No. 15-8629

IN THE

Supreme Court of the United States

ALFREDERICK JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively on collateral review to challenges of sentences imposed under the residual clause in U.S.S.G. § 4Bl.2(a)(2)?

II. Whether *Johnson*'s constitutional holding applies to U.S.S.G. § 4Bl.2(a)(2)'s identical residual clause, thus rendering that provision void?

III. Whether Petitioner's Pennsylvania conviction for robbery by force however slight is a "crime of violence" because it is listed in the commentary to U.S.S.G. § 4B1.2, even though it does not interpret and conflicts with the text of the guideline, after *Johnson*?

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, Federal Public and Community Defenders in the United States, have offices in 91 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici* represent tens of thousands of individuals in federal court each year, including many who were previously sentenced under the residual clause of the Career Offender Guideline. *Amici* have particular expertise and interest in the issues presented in this case.

SUMMARY OF ARGUMENT

This brief addresses the first issue before the Court: Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively on collateral review to challenges of sentences imposed under the residual clause in U.S.S.G. § 4Bl.2(a)(2). The Court held in *Welch v. United States*, __S. Ct. __ (April 18, 2016) (No. 15-6418), that "*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." *Welch* thus confirmed that *Johnson* applies retroactively to cases in which defendants were sentenced under the residual clause of the Armed

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[1] The parties to the case have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. Sup. Ct. R. 37.2(a). No counsel for a party authored any part of this brief, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). The holding and reasoning of *Welch* compel the same conclusion for cases in which defendants were sentenced under the identical clause of the Career Offender Guideline.

Welch clarified that whether a rule is substantive or procedural—the test for retroactivity—is determined by the function of the rule itself. In the sentencing context, the answer depends on whether the rule itself alters only the procedures by which a court decides whether a sentencing provision applies, or instead alters the substantive reach of the sentencing provision. *Johnson* said nothing about procedures for determining whether any sentencing provision applies, but instead altered the substantive reach of the Career Offender Guideline, thus narrowing the range of conduct and the class of persons that the guideline punishes. Because the residual clause is invalid, even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause. When a court has applied the Career Offender Guideline based on the residual clause, the sentence, whether inside or outside the guideline range, is based on that clause.

Applying *Johnson* retroactively to Guidelines cases is consistent with the courts' treatment of other rules altering the reach of the ACCA. The courts of appeals have uniformly held that new rules that merely narrow the definition of "violent felony" under the ACCA by interpreting its terms apply retroactively to Guidelines cases on collateral review, and the government has agreed. The government's newfound position with respect to *Johnson*, which entirely invalidates the residual clause because of unavoidable uncertainty and arbitrariness of adjudication, would

contravene the purpose of the vagueness doctrine and the basis for *Johnson*'s holding.

Holding *Johnson* retroactive to the Guidelines will not impact sentencing across the board or create an undue burden on the courts. *Johnson*'s holding applies narrowly to a hypothetical ordinary case, and so casts no doubt on the Guidelines generally or the many other laws that apply based on the facts as they occurred on a particular occasion. The courts have amply demonstrated their ability to handle these cases by addressing nearly 40,000 motions to reduce sentences under a retroactive amendment to the drug guidelines in the past fifteen months.

Although *Amici* believe that *Welch* resolves the issue, and are hopeful that the government will reconsider its position in light of *Welch*, there is no indication that it will do so. *Amici* therefore respectfully request that the Court either rule in Petitioners' favor on all three issues presented in this case and in *United States v. Travis Beckles*, No. 15-8544 (filed March 9, 2016) this term,[2] or grant certiorari in one of these cases this term and decide the case after full briefing and argument next term.[3] *Amici* note that in

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[2] If the Court were to rule only on retroactivity, it would not solve the cognizability problem in the Eleventh Circuit, which held in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015) that *Johnson* does not apply to the Guidelines, the result of which is that these claims are not cognizable under 28 U.S.C. § 2255. Nor would it resolve the issue in this case and in *Beckles,* where two circuits have ruled that offenses listed in the guideline's commentary are "crimes of violence" even though they do not interpret and conflict with the text of the guideline absent the residual clause.

[3] If the Court were to grant certiorari this term and decide the issues next term, petitioners could file § 2255 motions in the district courts and applications for successive § 2255 motions in

order to preserve the rights of individuals with claims, papers will have to be filed in the district and appellate courts sufficiently in advance of the one-year statute of limitations.

ARGUMENT

I. *Welch* Compels the Conclusion That *Johnson* Applies Retroactively to Guidelines Cases.

The Court held in *Welch* that *Johnson* announced a "substantive rule that has retroactive effect in cases on collateral review." *Welch*, slip op. at 15. The Court explained that "whether a new rule is substantive or procedural" is determined "by considering the function of the rule," *id*. at 10, which "depends on whether the new rule *itself* has a procedural function or a substantive function—that is, whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons the law punishes," *id*. at 11 (emphasis added).

Applying this test, the Court explained that "[b]y striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'" *Id*. at 9 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). The Court concluded:

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the courts of appeals within the statute of limitations, and ask the courts to hold them in abeyance pending a decision by this Court. However, unlike all other circuits, the Eleventh Circuit refused to stay applications for successive § 2255 motions pending *Welch*, and there is no guarantee that it would do so if the Court granted certiorari in a Guidelines case this term for decision next term.

> The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence. *Johnson* establishes, in other words, that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. It follows that *Johnson* is a substantive decision.

Id. at 9 (internal citation omitted). "By the same logic," *Johnson* is not a procedural decision because "it had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Armed Career Criminal Act," but instead "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Id*.

The Court did not limit its holding to ACCA cases. Moreover, it appears to have rejected the premise of the government's position that the rule announced in *Johnson* can be retroactive to ACCA cases but not to Guidelines cases, *i.e.*, that "ACCA errors and Guidelines errors" are "two distinct 'categories' that differ from a retroactivity perspective."[4] Contrary to this theory and consistent with lower court decisions before and after *Johnson*,[5] *Welch* made clear that the

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[4] Brief for United States in Opposition at 28-29, *In re Rivero*, No. 15-7776 (Apr. 1, 2016).

[5] *See* Brief of Federal Public & Community Defenders as Amici Curiae at 13-14, *Welch*, __ S. Ct. __ (No. 15-6418) (collecting cases in which courts of appeals held that *Begay v. United States*, 553 U.S. 137 (2008), and *Chambers v. United States*, 555 U.S. 122 (2009), apply retroactively to Guidelines cases); *In re Watkins*, 810 F.3d 375, 383 (6th Cir. 2015) (holding in an ACCA case that *Johnson* announced a substantive rule that is "categorically retroactive" to cases on collateral review); *In re Grant*, No. 15-5795 (6th Cir. March 7, 2016) (authorizing successive § 2255 motion in a Guidelines case based on *Watkins*); *Price v. United*

relevant "category" for retroactivity purposes is the "rule," not the kind of case in which it is invoked. The Court framed the question as whether the "new *rule* falls within one of the two *categories* that have retroactive effect under *Teague*," defined as "categories of *decisions*" that are "substantive *rules*" or "watershed *rules* of criminal procedure," *Welch*, slip op. at 7-8 (internal citations and quotation marks omitted) (emphases added). Accordingly, the substantive rule announced in *Johnson* is categorically retroactive to all cases in which it applies.[6]

But even if the government's as-applied analysis were correct, *Johnson* as-applied to the Guidelines is not a procedural rule but a substantive rule. *Johnson* "had nothing to do with the range of permissible methods a court might use to determine whether" any sentencing provision applies, but instead "changed the substantive reach" of the Career Offender Guideline,

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States, 795 F.3d 731, 734 (7th Cir. 2015) (holding in an ACCA case that *Johnson* "announced a new substantive rule" that is "categorically retroactive"); *Stork v. United States*, No. 15-2687, slip op. at 1 (7th Cir. Aug. 13, 2015) (authorizing successive § 2255 motion in a Guidelines case because "*Johnson* announced a new substantive rule" that is "categorically retroactive"); *Best v. United States*, No. 15-2417, slip op. at 1–2 (7th Cir. Aug. 5, 2015) (same); *Spells v. United States*, No. 15-3252, slip op. at 1 (7th Cir. Oct. 22, 2015) (same).

[6] *See Davis v. United States*, 564 U.S. 229, 243 (2011) (retroactivity is a "categorical matter"); *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) ("New constitutional rules announced by [the Supreme] Court that [are substantive] must be applied in . . . all federal habeas corpus proceedings."). In *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that new rules must be applied retroactively to all "similarly situated" defendants. *Id*. at 316. Defendants are "similarly situated" when they are at the same stage of the proceedings and rely on the same new rule. *Id*. at 315.

thus "altering 'the range of conduct or the class of persons that the [Guideline] punishes.'" *Welch*, slip op. at 9.[7] Because the residual clause is invalid, "even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id*. When a court has applied the Career Offender Guideline based on the residual clause, the sentence, whether inside or outside the guideline range, is based on that clause. *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013) ("'[T]he Guidelines are in a real sense the basis for the sentence.'") (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality opinion)) (italics omitted). Because the residual clause is invalid under *Johnson*, "it can no longer mandate or authorize *any* sentence." *Welch*, slip op. at 9 (emphasis added).

The government's arguments to the contrary are not consistent with *Welch* and otherwise do not withstand scrutiny. As noted, the government begins from the premise that "ACCA errors and Guidelines errors" can be "distinct 'categories' that differ from a retroactivity

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[7] *Johnson*'s alteration of the substantive reach of the Career Offender Guideline is obvious:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
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> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives~~, or otherwise involves conduct that presents a serious potential risk of physical injury to another~~.

U.S.S.G. § 4B1.2(a).

perspective."[8] It then applies different tests to these two "categories."

In arguing that *Johnson* is retroactive to ACCA cases at oral argument in *Welch*, the government stated that what "resolves the substantive-versus-procedural inquiry" is that a substantive rule changes the question the court is answering—from whether the defendant has a conviction that qualifies under the residual clause, to whether he has a conviction that qualifies only under the elements clause or the enumerated offense clause[9]—while a procedural rule may impose a higher burden of proof, alter the admissible evidence, or change the factfinder,[10] but the court is answering the same question unaltered by the new rule.[11] The government also acknowledged, as it must in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that a substantive rule need not lower the statutory maximum or eliminate the sentence the defendant actually received.[12]

The government then shifted to an "effects" test for Guidelines cases that would focus on the purported effect of *Johnson* overlaid on a stunningly inaccurate description of the pre-existing sentencing system. According to the government, *Johnson* is "procedural" as-applied to the Guidelines because the guideline

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[8] Brief for United States in Opposition at 28-29, *In re Rivero*, No. 15-7776 (Apr. 1, 2016).

[9] Transcript of Oral Argument at 13, *Welch*, __ S. Ct. __ (No. 15-6418).

[10] *See* Brief of the United States at 28, *Welch*, __ S. Ct. __ (No. 15-6418).

[11] Transcript of Oral Argument at 13, *Welch*, __ S. Ct. __ (No. 15-6418).

[12] *Id*. at 12, 14.

range does not alter statutory limits, but instead serves merely as "information" courts must consider within statutory limits, and that a "mistake" in applying the guidelines is just a "piece of misinformation" that courts may consider and weigh in determining the sentence.[13]

Two serious problems with this argument immediately leap to mind. First, it is the "function" of the "rule itself" that determines whether it is procedural or substantive, *Welch*, slip op. at 11, and *Johnson* says nothing about procedures, *id*. at 9. Although the rule of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), requiring consideration of youth and its attendant characteristics, has an express "procedural component," the Court rejected the State's argument that *Miller* "must have set forth a procedural rule," *Montgomery*, 136 S. Ct. at 734, because "[t]hose procedural requirements do not, of course, transform substantive rules into procedural ones," *id.* at 735. The government's argument here is even more untenable because *Johnson* has no procedural component at all.

Second, the Guidelines are not just "information," and courts may not consider or weigh a "mistaken" guideline range, much less an unconstitutionally enhanced career offender range, as a "piece of misinformation." Congress instructed that district courts "shall consider" the "sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines," 18 U.S.C. § 3553(a)(4), an instruction that has always been and remains mandatory. In this Court's now familiar words, district courts must "begin all sentencing proceedings by correctly calculating the

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[13] *Id*. at 20-21.

applicable guideline range," *Gall v. United States*, 552 U.S. 38, 49 (2007), courts "'*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process,'" *Peugh*, 133 S. Ct. at 2083 (quoting *Gall*, 552 U.S. at 50 n.6), and "failing to calculate (or improperly calculating) the Guidelines range" is "significant" reversible error, *Gall*, 552 U.S. at 51. Thus, the *correct* guideline range must be the "basis" for the sentence. *Peugh*, 133 S. Ct. at 2083; *see also Molina-Martinez v. United States*, __ S. Ct. __, slip op. at 9-10 (Apr. 20, 2016) (No. 14-8913).

District courts may not use an unconstitutional or otherwise improper legal interpretation in determining the guideline range, including whether an offense is a "crime of violence,"[14] and use of a "mistaken" guideline range will nearly always be reversed.[15] The

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[14] *See*, *e.g.*, *United States v. Soto-Rivera*, 811 F.3d 53, 56 (1st Cir. 2016) ("Figuring out whether the Guidelines define a particular offense as a crime of violence poses a purely legal question, so we review that particular issue de novo."); *United States v. Madrid*, 805 F.3d 1204, 1207 (10th Cir. 2015) (whether a "conviction qualifies as a crime of violence, justifying [an] enhanced sentencing recommendation" is a "determination we review de novo"); *id*. at 1211 (because *Johnson* renders the Career Offender Guideline's residual clause void for vagueness, courts may not use it as the "mandatory starting point" when it depends upon the residual clause).

[15] *See, e.g.*, *United States v. Anderson*, 526 F.3d 319, 330 (6th Cir. 2008) ("If the premise from which the district court must begin its sentencing analysis[] is incorrect, then it seems that an appellate court would have a difficult time saying that the result would have been unchanged."); *United States v. Goodman*, 519 F.3d 310, 323 (6th Cir. 2008) ("[W]e cannot find that a sentencing court has properly considered the § 3553(a) factors if it miscalculated the advisory Guidelines range."); *United States v. Ali*, 508 F.3d 136, 154 (3d Cir. 2007) ("[W]ith an incorrectly calculated

Court has already rejected as "not supportable" the government's description of the guidelines as "just one among many persuasive factors a sentencing court can consult," *Peugh*, 133 S. Ct. at 2087, and its argument that courts are "free to give careful consideration" to a higher guideline range than the one in effect when the offense was committed, *id*. The Court made clear in *Peugh* that a court may not consider, impose a sentence within, or decide whether to vary from, a guideline range that cannot be constitutionally applied.

The Court has also rejected the government's argument that the advisory guidelines lack "'the force and effect of laws,'" *id*. at 2085-86, and instead concluded the guideline range continues to have "legal force," *id*. at 2087. Accordingly, the government has conceded that for vagueness purposes, the advisory guidelines amount to "statutes fixing sentences."[16]

While all of the Guidelines are legislative in nature,[17] the Career Offender Guideline is uniquely

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guideline range, . . . the Judge necessarily was unable meaningfully to consider the recommended Guidelines range as required by § 3553(a)(4).").

[16] *See* Brief of Plaintiff-Appellee at 13-14, *United States v. Gillespie*, No. 15-1686 (7th Cir. Sept. 14, 2015) (quoting *Johnson*, 135 S. Ct. at 2557 (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979))); *see also* Appellee's Supplemental Brief at 8-9, *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015) (No. 14-2159) (same).

[17] Congress directed the Commission to "establish a sentencing range" for "each category of offenses involving each category of defendant." 28 U.S.C. § 994(b)(1). Congress enacts the Guidelines through its power to modify or disapprove them before they go into effect, *see* 28 U.S.C. § 994(p), and the Sentencing Commission is "fully accountable to Congress," and itself exercises "quasi-legislative power." *Mistretta v. United*

statutory and also uniquely severe. The Sentencing Commission established the Career Offender Guideline pursuant to a congressional directive to "specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants convicted for at least the third time of a felony that is a "crime of violence" or a specified drug offense. *See* 28 U.S.C. § 994(h). Accordingly, the guideline ties the offense level to the statutory maximum for the offense of conviction and automatically places the defendant in Criminal History Category VI if she is convicted for at least the third time of a felony that is a "crime of violence" or a "controlled substance offense." U.S.S.G. § 4B1.1(a)-(b) (2015).

The Commission has no discretion to reduce the severity of the Career Offender Guideline, *see United States v. LaBonte*, 520 U.S. 751, 757 (1997), despite the fact that it creates a "category of offender subject to particularly severe punishment," *Buford v. United States*, 532 U.S. 59, 60 (2001). Indeed, whether or not a defendant is subject to that punishment makes a huge difference. The guideline range for a defendant convicted of a drug offense who is classified as a career offender is tied to the *statutory maximum*, while the guideline range for a person convicted of a drug offense who is not classified as a career offender is tied to the *statutory minimum*.[18] As a result, the average Career

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States, 488 U.S. 361, 393-94 (1989); *see also United States v. Booker*, 543 U.S. 220, 243 (2005) (Commission is "properly thought of as exercising some sort of legislative power").

[18] *See Kimbrough v. United States*, 552 U.S. 85, 96-97 (2007); U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 54 (2011). The Commission maintains that this, too, is required by Congress. *See id.* ("Setting base offense levels at or just above the mandatory minimum penalty also fulfills the Commission's statutory mandate

Offender Guideline minimum in 2014 (204 months) was 2.46 times the non-Career Offender Guideline minimum (83 months), and the average sentence imposed on drug offenders classified as career offenders (138.6 months) was 2.35 times the average sentence imposed on drug offenders not classified as career offenders (62 months).[19] The difference for the petitioner, like many others, was even more pronounced. Because his statutory range was 0-30 years,[20] his Career Offender Guideline range was 262-327 months, U.S.S.G. § 4B1.1(b)(2). The sentence he received at the bottom of that range was 3.4 times the applicable non-Career Offender Guideline minimum of 77 months at the time, and 4.2 times the non-Career Offender Guideline minimum of 63 months under

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to consider 'the community view of the gravity of the offense,' [28 U.S.C. § 994(c)(4)] in that mandatory minimum penalties reflect Congress's expression of the community view of the gravity of the offense."); *see also* The Honorable Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 Am. Crim. L. Rev. 1, 5 (2015) ("In the SRA, Congress charged the Commission with promulgating guidelines that are 'consistent with all pertinent provisions' of federal law and with providing sentencing ranges that are 'consistent with all pertinent provisions of title 18, United States Code.' To that end, the original Commission incorporated mandatory minimum penalties into the Guidelines at their inception.") (citing 28 U.S.C. §§ 994(a), (b)(1)). *But see Kimbrough*, 520 U.S. 102-03.

[19] Sentencing Resource Counsel Project, Data Analyses (2016), *available at* http://www.src-project.org/wp-content/uploads/2016/04/Data-Analyses-1.pdf.

[20] Petitioner's statutory range for trafficking in less than 500 grams of cocaine was increased from 0-20 years to 0-30 years for doing so after a prior conviction for a "felony drug offense," 21 U.S.C. § 841(b)(1)(C). The government filed a notice under 21 U.S.C. § 851 based on a prior conviction that was time-barred under the Guidelines, U.S.S.G. § 4A1.2(e)(3).

the Guidelines as amended in 2014.[21] *See* U.S.S.G. § 2D1.1(c)(8) (2009); U.S.S.G. § 2D1.1(c)(9) (2014).

The mandatory Guidelines, of course, "ha[d] the force and effect of laws," were "binding on all judges," *United States v. Booker*, 543 U.S. 220, 233-34 (2005), and prescribed "the maximum [sentence] authorized."[22] *Id*. at 228, 244. But even under the advisory Guidelines, the guideline range is the most severe punishment a defendant is remotely likely to receive. Judges imposed above-guideline sentences in 2014 on only 0.98 percent of drug offenders who were not career offenders and on only 0.47 percent of those who were career offenders.[23] Only 0.57 percent of drug offenders not classified as career offenders received a sentence as high as the bottom of the guideline range for drug offenders who were classified as career offenders.[24] That is, a person who is not a career offender has a 99.43 percent chance of receiving a sentence lower than the Career Offender Guideline range. A person whose career offender range was based on the now-void residual clause is not saying that his sentence "might have been different,"[25] but that it almost certainly *would* have been different. The fact that the equivalent of a Career Offender Guideline sentence *could* be imposed on a rare

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[21] Mr. Jones' Criminal History Category, absent the career offender enhancement, was IV.

[22] "[B]inding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose." 543 U.S. at 226. The guidelines "required" and "mandated" sentences within particular ranges. *Id*. at 227.

[23] Data Analyses, *supra* note 19.

[24] *Id*.

[25] Transcript of Oral Argument at 47, *Welch*, __ S. Ct. __ (No. 15-6418).

defendant who is not a career offender after *Johnson* does not mean that all other defendants who are not career offenders after *Johnson* have not suffered the deprivation of a substantive right. *See Montgomery*, 136 S. Ct. at 734.

II. Giving Retroactive Effect to Decisions That Merely Narrowed the Residual Clause While Denying Retroactive Effect to *Johnson* Would Contravene the Purpose of the Void-for-Vagueness Doctrine and the Basis of *Johnson*'s Holding.

As petitioner and *amici* have noted, every court of appeals that has decided the issue has held that new rules that narrow the ACCA's definition of "violent felony" by interpreting its terms apply retroactively to Guidelines cases on collateral review.[26] The government has consistently taken that position in the courts of appeals,[27] and in this Court as well.[28] The government now asks this Court to take the opposite position with respect to *Johnson*. The Court rejected a similar result in *Welch*, noting that "[t]reating decisions as substantive if they involve statutory

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[26] Brief of Federal Public & Community Defenders as Amici Curiae at 13-14, *Welch*,__ S. Ct. __ (No. 15-6418); Petition for Writ of Certiorari at 13-14, *Jones v. United States*, No. 15-8629 (Mar. 18, 2016).

[27] *Ibid*.

[28] "The government does not dispute that *Begay* constitutes a substantive holding concerning the applicability of Section 924(e) and that it is therefore retroactive to cases on collateral review." Brief for the United States, *Coley v. United States*, 2010 WL 11421164, at *9 n.2 (U.S. March 18, 2010) (citing *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004); *Bousley v. United States*, 523 U.S. 614, 620-621 (1998)).

interpretation, but not if they involve statutory invalidation, would produce unusual outcomes." *Welch*, slip op. at 14.

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," but when a provision is so lacking in ascertainable standards that it cannot be adequately clarified, the vagueness doctrine bars its enforcement altogether. *United States v. Lanier*, 520 U.S. 259, 266 (1997) (internal citation and quotation marks omitted); *Skilling v. United States*, 561 U.S. 358, 416 (2010) (Scalia, J., concurring). The vagueness doctrine not only ensures fair warning, but prohibits the deprivation of liberty under a law "so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. The latter is "the more important aspect of the vagueness doctrine," *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), and that was the basis for the Court's holding in *Johnson*. Based on its own "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause," and the lower courts' demonstrated inability to "apply [it] consistently" in both ACCA and Guidelines cases,[29] the Court concluded that the clause had so defied efforts to interpret its meaning that it must be struck altogether. *See* 135 S. Ct. at 2557-60; *see also Welch*, slip op. at 2-3 (federal courts "remained

[29] The Court analyzed four Guidelines cases in reaching this conclusion. *See Johnson*, 135 S. Ct. at 2560 (analyzing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013), *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010), *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010), and *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

mired in 'pervasive disagreement'" after the Court "sought for a number of years" to construe the clause "in a more precise fashion").

The result of the government's position here would be that decisions that only narrowed the residual clause under the "junior version of the vagueness doctrine" would be retroactive to Guidelines cases, but the constitutional holding of *Johnson*, which entirely struck the clause because of "unavoidable uncertainty and arbitrariness of adjudication," 135 S. Ct. at 2562, would not. The Court should reject that result, as it did in *Welch*.

III. Holding That *Johnson* Applies to the Guidelines and That It Is Retroactive to Guidelines Cases Will Not Impact Sentencing Across the Board or Create an Undue Burden on the Courts.

Contrary to the Eleventh Circuit's assertion, holding that *Johnson* applies to the Guidelines will not "upend our sentencing regime." *United States. v. Matchett*, 802 F.3d 1185, 1196 (11th Cir. 2015). The residual clause is unconstitutionally vague because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts," *Johnson*, 135 S. Ct. at 2257, but this Court "[did] not doubt" the constitutionality of laws requiring application of a standard to the "actual . . . facts" of "real-world conduct," *id*. at 2561 (internal citation and quotation marks omitted). Nearly every guideline provision is determined on the basis of the facts of real-world conduct. *See* U.S.S.G. § 1B1.3(a). Nor does *Johnson* "cast . . . doubt" on any other laws that require gauging the riskiness of a defendant's conduct "on a *particular occasion*." *Welch*, slip op. at 3-4.

Nor will giving *Johnson* retroactive effect in Guidelines cases unduly burden the courts. In the past fifteen months, the courts efficiently ruled on 38,242 motions to reduce sentences under a retroactive amendment to the drug guidelines.[30] The number of prisoners who were sentenced under the Guidelines' residual clause is far less than that, and courts have been preparing to effectively handle these cases. *See* Pet. 16-18; Data Analyses, *supra* note 19.

CONCLUSION

For the foregoing reasons, *amici* request that, before the statute of limitations runs, the Court rule in Petitioners' favor on the issues presented in this case and in *United States v. Travis Beckles*, No. 15-8544 (filed March 9, 2016) this term, or grant certiorari in one of these cases this term and decide the case after full briefing and argument next term.

Respectfully submitted,

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April 21, 2016

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[30] U.S. Sent'g Comm'n, 2014 Drug Guidelines Amendment Retroactivity Data Report, tbl.1 (Apr. 2016).

APPENDIX

APPENDIX

Federal Public and Community Defenders

Alabama, Northern
KEVIN BUTLER

Alabama, Middle
CHRISTINE FREEMAN

Alabama, Southern
CARLOS WILLIAMS

Alaska
FRED RICHARD CURTNER

Arizona
JON M. SANDS

Arkansas, Eastern
JENNIFFER MORRIS HORAN

Arkansas, Western
BRUCE EDDY

California, Central
HILARY POTASHNER

California, Eastern
HEATHER ERICA WILLIAMS

California, Northern
STEVEN GARY KALAR

California, Southern
REUBEN CAHN

Colorado
VIRGINIA L. GRADY

Connecticut
TERENCE S. WARD

Delaware
EDSON A. BOSTIC

District of Columbia
A. J. KRAMER

Florida, Middle
DONNA LEE ELM

Florida, Northern
RANDOLPH P. MURRELL

Florida, Southern
MICHAEL CARUSO

Georgia, Middle
CHRISTINA HUNT

Georgia, Northern
STEPHANIE KEARNS

Guam
JOHN T. GORMAN

Hawaii
PETER C. WOLFF, JR.

Idaho, Central and Northern
ANDREA GEORGE

Idaho, Southern
SAMUEL RICHARD RUBIN

Illinois, Central
THOMAS W. PATTON

Illinois, Northern
CAROL BROOK

Illinois, Southern
PHILLIP J. KAVANAUGH

Indiana, Northern
JEROME T. FLYNN

Indiana, Southern
MONICA FOSTER

Iowa, Northern and Southern
JAMES F. WHALEN

Kansas
MELODY BRANNON

Kentucky, Western
SCOTT WENDELSDORF

Louisiana, Eastern
CLAUDE KELLY

Louisiana, Middle and Western
REBECCA L. HUDSMITH

Maine
DAVID BENEMAN

Maryland
JAMES WYDA

Massachusetts
MIRIAM CONRAD

Michigan, Eastern
MIRIAM L. SIEFER

Michigan, Western
SHARON TUREK

Minnesota
KATHERIAN D. ROE

Mississippi, Northern
SAMUEL DENNIS JOINER

Missouri, Eastern
LEE LAWLESS

Missouri, Western
MADELEINE CARDARELLA

Montana
ANTHONY R. GALLAGHER

Nebraska
DAVID STICKMAN

Nevada
RENE VALLADARES

New Hampshire
MIRIAM CONRAD

New Jersey
RICHARD COUGHLIN

New Mexico
STEPHEN P. MCCUE

New York, Eastern and Southern
DAVID PATTON

New York, Northern
LISA PEEBLES

New York, Western
MARIANNE MARIANO

North Carolina, Eastern
THOMAS P. MCNAMARA

North Carolina, Middle
LOUIS C. ALLEN III

North Carolina, Western
ROSS RICHARDSON

North and South Dakota
NEIL FULTON

Ohio, Northern
DENNIS G. TEREZ

Ohio, Southern
DEBORAH WILLIAMS

Oklahoma, Eastern and Northern
JULIA L. O'CONNELL

Oklahoma, Western
SUSAN M. OTTO

Oregon
LISA HAY

Pennsylvania, Eastern
LEIGH SKIPPER

Pennsylvania, Middle
JAMES V. WADE

Pennsylvania, Western
LISA B. FREELAND

Puerto Rico
ERIC A. VOS

Rhode Island
MIRIAM CONRAD

South Carolina
PARKS NOLAN SMALL

Tennessee, Eastern
ELIZABETH FORD

Tennessee, Middle
HENRY A. MARTIN

Tennessee, Western
DORIS RANDLE-HOLT

Texas, Eastern
G. PATRICK BLACK

Texas, Northern
JASON D. HAWKINS

Texas, Southern
MARJORIE A. MEYERS

Texas, Western
MAUREEN SCOTT FRANCO

Utah
KATHRYN N. NESTER

Vermont
MICHAEL L. DESAUTELS

Virgin Islands
OMODARE JUPITER

Virginia Eastern
GEREMY KAMENS

Virginia, Western
LARRY W. SHELTON

Washington, Eastern
ANDREA GEORGE

Washington, Western
MICHAEL FILIPOVIC

West Virginia, Northern
BRIAN J. KORNBRATH

West Virginia, Southern
CHRISTIAN M. CAPECE

Wisconsin, Eastern and Western
DANIEL STILLER

Wyoming
VIRGINIA L. GRADY