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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

WHETHER THE RESIDUAL CLAUSE IN THE ARMED CAREER CRIMINAL ACT OF 1984, 18 U.S.C. § 924(e)(2)(B)(ii), IS UNCONSTITUTIONALLY VAGUE

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person . . . shall be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. §§ 924(e)(1) and (e)(2)(B) (Armed Career Criminal Act):

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)
>
> (e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that —
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . . .

STATEMENT[1]

1. The Court has asked the parties to address whether the "residual clause" of the Armed Career Criminal Act (ACCA) is unconstitutionally vague. Although Samuel Johnson's request for certiorari did not raise this question, it was raised below.

2. In his Sentencing Position, Mr. Johnson objected to his treatment under the ACCA and argued that the provision was unconstitutionally vague. (Defendant's Sentencing Position, dckt. no. 25, p. 14) The district court rejected this challenge, noting that it was "bound by the precedent of the Supreme Court" on the vagueness issue. (Sentencing Hearing, September 5, 2012, p. 18, dckt. no. 29).

3. Mr. Johnson also raised the vagueness challenge on appeal to the Eighth Circuit Court of Appeals. (Case no. 12-3123) On July 31, 2013, in an unpublished per curiam opinion, the Eighth Circuit rejected this claim, noting that this Court has "upheld the constitutional validity of § 924(e) against challenges that it was unconstitutionally vague." *United States v. Johnson*, 2013 WL 3924353, *7 (8th Cir. 2013).

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1. Most of the relevant procedural history and factual background have been set forth in the Statements provided in the opening Briefs, and will not be restated here.

SUMMARY OF ARGUMENT

The residual clause of the ACCA's violent felony definition is unconstitutionally vague. Although it is only fourteen words long, the impact of the poorly drafted clause cannot be overstated. Contained within a criminal statute, the residual clause converts the offense of being a felon in possession of a firearm from a crime for which a defendant can be incarcerated for no more than ten years into an offense mandating no less than fifteen years behind bars, and permitting imprisonment for life. Such an onerous penalty must not rest on the shaky foundation of an unclear statute.

The vagueness of the residual clause is apparent from the language of the provision itself, which fails to provide limits to govern its nebulous coverage or definitions to narrow its scope. In addition, although this Court has now endeavored five times to interpret the clause and identify a framework by which it can be applied consistently to the wide variety of state court crimes that might or might not fall within it, the Court has not yet succeeded. Instead, each effort has led to a different analytical framework that resolves the particular case before the Court, but fails to articulate an interpretive principle that can resolve future cases considering other types of offenses. As each new residual clause decision adds to the challenge, members of the Court have repeatedly called for Congressional intervention, but to no avail.

The vagueness of the language and this Court's inability to craft a clear framework for its application have left lower courts without guidance, struggling to apply the residual clause consistently to the countless state court

offenses that might be included within its reaches. Circuit courts are in turmoil and their decisions reflect significant disagreements regarding the violent felony status of many offenses, disagreements which remain even when this Court has already specifically addressed a similar offense. In addition, lower courts are widely divided regarding the proper analytical framework to apply, with various courts emphasizing different holdings from this Court's jurisprudence in sometimes contradictory ways.

The residual clause's vagueness violates the Due Process Clause of the Constitution. It fails to provide notice to citizens and lawyers regarding the scope of its provisions. It provides so little guidance to courts and the government that it is applied arbitrarily and inconsistently from one case to the next. And the clause requires the Court to attempt, in vain, to bring clarity where none exists, struggling to shoulder a burden that the Constitution plainly leaves to Congress. The Court should hold that the residual clause is void due to its unconstitutional vagueness, both as applied to Samuel Johnson's offense of mere possession of a short-barreled shotgun, and across the board. It is time for the Court to recognize the residual clause for "the drafting failure it is" and declare it void for vagueness.

ARGUMENT

I. THE ACCA'S RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE.

The residual clause of the ACCA is unconstitutionally vague. The Due Process Clause requires a statute, particularly a criminal statute that sends people to

prison for a very long time, to be drafted with sufficient clarity that it puts citizens, prosecutors, and courts alike on clear notice of what it requires, what it forbids, and the consequences of violating it. This fundamental requirement protects citizens from arbitrary enforcement and allows them to conform their conduct to the law. As importantly, it preserves the essential roles of both Congress and the Court and leaves to the former the job of defining crimes and punishments.

The residual clause is so vaguely worded that it achieves none of these goals. It not only fails to advise a prospective criminal whether he will be burdened with the extreme sentences required by the ACCA, but even learned counsel steeped in the clause's intricacies struggle for the answer. The lower courts' applications of the residual clause are wildly divergent. Defendants from different circuits with identical criminal histories face widely disparate sentences because, despite honest efforts, lower courts cannot achieve anything resembling uniform application of the clause's scope. Most frustratingly, although this Court is now trying for a fifth time since 2007 to articulate an intelligible analytical framework that corrects the residual clause's mistakes and fills in its omitted clarity, the Court's efforts have proved unsuccessful. Despite repeated calls for legislative correction, Congress has not seriously tried even once to fix the residual clause since its adoption.

Declaring a statute unconstitutionally vague is undoubtedly strong medicine, but this Court's exhaustive efforts to salvage the statute through the normal avenues of statutory interpretation and discernment have proven insufficient. The experience of the last decade of litigation

has shown that the residual clause is irredeemably, unworkably opaque. This Court should strike it down as unconstitutionally vague.

A. The Residual Clause of the ACCA Is Fundamentally Vague.

The residual clause of the ACCA, found within 18 U.S.C. § 924(e)(2)(B)(ii), includes in the definition of violent felony any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." That inscrutable clause, a thorn in the side of this Court and others for many years, is undeniably vague.

1. Textual Vagueness: The Statutory Language Is Simply Unclear.

An examination of the text of the residual clause demonstrates that it is plagued by a lack of clarity. It contains several points of ambiguity that, together, fail to provide either notice or guidance: its conflicting terms permit "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meaning." *United States v. Williams*, 553 U.S. 285, 306 (2008). Worse, unlike many federal criminal statutes which include definitions for unclear words and phrases, the ACCA does not define any of the residual clause's vague or ambiguous terms. Simply put, the language of the residual clause itself dealt the Court a very bad hand indeed.

Originally, the ACCA treated only burglary and robbery as violent felonies and the statute defined both terms. *See Taylor v. United* States, 495 U.S. 575, 581 (1990). However, in 1986, Congress decided to change the

law so that more offenses would count as predicates under the ACCA and grappled with how to do so. It considered simply adding crimes to the list of enumerated offenses, adding all offenses that have force as an element, or adding a "catch-all" rule that considered the risk that physical force would be used. *Taylor*, 495 U.S. at 587. In the end, Congress adopted versions of all three approaches. Congress altered the "catch-all" provision so that it included offenses which presented risk of injury instead of risk of the use of force, and attached that provision to the enumerated offenses with the word "otherwise." The clause now reads: "is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*." § 924(e)(2)(B)(ii). Although no part of this language is clear, two sections contribute most to its overall vagueness: the use of four disparate examples followed by "otherwise," and the phrase "serious potential risk."

The strange construction of the residual clause creates ambiguity, and the use of the word "otherwise" adds confusion. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, (1991) (noting that confusing grammatical structure contributes to the rule's vagueness). The clause follows a list of four substantially dissimilar offenses, purporting to add all unspecified crimes that "otherwise" involve conduct that presents the stated degree of risk. Although the most common dictionary definition of otherwise is perhaps "in a *different* way or manner,"[2] the Court has read the word in the residual clause as meaning that

2. *See Merriam-Webster Dictionary* (http://www.merriam-webster.com/dictionary)(last visited Feb. 18, 2015)

the risk presented must be the *same* as the enumerated offenses that precede it. *Begay v. United States*, 553 U.S. 137, 151-52 (2008) (Scalia, J., concurring). The confusing meaning of "otherwise" is magnified by the dissimilarities between the enumerated offenses.

> The phrase "shades of red," standing alone, does not generate confusion or unpredictability; but the phrase "fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red" assuredly does so.

Id.

Not only is the residual clause's design a significant source of vagueness, but it is made worse by its inclusion of three words that, read together, have almost no clear meaning: "serious potential risk." The three words together represent a confounding mix of contradiction and redundancy. Such confused phrasing, without any other statutory definition, exemplifies precisely what the vagueness doctrine forbids: a term without a concrete meaning that permits judges, juries, and others to exercise their subjective whim. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 392 (1926) (noting that a statute's critical terms must be sufficiently clear because an "important element cannot be left to conjecture, or be supplied by either the court or the jury" (citation omitted)).

First, the term "serious," as the Court cheekily noted in *United States v. Stevens*, must be "taken seriously." 559 U.S. 460, 462 (2010) (examining the term "serious" in a statute criminalizing depictions of animal cruelty). Rejecting the government's suggestion that the word

refers to "anything that is not scant," the Court explained that "[s]erious ordinarily means a good bit more." *Id.* at 478. The Court wrote approvingly of the government's concession below that a commonly accepted meaning of the word "serious" was "significant and of great import." *Id.*

The use of "serious" in the residual clause must similarly be intended to narrow the provision's reach to only predicate offenses presenting a risk that is "significant and of grave import," rather than scant, remote, or merely average. But this apparent clarity evaporates in context. The next two words, read together, seem to directly contradict the word "serious," leaving the three words together arguably meaningless, and certainly unclear.

To start with, "potential" is different from actual and means something less concrete. In *Colautti v. Franklin*, 439 U.S. 379, 386-87, 391-93 (1979), the Court considered the term in a statute governing abortions, and found that a fetus' "potential" ability to survive was broader than an actual ability to survive. When read with the term risk, potential becomes even less concrete. As the Court surmised in *James*, "potential risk" is an "inherently probabilistic" concept. 555 U.S. at 207. But how "probabilistic" can it be when it must also be "serious" and what of the obvious redundancy of "potential risk"?

Certainly, other statutes use language similar to "serious potential risk." In both *James* and *Sykes,* explored in detail below, the Court identified other statutes that used language comparable to the residual clause's phrase, suggesting that because similar words appear in other laws, the clause is not unconstitutionally vague. *See James v. United* States, 550 U.S. 192, 210 n.6

(2007), and *Sykes v. United States*, 131 S. Ct. 2267, 2277 (2011). However, not one of these statutes contains the interpretive quagmire inherent in the fourteen words of the residual clause. None of the statutes listed employ the word "potential." Nor do they complicate matters by providing a list of four widely disparate examples followed by "otherwise" before the phrase in question.

More importantly, each of the examples referred to by the Court uses a similar term more clearly and in a context less likely to raise constitutional concerns than the residual clause. For instance, 18 U.S.C. § 1031(b)(2), which increases the fine (but not the term of incarceration) in a fraud case, requires "conscious or reckless risk of serious personal injury," attaching both a narrowing *mens rea* and a degree of gravity to the injury required. Similarly, § 2258B(b)(2)(B) deals with civil penalties and nonetheless requires intentional or reckless conduct. Likewise, § 2118(e)(3) and § 2246(4) include the term "risk of death" as one aspect of a detailed definition of "significant bodily injury." In both statutes the provisions, when read in context, are quite specific and precise.[3]

The examples from the *James* footnote are even more readily distinguishable. Title 18 U.S.C. § 2332b(a)(1)(B), for instance, uses the term "substantial risk of serious bodily injury" as an element, but requires the defendant to

3. Although 18 U.S.C. § 3286(b) uses the term "foreseeable risk of death or serious bodily injury," it does so only to extend the statute of limitations for certain terrorism offenses that either cause or create the risk. Moreover, "foreseeable" serves as a limitation on the risk, requiring the risk to be an intended or predictable consequence of the offense. There is no such limitation on "serious potential risk" in the residual clause.

create that risk by first damaging or destroying property, a much clearer requirement tying a narrowly tailored action to the resulting risk. In contrast, the residual clause does not tie the risk to *any* action of the defendant, let alone a specific action. Instead, the offense must only involve "conduct that presents" the required risk, another portion of the residual clause that detracts from, rather than adds to, the clarity of the provision.[4]

Another crucial distinction is that the Court has not once considered whether any of the listed statutory provisions are unconstitutionally vague, let alone grappled with their meaning over and over again, as it has done with the residual clause. F'inally, the simple appearance of similar (though certainly less vague) language in another statute does not prove that the residual clause's language is sufficiently clear.[5] "Of course, even if the cited statutes

4. In addition, the vagueness of the clause is exacerbated by the fact that the risk that is otherwise presented need not be an element of the offense, in contrast to the requirement in the force clause; instead the offense must only otherwise involve "conduct that presents" the risk.

5. The contrast between the residual clause and statutes that are sufficiently clear is demonstrated by two decisions considering statutes that govern abortions. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court considered a Nebraska statute which criminalized delivery of a "substantial portion" of a fetus during an abortion and found that the undefined term failed to provide useful limits that would prevent the law from improperly impinging on a woman's rights. In contrast, in *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007), the Court rejected a vagueness challenge to a similar bill passed by Congress in response to *Stenberg*, noting that its more specific language provided "relatively clear guidelines as to prohibited conduct," and "objective criteria" to discern when a

were comparable, repetition of constitutional error does not produce constitutional truth." *Sykes*, 131 S. Ct. at 2288 (Scalia, J., dissenting).

In sum, none of the statutes the Court mentioned in its brief consideration of vagueness in *James* and *Sykes* presented the linguistic imbroglio posed by the "vague and fluid" residual clause. *See United States v. Cardiff*, 344 U.S. 174, 176 (1952) (warning against such terms in criminal statutes).

2. Interpretive Vagueness: The Court's Efforts Have Been Unsuccessful.

This Court's jurisprudence demonstrates rather than vitiates the unconstitutional vagueness of the residual clause. The Court is now reviewing the scope and application of these fourteen words for the fifth time since just 2007, an unprecedented frequency of attention for the highest court to give to any statute, let alone a single clause within a subdivision of a statute. At each turn, the Court has tried to articulate a test to guide application of the clause, not just to the case before it, but to other predicate offenses as well. Unfortunately, the shortcomings of each interpretive effort are quickly revealed by the next predicate offense that cannot be judged by applying the previous tests. That the Court has felt it necessary to accept review so often in order to instruct lower courts demonstrates the statute's vagueness. The Court's inability to provide a useful

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doctor has performed an unlawful procedure. *Id.* at 149 (citations omitted). The difference between the vague "substantial portion" and the specific rules later adopted by Congress made the latter law constitutional when the former was not.

interpretive rule to guide lower courts and notify potential defendants despite all of these efforts is even more telling.

James v. United States (2007): As Risky As the Closest Analog

In 2007, the Court addressed the residual clause specifically for the first time in *James v. United States*, 550 U.S. 192, and considered whether attempted burglary under Florida law qualified as a violent felony.[6] Although perhaps *James* presented the most straightforward question of all of the felonies contemplated by this Court's residual clause jurisprudence, there was nonetheless disagreement among the circuits before the Court's decision.[7] The Court held that a predicate offense, examined categorically based on its elements, qualified under the residual clause if it posed a risk "comparable to that posed by its closest analog among the enumerated offenses." *Id.* at 203. "Potential risk" was described as an "inherently probabilistic" concept, but the Court made no mention of the word "serious." *Id.* at 207.

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6. *James* and the other residual clause cases were decided against the important backdrop of the "categorical" and "modified categorical" approaches of *Taylor* 495 U.S. at 600-03 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). Although neither were residual clause cases, but instead considered other portions of the ACCA's violent felony definition, since *James*, the Court has applied the same categorical, elements-based approach to the residual clause.

7. *See* Petition for Certiorari, *James v. United States*, No. 05-9264 (noting a split among the circuits regarding whether various statutes criminalizing attempted burglary count as violent felonies).

The *James* Court also introduced the "ordinary case" concept, and said that the proper inquiry is "whether the conduct encompassed by the elements of the offense, in the ordinary case" presents the requisite risk. The Court concluded that an ordinary case of attempted burglary was at least as risky as regular burglary. *Id.* at 208. No guidance was given regarding how a court should select the hypothetical "ordinary case" when conducting the analysis.

Right away, the difficulties inherent in the Court's test were clear. Four members of the Court dissented for two different reasons. Justice Scalia, joined by Justices Stevens and Ginsburg, described the challenge that lower courts would have applying the *James* construct:

> The problem with the Court's approach to determining which crimes fit within the residual provision is that it is almost entirely ad hoc. *This* crime, the Court says, *does* "involv[e] conduct that presents a serious potential risk of physical injury to another." That gets this case off our docket, sure enough. But it utterly fails 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.

Id. at 215 (Scalia, J., dissenting). The "closest analog" rule might work in a case where the closest analog is readily apparent, but is less useful for other crimes, like drunken driving. *Id.* at 215-16. The dissent suggested that a court should instead require the degree of risk to be no

less than "the risk posed by the least dangerous of those enumerated crimes."[8]

In addition, the dissent strongly criticized the vagueness of the provision, even though the parties had not briefed the issue. It noted that "[i]mprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of ACCA's residual provision, yet its boundaries are ill defined." *Id.* at 216. Even then, at the beginning of the Court's long grappling with the residual clause, the dissenting members suggested that "Congress has simply abdicated its responsibility when it passes a criminal statute insusceptible of an interpretation that enables principled, predictable application."[9] *Id.* at 230. The majority, operating without the benefit of the spate of thorny cases that would soon follow, answered the concern about vagueness by noting that the residual clause is not "so indefinite as to prevent an ordinary person from understanding what conduct it prohibits," and citing statutes with similar language, as explored above. *Id.* at 210 n.6.

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8. Interestingly, although the dissent found that the least dangerous of the enumerated offenses was burglary and therefore compared the risk of attempted burglary to burglary just as the majority had, the dissent concluded that the balance tilted the other way and the risk posed by the attempt was plainly less. *Id.* at 226-27. Even conducting the same comparison, the two "sides" reached different conclusions about risk.

9. Justice Thomas dissented for the same reasons he dissented in *Shepard,* 544 U.S. at 27, namely his belief that *Apprendi v. New Jersey*, 530 U.S. 466, 487-88 (2000), and the Sixth Amendment preclude judges from making the determination of whether a prior offense is a violent felony under the ACCA. *James*, 550 U.S. at 231-232.

The split decision from the Court in *James* and the explicit three-Justice suggestion that the clause was vague were surely a call for congressional action.

***Begay v. United States* (2008): Purposeful, Violent, and Aggressive**

Five months after *James,* the Court granted review in *Begay v. United States*, again taking on the interpretive task left to it by the residual clause's unclear wording. The *James* "as risky as the closest analog" test had already proved insufficient to answer the question of whether felony driving under the influence of alcohol (DUI) satisfied the residual clause. Again, the Court was divided, with five Justices in the majority, Justice Scalia concurring on much different grounds, and three Justices dissenting. *Begay*, 553 at 139, 148, 155.

At the outset the majority assumed (and implicitly agreed) that DUI "involves conduct that presents a 'serious potential risk of physical injury to another,'" *id.* at 141, a conclusion which would have ended the inquiry under *James*' risk comparison. Indeed, the Court did not attempt to compare DUI to whatever enumerated offense might be its closest analog, simply accepting that it is "an extremely dangerous crime." However, the majority decided that DUI "is simply too unlike the provision's listed examples for us to believe that Congress intended the provision to cover it," and then looked for a way to formulate that observation into a useful interpretive framework for the residual clause. *Id.* at 141-42.

The result was the Court's conclusion that in order to qualify as a violent felony, an offense had to be "roughly

similar, in kind as well as in degree of risk posed," to the enumerated offenses. *Id.* at 143. The Court noted that the listed "examples" all typically involve "purposeful, violent and aggressive" conduct, and suggested those terms as guideposts against which to compare a particular predicate offense. *Id.* at 144-45. The Court also suggested that crimes that are, "or are most nearly comparable to, crimes that impose strict liability" should not count under the residual clause. *Id.* at 145.

The concurrence and dissent reflected, for a second time, the flaws inherent in the residual clause and the Court's struggle to articulate a workable test. Justice Scalia described the Court's latest effort as another "made-for-the-case improvisation" that was inadequate to encompass all future cases. *Id.* at 150 (Scalia, J., concurring). Agreeing with the dissent that the "purposeful, violent and aggressive" formulation finds no home in the clause's language and that the sole question should be risk, he disagreed with both the majority and the dissent that DUI posed the requisite degree of risk. The concurrence pointed to significant flaws in the statistics relied upon by the majority, including the fact that the total incidence of death from DUI does not demonstrate the likelihood that a given incidence of the crime will cause harm. *Id.* at 154. Justice Scalia urged application of the rule of lenity: "I will not condemn a man to a minimum of 15 years in prison on the basis of such speculation." *Id.*

The three-Justice dissent agreed both with the majority's conclusion about the risk caused by DUI and with the concurrence's conclusion about the lack of statutory support for the "similar in kind" framework, and therefore argued that drunken driving fell within the

residual clause. *Id.* at 155-63. However, Justice Alito, who authored the dissent, noted that the clause "calls out for legislative clarification," and expressed sympathy for the majority's "attempt to craft a narrowing construction." *Id.* at 155.

For the second time, Congress was asked for help from members of the Court.

Chambers v. United States (2009): Quantitative and Qualitative Assessment

Apparently recognizing already that neither of its previous efforts would decide whether failing to report for weekends in jail under Illinois's escape statute was covered by the residual clause, the Court granted certiorari in *Chambers v. United States*, 555 U.S. 122 (2009), just five days after it decided *Begay*. The question presented was, once again, whether a particular state offense counted as a violent felony under the residual clause, but instead of sending the case back for reconsideration in light of *Begay*, full review was necessary. Once again, the case came to the Court amid a clear Circuit split.[10]

The *Chambers* decision was the least controversial among this Court's struggles with the residual clause, as all nine Justices concurred in the judgment, and only two Justices joined in a single concurrence. The Court held that failure to report was "[c]onceptually speaking" a "far cry" from the purposeful, violent and aggressive conduct

10. *See id.* at 125 (noting a 2-1 split on the issues of walkaway escape from custody); Petition for Certiorari, *Chambers*, No. 06-11206 (noting a greater 10-2 split on the broader issue of escape).

the statute required. *Id.* at 128. The Court also relied on statistics documenting that failure to report or to return from temporary release almost never involved violence. *Id.* at 129 (citing United States Sentencing Commission, Report of Federal Escape Offenses in Fiscal Years 2006 and 2007 (Nov. 2008)).

The unanimity of the result, however, did not indicate that interpretative consensus had been achieved or that the Justices' mounting frustrations with the residual clause had been resolved. Justice Alito, joined by Justice Thomas, concurred: "I write separately, however, to emphasize that only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship and *Taylor*'s 'categorical approach have pushed us.'" *Id.* at 132.

> After almost two decades with *Taylor*'s "categorical approach," only one thing is clear: ACCA's residual clause is nearly impossible to apply consistently. Indeed, the "categorical approach" to predicate offenses has created numerous splits among the lower federal courts, the resolution of which could occupy this Court for years. What is worse is that each new application of the residual clause seems to lead us further and further away from the statutory text.

Id. at 133.

This was the third time members of the Court asked Congress to help sort out the quagmire caused by the residual clause.

Sykes v. United States (2011): Statistics and Common Sense

This time the Court waited a bit before taking another bite at the residual clause, agreeing in 2010 to decide whether fleeing the police in a motor vehicle in violation of Indiana law was a violent felony. The question of felony fleeing had divided the lower courts,[11] and even led to rapid vacillations within individual circuits. *See* section A(3)*, infra.* Predictably, the *Sykes* decision was the most divisive of all, yielding four separate opinions and a six-three split as to the proper outcome. *Sykes v. United States*, 131 S. Ct. 2267 (2011).

The majority relied both on its "commonsense conclusion" that vehicular flight is a violent felony and on statistics documenting crashes during flights from the police nationwide to support its holding that the offense qualifies under the residual clause. *Id.* at 2274. In reaching this conclusion, the majority suggested that the *Begay* formulation requiring consideration of whether a crime was purposeful, violent and aggressive was "redundant" of the risk analysis it conducted, *id.* at 2275, and further advised that the formulation was mostly useful in assessing offenses "akin to strict liability, negligence, and recklessness crimes." *Id.* at 2276. No mention was made of the fact that the *Begay* test had been adopted only four years previously, following a realization that assessing risk alone simply did not answer the necessary question in certain cases. Although the *Sykes* majority expressly considered only the risk that fleeing presented and not its qualitative nature, it spent several paragraphs

11. *Sykes*, 131 S. Ct. at 2272 (2011) (describing a 5-3 division among Courts of Appeals regarding fleeing in violation of various state statutes).

characterizing the crime as a "provocative and dangerous act," with "confrontations" at the beginning and end of the crime.

The other opinions from *Sykes* demonstrated both the difficulty of answering the very narrow question before the Court and the impossibility of crafting a clear test applicable to a broad swath of predicate offenses. Justice Thomas concurred with the judgment, celebrating the majority's decision not to rely on the *Begay* test and bemoaning the suggestion that the test had continuing relevance in certain cases. *Id.* at 2277. Justice Thomas also relied on "common sense and real world experience," which, reinforced by statistics and media reports about injuries during police chases, confirmed the crime's dangerousness. *Id.* at 2280. He emphasized "ordinary case" analysis to reject the observation that the statute could be and indeed had been violated in non-risky ways. *Id*. at 2281.

Justice Scalia dissented, offering his most comprehensive analysis to date of the residual clause's vagueness and resulting unconstitutionality. *Id.* at 2284. He urged that the *Sykes* formulation created "a fourth ad hoc judgment that will sow further confusion," and noted that the Court applied neither the closest analog test of *James*, nor the "purposeful, violent and aggressive" test from *Begay*. *Id.* at 2285. Most importantly, Justice Scalia criticized the majority's reliance on statistics to bolster its conclusion. He noted that the Court did not consider whether the dataset on which it relied was "a representative sample of all vehicular flights"; nor how many of the injuries at issue are attributable to a reckless driver rather than a person engaged in a flight from police; nor whether the statistics quantifying the risks presented

by the enumerated offenses were accurate themselves. *Id.* at 2286.

> In sum, our statistical analysis in ACCA cases is untested judicial fact finding masquerading as statutory interpretation. . . . [T]he more fundamental problem with the Court's use of statistics is that, far from eliminating the vagueness of the residual clause, it increases vagueness. Vagueness, of course, must be measured *ex ante* — *before* the Court gives definitive meaning to a statutory provision, not *after*. . . . And is it seriously to be expected that the average citizen would be familiar with the sundry statistical studies showing (if they are to be believed) that this-or-that crime is more likely to lead to physical injury than what sundry statistical studies (if they are to be believed) show to be the case for burglary, arson, extortion, or use of explosives? To ask the question is to answer it.

Id. at 2286-87.[12] Although Justice Scalia acknowledged that the Court had, in the past, upheld other vague

12. Justice Scalia is not alone in bemoaning the unreliability of statistical analysis by appellate courts grappling with the residual clause. As one commentator has observed, "[w]ithout any standards, the statistical approach is a dressed-up version of the imaginary ordinary crime approach and the smell test. Ultimately, they are all subjective inquiries that guesstimate the violence of crimes whose elements do not require violent conduct. . . . Such a capricious method of statutory interpretation cannot adequately place offenders on notice of which actions trigger the ACCA and its fifteen-year minimum . . . ." David C. Holman, *Violent Crimes and Known Associates*: *The Residual Clause of the Armed Career Criminal Act*, 43 Conn. L. Rev. 209, 254 (2010).

statutes against constitutional challenges, "[w]hat sets ACCA apart from those statutes — and what confirms its incurable vagueness — is our repeated inability to craft a principled test out of the statutory text. We have demonstrated by our opinions that the clause is too vague to yield 'an intelligible principle,' each attempt to ignore that reality producing a new regime that is less predictable and more arbitrary than the last." *Id.* at 2287-88 (internal citation omitted).

Justice Kagan, joined by Justice Ginsburg, separately dissented. Emphasizing the importance of examining the specific statutory subsection of the state law at issue rather than "some abstract notion of vehicular flight," the dissent concluded that the provision did not proscribe an offense that presented the required degree of risk, although other subsections of the statute did. *Id.* at 2289-90. Noting that the "purposeful, violent and aggressive," test was applied not only in *Begay*, but was also cited with approval in *Chambers,* which considered a plainly intentional crime, the dissent predicted that the formulation would make a resurgence in the next case that considers a crime that "involves risk of injury but not violence or aggression." *Id*. at 2289 n.1.

For the fourth time in five years, members of the Court, both explicitly and implicitly, asked Congress to fix the statutory language that had given rise to such disparate conclusions.

Johnson v. United States (2015): A Crime of Mere Possession

On the heels of these four decisions, the Court granted review in the instant case just seven years after it decided *James*, accepting the request to settle yet another deep circuit split presented by yet another predicate offense that was dissimilar to all of the ones that had been considered before. Any test or rule that the Court may craft to deal with this case — a case of mere possession, involving conduct that is widely legal, and lacking any useful statistical evidence — remains to be seen. However, the government, seemingly recognizing that none of the Court's previous decisions leads to obvious inclusion of the offense at issue within the residual clause's scope, has proposed yet another interpretative device for the Court: the predicate offense should be judged, not based on its own elements, but based on other possible offenses that the predicate offense may one day enable. This theory certainly explains the government's repeated suggestion that the ordinary case of mere possession of a short-barreled shotgun is possession by a criminal in connection with a violent crime. *See, e.g.,* Govt. Br. 18. Unfortunately, this test is untrue, unworkable, and provides even fewer guidelines and limitations than any of the other tests which the Court has tried.

In sum, the Court's sincere and sustained efforts to bring clarity to the residual clause have been unsuccessful, perhaps leaving things even more muddled than when they began. In each case, the Court seems to have been guided as much by the majority's intuitive sense about the danger presented by an offense in its generic form as by the language of the clause itself. For instance, the

"closest analog" analysis of *James* may guide whether to include an offense that is a variation of an enumerated crime. The "purposeful, violent and aggressive" test of *Begay* helps explain why the risky conduct of DUI cannot be what Congress intended when it defined violent felony. And the *Sykes* majority's intuitive sense that fleeing the police is very dangerous let it focus less on the statutory subdivisions at issue in that case and more on the offense of fleeing generally, and to elevate statistical "evidence" over an analytical framework it had relied upon just four years before. But none of these tests squarely resolve either the question now before the Court, or the many other questions raised by the clause's vague language.

If the Court's four previous tests are applied to the residual clause, its original fourteen words might now read something like this:

> *[Violent felony includes an offense that] is similar in kind as well as in degree of risk to its closest analog among burglary, arson, extortion, or the use of explosives (if that can be identified) when the ordinary case representing the offense in question is viewed by examining its elements categorically, based on a consideration of such statistics as are brought to the Court's attention and is also "purposeful, violent and aggressive" (though this last part may only matter if the specific offense has a mens rea akin to negligence, recklessness or strict liability.)*

Although each addition to or clarification of the test was offered in an attempt to decide the case then before

the Court, to guide lower courts, and to notify citizens, the combined effect of the Court's efforts has been the opposite.

3. Inconsistency in Application: The Lower Courts are Hopelessly Adrift.

The unconstitutional vagueness of the residual clause is perhaps most clearly demonstrated by the never-ending turmoil within the district courts and courts of appeals as they struggle to apply the clause's language, and to adapt to each of this Court's decisions altering the applicable legal standard. Not only have the courts themselves expressed increasing frustration with the challenge of implementing a clause that is both difficult to apply and onerous in impact, but their decisions are all over the map, with splits among the circuits regarding many predicate offenses.

First, the courts have expressed frustration with the residual clause, though they recognize that now only this Court can declare it unconstitutionally vague. In *United States v. Vann,* 660 F.3d 771 (4th Cir. 2011), for instance, the Fourth Circuit convened *en banc* to determine whether violating a particular subsection of North Carolina's "indecent liberties" statute constitutes a violent felony under the residual clause. Although the votes broke down ten to two in favor of holding that the offense did not qualify, there were seven separate opinions expressing widely different reasoning. The task was made more complicated by real questions about whether the categorical approach or modified categorical approach should apply, and the outcome that resulted from each in applying *Begay*, *Chambers*, and *Sykes.* Judge Agee, who

authored one of the many opinions, eloquently expressed the difficulty of applying the required analysis:

> [N]o matter how diligently and painstakingly my colleagues and I labor over the mystery of the ACCA residual clause, a black hole of confusion and uncertainty stymies our best efforts. . . . The dockets of our court and all federal courts are now clogged with these cases. Unless Congress acts to provide clarity to its intent for this statute, the problem will only continue.

Vann, 660 F.3d at 787 (Agee, J., concurring) (internal quotation marks omitted); *see also United States v. Pate*, 754 F.3d 550, 557 (8th Cir. 2014) (describing Justice Scalia's views on the residual clause as "well known and eloquently expressed," but observing that the panel was precluded by precedent from adopting the vagueness argument, regardless of what they personally thought.)

Similarly, in *United States v. Miller*, when the Seventh Circuit held that mere possession of a short-barreled shotgun is not a violent felony, the court also expressed frustration with the clause's opacity:

> The Supreme Court has addressed the residual clause four times in a recent five-year period. Perhaps no single statutory clause has ever received more frequent Supreme Court attention in such a short period of time or such a proliferation of lower court reaction. Although Congress has done nothing to add clarity to ACCA's residual clause, [cases decided recently]

> direct us to a different understanding of how to apply the residual clause.

Id. at 437 (internal footnote omitted); *see also United States v. Jones*, 689 F.3d 696, 699, 704-05 (7th Cir. 2012) ("For us to say that the residual clause is unconstitutionally vague — essentially that it lacks a coherent, ascertainable standard — would be to say that the Supreme Court failed to ascertain and apply a standard in *James, Begay, Chambers,* and *Sykes*. Justice Scalia may be right, but attributing failure to the Supreme Court is not within our authority.") The Eleventh Circuit also bemoaned the clause's intractable lack of clarity:

> However logical Justice Scalia's reasoning, and however appealing the result of that logic might be to courts, like our own, with caseloads enhanced by residual clause enhancement issues, the majority opinion in *Sykes* took the position that the ACCA residual clause states an intelligible principle and provides guidance that allows a person to conform his or her conduct to the law. The position appears to foreclose a conclusion, at least by a lower federal court such as our own, that the residual clause is unconstitutionally vague.

United States v. Chitwood, 676 F.3d 971, 978 n.3 (11th Cir. 2012) (citations and internal quotation marks omitted).

Not only do the lower courts express frustration regarding the residual clause's vagueness, but their substantive rulings, and the frequent disagreements they reflect, validate that frustration. The number of "circuit

splits" created by the vagueness of the residual clause is truly remarkable. As noted above, four of the five residual clause cases the Court has considered arose from a split among the circuits regarding whether the offense in question (attempted burglary, failure to surrender, felony fleeing, mere possession of a short-barreled shotgun) falls within the residual clause.[13] Like the Hydra of Greek mythology, each time the Court resolves a split among the lower courts regarding how to apply the residual clause to a particular sort of predicate offense, two more unresolved questions arise to take its place.

For instance, the lower courts are in current disagreement[14] about whether or not statutory rape and similar sex offenses involving minors,[15] violent offenses

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13. Only *Begay* did not arise from a split in lower court authority: instead all three courts to have ruled on the issue at the time the Court intervened had erroneously decided that felony DUI was a violent felony.

14. The disagreements discussed in this section include cases that apply the residual clauses from the ACCA's violent felony definition and the Sentencing Guidelines "crime of violence" definition. All circuits have held that the two definitions are almost entirely indistinguishable and therefore decisions regarding the application of one definition apply to cases arising from the other. *See e,g., United States v. King*, 673 F.3d 274, 279 n.3 (4th Cir. 2012); *United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011); *United States v. Denson*, 728 F.3d 603, 607 (6th Cir. 2010).

15. *Compare United States v. Daye*, 571 F.3d 225, 229-36 (2d. Cir. 2009) (statutory rape under Vermont law is a violent felony); *with United States v. Van Mead*, 773 F.3d 429, 432-38 (2d Cir. 2014) (statutory rape under New York law not violent); *United States v. Harris*, 608 F.3d 1222, 1233 (11th Cir. 2010) (Florida offense not violent felony); *United States v. Goodpasture*, 595 F.3d 670, 672-73

involving recklessness,[16] and conspiracies to commit violent offenses,[17] are violent felonies under the residual clause. There is also disagreement regarding whether certain forms of escape from custody are violent felonies, even though this Court specifically addressed a variant of escape in *Chambers*.[18] Different courts even reach opposite conclusions when interpreting the very same

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(7th Cir. 2010) (California crime of lewd conduct with person under 14 not violent felony); *United States v. Thornton*, 554 F.3d 443, 446-49 (4th Cir. 2009) (Virginia statutory rape not violent felony); *and United States v. Christensen*, 559 F. 3d 1092, 1095 (9th Cir. 2009) (Washington statutory rape not violent felony).

16. *Compare United States v. Espinoza*, 733 F.3d 568, 572-74 (5th Cir. 2013) (Texas conviction for reckless assault constitutes violent felony); *with Jones*, 689 F.3d at 626 (Kentucky conviction for reckless homicide not violent because "reckless conduct no longer qualifies under the residual clause"). The Fifth and Sixth Circuits seem most specifically at odds regarding whether *Sykes* undermined *Begay's* continuing viability even in cases with a *mens rea* of recklessness.

17. *See United States v. Chandler*, 743 F.3d 648, 661-62 (9th Cir. 2014) (Bybee, J. concurring) (noting split among circuit courts). Petitions for certiorari in *Chandler* and another case are pending before this Court on the contentious issue of whether conspiracy offenses are covered by the residual clause. *See* Petition for Certiorari, *Chandler v. United States*, No. 14-282, and Petition for Certiorari, *Melvin v. United States*, No. 14-6510.

18. *Compare United States v. Delgado*, 320 F. App'x 286, 287 (5th Cir. 2009) (holding that, despite *Chambers*, walkaway escape is crime of violence because all escape comes with risk of harm); *with United States v. Oaks*, 665 F.3d 719, 720-21 (6th Cir. 2012) (relying on statistics to hold that escape from non-secure custody is not a violent felony), *and United States v. Lee*, 586 F.3d 859, 874 (11th Cir. 2009).

statutory provision from the same state's penal code, *compare, e.g., United States v. Brown*, 514 F.3d 256, 269 (2d Cir. 2008) (holding that violating New York's third-degree burglary statute is always a violent felony under the residual clause), *with United States v. Prater*, 766 F. 3d 501, 517 (6th Cir. 2014) (holding that same provision sometimes qualifies and sometimes does not), and when considering virtually identical provisions from different states. *Compare, e.g., United States v. Montgomery*, 402 F.3d 482, 488-89 (5th Cir. 2005) (holding Texas conviction for retaliation against government officials not violent felony because threatened harm need not be physical), *with United States v. Sawyers*, 409 F.3d 732, 742-43 (6th Cir. 2005) (treating almost identical language in Tennessee retaliation statute as a violent felony), *abrogated on other grounds by United States v. Vanhook*, 640 F.3d 706 (6th Cir. 2011). It is hard to imagine that whatever test the Court employs in the current factual context involving mere possession of a weapon will resolve even one of these disagreements among lower courts, let alone all of them.

Not only do the lower courts disagree about the violent felony status of various predicate offenses under the residual clause, but they disagree about the proper analytical framework to apply to these cases. For instance, the Fourth and Tenth Circuits reached opposite outcomes while interpreting very similar state statutes criminalizing battery of a police office, due to the courts' very different application of the "ordinary case" concept to the residual clause. *Compare United States v. Carthorne*, 726 F.3d 503, 514-515 (4th Cir. 2013), *with United States v. Williams*, 559 F.3d 1143, 1148-49 (10th Cir. 2009). In each case, the elements of the statute permit it to be violated with the "slightest touching." The Fourth Circuit,

emphasizing the essential elements, found that because the offense can be committed with minimal contact, it does not present a serious potential risk of physical injury. *Carthorne*, 726 F.3d at 514 (noting that, due to the clarity of the elements, it need not "hypothesize about unusual cases"). In contrast, the Tenth Circuit acknowledged that the elements are important, but held that the ordinary case likely involves violence rather than slight touching, and therefore the offense qualifies under the residual clause. *Williams*, 559 F.3d at 1148; s*ee also Van Mead*, 773 F.3d at 435 (noting it is "difficult to determine what kind of conduct and degree of risk is present in the 'ordinary' case, because it is difficult to determine what constitutes an 'ordinary' case.")

Similar disagreements regarding the proper analytical framework for residual clause review are played out every day across the country. As Judge Kozinski of the Ninth Circuit observed while grappling with the residual clause and the "ordinary case" concept, there is no simple basis in the law for determining whether "most of the cases" involve dangerous conduct: "Don't even think about how a court is supposed to figure out whether a statute is applied in a certain way 'most of the time.' (A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?)" *United States v. Mayer*, 560 F.3d 948, 951 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing *en banc*). This was among the concerns with the residual clause that led Judge Kozinski to worry that the panel's decision is a "train wreck in the making" that "reads the ACCA's residual clause so broadly that nearly any crime will qualify." *Id.*

To make matters worse for the twin goals of notice and consistency, some predicate offenses have led not only to disagreements at particular moments in time, but also to changing and evolving splits among the lower courts in light of this Court's intervening residual clause rulings. For instance, before *Begay*, lower courts disagreed about whether fleeing the police in a motor vehicle and similar offenses were violent felonies, with several circuits finding that they were, and one disagreeing.[19] Following *Begay*, with its "purposeful, violent and aggressive" standard, the landscape changed entirely, though lower-court agreement on the issue remained elusive. By then four circuits held that flight was a violent offense, and four disagreed.[20]

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19. *Compare Powell v. United States*, 430 F.3d 490, 492 (1st Cir. 2005) (Maine conviction for eluding police is violent felony in light of risk presented); *United States v. James*, 337 F.3d 387, 390-91 (4th Cir. 2003) (South Carolina conviction is violent felony); *United States v. Martin*, 378 F.3d 578, 582-84 (6th Cir. 2004) (Michigan conviction violent); *and United States v. Howze*, 343 F.3d 919, 922 (7th Cir. 2003) (Wisconsin conviction violent); *with United States v. Kelly*, 422 F.3d 889, 892-97 (9th Cir. 2005) (holding that the offense was not violent because the analysis focused on the "most innocent conduct" that would violate the statute).

20. *Compare United States v. Harrimon*, 568 F.3d 531, 534-37 (5th Cir. 2009) (Texas conviction for fleeing arrest purposeful, violent, and aggressive); *United States v. LaCasse*, 567 F.3d 763, 766-67 (6th Cir. 2009) (Michigan conviction is violent); *United States v. Spells*, 537 F.3d 743, 750-52 (7th Cir. 2008) (Indiana conviction qualifies because similar to enumerated crimes); *United States v. McConnell*, 605 F.3d 822, 830 (10th Cir. 2010) (Kansas conviction for fleeing and eluding police is violent); *with United States v. Tyler*, 580 F.3d 722, 725-26 (8th Cir. 2009) (Minnesota fleeing offense not violent); *United States v. Jennings*, 515 F.3d 980, 989-90, 992-93 (9th Cir. 2008) (Washington conviction not

Although *Sykes* largely resolved the dispute, questions and disagreements remain today about how to apply that seemingly straightforward holding to the reality of state laws that prohibit fleeing the police in widely different ways. *See, e.g., United States v. Smith*, 772 F.3d 680, 684-85 (11th Cir. 2014) (Martin, J., dissenting from denial of rehearing *en banc*) (disagreeing with majority's application of *Descamps v. United States*, 133 S. Ct. 2276 (2013), and with the conclusion that fleeing on foot is also violent); *United States v. Doyle*, 678 F.3d 429, 437-42 (6th Cir. 2012) (White, J., dissenting) (disagreeing with majority's holding that lower-level fleeing offense lacking element of risk is violent felony).[21]

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violent); *United States v. Harrison*, 558 F.3d 1280, 1301 (11th Cir. 2009) (holding in the context of "ever developing Supreme Court precedents" that Florida fleeing offense not violent). The Fourth Circuit strained to answer the question with respect to one state statute in South Carolina, initially holding that flight might be deemed violent in some cases, *United States v. Roseboro*, 551 F.3d 226, 242-43 (4th Cir. 2009), before finally settling on the conclusion that flight *never* constitutes a violent offense, *United States v. Rivers*, 595 F.3d 558, 560, 565 (4th Cir. 2010) (focusing on lack of the requisite intent).

21. Another example of vacillations regarding a single predicate can be found in *United States v. Snyder,* 5 F. Supp. 3d 1258, 1265 (D. Or. 2014). Because the district court found that one of his three possible predicates, attempt to elude the police, was not a violent felony, he was originally sentenced to 110 months. The government appealed and the case was remanded in light of *Sykes*. While awaiting resentencing to fifteen years as required by the ACCA, the Court issued *Descamps*. Although it did not change the status of Mr. Snyder's fleeing offense, the district court held that his "non-generic" burglary offense no longer satisfied the residual clause under the analysis required by *Descamps*. Mr. Snyder was again sentenced to 110 months.

The problem is compounded exponentially by the fact that each of this Court's rulings interprets an individual state's particular statute, not an imagined generic version of an offense. As *James* made clear,[22] each residual clause inquiry begins with the elements: the *Sykes* Court grappled with a particular subsection of Indiana law rather than the general idea of fleeing the police, and *Chambers* contemplated a multi-faceted Illinois statute that dealt with several sorts of escape rather than a generic offense. Each of this Court's decisions provides guidance when examining another state's similar offense, particularly when the two statutes are alike in design. However, the Court's decisions do not answer whether another statute contemplates a violent felony when two different state statutes share nothing more than a name. The statute-by-statute variability created by the residual clause will only increase in the future, due to the renewed emphasis on the elements and structure of each state offense mandated by *Descamps*, 133 S. Ct. 2283.

In sum, Justice Scalia's prediction from 2007 has come true, as demonstrated by the lower courts' never-ending struggle to discern a clear standard of application for the residual clause.

> Thus for what is probably the vast majority of cases, today's opinion provides no guidance whatever, leaving the lower courts to their own devices in deciding, crime-by-crime, which conviction 'involves conduct that presents a serious potential risk of physical injury to

22. *James*, 550 U.S. at 201-02; *see also Moncrieff v. Holder*, 133 S. Ct. 1678, 1684-87 (2013).

> another.' It will take decades, and dozens of grants of certiorari, to allocate all the Nation's crimes to one or the other side of this entirely reasonable and entirely indeterminate line.

James, 550 U.S. at 216 (Scalia, J., dissenting).

B. The Vagueness of the Residual Clause Violates Due Process.

The incomprehensible language of the text, this Court's unsuccessful efforts to articulate a broadly applicable test, the discord in the analyses applied and outcomes reached by the lower courts for more than a decade, and Congress' failure to fix the problem all demonstrate the vagueness of the residual clause. What is also clear is that the provision's ambiguity is so significant and so intractable that it violates the Due Process Clause of the Constitution.

1. The Vagueness Doctrine Protects Due Process.

The "vagueness doctrine," bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application." *Connally,* 269 U.S. at 391. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (noting that the "requirement of clarity" is mandated by the Due Process Clause); *City of Chicago v. Morales*, 527 U.S. 41,

56 (1999) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.")

The doctrine of vagueness serves at least three constitutionally essential goals. First, citizens are entitled to know what the law says, in terms that are clear enough to follow and understand. "Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). As the Court explained in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *See also McBoyle v. United States*, 283 U.S. 25, 27 (1931) (requiring "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

A second critical due process concern raised by vague statutes is that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory manner." *FCC v. Fox*, 132 S. Ct at 2317. Indeed, the Court has suggested that this aspect of vagueness doctrine, "the requirement that a legislature establish minimal guidelines to govern law enforcement," is more important to due process concerns than notice. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting

Smith v. Goguen, 415 U.S. 566, 574 (1974)). Vague statues "permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. at 575)).

The lack of clarity created by vague statutes leads to arbitrariness by courts and judges as well as law enforcement. In *United States v. L. Cohen Grocery Co.,* the Court found vague a statute that prohibited charging "any unjust or unreasonable rate" for necessities, without specifying what conduct would qualify. *Cohen Grocery*, 255 U.S. 81, 89-90 (1921). The law gave too much discretion and too little guidance to judges, leaving it to courts and juries to determine whether a particular price would be unreasonable. *Id.* In demonstration of the arbitrariness permitted by the vague language, the Court highlighted the conflicting tests and outcomes among lower courts grappling with the provision. *Id. See also Grayned*, 408 U.S. at 109 (describing vague statutes as improperly vesting "policemen, judges and juries" with the duty to resolve questions "on an ad hoc and subjective basis"); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966) (warning against a law so "vague and standardless" that it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.").

Third, the constitutional mandate that statutes be drafted with clarity protects the essential separation of powers among the three branches of government. In 1890, the Court described the already long-standing doctrine of strict construction as being based, in part "on the sound principle that it is for the legislature, not the court, to

define a crime and ordain its punishment." *United States v. Lacher*, 134 U.S. 624, 629 (1890).

> 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. This would, to some extent, substitute the judicial for the legislative department of the government.

United States v. Reese, 92 U.S. 214, 221 (1875); *see also United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997) ("The fair warning requirement also reflects the deference due to the legislature, which possesses the power to define crimes and their punishment.")

Each of the concerns that require vague statutes to be declared unconstitutional applies with even greater force in the context of criminal statutes. *See Connally,* 269 U.S. at 393 ("A criminal statute cannot rest upon an uncertain foundation. . . . Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirement and the courts upon another."). This is because "the consequences of imprecision are qualitatively less severe" in statutes involving civil penalties than in criminal statutes. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982); s*ee also Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 588 (1998) (suggesting that the "undeniably opaque" terms at issue in the statute would raise "substantial vagueness concerns" in criminal statute). Indeed, the more significant the

criminal sanction, the more searching a court's analysis must be. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 46 (1991) (O'Connor, J., dissenting) ("Our scrutiny under the vagueness doctrine intensifies, however, in proportion to the severity of the penalty imposed . . . .") (citations omitted).

These constitutional considerations are equally offended by vague sentencing statutes. In *United States v. Evans*, 333 U.S. 483 (1948), the Court considered a criminal statute that had vague and poorly written sentencing provisions. The Court rejected the government's invitation to disregard the flaws in the statute because they impacted only the penalty and not the law's prohibitions. *Id* at 485. The Court found that, although it was given the task of interpreting all aspects of criminal law, even when their drafting was less than precise, it could not be asked to go as far as rewriting the penalty provisions entirely.

> But strong as the presumption of validity may be, 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. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions.

Id. at 486.

Similarly, in *United States v. Batchelder*, 442 U.S. 114, 123 (1979), the Court made clear that the vagueness doctrine could apply to a sentencing statute, even when the

illegality of the conduct at issue was not in question. "So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *See also United States v. Brown*, 333 U.S. 18 (1948) (considering a vagueness challenge to a poorly drafted sentencing provision for escape). *But cf. Chapman v. United States*, 500 U.S. 453, 467-68 (1991) (rejecting vagueness challenge to a mandatory minimum sentencing statute, and suggesting that concerns about the vagueness of sentencing provisions are less than concerns about the vagueness of criminal prohibitions themselves.)[23] Against this doctrinal backdrop, the constitutional flaws of the residual clause become clear.

2. The Residual Clause Fails to Provide Notice to Citizens, to Defendants, Even to Attorneys.

The residual clause, which remains enigmatic, fails to do what the Constitution requires: "provide a person of ordinary intelligence fair notice." *Williams*, 553 U.S. at 304. If this Court has been unable to create an intelligible principle of application for the residual clause, an average citizen stands little chance of accurately assessing his own criminal history and predicting whether it will expose him to the enhanced penalties of the ACCA through its "catch-all" clause. The Court's increasing reliance on statistics

23. Although this Court has twice addressed the vagueness of the residual clause (though never after briefing and argument), in *James* and *Sykes*, and each time declined to find it was unconstitutionally vague, in neither case did the Court even hint that the doctrine is inapplicable to the residual clause because it is part of a sentencing provision.

exacerbates, rather than lessens, the unconstitutional lack of notice created by the vagueness of the residual clause. No citizen can be expected, not only to read the law itself and the meaning given it by the courts, but also to conduct searching statistical analysis to determine whether the offenses in their criminal history might count as violent felonies under the residual clause. "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *Cardiff*, 344 U.S. at 176.

The unconstitutional lack of notice created by the vagueness of the residual clause is even more dramatic due to vacillations created by this Court's frequent efforts to create a clear rule governing its application. Because the standards for applying the clause seem to be in constant flux, clarity and predictability are never achieved. Even once a prosecution for a violation of § 922(g) is underway, it is often difficult to predict whether a defendant's criminal history will trigger application of the ACCA.

Imagine an attorney trying to advise a defendant from the District of Minnesota whose status as an Armed Career Criminal hinges on one conviction in his criminal history, felony fleeing in violation of Minnesota law. Were he facing sentencing for being a felon in possession of a firearm in 2005, his counsel would have advised him that the residual clause did not include his prior offense due to its "plain" language. That advice would have become less confident over the years because by 2008, she would have known that *James*' risk analysis was difficult to interpret and fleeing the police had been deemed a violent felony in four other Circuits, though the Eighth Circuit had not yet ruled. *See* notes *19 - 21, supra.* Even after *Begay*,

she would have remained unable to predict whether her client was facing no more than ten years or fifteen to life. At last, on September 4, 2009, the Eighth Circuit ruled in *United States v. Tyler* that under *Begay,* fleeing the police in Minnesota was not a crime of violence.[24] Between late 2009, therefore, and the grant of review in *Sykes* one short year later, a learned attorney could have confidently advised her client that he would face no more than ten years in prison. Although the Court's decision to hear *Sykes* and the subsequent opinion would have shown that the *Tyler* decision was vulnerable, until the Eighth Circuit held that the reasoning of *Sykes* applied to Minnesota's unique iteration of felony fleeing in October 2012, that outcome and her advice were uncertain.[25] For a time, the attorney could again confidently advise her client, this time that he would be facing at least fifteen years in prison. However, after the Court decided *Descamps* in June 2013, the certainty of her advice weakened once again as the divisibility of the Minnesota statute was called into question.[26] One year later, the Eighth Circuit confirmed that, although the issue merited "careful consideration," *Descamps* did not require it to change directions.[27] Once again, the attorney's advice became clear regarding whether Minnesota's fleeing the police satisfied the residual clause.

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24. *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009) (holding felony fleeing is not a crime of violence under the residual clause of the guidelines definition of crime of violence).

25. See *United States v. Bartel*, 698 F.3d 658 (8th Cir. 2012).

26. *Descamps v. United States*, 133 S. Ct. 2276 (2013).

27. *United States v. Pate*, 754 F.3d 550, 554 (8th Cir. 2014).

This single realistic hypothetical example demonstrates plainly how little guidance the residual clause provides, even to an attorney who makes a careful study of the clause's scope. It proves even more clearly that a regular citizen does not have notice of the provision's parameters. And this example is, in reality, played out in countless cases across the country, often in cases even more complex because not one but two or three of a defendant's predicate offenses potentially fall within the fluid borders of the residual clause.[28]

It is almost beyond dispute at this point that the residual clause "fails to give a person of ordinary intelligence fair notice" that he might be covered by the ACCA's massive sentencing enhancement. *Papachristou,* 405 U.S. at 162 (citations omitted). As the Court admonished long ago: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta*, 306 U.S. at 453. The residual clause's vagueness violates this essential rule.

3. The Residual Clause Encourages Arbitrary and Subjective Decisions by Judges and Prosecutors.

The vagueness of the residual clause leads to arbitrary and subjective decisions by courts around the country. In addition, no clear limitations are placed on prosecutors,

28. The above example was also made simpler by the fact that the Minnesota fleeing provision at issue in *Tyler*, *Bartel* and *Pate*, has received frequent attention from the Eighth Circuit. Many state criminal statutes are examined less often in the residual clause context, providing even less notice about whether they are included in the residual clause's definition or not.

who can argue that almost any prior felony in a defendant's history qualifies for residual clause treatment, radically increasing that person's possible sentence. As explored above, the vague language of the clause has led to a seemingly case-by-case assessment on the part of this Court and lower courts alike trying to determine whether a particular state's predicate offense falls within its boundaries. When a judge must rely on "common sense," shaky statistics, and changing mandates from this Court in the place of clear and specific statutory language, the resulting decisions are "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306. When applying the residual clause to predicate offenses leads not only to so many different results across the circuit courts, but also to substantially different analytical approaches as well, it is hard to contest that the residual clause fails to guide courts or prosecutors. And each of these disagreements worsens the unfair reality that defendants with identical criminal histories are serving vastly different sentences depending on the court in which they were prosecuted. As warned of in *Giacco*, a law such as this violates due process if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giacco*, 382 U.S. at 402-03.

The arbitrariness and inconsistency permitted by the residual clause's lack of guidance is arguably made worse by the fact that judges must interpret and apply its dictates without assistance from juries. Recidivist enhancements are not subject to the protections of the Sixth Amendment and the *Apprendi v. New Jersey* jurisprudence; the decision regarding whether the

ACCA's significant penalties apply is made by a district court judge because, in theory, she is not finding facts but merely noting the existence of earlier convictions that presumably comported with the Constitution. *See, e.g., Apprendi*, 530 U.S.at 487-88; *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Shepard v. United States*, 544 U.S. 13, 25-26 (2005) (acknowledging possible Sixth Amendment concerns raised by courts not following narrow categorical assessment). However, given the lack of direction provided by the residual clause, the assumption that underpins *Almendarez-Torres* becomes less reliable. Judges are tasked with making very subjective and factual determinations every time they are asked to rule upon whether a particular state's specific offense satisfies the residual clause: the lack of guidance provided to courts by the text raises not only due process concerns, but begins to raise Sixth Amendment concerns as well.

4. The Residual Clause Represents an Abdication By Congress and Violates Separation of Powers.

A final but serious constitutional problem created by the intractable vagueness of the residual clause is that it threatens the separation of powers protected by our Constitution. Of course, the relationship between the Court and Congress is designed to be a healthy reciprocal one, where Congress strives to draft a law with sufficient clarity and the Court strives to interpret it in a way that gives voice to congressional intent.

> For where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether

> omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evidence purpose. This is as true of penalty provisions as it is of others.

Evans, 333 U.S. at 486; *see also Skilling v. United States*, 561 U.S. 358, 403 (2010) (noting that "our case law's current . . . requires us, if we can, to construe, not condemn, Congress' enactments"). However, there are constitutional limits beyond which the Court should not go in attempting to salvage a poorly drafted law, and the residual clause has already taken the Court to those limits and, respectfully, beyond. The Court has used every tool in its interpretive tool box, from "plain" language to classic rules of statutory interpretation, from legislative history to reliance on statistics: none have made clear what Congress did not.

What makes the residual clause different is that despite abundant notice regarding its serious flaws and the clear legal morass surrounding its application, Congress has not acted to fix it, plainly casting a "net large enough to catch all possible offenders" and leaving it to the Court to sort it out. *Reese*, 92 U.S. at 221. Congress has not attempted to fix the ACCA's most embattled language; indeed, no changes to the residual clause have been seriously considered by Congress since its adoption in 1986. [29]

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29. Only one bill has been proposed during this time that would alter the definition of "violent felony." In 2010, Senator Arlen Specter offered Senate Bill 4045, which would have eliminated the categorical approach and allowed courts to examine the facts underlying a prior offense to determine whether it met the

Congress' silence on this matter stands in contrast to its willingness, in other cases, to promptly fix criminal statutes after the Court has found fault with them, adopted a limiting interpretation with which Congress did not agree, or declared them vague. For instance, in 1995, the Court considered 18 U.S.C. § 924(c), which punished a person who "uses or carries" a firearm during a drug crime or crime of violence, *see Bailey v. United States*, 516 U.S. 137 (1995), and adopted a narrowing definition of "use." By 1998, Congress had amended the statute to clarify its meaning; it took swift action although the Court had only applied a narrowing reading, had interpreted "use" only twice in ten years, and no member of the Court had even hinted at the statute's vagueness. Congress also responded quickly to include deprivation of honest services within the mail fraud statute after the Court applied a narrowing interpretation. *See Cleveland v. United States*, 531 U.S. 12, 19-20 (2000) (describing the congressional amendment of fraud statutes in 1988 as response to *McNally v. United States*, 483 U.S. 350, 359-360 (1987)); *see also* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f) (1), 123 Stat. 1617, 1618 (codified at 18 U.S.C. § 1956) (altering the definition of "proceeds" in the money laundering statutes in light of *United States v. Santos*, 553 U.S. 507, 514 (2008)).

Congress' lack of action to remedy the clear flaws in the residual clause stands in marked contrast to these examples. The opinions of various members of

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definition of violent felony. Although the proposed legislation only slightly changed the text of the residual clause at all, it would have expanded other parts of the violent felony definition and added additional enumerated offenses. The bill was referred to Committee, and no further action was taken.

the Court have advised Congress on several occasions that the residual clause is "ill-defined," and suffers from "shoddy draftsmanship;" that it "calls out for legislative clarification" that "only Congress can rescue the federal courts" from its "mire;" and that as a result it is incurably vague. *See* Section A(2), *supra*. And yet Congress has not responded.

The Court must not continue, at expense of the due process the Constitution affords to all citizens, to strive to find specific and precise meaning where none exists.

> This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law.

Evans, 333 U.S. at 495.

Two previous decisions provide guidance regarding the healthy give-and-take that the Constitution requires from Congress, and demonstrate the propriety of acting in the absence of that essential reciprocity. In *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010), the Court rejected a pre-enforcement vagueness challenge to a statute criminalizing the provision of material support to terrorist organizations. In addition to finding that the statute's language was sufficiently clear, the Court noted that Congress "took care to add narrowing definitions to the statute . . . over time." *Id.*

In *United States v. Evans*, in contrast, the Court considered the poorly drafted penalty provision of a criminal statute and found that it was unsalvagably muddled. The Court noted, with a hint of frustration, that Congress had been asked repeatedly by the "Commissioner General" to fix the statute with the same corrective language that the government was now asking the Court to read into the statute, and had failed to act. *Id.* at 491-492.

> These efforts were made as conflicting judicial decisions demonstrated that the courts were very much at sea and their floundering was brought to congressional attention. In each instance nevertheless the effort was unsuccessful.

Id. at 492. After observing that too much would be required to fix the poorly drafted portions of the statute through interpretation, the Court concluded: "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make." *Id.* at 495. The Court found the statute vague despite the fact that it had never previously attempted to interpret it. *See also Todd v. United States*, 158 U.S. 278, 283-84 (1895) (noting that Congress could have adopted the interpretation advocated by the government, "but it has not as yet seen fit to do so.")

The present case is very similar to *Evans* in this respect. Congress not only drafted a flawed provision when it adopted the residual clause in 1986, but it has been "on notice" of the problems with the residual clause

for years, and has not responded to frequent polite requests from members of the Court to revise it. The Court should now end the polite requests and speak with the power the Constitution gives it to declare the statute unconstitutionally vague.

C. The Residual Clause Is Unconstitutional As Applied To Samuel Johnson, And On Its Face.

Samuel Johnson urges the Court to declare the residual clause of the Armed Career Criminal Act "void for vagueness." At a minimum, the clause should be declared unconstitutionally vague as it applies to him and the predicate offense of mere possession of a short-barreled shotgun. But he also urges that the Court should take the admittedly unusual step of declaring the entire clause unconstitutional across the board.[30]

1. As Applied to Samuel Johnson and Mere Possession of a Short-Barreled Shotgun, the Residual Clause Is Unconstitutional.

The residual clause is unconstitutionally vague as applied to Samuel Johnson, and his predicate offense of possession of a short-barreled shotgun. As explored in the first round of briefing and argument, nothing in the text

30. Mr. Johnson urges the Court to strike down, not the entire ACCA, nor even the entire definition of "violent felony," but only that part of the definition that offends the Constitution. This narrowly prescribed remedy means that being a felon in possession of a firearm will remain a crime and the severe penalties of the ACCA will remain available through application of other parts of the violent felony definition, where appropriate. Only the unconstitutional portion of § 924(e)(2)(B)(ii) must go.

of the statute, in the legislative history, or in this Court's earlier proclamations put Mr. Johnson on notice that his 2007 conviction for mere possession of the weapon would one day count as a "violent felony." This is so because the offense contains no element of force, is not an enumerated offense, involves mere possession, and involves conduct that is widely legal. In fact, the only textual clue present in the residual clause regarding mere possession of a short-barreled shotgun suggests that because "*use* of explosives" is specifically included, mere *possession* of a weapon would not be.[31] Indeed, each of the Court's previous decisions on the residual clause would suggest to Mr. Johnson that this particular conviction does not count as violent because there is no evidence that a mere possession offense, when examined properly on its own elements, presents even close to the degree of risk created by the enumerated offenses. Moreover, the offense – one of near strict liability at the time Mr. Johnson committed it and likely still today – fails to satisfy any part of *Begay's* purposeful, violent and aggressive test.

In order for the government to argue that mere possession of a short barreled shotgun is covered by the residual clause, it had to propose a new test by which the Court would imagine dangerous offenses that might follow eventually from the offense actually at issue. This test, if adopted by the Court, has no apparent limitations and would render the residual clause even more vague than it already is. And an after-the-fact new test would indeed violate constitutional notice requirements if applied to Mr. Johnson. *See F.C.C. v. Fox*, 132 S. Ct. at 2320 (2012) (striking down regulations as unconstitutionally vague

31. *See* Petitioner's Opening Brief, p. 24.

as applied in part because the decision that conduct was covered came after the conduct itself).

The residual clause is therefore vague as applied to Mr. Johnson because, based on an examination of his case alone, the flaws in the clause are clear. The statute's text and the Court's tests do not clearly include mere possession of a short-barreled shotgun within their coverage and the lower courts are deeply divided about the violent status of this offense, with more courts agreeing that it should not count than finding that it should.

Plainly, this is not a case where Mr. Johnson is unambiguously included within the scope of the residual clause, and therefore looks to imagined cases on the margins of the statute to support an otherwise unavailing claim of vagueness. *See Humanitarian Law*, 561 U.S. at 18-19 (citing *United States v. Raines*, 362 U.S. 17, 21-22 (1960). Instead, Mr. Johnson is standing beyond the edge of the grey area or blurry margin of the residual clause, far from its heartland, and the Constitution prohibits application of its dictates to him. Therefore, he urges the Court to, at a minimum, vacate his ACCA sentence and remand for resentencing. *See Skilling*, 561 U.S. at 424 (Scalia, J., concurring) (noting proper remedy is holding that statute is vague as applied and vacating conviction).

2. The Residual Clause Is Unconstitutionally Vague Across the Board.

The Court should also declare the residual clause of the ACCA facially unconstitutional because its fatal vagueness violates due process. For three reasons, this admittedly significant remedy is called for in this case.

First, although the Court has expressed a preference for "as applied" challenges, it has also used the power given to it by the Constitution to strike down statutes that are fatally vague. In *Chicago v. Morales*, for instance, the Court struck down a Chicago ordinance designed to control gang activity rather than simply ruling it invalid as applied to the defendants before the Court. 527 U.S. at 64-65 (plurality opinion). It did so although the ordinance did not infringe on recognized First Amendment rights. *Id.* at 55; s*ee also Giacco*, 382 U.S. at 402 (facially striking down a statute as vague because it raised concerns about arbitrary enforcement). In *Kolander v. Lawson* the Court asserted that in fact it had, "at times. . . invalidate[d] a criminal statute [for vagueness] on its face when it could conceivably have had some valid application," and struck down the statute before it as "unconstitutionally vague on its face." 461 U.S. at 358 n.8, 361.

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court suggested that a facial attack in any context can only succeed if the petitioner establishes that "no set of circumstances exists under which the Act would be valid." However, *Salerno's* absolutist characterization has been described as "dictum" by members of the Court, *see Morales*, 527 U.S. at 55 n. 22 (Stevens, J.), and commentators alike.[32] Even after *Salerno*, the Court

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32 *See also Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (Stevens, J., dissenting from denial of certiorari) (labeling the *Salerno* formulation dicta and inaccurate). At least one prominent commenter has suggested that the Court does not follow *Salerno's* sweeping proclamation. *See* Richard Fallon, *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915 (2011) (reviewing several years of Supreme Court cases and showing that successful facial challenges are not and should not be rare);

has invalidated statutes facially for vagueness. *See e.g., Chicago v. Morales*, 527 U.S. 41 (1999).

It appears that the Court's reservations about facial challenges are most pronounced when they arise during pre-enforcement litigation attempting to block the future use of a law rather than during a challenge to an already-underway application of the law to a particular case. *See, e.g., Humanitarian Law,* 561 U.S. at 18-20 (discussing the "as-applied" vs. facial dichotomy while addressing a pre-enforcement challenge to a criminal statute). Needless to say, neither Mr. Johnson's case nor the dozens of other residual clause cases referenced today are pre-enforcement challenges: in every instance, a defendant has been charged with a crime and the government has sought application of the ACCA's massive penalties through operation of the residual clause.

Second, given this Court's unique history of efforts to interpret the residual clause combined with Congress' unwillingness to assist in the enterprise, concerns of constitutional avoidance and deference to separation of powers that motivate the preference for as applied challenges are significantly lessened.[33] Certainly, the Court hesitates to grant facial vagueness challenges in

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see also Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 261-62 (1994).

33. *See* Retired Justice Sandra Day O'Connor, *Forward: The Rule of Law and Civic Education*, 62 SMU L. Rev. 693, 695 ("[L]egislators and regulators must provide citizens with fair notice of the laws they are expected to follow. If lawmakers fail to do so, judges must invalidate these laws and regulations as unconstitutionally vague.")

part because the Court avoids sweeping proclamations when narrower ones will do. *See, e.g., Skilling*, 561 U.S. at 403-04. However, here, judicial economy and due process would both be served by the Court making a more definitive decision. Otherwise, as-applied challenges will proliferate in the same way that challenges based on particular state statutes have.

Finally, the clause is arguably vague in all of its applications, satisfying even the most stringent *Salerno* standard. *See Salerno*, 481 U.S. at 745. Given the lack of clarity in the text and its resistance to consistent interpretation, the residual clause provides neither notice nor limiting principles for its application. Admittedly this Court has twice before held that individual state's specific offenses fall within the residual clause's dictates in *James* and *Sykes.* However, even those two decisions arose from circuit splits, led to split decisions and gave rise to dissents regarding vagueness. And in neither of those cases was the Court able to apply a clean and definite interpretation to the residual clause. In *Begay* and *Chambers* the Court decided that the clause did not cover the offense in question, though again there were strong differences of opinion, and the *Johnson* case appears to be continuing this trend. Frankly, it is difficult to imagine an offense that is non-controversially and plainly included within the residual clause's dictates in light of the clause's nebulous language and this Court's evolving jurisprudence.

The reluctance to grant facial challenges is in part due to the Court's aversion to resting decisions of constitutional magnitude on hypothetical scenarios. *Hill v. Colorado*, 530 U.S. 703, 733 (2000). But given the countless very real predicate offenses arising from every

district in the nation, the Court need not reach out for imagined situations in order to assess the broad vagueness of the provision. Mr. Johnson urges the Court that he has established that the residual clause is vague in all of its applications, including the real application currently before the Court, the real cases that have come before, and the real questions that have yet to be answered.

Certainly the Court's power to declare a statute unconstitutionally vague is "strong medicine" to be used sparingly.[34] This case, however, calls out for that strong medicine.

34. *See NEA v. Finley*, 524 U.S. 569, 580 (1998) (noting that facial invalidation of a statute as unconstitutionally vague is "strong medicine" which should be "employed by the Court sparingly").

CONCLUSION

Samuel Johnson asks the Court to vacate his ACCA enhanced sentence and remand for resentencing. At a minimum, the Court should determine that mere possession of a short-barreled shotgun is not a violent felony either because it is simply not included within the residual clause or because that clause is unconstitutionally vague as to him. Mr. Johnson also urges the Court to strike down the residual clause as facially invalid.

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