No. 13-7120

IN THE
Supreme Court of the United States

SAMUEL JAMES JOHNSON
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, FAMILIES AGAINST MANDATORY MINIMUMS, AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984 substantially increases the penalty range for certain firearm possession offenses if the defendant has three qualifying prior convictions. A "violent felony" conviction qualifies. Under the Act, "the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year" that has certain specified elements or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

The Question Presented is whether the residual clause in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii) ("otherwise involves conduct that presents a serious potential risk of physical injury to another"), is unconstitutionally vague.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae National Association of Criminal Defense Lawyers, National Association of Federal Defenders, and Families Against Mandatory Minimums are leading criminal defense associations that, among other things, provide training and legal resources to attorneys practicing in criminal law. The Cato Institute is a non-partisan public policy research foundation that since 1977 has advanced the principles of individual liberty, free markets, and limited government. *Amici* have a fundamental interest in the fair and just administration of the criminal justice system through clear laws that are properly applied in accordance with the dictates of the Constitution, the will of Congress, and the decisions of this Court.

More detailed information about individual *amici* is provided in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the fifth time since 2007, the Court seeks to resolve confusion in the lower courts over the scope and meaning of the Armed Career Criminal Act's ("ACCA's") residual clause. The Court has gone to great lengths to achieve this goal, applying the

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to its preparation or submission. All parties have consented to the filing of this brief and copies of the letters of consent have been lodged with the Clerk of the Court.

statute's Delphic language to specific state statutes that outlaw attempted burglary, failure to report for confinement, intentional flight from law enforcement, operation of a vehicle under the influence of alcohol, and now, possession of a short-barreled shotgun. But despite this Court's repeated attempts to clarify the residual clause, lower courts continue to struggle with a litany of challenges to the statute's application to myriad criminal laws—ranging from statutory rape to battery to inchoate offenses and beyond.

Numerous circuit splits persist, leaving the courts, litigants, and the public unable to surmise which predicate offenses are included within the residual clause or why. Each circuit split illustrates the confusion that flows from the statute's vague formulation. Given the sheer volume of these cases with their conflicting rationales, only one thing can be said about the residual clause with any certainty: It is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). A decision that resolves whether the Minnesota firearm statute at issue otherwise involves conduct that presents a serious potential risk of physical injury to another is unlikely to succeed where four previous attempts have failed. Instead, lower courts will still be left without a guiding principle for deciding what the residual clause means for the hundreds of other state laws that may—or may not—be "violent felonies." Only by holding that ACCA's residual clause is unconstitutionally vague will the Court be able to put an end to this game of residual clause whack-a-mole.

ARGUMENT

I. DESPITE THIS COURT'S REPEATED EFFORTS TO DIVINE A WORKABLE STANDARD FROM THE VAGUE WORDING OF ACCA'S RESIDUAL CLAUSE, NUMEROUS CIRCUIT SPLITS PERSIST OR HAVE EVEN DEEPENED

In a quartet of cases since 2007, this Court has attempted to craft a coherent standard for determining whether a crime is a "violent felony" under ACCA's residual clause. *See Sykes v. United States*, 131 S. Ct. 2267 (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007). Although each try has more or less resolved that question for the state statute then at issue, the process has not yielded a rule that provides lower courts or defendants with sufficient guidance for the multitude of other offenses that potentially qualify as violent felonies under the residual clause. As a result, similarly situated defendants face dramatically different outcomes depending on where—and even when—they are sentenced. A ruling that fails to confront the unconstitutional vagueness of the residual clause would leave these other circuit splits to be resolved by later grants of certiorari, on a state-statute-by-state-statute basis.

1. The Court has already seen this problem play out, first in *James* and continuing forward in *Begay*, *Chambers*, *Sykes*, and now *Johnson*. With the first four cases in the books, the law facing a lower court looks, as a general matter, something like this: If the predicate has a "close[] analog" to an enumerated offense, the court compares the risk presented by the

predicate with that presented by the analogous enumerated offense. *James*, 550 U.S. at 203. In doing so, the court tries to figure out what an "ordinary" violation of the predicate statute looks like and whether that violation "presents a serious potential risk of injury to another." *Id.* at 208. If the court decides that the risks are sufficiently similar, the predicate is a violent felony. But there is an important caveat: If the *Begay* test also applies to predicates with close analogous to an enumerated offense, the court must also examine whether the predicate involved "purposeful, violent, and aggressive" conduct. *See Sykes*, 131 S. Ct. at 2289 n.1 (Kagan, J., dissenting) ("I understand the majority to retain the 'purposeful, violent, and aggressive' test, but to conclude that it is 'redundant' in this case.").

For the large number of cases where the predicate is not analogous to an enumerated offense, a lower court must take a different approach. It starts by comparing the risk presented by the predicate (again, with an eye to the "ordinary" case) to the risk generally presented by (at least some of) the enumerated offenses. *See Sykes*, 131 S. Ct. at 2273-75; *but see Chambers*, 555 U.S. at 127-28 (using the *Begay* test to analyze risk level). If the risk level is not sufficiently comparable, the predicate is not a violent felony. If the risk level is sufficiently comparable, the court must choose from three more possible paths.

First, the court could embark on a *mens rea* analysis. *Begay*, 553 U.S. at 144-45. If the predicate's *mens rea* is less than knowingly, the court could conclude that the predicate is not a violent

felony. *See id*. If the *mens rea* is at least knowingly, the court could conclude that the predicate *is* a violent felony. *Sykes*, 131 S. Ct. at 2275-76. But it remains unclear whether a *mens rea* of knowingly or greater is sufficient by itself to qualify the predicate as a violent felony, *see id*. at 2289 n.1 (Kagan, J., dissenting) ("I do not think the majority could mean to limit the [purposeful, violent, and aggressive] test to 'strict liability, negligence, and recklessness crimes.'"), or, conversely, whether a *mens rea* of less than knowingly disqualifies a predicate from violent felony status. *Sykes*, 131 S. Ct. at 2275 ("levels of risk divide crimes that qualify from those that do not").

Second, the court could ask whether the predicate offense involves purposeful, violent, and aggressive conduct. *Begay*, 553 U.S. at 144-45; *Chambers*, 555 U.S. at 128. If the answer is yes, the court could conclude that it is a violent felony. *See Chambers*, 555 U.S. at 128. If the answer is no, the court could conclude that it is not. *See Begay*, 553 U.S. at 145-48. But aside from the problem of statutes that occupy a spot between those two extremes (*e.g.*, purposeful and violent, but not aggressive), it is unclear whether a *mens rea* of less than knowingly renders the purposeful, violent, and aggressive inquiry moot. *See*, *e.g.*, *Sykes*, 131 S. Ct. at 2276; *id*. at 2277 (Thomas, J., concurring in the judgment) ("[T]he majority errs by implying that the 'purposeful, violent, and aggressive' test may still apply to offenses 'akin to strict liability, negligence, and recklessness crimes.'").

Third, the court could try to avoid the uncertainty presented by the previous options by

limiting the residual clause to predicates that (i) are purposeful, violent, and aggressive, *and* (ii) require a *mens rea* of at least knowingly. But the jury is still out on whether that would be enough, in and of itself, because that inquiry does not ensure that the risk will be comparable to the risk posed by the enumerated offenses. *See Sykes*, 131 S. Ct. at 2275-76 ("In many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk . . . . As between the two inquiries, risk levels provide a categorical and manageable standard that suffices to resolve the case before us.").

2. Given this array of possible approaches, it should come as no surprise that lower courts have struggled mightily with nearly every other category of predicate that might be eligible for the status of violent felony. A review of just a handful of the circuit divisions that loom on the horizon helps illustrate why no end to this confusion is in sight.

Inchoate Offenses. State criminal codes—like Title 18 of the United States Code—contain numerous inchoate offenses such as attempt, conspiracy, or solicitation. At first blush, this Court's holding in *James* would seem to resolve the scope of the residual clause for attempt. In *James*, the focal point of the analysis was whether the risk posed by attempted burglary under Florida law was "comparable to that posed by its closest analog among the enumerated offenses," "completed burglary." 550 U.S. at 203. To convict under the Florida version of attempted burglary, the State must prove an overt act directed toward entry of a building; the Court reasoned that the offense was therefore a violent felony because both completed

and attempted burglary pose the same risk of "face-to-face confrontation between the burglar and a third party." *Id.* at 203-07.

Yet *James* brought no clear resolution for other types of attempt offenses, much less inchoate crimes in general. Some lower courts have held that these other inchoate state offenses are violent felonies, while other courts have held the opposite in indistinguishable circumstances. Indeed, as Justice Alito observed in *Chambers*, 555 U.S. at 133 n.2 (Alito, J., concurring), "even after" *James* a circuit split persists as to overt-act attempted burglary—the very type of crime that the Court considered in *James*. *Compare*, *e.g.*, *United States v. Martinez*, 602 F.3d 1166, 1171-73 (10th Cir. 2010) (concluding *Begay* left the relevant analysis in *James* intact, and therefore Arizona's attempted burglary statute is not a violent felony because it required a "step" toward commission of the offense, but not necessarily a "substantial" step), *with United States v. Davis*, 689 F.3d 349, 357-58 (4th Cir. 2012) (after *Begay*, the test under *James* is whether the conduct at issue is "purposeful, violent, and aggressive," and "in the ordinary case, presents a serious potential risk of injury to another"; holding that West Virginia's attempt statute is a violent felony (internal quotation marks omitted)), *United States v. Smith*, 645 F.3d 998, 1004-05 (8th Cir. 2011) (noting *Sykes* requires examination into "levels of risk" and holding that the overt act required under Minnesota's attempted burglary law presented a level of risk similar to completed burglary), *and United States v. Lynch*, 518 F.3d 164, 170 (2d Cir. 2008) (under comparison test of *James*, New York's attempted

burglary offense is a violent felony because it requires an overt act that "carr[ies] the project to within dangerous proximity of its accomplishment" (internal quotation marks omitted)).

Confusion also continues for other inchoate offenses such as conspiracy to commit a violent crime. The approach favored by the Fifth and Ninth Circuits applies *James* to inquire whether the "target offense" of the conspiracy—for example, robbery—presents a risk "comparable to that posed by its closest analog among the enumerated offenses." That tends to bring crimes of conspiracy within the residual clause regardless of whether any overt act is required—a result at odds with the attempted burglary case law discussed above.

For example, in *United States v. Chandler*, the Ninth Circuit held that the Nevada offense of non-overt-act conspiracy to commit robbery is a violent felony. 743 F.3d 648, 653-55 (9th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3149 (U.S. Sept. 8, 2014) (No. 14-282). The court relied on *James* to reason that a conspiracy "increases the chances that the planned crime will be committed," and thus "creates the same risk of harm as the violent crime itself." *Id.* at 652, 654 (citing *United States v. Mendez*, 992 F.2d 1488 (9th Cir. 1993)). Utilizing the *James* comparison test, the court concluded that robbery poses potentially greater risk of serious injury than burglary or extortion "because robbery requires a taking from a person, against his or her will, by means of force or violence or fear of injury." *Id.* at 655. A target-offense analysis therefore led the court to declare conspiracy to commit robbery a violent felony under the residual clause.

Similarly, the Fifth Circuit concluded in *United States v. Gore*, 636 F.3d 728, 734, 738 (5th Cir. 2011), that the Texas offense of conspiracy to commit aggravated robbery is a violent felony. The Fifth Circuit applied *James* to conclude that the offense "presents a serious potential risk of injury," because the agreement increased the "possibility of a face-to-face confrontation" should "the agreement . . . be carried forward." *Id.* at 736-38. Further, *Gore* determined that its conclusion was compatible with this Court's decisions in *Begay* and *Chambers*, because a robbery conspiracy contemplates physical assault and aggression toward another person and is therefore "similar in kind as well as degree of risk posed" by the enumerated offenses. *Id.* at 739 (internal quotation marks omitted).

Other courts such as the Tenth Circuit take a different approach; while they also are guided principally by *James*, they limit the residual clause's "risk" inquiry to the conspiracy offense itself as opposed to the target of the conspiracy. These courts are therefore more likely to conclude that the same state offenses are *not* violent felonies within the meaning of the residual clause. In *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007), for example, the court considered a Colorado conviction for conspiracy to commit burglary. Even though the statute required proof of an overt act, that act did not "need [to] be directed toward the entry of a building or structure," leading the court to conclude that it might "create no risk of a violent confrontation." *Id.* at 1044. Noting that the overt act could be "wholly lawful if committed apart from the conspiracy," the court found the risk of physical injury of conspiracy

to commit burglary was not comparable to that presented by the completed crime. *Id.* at 1041-42, 1044; *see also Martinez*, 602 F.3d at 1168-73 (applying *Fell* to Arizona's attempted burglary statute).

The Eleventh Circuit has taken yet another approach to conspiracy claims, ruling that the *James* test must be applied differently after *Begay*. This approach tends to rule out conspiracies as violent felonies. In *United States v. Whitson*, 597 F.3d 1218, 1222 (11th Cir. 2010) (per curiam), for example, the Eleventh Circuit addressed the South Carolina crime of non-overt-act conspiracy to commit robbery.[2] Although the court reaffirmed its prior holding that a conspiracy to commit a violent crime "concerns serious risk of physical injury," it read *Begay* to require not only the risk of injury specified in *James*, but also that the offense of conviction "in itself, involves conduct that is purposeful, violent, and aggressive." *Id.* *Begay*, the Eleventh Circuit held, "requires us to separate" the conspiracy and its target offense "and to examine *the conspiracy alone*."

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[2] The Eleventh Circuit was applying U.S.S.G. § 4B1.2, the Sentencing Guidelines provision for Career Offenders, which has the same language used in ACCA's residual clause. *Compare* U.S.S.G. § 4B1.2(a)(2), *with* 18 U.S.C. § 924(e)(2)(B)(ii). Lower courts apply this Court's rulings on ACCA's residual clause to determinations made under the residual clause of § 4B1.2. *See*, *e.g.*, *United States v. Polk*, 577 F.3d 515, 518-19 (3d Cir. 2009); *United States v. Mohr*, 554 F.3d 604, 608-09 (5th Cir. 2009); *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008).

Id. at 1223. Because South Carolina conspiracy law did not require proof of an overt act, the court declared it was "difficult" to "see how the simple act of agreeing is either 'violent' or 'aggressive.'" *Id.* at 1222; *see also United States v. Lee*, 631 F.3d 1343, 1349 (11th Cir. 2011) (affirming *Whitson*'s analysis).

The Fourth Circuit agrees with the Eleventh Circuit's mode of analysis, but it reaches the opposite result. In *United States v. White*, 571 F.3d 365, 372-73 (4th Cir. 2009), the court held that non-overt-act conspiracy to commit robbery under North Carolina law is a violent felony because the agreement is "to achieve a violent objective" and the "inten[t] to achieve that object . . . substantially increase[s] the risk that [the conspirators'] actions will result in serious physical harm to others." *Id.* at 371. Further, the court reasoned that the offense was "purposeful, violent, and aggressive" because the intentional agreement made the contemplated "acts of violence . . . much more likely." *Id.* at 371-72.

These cases show that a ruling on whether possession of a sawed-off shotgun in Minnesota is a violent felony under the residual clause would leave unresolved the multiple splits for the different variations of attempt, conspiracy, and other inchoate offenses found in the criminal codes of each State.

Battery on a Law Enforcement Officer. Courts have similarly been unable to glean from this Court's decisions a consistent approach to whether the crime of battery on a law enforcement officer is a violent felony under the residual clause. As a result, different courts reach different outcomes for state statutes that are essentially the same.

Some circuits have relied on *Begay* and *James* to label this type of battery a violent felony if the risk of injury presented by the "ordinary" commission of the offense is comparable to that for an enumerated offense. In these circuits, it does not matter whether the state statute also encompasses a variety of conduct that unquestionably fails to present the risk. For example, the Tenth Circuit in *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009), relied on *Begay* and *James* to rule that Oklahoma's statute is a crime of violence under U.S.S.G. § 4B1.1. *Id.* at 1147-49 (construing test under *James* and *Begay* as whether "the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another" (internal quotation marks omitted)). The court looked to the facts of several state cases to conclude that "[t]he ordinary violation of the statute in this case involves far more violence than slight touching," even though "only the *slightest touching* is necessary" for conviction of the crime. *Id.* at 1146 n.4, 1148. The court further determined that while the offense of battery on a police officer "may or may not explode into violence and result in physical injury to someone at any given time," it "*always* has the serious potential to do so." *Id.* at 1149; *see United States v. Kutz*, 439 F. App'x 751, 753 (10th Cir. 2011) (reaffirming and applying *Williams* in construing ACCA's residual clause); *see also United States v. Smith*, 652 F.3d 1244, 1248 (10th Cir. 2011) (stating *Sykes* clarified the inquiry for intentional crimes under *Begay* and *James* is whether a crime is "similar in risk to the listed crimes," not whether it is "purposeful, violent, and aggressive," and applying *Williams* to an Oklahoma conviction for assault or

battery by a person in custody of an employee of the Office of Juvenile Affairs).

The First Circuit reached the same result for a Massachusetts statute that punishes assault and battery on a law enforcement officer. But that was only fortuitous, because the First Circuit does not apply the Tenth Circuit's test. Instead of looking primarily at the "ordinary case," the First Circuit emphasizes *Begay*'s "purposeful, violent, and aggressive" formulation. *United States v. Dancy*, 640 F.3d 455, 465-68 (1st Cir. 2011). The court reasoned that the offense requires the defendant to know his victim was a police officer on active duty, which it found was enough to meet *Begay*'s "purposeful" requirement. *Id.* at 467-69. Only within this construct did the court apply a hybrid of the "ordinary case" approach, reasoning that "the crime . . . nearly always involves the intentional striking of a police officer," who "usually" is armed. *Id.* at 468, 470. Together, these suppositions demonstrated that the offense involves "purposeful, violent, and aggressive conduct" and fell within the residual clause. *Id.* at 466, 470; *see also*, *e.g.*, *United States v. Anderson*, 745 F.3d 593 (1st Cir. 2014), *petition for cert. filed*, No. 14-5229 (U.S. July 12, 2014) (applying *Dancy*'s reasoning to Massachusetts offense of battery against court officer); *United States v. Jonas*, 689 F.3d 83 (1st Cir. 2012) (same as to Massachusetts offense of battery against a correctional officer). It is quite possible that without the knowledge requirement found in the Massachusetts statute, the First Circuit and the Tenth Circuit would come to different conclusions; the Tenth Circuit's conclusion about the riskiness of

an "ordinary violation" does not appear to turn on a *mens rea* analysis.

The Fourth Circuit also disagrees with the Tenth Circuit's test—but, unlike the First Circuit, the Fourth Circuit concludes that battery on a law enforcement officer is *not* a crime of violence under U.S.S.G. § 4B1.1. The Fourth Circuit's reasoning shifts the focus away from both the "purposeful, violent, and aggressive" test and the "ordinary case," instead emphasizing the categorical approach utilized in *Sykes* and *James*. *United States v. Carthorne*, 726 F.3d 503, 507 (4th Cir. 2013) (Virginia statute), *cert. denied*, 134 S. Ct. 1326 (2014). Under this categorical approach, the court found dispositive the fact that a conviction could rest on even "the slightest touching or without causing physical injury to another." *Id.* at 514. The statute's elements thus did not pose "a *serious* potential risk of physical injury." *Id.* As for its sister circuit's empirical observation that such conduct presents the ever-present "serious potential" to "explode into violence," the Fourth Circuit was not convinced. *Id.* (warning that courts "would do a great disservice to law enforcement officers by accepting . . . that a police officer who is a victim of [assault or battery] . . . is like a powder keg, capable of exploding into violence").

Making matters more muddled, the Fourth Circuit insisted that even if it agreed with the First Circuit on the appropriate test, it would still disagree on the outcome. According to the Fourth Circuit in *Carthorne*, "the elements of the offense do not substantiate the proscribed conduct as 'violent,' even

if it could be considered 'purposeful' and 'aggressive.'" 726 F.3d at 515 n.12.

Completing the circle, the Eleventh Circuit agrees with the Fourth Circuit that *Sykes* controls, but when the Eleventh Circuit applies that reading of *Sykes* it instead reaches the outcome of the courts that *reject* such an approach. *See Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013), *cert. denied*, 133 S. Ct. 2873 (2013) (concluding that if vehicular flight in *Sykes* "fell under the residual clause because it could *potentially* cause a confrontation with police," then battery must also, as it "*necessarily* includes some physical confrontation with police").

Statutory Rape. Even greater lower-court confusion will confront this Court when the time comes to consider prior convictions for statutory rape. These state laws vary significantly from one State to the next along numerous inflection points, including the age of the victim, the age of the defendant, the specific conduct prohibited, and whether force is an element. In evaluating whether the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another," courts must first choose which test to apply and then evaluate one or more of the relevant statutory elements, often proceeding on intuition and feel in the absence of empirical data. As the First Circuit has observed, this task is one lower courts have "neither the expertise nor the authority" to perform, *United States v. Meader*, 118 F.3d 876, 885 (1st Cir. 1997), and it has led to inconsistent outcomes.

Those circuits holding that statutory rape is a violent felony do not agree why. In *United States v. Daye*, 571 F.3d 225, 231-34 (2d Cir. 2009), for example, the Second Circuit applied *Begay* to conclude that Vermont's law prohibiting sexual assault of a child encompasses "purposeful, violent, and aggressive" conduct, even though the law is a strict liability crime that reaches not just "forcible assault" but also sexual contact without physical force. The court reasoned that, despite strict liability, the sexual contact is intentional, and "creates a risk of injury to the victim," because "a child has essentially no ability to deter an adult from using such force to coerce the child into a sexual act." *Id.* at 234. The Second Circuit also stated that even if the child had "purportedly consen[ted]," there was still "a serious risk of physical injury" due to, *inter alia*, the greater odds of contracting sexually transmitted diseases. *Id.* at 231. Relying on a combination of intuition and precedent, the court concluded that "a typical instance of this crime will involve conduct that is at least as intentionally aggressive and violent as a typical instance of burglary." *Id.* at 234.

The First Circuit has also labeled statutory rape a violent felony in some contexts, but rather than rely on *Begay* it emphasized *James* and its "similarity of risk" analysis. *See United States v. Velazquez*, 2015 WL 310487 (1st Cir. Jan. 26, 2015) (holding Maine offense of statutory rape of minors under fourteen years of age is a violent felony). Unlike the Second Circuit, the *Velazquez* court acknowledged that *Begay*'s "purposeful, violent, and aggressive" test could be read to exclude strict

liability crimes from the residual clause, but it went on to explain that the *Begay* formulation merely "serve[d] as a general guide in discerning whether an offense is sufficiently 'similar in kind' to the exemplar crimes." *Id.* at *5-6. What mattered, according to the First Circuit, was the presence of "conduct that is not only dangerous but also indicative of a willingness to inflict harm on an identifiable victim." *Id.* at *5; *see also United States v. Howard*, 754 F.3d 608, 609-10 (8th Cir. 2014), *petition for cert. filed*, No. 14-7280 (U.S. Nov. 24, 2014) (analyzing Arkansas's statutory rape statute under a "similarity of risk" test and holding it was a violent felony, but without identifying which Supreme Court case applies); *United States v. Thomas*, 231 F. App'x 765, 766 (9th Cir. 2007) (applying *James* and holding that statutory rape under Washington law poses categorical risk of harm because "it necessarily involves close physical contact with a victim who has clearly expressed lack of consent to sexual intercourse," even though statute "does not require an element of force").

Unlike the Second Circuit, which disagrees with the First Circuit on the test but agrees on the result, the Fourth, Seventh, Tenth, and Eleventh Circuits agree with the First Circuit on the test but then disagree on the result. For instance, in *United States v. McDonald*, 592 F.3d 808, 815 (7th Cir. 2010), the Seventh Circuit applied the *Begay* approach to hold that a Wisconsin statute prohibiting "*all* acts of sexual intercourse or contact with a child age 13 to 15" was not categorically a violent felony. That definition of the offense, the court reasoned, "sweeps broadly . . . without regard to consent-in-fact or

whether the perpetrator and the victim are close in age." *Id.* Given the breadth of the statute, there was no basis under *Begay* to find the offense "typically 'violent and aggressive'" based solely on the ages of the victims, as other circuits had done. *Id.* (internal quotation marks omitted); *see also United States v. Thornton*, 554 F.3d 443, 447-49 (4th Cir. 2009) (holding similarly and stating medical evidence of harms—including unplanned pregnancy and sexually transmitted diseases—that may result from sexual contact between adults and minors is insufficient to establish that Virginia's offense of statutory rape is a violent felony under the residual clause because *Begay* requires the offense to be "like those listed in [the residual clause], both in kind and degree of risk"); *United States v. Owens*, 672 F.3d 966, 971-72 (11th Cir. 2012) (similar; under *Begay*, second-degree rape and sodomy of minors between twelve and sixteen under Alabama law does not pose the same kind or degree of risk as the enumerated offenses).

The Tenth Circuit adds a different gloss, viewing *Begay* as creating an "exception" to the residual clause for all strict liability, negligence, and recklessness crimes, such that a strict-liability statutory rape offense can never be a violent felony. *United States v. Wray*, 2015 WL 328589, at *7-8 (10th Cir. Jan. 27, 2015). Because Colorado's statute prohibiting sexual assault of minors between fifteen and seventeen years where the perpetrator was at least ten years older was a strict liability crime, *Begay* meant it was per se not a crime of violence under U.S.S.G. § 4B1.2. *Id.* at *7. This is, of course, the opposite of what the Second Circuit concluded

after applying the same language from *Begay*. *See Daye*, 571 F.3d at 234-35.

The statutory rape laws demonstrate why it is so difficult to apply the various court-generated residual clause tests with consistency. Putting aside variations from one State to the next, the *same* statute can penalize conduct whether the offender and victim differ in age by three years or thirty; whether the victim gave "consent-in-fact" or strongly resisted; or whether the offender was in a position of authority or a schoolmate. The makes determination of the "ordinary case" of statutory rape especially problematic; some conduct prosecuted under these laws is extremely "purposeful, violent, and aggressive," while other conduct is not fairly described as meeting this test. *See*, *e.g.*, Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 Tex. Tech. L. Rev. 5, 12-18 (2013) (discussing how age-determinative sex offenses may be less serious based on the perpetrator's age). Thus, even after this Court takes up its first residual clause statutory rape case, it is unlikely that the decision will provide meaningful guidance for lower courts as they face a multitude of other statutory rape laws with their many varying elements.

3. These are just three types of state laws where disagreements in outcome and approach have persisted and even worsened despite this Court's repeated attempts to give meaning to the residual clause. The lower court opinions are a testament to the futility of seeking to manufacture clarity on a case-by-case basis, rather than through legislation. There is no reason to think that, on its fifth try, this

Court could craft an intelligible principle that would clarify the residual clause's applicability to other potential predicates, particularly given the fractured decisions that the first four cases have generated. After several years of effort, neither the Government nor anyone else has come up with a workable test, much less one faithful to the words Congress used in drafting the statute. Instead, the residual clause continues to create more questions for every one that this Court tries to answer.

II. THE RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE AS TO ALL POSSIBLE PREDICATES

As the judiciary's experience with ACCA demonstrates, the residual clause "provides no 'ascertainable standard' for the conduct it condemns." *Skilling v. United States*, 561 U.S. 358, 424 (2010) (Scalia, J., concurring in part and concurring in the judgment). This Court should therefore reverse Mr. Johnson's conviction in a decision that recognizes the residual clause's unconstitutional vagueness in all of its potential applications. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (permitting a facial vagueness challenge where statute was alleged to be vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all").

1. This Court normally limits its inquiry to whether a statute is vague as applied to the facts of the case before it. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010); *Chapman v. United States*, 500 U.S. 453, 467 (1991); *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *Village of*

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982); *United States v. Powell*, 423 U.S. 87, 92 (1975); *Parker v. Levy*, 417 U.S. 733, 757 (1974). For several reasons, this Court should conclude that the unconstitutional vagueness of the residual clause is not confined to sawed-off-shotgun-possession offenses.

Despite the general preference for assessing vagueness on an as-applied basis, this Court has decided due-process vagueness challenges that are not limited to the facts of a given case. *See*, *e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 55-64 (1999); *Kolender v. Lawson*, 461 U.S. 352, 357-62 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-78 (1974); *Coates*, 402 U.S. at 614; *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-91 (1921). The key difference in those cases is that the provision at issue "simply has no core," thus lacking "any ascertainable standard for inclusion and exclusion." *Gougen*, 415 U.S. at 578. Where a statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all," *Coates*, 402 U.S. at 614, it is unconstitutional in *all* potential applications.

Vagueness challenges of this sort are essential to preserving the separate roles of the legislature and the judiciary. In constitutional democracies, vague laws—and vague criminal laws in particular—fundamentally undermine the relationship between the government and its citizens. Citizens vest in their elected representatives the highly potent power to draft laws that deprive persons of their property,

their liberty, and even their life. The legislature violates its compact with the people when it tries to delegate to the courts the weighty task of deciding what conduct triggers those severe penalties. However well-meaning or technically skilled federal judges might be in drawing those lines, the people have assigned that duty to their elected representatives, who are more directly responsive to the voice of the people.

This Court therefore has explained that "there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning." *United States v. Evans*, 333 U.S. 483, 486 (1948). When Congress writes a law so indefinite that the courts are left to create both its core and its outer boundaries on a case-by-case basis, the prohibition on federal common law crimes goes out the window. *See id*. ("In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions."); *see also United States v. Lanier*, 520 U.S. 266, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts.").

The residual clause is unconstitutionally vague for reasons that are by no means peculiar to Mr. Johnson's case or to the particular statute here. For any potential predicate, the problem is that the residual clause is "so vague and standardless" that it not only "leaves the public uncertain as to the conduct it prohibits," *Giaccio*, 382 U.S. at 402-03, but also delegates impermissibly the legislative power to "defin[e] crimes and fix[] penalties." *Evans*, 333 U.S.

at 486. Indeed, as different Justices have recognized, the case law applying the residual clause has necessarily developed on an essentially arbitrary and ad hoc basis. *See*, *e.g.*, *James*, 550 U.S. at 215 (Scalia, J., dissenting) ("The problem with the Court's approach to determining which crimes fit within the residual provision is that it is almost entirely ad hoc."); *Chambers*, 555 U.S. at 133 (Alito, J., concurring in the judgment) ("ACCA's residual clause is nearly impossible to apply consistently."); *Sykes*, 131 S. Ct. at 2295 (Kagan, J., dissenting) ("So by its own terms, the Court's opinion—our fourth applying ACCA's residual clause in as many years—applies only to a single State's vehicular flight statute as it existed from 1998 to 2006." (quoting *id*. at 2287 (Scalia, J., dissenting) ("[W]e will be doing ad hoc application of ACCA . . . until the cows come home.")).

2. As this Court has struggled to avoid crossing the line between interpreting and making law, defendants have been unable to surmise how the residual clause will apply to the multitude of predicates yet to make it onto this Court's docket. This is not a statute that plainly applies to some conduct but has uncertainty at the outer margins. For statutes like that, a defendant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Humanitarian Law Project*, 561 U.S. at 20. The residual clause is different, because no predicate is clearly a violent felony under ACCA's residual clause until after this Court says so.

This absence of a core of covered conduct is a product of how the residual clause operates. In the

typical penal statute that uses risk of injury as an element, the defendant will be in a position to ask whether his conduct is sufficiently "risky." *See*, *e.g.*, *James*, 550 U.S. at 210 n.6 (citing statutes that forbid such things as "creat[ing] a substantial risk of serious bodily injury to any other person" by destroying or damaging property); *Sykes*, 131 S. Ct. at 2277 (same). The residual clause is different. Its role is to categorize previous convictions for recidivism-enhancement purposes. The clause seeks to bring within its scope a wide array of statutes covering highly varied types of offenses. Thus, an ACCA defendant must surmise whether a *statute* of conviction is of the *type* that will meet the relevant test (or tests) articulated by this Court. At least with other "risk of injury" laws the defendant can compare *his own* contemplated conduct to the language of the statute. The residual clause, though, necessarily looks to many things that are quite separate from the defendant's conduct. These include the "typical" case prosecuted under the same or similar statutes, statistical analyses of prosecutions as a whole, or offense elements across a range of other statutes (including those in other States) that the defendant did not violate.

Mr. Johnson's case illustrates this important distinction. He did not receive a higher sentence because he previously possessed a sawed-off shotgun in a manner that created an unacceptable risk of injury to others. He received it because the lower courts concluded that this statutory offense was similar in kind and risk to the enumerated offenses. *United States v. Johnson*, 526 F. App'x 708, 711 (8th Cir. 2013). For Mr. Johnson to have understood that

his prior offense qualified as an ACCA predicate, he would have needed to predict which of the tests applied—should he focus on the "ordinary case"? whether possession rises to the level of "purposeful"? some other formulation? And even assuming he knew the right test, he still would have needed to develop a working knowledge of how Minnesota's possession statute and statutes arguably like it apply across the totality of persons who might violate them. It is hard to imagine a statute where the penal consequences of a defendant's conduct are so far removed from, well, the defendant's own conduct.

3. This is not a situation where "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute." *Lanier*, 520 U.S. at 266. Over an eight-year span this Court has decided whether four particular state statutes are violent felonies under the residual clause. But as explained earlier, those decisions have offered no clear guidance for the multitude of other predicates that can be found, in all their varied formulations, in the criminal codes of every State. *See*, *e.g.*, *Begay*, 553 U.S. at 148 ("we hold only that, *for purposes of the particular statutory provision before us*, a prior record of DUI . . . . falls outside the scope of [ACCA]" (emphasis added)).

The sheer number of times this Court has revisited the residual clause in less than a decade is telling: In no other context have repeated decisions by this Court so "utterly fail[ed] to do what this Court is supposed to do: provide guidance concrete enough to ensure that the ACCA residual provision will be applied with an acceptable degree of consistency by the hundreds of district judges who

impose sentences every day." *James*, 550 U.S. at 215 (Scalia, J., dissenting).

4. A ruling from the Court on whether another particular state statute "otherwise involves conduct that presents a serious potential risk of physical injury to another," will provide little relief—to this Court, to the lower courts, or to defendants. And even were it possible to recast that statutory language to create a predictable core of covered predicates, it "is not the job of this Court to impose a clarity which the text itself does not honestly contain." *Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting); *see also United States v. Reese*, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."). Accordingly, this Court should declare ACCA's residual provision unconstitutionally vague.

III. ACCA'S IMPOSITION OF A SUBSTANTIAL, MANDATORY MINIMUM SENTENCE WARRANTS HEIGHTENED SCRUTINY

The confusion engendered by ACCA's residual clause is of heightened concern given the significantly higher minimum penalty that the residual clause mandates. A conviction of unlawful possession of a firearm as a previously convicted felon—the principal offense that potentially subjects a defendant to ACCA—is punishable by a statutory maximum of ten years' imprisonment, with no mandatory minimum. 18 U.S.C. § 924(a)(2). Under the Sentencing Guidelines, a defendant with two qualifying felony convictions who pleads guilty to

possessing a single firearm and earns credit for acceptance of responsibility will typically face a sentencing range of fifty-seven to seventy-one months. U.S.S.G. §§ 2K2.1(a)(1), 3E1.1, 5A (sentencing table, level 23, Criminal History Category III). If, however, a defendant "has three previous convictions . . . for a violent felony or a serious drug offense," ACCA subjects that defendant to a mandatory *minimum* of fifteen years' imprisonment, and a maximum of life. 18 U.S.C. § 924(e)(1); *Logan v. United States*, 552 U.S. 23, 27 (2007).

Application of the residual clause thus has enormously severe consequences, roughly tripling the sentence otherwise recommended for the offense. This dramatic and mandatory increase warrants heightened judicial scrutiny. Mandatory minimums, as this Court has repeatedly recognized, subject defendants to a greater loss of liberty, constrict or eliminate altogether a sentencing judge's discretion, are fundamentally at odds with imposing fair, honest, and rational sentences, and create disproportionate impacts on many offenders. Those consequences are all the more severe where a mandatory minimum raises the sentence far above the statutory maximum that would otherwise apply. This Court should require Congress to speak more clearly than otherwise would be the case before concluding that Congress has made clear its intent to subject particular individuals to such consequences. Because Congress did not do so in ACCA's residual clause, that clause should be invalidated.

1. Statutes imposing mandatory minimums are "phenomena of fairly recent vintage genesis." *Harris*

v. United States, 536 U.S. 545, 581 n.5 (2002) (Thomas, J., dissenting); *cf. United States v. Booker*, 543 U.S. 220, 236 (2005). Over the course of the past two decades, this Court has repeatedly recognized the impact of, and the necessity of heightened scrutiny to evaluate, statutes that impose such mandatory minimums.

There are several good reasons to tread cautiously in this area. First, by increasing the penalty for a crime, mandatory minimums have a substantial impact on a defendant's constitutionally protected liberty interest. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). As this Court recently explained, "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's 'expected punishment has increased as a result of the narrowed range' and the 'prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish.'" *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 522 (2000) (Thomas, J., concurring)); *see also Harris*, 536 U.S. at 577-78 (Thomas, J., dissenting) ("As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense."). The Sixth Amendment therefore requires that a jury find any fact necessary to impose a mandatory minimum sentence. *Alleyne*, 133 S. Ct. at 2158.

Second, mandatory minimums "can eliminate a sentencing judge's discretion in its entirety." *Almendarez-Torres v. United States*, 523 U.S. 224, 244-45 (1998). In *Almendarez-Torres*, the Court foresaw exactly the predicament courts find themselves in under the residual clause: "A mandatory minimum can . . . mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed." *Id*. (quotation marks omitted). That is what happened at Mr. Johnson's sentencing hearing. Transcript of Sentencing Hearing, R. Doc. 39, at 22 ("I impose the sentence reluctantly because a sentence of half that or two-thirds of that would be more than sufficient to qualify. But as I say, I do not have any choice in the matter.").

Third, statutes imposing mandatory minimum sentences "can produce unfairly disproportionate impacts on certain kinds of offenders." *Almendarez-Torres*, 523 U.S. at 245. Unlike the Guidelines, mandatory minimums "rarely reflect an effort to achieve sentencing proportionality—a key element of sentencing fairness that demands that the law punish a drug 'kingpin' and a 'mule' differently." *Harris*, 536 U.S. at 570-71 (Breyer, J., concurring in part and concurring in the judgment). Similarly, these statutes often "transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring," a transfer of power that has "reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate." *Id*. at 571; *see also id.* at 570 ("[A]s mandatory minimum sentencing statutes have proliferated in number and importance, judges,

legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike."); *Statement on Behalf of the Judicial Conference of the United States from U.S. District Judge Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security*, 19 Fed. Sent. R. 344, 344 (2007) ("Mandatory minimum sentences mean one-size-fits-all injustice. . . . [and] produce sentences that can only be described as bizarre.").

For each of these reasons, statutes that routinely impose a harsh and frequently disproportionate mandatory minimum sentence warrant greater scrutiny.

2. Applying heightened scrutiny to the residual clause is consistent with this Court's long-standing approach to mandatory minimum statutes. Before *Alleyne*, this Court recognized that treating the triggering fact for a mandatory minimum as a mere sentencing factor for the judge to find by a preponderance of the evidence "would raise serious constitutional questions[.]" *Jones v. United States*, 526 U.S. 227, 251-52 (1999*); id.* at 243-44 ("It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations *setting ultimate sentencing limits* without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." (emphasis added)). Accordingly, the Court required that fact to be submitted to the jury. *Id*. at 251-52.

The possibility that a mandatory minimum provision will produce significant disparities in sentence outcomes has likewise guided this Court's decisions on the scope and nature of essential procedural protections. *See Castillo v. United States*, 530 U.S. 120, 127, 131 (2000) (holding "the length and severity of [the] added mandatory sentence" required a jury finding). When this Court held that the jury must find a fact that "vaults a defendant's mandatory minimum sentence from 5 to 30 years," it found it "not likely that Congress intended to remove the indictment and jury trial protections when it provided for such an extreme sentencing increase." *United States v. O'Brien*, 560 U.S. 218, 229-31 (2010).

Alleyne was the capstone of these cases, holding that *any* fact increasing the mandatory minimum sentence must be submitted to the jury. 133 S. Ct. at 2161. This conclusion was compelled because "it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment." *Id*. Simply stated, "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id.* *Alleyne* holds that *all* mandatory minimums warrant this constitutional protection. And consistent with this Court's pre-*Alleyne* pronouncements, a particularly severe, mandatory consequence—like that imposed by ACCA—warrants particularly careful consideration.

Beyond the Sixth Amendment context, this Court has similarly displayed heightened sensitivity toward the use of mandatory minimums to impose disproportionally severe consequences. When this Court held unconstitutional a statute that made

death the mandatory sentence for first-degree murder, it echoed the concern applicable to all mandatory minimums, noting that they simply do not allow for "consideration of more than the particular acts by which the crime was committed." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality). In applying that same logic beyond the death penalty context, this Court recently held "that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (emphasis added). The Court placed special emphasis on the fact that "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id*. at 2467.

The Court exercises special caution when addressing mandatory sentences because due process principles apply most acutely in the criminal context. "The ordinary mechanism that we use . . . for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' is the test that we articulated in *Mathews v. Eldridge*." *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2007) (internal citation omitted); *see also Carey v. Piphus*, 435 U.S. 247, 259-60 (1978). Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), the specific "private interest that will be affected by the official action" is of critical importance in identifying the "specific dictates of due process." *Id.* at 334-35. Due process protections are thus most important in the criminal context because the private interest at stake is the "most elemental of

liberty interests—the interest in being free from physical detention by one's own government." *Hamdi*, 542 U.S. at 529; *see also Addington v. Texas*, 441 U.S. 418, 423-24, 428 (1979) ("The heavy [due process] standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free"; discussing burden of proof).

A statute like ACCA implicates these liberty interests in a more heightened manner by taking away the district court's option to consider mitigating factors and replacing that exercise of discretion with a dramatic, mandated increase in the prison term. Due process demands a more exacting scrutiny to ensure the statute gives fair notice of that draconian consequence.

3. The heightened scrutiny required here is also consistent with the caution that this Court has exercised in construing ACCA's residual clause. In *Begay*, for example, the Court relied on the severity of the penalty to reject the residual clause's applicability to DUI, even though the Court "assume[d] that the lower courts were right in concluding that DUI involves conduct that 'presents a serious potential risk of physical injury to another'" and acknowledged that "[d]runk driving is an extremely dangerous crime." 553 U.S. at 141. In adopting an interpretation narrower than what the text of the residual clause might call for, *see id*. at 155 (Alito, J., dissenting), the Court homed in on the fifteen-year mandatory minimum. *See id*. at 145-46 (majority opinion) ("We have no reason to believe that Congress intended a 15-year mandatory prison

term" to be triggered by predicates that did not involve "purposeful, violent, and aggressive conduct"); *see also id.* ("Were we to read the statute without this distinction, its 15-year mandatory minimum sentence would apply to a host of crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'").

In sum, the Court has consistently recognized that the consequences of mandatory minimum sentences are significant enough to trigger constitutional protection. And that protection is all the more important where, as here, the increase in sentence is severe. The Court should be especially vigilant of the due process guarantee against vague statutes where the stakes of applying an unclear law are so high.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be reversed on the ground that ACCA's residual clause, *see* 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague.

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APPENDIX

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NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving federal sentence enhancements. In furtherance of this and its other objectives, NACDL files approximately fifty *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

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establishing a system of criminal law that is constitutionally limited, properly applied, and clear.