. *Amicus* contends (Br. 31) that the substantive effect of a rule grounded in the Constitution's procedural protections cannot transform the rule into a substantive one because "virtually every [procedural] rule" "has the *potential* to be outcome-determinative in at least some, if not many, cases." That argument misconceives the basic distinction this Court has drawn between substantive and procedural rules.

Procedural rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. at 352; see *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 730 (2016). The outcome of applying a new substantive rule, in contrast, is that a prisoner

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a capital sentence. See *Espinosa*, 505 U.S. at 1080; *Lambrix*, 520 U.S. at 534-535. Rather, the sentencing judge, not the jury, was to "make the critical findings necessary to impose the death penalty." *Hurst* v. *Florida*, 136 S. Ct. 616, 622 (2016). In both *Espinosa* and *Lambrix*, the trial judge unquestionably found valid aggravating factors rendering the defendants eligible for a capital sentence. See *Espinosa*, 505 U.S. at 1080 (trial court found four aggravating factors and two mitigating factors); *Lambrix*, 520 U.S. at 521 (trial court found five aggravating factors for one murder, four aggravating factors for a second murder). Today, the jury would have to find the necessary aggravating factor to make a defendant death-eligible, *Hurst*, 136 S. Ct. at 621-622, but that has no impact on the retroactivity analysis in *Lambrix*.

"stands convicted of an act that the law does not make criminal or faces a punishment the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (citations and internal quotation marks omitted). It is that latter category that implicates the core justification for habeas relief. *Davis*, 417 U.S. at 346; *Ex parte Lange*, 85 U.S. (18 Wall.) at 176.

Amicus identifies (Br. 31-32) *Beard* v. *Banks*, 542 U.S. 406 (2004), and *Sawyer* v. *Smith*, 497 U.S. 225 (1990), as cases where the Court concluded that new constitutional rules were procedural "despite their obvious effect on a defendant's ultimate sentence." But the rules in those cases—that juries may consider mitigating factors even if not found unanimously, *Banks*, 542 U.S. at 408, 420; and that a jury must not be told that the responsibility for determining the defendant's sentence rests elsewhere, *Sawyer*, 497 U.S. at 229, 232, 244-245—do not have an "obvious effect[]" (Amicus Br. 31) on the outcome of the sentencing proceeding. Those rules are concerned with the information that a capital sentencing jury may consider in deciding whether an authorized sentence of death is appropriate; they do not alter the range of punishments the jury may impose. See *Banks*, 542 U.S. at 419-420 (effect of the new rule was to "remove some remote possibility of arbitrary infliction of [a] death sentence"); *Sawyer*, 497 U.S. at 244 (new rule was designed to enhance "the accuracy of capital sentencing"). As the Court explained in *Montgomery*, "[t]hose decisions altered the processes in which States must engage before sentencing a person to death. The processes may have had some effect on the likelihood that capital punishment would be imposed, but none of those decisions rendered a certain

penalty unconstitutionally excessive for a category of offenders." 136 S. Ct. at 736.

The holding of *Johnson*, in contrast, goes beyond raising the possibility of a different outcome for a defendant whose ACCA status depends on the residual clause. In *Johnson*, the Court *invalidated* the residual clause as "void for vagueness." 135 S. Ct. at 2562. *Johnson* therefore *eliminates* any possibility of imposing a sentence greater than ten years of imprisonment on a prisoner whose ACCA status depends on that clause. 18 U.S.C. 924(a)(2). Thus, for the class of prisoners who received a sentence of at least 15 years of imprisonment (the ACCA's mandatory minimum) based on the now-invalid residual clause, *Johnson* establishes that their sentences are illegal because the sentencing court had no authority to impose that enhanced term. See *Montgomery*, 136 S. Ct. at 730-731 (relying on *Ex parte Siebold*, 100 U.S. 371, 376-377 (1879), to conclude that "[a] penalty imposed pursuant to an unconstitutional law is * * * void").[2]

4. The effects-based rationale for categorizing new rules as substantive or procedural demonstrates why the United States takes the position that *Johnson* applies retroactively in ACCA cases, but not in cases where application of the similarly worded residual clause in Sentencing Guidelines § 4B1.2(a), led to a

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[2] *Amicus* suggests (Br. 38-39) that this definition of a class of defendants for whom a punishment is prohibited is "circular" and would necessarily encompass all defendants whose rights would be violated under *any* new rule. That is incorrect. The definition encompasses a class consisting of those no longer *eligible* for the sentence in question; it would not apply to rules that create a class of persons facing the same ranges of sentences under new and different procedures.

career-offender sentence. Compare Amicus Br. 32-33 (suggesting that the rule is procedural in all contexts), with Federal Public and Community Defenders Amicus Br. 14-15 (suggesting that it is substantive in all contexts).

The rule adopted in *Johnson* has substantive effect in ACCA cases because it increases a sentence to 15 years to life imprisonment, which is "a punishment that the law cannot impose." *Summerlin*, 542 U.S. at 352. Compare 18 U.S.C. 924(e), with 18 U.S.C. 924(a)(2); U.S. Br. 26-27. The same principles dictate that *Johnson* is not retroactive in guidelines cases. The invalidation of the residual clause in Guidelines § 4B1.2(a) could establish an incorrect guidelines range for a defendant who was sentenced as a career offender because a prior conviction was counted under the residual clause. See Sentencing Guidelines § 4B1.1. But it would not (and could not) alter the statutory boundaries for sentencing set by Congress for the defendant's crime. The Sentencing Commission has no authority to override Congress. See *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989) (Sentencing Guidelines do not usurp "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead operate "within the broad limits established by Congress"). A sentence imposed on the basis of an incorrect guidelines range will still fall within an unchanged statutory range, which is not true in a case involving prejudicial *Johnson* error under the ACCA.[3]

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[3] A holding that a *statutory* mandatory minimum sentence was imposed as a result of legal error in counting a prior conviction would be a substantive ruling, even if the sentence remained within the authorized statutory range. See U.S. Amicus Br. at 5, 15-17,

5. Justice Harlan's concurring opinion in *Mackey* and his opinion for the Court in *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), confirm that the substantive effect of applying a new rule, and not the constitutional source of the rule, determines whether the rule is substantive and should be applied retroactively. Justice Harlan pointed to the "divergent ways" in which the new rule announced in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), applied in *Mackey* and *United States Coin & Currency* to demonstrate that "[s]ome rules may have both procedural and substantive ramifications." *Mackey*, 401 U.S. at 692 n.7 (opinion of Harlan, J.).

Marchetti and *Grosso* held that a defendant who asserts his Fifth Amendment privilege against self-incrimination may not be prosecuted for failing to register as a gambler and pay the related gambling excise tax. *Marchetti*, 390 U.S. at 60-61; *Grosso*, 390 U.S. at 67 ("petitioner's submission of an excise tax payment, and his replies to the questions on the attendant return, would directly and unavoidably have served to incriminate him"). In *United States Coin & Currency*, Justice Harlan's opinion for the Court ex-

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Montgomery v. *Louisiana*, No. 14-280 (filed July 29, 2015) (explaining that a ruling identifying a mandatory-minimum error is substantive because it expands the range of permissible sentencing outcomes). But an error in calculating the guidelines range does not have that effect; it simply affects the process for imposing sentence within the statutory boundaries. See U.S. Br. 38 n.9; cf. *Conrad* v. *United States*, No. 14-3216, 2016 WL 851703, at *2-*3 (7th Cir. Mar. 4, 2016) (declining to treat use of the incorrect guidelines range in violation of the *Ex Post Facto* Clause, see *Peugh* v. *United States*, 133 S. Ct. 2072 (2013), as retroactive on collateral review).

plained that the holdings of *Marchetti* and *Grosso* applied retroactively in a forfeiture proceeding based on failure to file the incriminating tax documents, because those cases established that gamblers "had the Fifth Amendment right to remain silent in the face of the statute's command that they submit reports which could incriminate them." 401 U.S. at 723. "[T]he conduct being penalized" through the forfeiture, he stated, "is constitutionally immune from punishment." *Id.* at 724.[4]

In his concurring opinion in *Mackey*, decided on the same day, Justice Harlan concluded that the rule announced in *Marchetti* and *Grosso* did not apply retroactively to warrant habeas relief for a prisoner who had been convicted for failure to pay income tax, even though the government had introduced his wagering excise tax returns at trial. 401 U.S. at 700. Justice Harlan explained that, unlike the defendant in *United States Coin & Currency*, who was penalized for failure to file the incriminating tax documents, the conduct for which Mackey was being punished—evading payment of federal income tax—was not constitutionally immune from punishment. *Ibid.* Mackey was claiming only that "the procedures utilized in procuring his conviction were vitiated by" *Marchetti* and *Grosso*. That procedural consequence did not warrant collateral relief. *Id.* at 701 (opinion of Harlan, J.). The different outcomes in *Mackey* and *United*

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[4] *United States Coin & Currency* arose on direct appeal, but it was decided before *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), held that all new rules apply to cases on direct appeal, and the United States had argued that *Marchetti* and *Grosso* should not be applied retroactively to seizures of property that occurred before the decisions were handed down. 401 U.S. at 722.

States Coin & Currency confirm Justice Harlan's understanding that the *effect* of applying a new rule in a given context, and not the constitutional source of the right vindicated by the new rule (which, after all, was precisely the same in both cases), establishes whether the rule is entitled to retroactive application.

B. The Holding of *Johnson* Is Substantive Because Defendants With ACCA Sentences That Depend Upon The Residual Clause Face An Unauthorized Punishment

Amicus contends (Br. 33-43) that *Johnson* does not fit within any recognized category of substantive rules. That argument is misconceived. Because the holding of *Johnson* alters the statutory boundaries of permissible sentences that a court may impose under the ACCA, it falls within this Court's established framework for identifying substantive rules.

1. *Amicus* contends (Br. 33-39) that the term "substantive" is a "legal term of art" that derives from Justice Harlan's concurrence in *Mackey* and covers only new rules that "set forth categorical constitutional guarantees that place certain criminal laws and punishments *altogether beyond* the State's power to impose." Br. 35 (quoting *Montgomery*, 136 S. Ct. at 729); *ibid.* (substantive decisions "announce a substantive individual *right* to engage in the conduct punishable under the residual clause"). *Amicus* concludes (Br. 35-39) that *Johnson* did not announce such a rule because Congress remains free to impose a 15-year sentence on a defendant with the same prior convictions as petitioner.

That view cannot be squared with *amicus*'s concession (Br. 44-45) that *Ex parte Siebold*, *supra*, and *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), involved substan-

tive rules. The conduct at issue in *Ex parte Siebold*—interfering with an election, including by stuffing a ballot box, 100 U.S. at 377-379—was not protected by any constitutional guarantee or outside of Congress's power to proscribe. The issue was whether Congress could regulate the election through "partial regulations intended to be carried out in conjunction with regulations made by the States," or whether it had to "assume the entire regulation of the elections of representatives" in order to properly exercise its constitutional authority. *Id.* at 382. And although the holding of *Yick Wo* was that a laundry-licensing statute had been enforced in a discriminatory manner in violation of the Equal Protection Clause, 118 U.S. at 366-367, 373-374, the underlying conduct of operating a laundry in a wooden building without a license was not constitutionally protected, nor was it outside of the State's power to regulate. *Id.* at 366; see U.S. Br. 33-34.

Amicus's source-based analysis is not only contrary to this Court's approach, it would introduce needless and irrelevant complexities into retroactivity analysis. *Amicus* posits (Br. 13) that rules grounded in substantive due process are retroactive, but rules grounded in procedural due process are not. But the precise constitutional basis of vagueness doctrine is by no means clear. The vagueness doctrine is grounded in the "fail[ure] to give ordinary people fair notice of the conduct it punishes," but it also protects against laws that lack sufficiently clear standards and therefore "invite[] arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. Although the notice function of vagueness may have a procedural function (Amicus Br. 24-25), the arbitrary-enforcement aspect of the doctrine ad-

dresses the content of the law. The justification of "establish[ing] minimal guidelines to govern law enforcement" is "the more important aspect of the vagueness doctrine," *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (citation and internal quotation marks omitted), and it was the basis for the Court's holding in *Johnson*, see 135 S. Ct. at 2558 ("By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.").

In any event, the Court's holding in *Johnson* is qualitatively different from procedural due process rules providing notice and a right to be heard in a particular proceeding, like a rule addressing "notice of * * * the evidence the [government] intend[s] to use against [the defendant] at the penalty hearing of his trial." *Gray* v. *Netherland*, 518 U.S. 152, 155, 170 (1996) (holding that a new rule regarding the adequacy of such notice in a capital sentencing trial was a procedural rule). *Johnson invalidated* the residual clause, thereby eliminating a category of crimes that will trigger a 15-year mandatory minimum sentence. 135 S. Ct. at 2562. "[A] change in the permissible length of a sentence is not procedural. The change does not affect the sentencing process but only the sentencing result—the length of the sentence, which is a matter of substance no less than the verdict is." *Conrad* v. *United States*, No. 14-3216, 2016 WL 851703, at *2 (7th Cir. Mar. 4, 2016).

2. Equally important, this Court's decisions recognize that the universe of substantive rules that have retroactive effect is not strictly limited to the exam-

ples described by Justice Harlan. To the contrary, in *Bousley*, the Court explained that statutory-interpretation decisions of this Court holding that a federal criminal statute does not reach certain conduct are "*like*" decisions that "plac[e] conduct beyond the power of the criminal law-making authority to proscribe," and are therefore substantive and retroactive, because of the "significant risk that a defendant stands convicted of an act that the law does not make criminal." 523 U.S. at 620 (emphasis added; citations and internal quotation marks omitted).

The Court in *Bousley* concluded that the holding of *Bailey*, which narrowed the construction of "use" of a firearm in 18 U.S.C. 924(c) to exclude possession offenses, was substantive and retroactive, 516 U.S. at 624, even though Congress could (and did) amend Section 924(c)(1) to restore possession offenses to the statute. See U.S. Br. 36-37. In other words, the holding of *Bailey* was substantive even though prohibiting the possession of a firearm during and in relation to a crime of violence or a drug trafficking crime was not "altogether beyond [Congress's] power to impose." *Montgomery*, 136 S. Ct. at 729.

Amicus attempts to explain away *Bousley* (Br. 40-41) by arguing that, in cases where the Court "interprets the terms of [a] statute in furtherance of congressional intent," the Court is explaining what the statute has always meant since its enactment. Br. 40 (citing *Rivers* v. *Railway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). According to *amicus* (*ibid.*), statutory-construction decisions therefore raise separation-of-powers concerns because conduct falling outside of the narrow construction of the statute "was *never* unlawful." But that explanation cannot distin-

guish statutory-construction decisions from the constitutional vagueness holding of *Johnson*. In *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), the Court explained that when a decision of this Court establishes a new constitutional rule, the source of that new rule "is the Constitution itself, not any judicial power to create new rules of law," and the underlying right therefore "necessarily pre-exists our articulation of the new rule." *Id.* at 271.

Amicus contends (Br. 40-41) that declining to apply the vagueness holding of *Johnson* retroactively would raise no separation of powers concerns because Congress *wanted* to subject at least those prisoners with previous convictions for "clearly risky crimes" to 15-year sentences—and the holding of *Johnson overrode* that congressional intent. But the Court rejected that view of the residual clause in *Johnson*, noting that many convictions that may seem to be straightforward cases for application of the residual clause may "turn out not to be so easy after all," 135 S. Ct. at 2560, and that the residual clause is so vague that it cannot even be construed or applied to any core category of crimes, *id.* at 2562 (residual clause is "a judicial morass that defies systemic solution" and "a black hole of confusion and uncertainty") (citation and internal quotation marks omitted); U.S. Br. 35. In any event, once the Court facially invalidated the residual clause as unconstitutionally vague, despite recognizing that some crimes are "obviously risky," 135 S. Ct. at 2561, the result is that the residual clause has always been invalid, see *Danforth*, 552 U.S. at 271, and covers nothing.

Separation-of-powers concerns are therefore implicated when a defendant is serving a criminal sentence

under a statute that this Court has declared void for vagueness. An Article III court has no power to lawfully impose a 15-year sentence if the statutory maximum term of imprisonment validly authorized by Congress is ten years. See *United States* v. *Evans*, 333 U.S. 483, 486 (1948) ("In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions."); U.S. Br. 30. A defendant sentenced under the ACCA's residual clause "faces a punishment that the law cannot impose upon him," *Summerlin*, 542 U.S. at 352—and the holding of *Johnson* therefore has a substantive effect—even if a future class of defendants could receive that punishment if the law were amended.

3. Given the holding of *Bousley* and the separation-of-powers theory that *amicus* sets forth to account for that decision, *amicus* is forced to acknowledge (Br. 41-42) that the Court's decisions in *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 555 U.S. 122 (2009), which narrowed the scope of the residual clause by interpreting its terms to exclude certain convictions from qualifying for the enhancement, announced new substantive rules that apply retroactively on collateral review. See U.S. Br. 31-33. That concession confirms that the theory *amicus* sets forth is unsound.

The "canon of strict construction of criminal statutes" is a "junior version of the vagueness doctrine" that "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (citation and internal quotation marks omitted). The vagueness doctrine is more powerful

medicine for insoluble ambiguity. It "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Ibid.* (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385 (1926)). It would thus be strikingly anomalous if *Begay* and *Chambers*, which only narrowed the scope of the residual clause under the "junior version of the vagueness doctrine," achieved the status of substantive rules that apply retroactively on collateral review, but the constitutional holding of *Johnson* barring the enforcement of the residual clause as entirely void for vagueness was merely a procedural rule.

4. *Amicus* contends (Br. 42-43) that if *Johnson*'s invalidation of the residual clause is a substantive rule, then the Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002), should also have been classified as substantive because it "invalidated state capital sentencing statutes," yet the Court held that *Ring* announced a procedural rule. See *Summerlin*, 542 U.S. at 353. That is wrong. In *Summerlin*, the Court concluded that *Ring*, which held that the Sixth Amendment requires a jury—not a judge—to "find an aggravating circumstance necessary for imposition of the death penalty," *Ring*, 536 U.S. at 609, was a "prototypical procedural rule[]" because altering the decision-maker in a capital sentencing scheme "did not alter the range of conduct Arizona law subjected to the death penalty." *Summerlin*, 542 U.S. at 352. The holding of *Johnson*, in contrast, alters the statutory boundaries of the authorized sentences that the decision-maker may impose, and it is substantive for that reason.

C. *Amicus Curiae*'s Policy Arguments Do Not Justify Refusing To Recognize *Johnson* As Substantive

1. *Amicus* contends (Br. 49-52) that the Court should not apply *Johnson* retroactively because it would produce a "windfall" for prisoners who received ACCA sentences based on residual-clause convictions that clearly fall within the parameters of that (now-invalid) clause. As explained above, p. 16, *supra*, the Court rejected that view of the residual clause in *Johnson*. 135 S. Ct. at 2560. *Amicus*'s contention (Br. 50) that some defendants who were sentenced under the residual clause "had sufficient notice" that their prior convictions would subject them to an enhanced penalty under the ACCA is irreconcilable with the Court's holding that the statute is so incurably vague that it cannot even be construed. *Johnson*, 135 S. Ct. at 2562.

2. *Amicus* notes (Br. 51-52) that the retroactive application of *Johnson* will impose considerable costs on the criminal justice system in the form of supplemental briefing to determine whether a prisoner's ACCA sentence is justified based on another portion of the definition of "violent felony" such as the elements clause, 18 U.S.C. 924(e)(2)(B)(i), and the necessity of recalculating the prisoner's guidelines range and holding a new sentencing hearing. But the retroactive application of new substantive rules to cases on collateral review always comes with some cost. Those costs are justified where, as in the case of a defendant whose ACCA sentence depends upon the residual clause, "the criminal process [has come] to rest at a point where it ought properly never to repose." *Montgomery*, 136 S. Ct. at 732 (quoting *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.)).

3. *Amicus* further contends (Br. 52-53) that applying *Johnson* retroactively would undermine the decisions of prosecutors who negotiated plea deals for Section 922(g)(1) offenses with defendants who had committed more serious crimes, in light of the ACCA's severe 15-year mandatory minimum sentence. Although the United States advanced that argument in *Johnson* as a reason not to invalidate the residual clause based on the reliance interests that underlie the principle of *stare decisis*, U.S. Supp. Br. at 48-51, *Johnson*, *supra* (No. 13-7120); *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991), the argument has no bearing on whether a rule is substantive. *Amicus*'s reliance argument would have been relevant to retroactivity analysis under *Linkletter* v. *Walker*, 381 U.S. 618, 636 (1965), but *Teague* jettisoned that approach.

4. *Amicus* contends (Br. 53-55) that "[a]pplying *Johnson* retroactively" could undermine countless other convictions and sentences under other federal and state laws that contain language similar to the language Congress used in the residual clause. *Amicus* notes (Br. 53) that some courts have held that the residual clause in Sentencing Guidelines § 4B1.2(a) is unconstitutionally vague in light of *Johnson*, but as explained above, pp. 8-9, *supra*, applying the holding of *Johnson* to the residual clause in the Guidelines does not mean that *Johnson* has retroactive effect in that context.

Amicus further notes (Br. 54) that some lower courts have concluded that other federal statutes, specifically 18 U.S.C. 924(c)(3)(B) and 18 U.S.C. 16(b), are unconstitutionally vague in light of *Johnson*. The Court in *Johnson* rejected the suggestion that its decision would necessarily invalidate other statutes

with similar language, 135 S. Ct. at 2561, and whether those lower-court decisions are upheld on further review remains to be seen. But in any event, the potential effect of *Johnson* on other criminal statutes does not justify denying collateral relief to a class of prisoners serving unauthorized sentences.

II. THE COURT SHOULD NOT AFFIRM THE JUDGMENT OF THE COURT OF APPEALS ON AN ALTERNATIVE GROUND

A. *Amicus* contends (Br. 56-58) that the Court "can affirm without remanding" because petitioner's robbery conviction qualifies as a violent felony under the ACCA's elements clause. See 18 U.S.C. 924(e)(2)(B)(i) (prior conviction punishable by a term exceeding one year of imprisonment is a violent felony if it "has as an element the use, attempted use, or threatened use of physical force against the person of another"); *Curtis Johnson* v. *United States*, 559 U.S. 133, 140 (2010) (force required by the elements clause is "force capable of causing physical pain or injury to another person"). Although petitioner's conviction may well qualify on that basis, this Court should not address that issue in the first instance. "[The Court] ordinarily do[es] not decide in the first instance issues not decided below." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 168-169 (2004) (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam)). Affirming on that basis would be particularly unwarranted because the standard for issuing a certificate of appealability requires only a reasonably debatable issue, and the Eleventh Circuit's opinion on direct appeal avoiding that issue suggests that the elements-clause issue would meet that standard. See U.S. Br. 43-46.

B. Nor should the Court, as *amicus* suggests (Br. 58-60), affirm the court of appeals' denial of a certificate of appealability based on petitioner's procedural default of his *Johnson* claim. The United States did not assert a defense of procedural default in its response to the petition for a writ of certiorari, see U.S. Mem. 1-3 (suggesting that the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings in light of *Johnson*), or in its opening brief. The United States hereby expressly waives any procedural default defense against petitioner on his *Johnson* claim.

The Court should accept that waiver. *Wood* v. *Milyard*, 132 S. Ct. 1826, 1830 (2012) (court may not "bypass, override, or excuse" the government's "deliberate waiver of a * * * defense" in a habeas case; finding waiver of statute of limitations defense); *Bryant* v. *Warden*, 738 F.3d 1253, 1261 (11th Cir. 2013) (same as to procedural default). And in any event, it would make little sense to decide this case on grounds of procedural default. The conflict in the courts of appeals on the question whether *Johnson* is retroactive developed in the context of denials of authorization for leave to file second or successive Section 2255 motions, which raise the question whether this Court "made" *Johnson* retroactive, see 28 U.S.C. 2244(b)(3)(C), 2255(h)(2), and that conflict is not directly reviewable by this Court, see 28 U.S.C. 2244(b)(3)(E), 2255(h). Prisoners who need authorization to file second or successive Section 2255 motions must comply with a one-year statute of limitations, 28 U.S.C. 2255(f)(3), which runs from the date of the Court's decision in *Johnson*, see *Dodd* v. *United States*, 545 U.S. 353, 357 (2005). Those prisoners need

a definitive ruling on retroactivity from the Court this Term. See U.S. Br. 41-42. Accordingly, the Court should decide whether *Johnson* is a substantive rule that applies retroactively on collateral review.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be vacated and the case should be remanded.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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