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 REPLY BRIEF FOR THE PETITIONER

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SUMMARY OF ARGUMENT

The residual clause of the ACCA is unconstitutionally vague. The Court's concerted efforts to impart predictable meaning to the clause's flawed language have resulted in a patchwork doctrine, guaranteeing continued confusion in the lower courts and an unending stream of residual clause cases on this Court's docket. Although other statutes use similar risk-based phrasing, none present the same textual, analytical, and jurisprudential difficulties. Voiding the residual clause is squarely supported by vagueness doctrine, and the principle of stare decisis should not tie the Court's hands. In light of its unique history, the Court should declare the residual clause void for vagueness.

ARGUMENT

I. THE VAGUENESS OF THE RESIDUAL CLAUSE VIOLATES DUE PROCESS.

The residual clause is unconstitutionally vague. Its unclear text requires courts to apply speculative risk analysis categorically to a vast array of state crimes without any explicit connection to the elements of those offenses. Although this Court has issued four opinions since 2007 trying to compensate for the clause's vagueness, it has not succeeded in creating a useful interpretive framework, leading to turmoil in the lower courts. Vagueness doctrine squarely applies to the residual clause and renders it unconstitutional.

A. The Court's Jurisprudence Has Not Cured the Residual Clause's Vagueness.

The residual clause's vagueness has led to discord within this Court's jurisprudence and disagreement and frustration throughout the lower courts. The government claims that *Sykes v. United States*, 131 S. Ct. 2267 (2011), has both paved way for clarity in applying the residual clause and marginalized this Court's decision in *Begay v. United States*, 553 U.S. 137 (2008). Although this idealized version of residual clause jurisprudence may cohere in theory, it falls apart in practice. Every one of the circuit court opinions expressing profound frustration with the residual clause's vagueness came after *Sykes*. (Pet. Supp. 26-28, 32.) It cannot be that seasoned jurists from many circuits are expressing serious dissatisfaction with the vagueness of the residual clause based on nothing more than a failure to properly understand *Sykes*.

Entrenched disagreements among the lower courts remain today that will not be answered by the Court's decision regarding the violent felony status of mere possession of a short-barreled shotgun. Closer examination reveals that even the "easy cases" referenced by the government as readily falling within the residual clause are not uniformly settled. And the ordinary case doctrine as broadly interpreted by the government exacerbates the vagueness of the residual clause, giving less guidance to lower courts rather than more.

1. The Court's Jurisprudence Does Not Establish an Easily Applied Residual Clause Framework.

Each of the Court's four previous residual clause decisions has, in an attempt to address a specific predicate offense, led to a different analytical approach. Although *Sykes* represents the most recent effort by this Court to compensate for the clause's vagueness, it does not go "a long way toward dispelling the potential confusion" created by its inscrutable language. (Govt. Supp. 38.) Rather than unifying this Court's residual clause jurisprudence into a single framework, *Sykes* raises even more questions. For instance, although the *Sykes* majority opinion suggests that *Begay's* consideration of the nature of a predicate offense is most relevant to cases involving mens rea ranging from strict liability to recklessness, *Sykes*, 131 S. Ct. at 2275-76 (2011), the dissents both suggest a very different understanding of the continuing relevance of *Begay*. *See Sykes*, 131 S. Ct. at 2285 (Scalia, J., dissenting); *Id.* at 2289 n. 1 (Kagan, J., dissenting). While the "purposeful, violent and aggressive" test may not have been necessary to the Court's decision in *Sykes*, it is difficult to see how the Court could have reached any decision in *Begay* itself without that guidance, given the opinion of five Justices that drunken driving is extremely risky but should not trigger the ACCA. And *Begay* is not alone among this Court's residual clause decisions in considering the qualitative nature of the predicate offense; the Court also considered the *Begay* framework in *Chambers v. United States*, 555 U.S. 122, 128 (2009), which addressed a plainly intentional offense. *See Sykes*, 131 S. Ct. at 2289 n. 1 (Kagan, J., dissenting).

The lower courts likewise do not all agree that *Sykes* sidelined any qualitative assessment of predicate offenses in most cases. For instance, in *United States v. Denson*, 728 F.3d 603, 610 (6th Cir. 2013), the Sixth Circuit noted the tension in this Court's jurisprudence and observed that it treats the *Sykes* language regarding *Begay* as "not mandatory," so a qualitative assessment remains relevant, even in cases involving purposeful mens rea. *See also United States v. Martin*, 753 F.3d 485, 490 (4th Cir. 2014) (noting that "in this circuit…we have continued, even after *Sykes* to apply *Begay's* similar-in-kind requirement to residual-clause cases.") And even were it settled that the "purposeful, violent and aggressive test" now only applies to offenses with lesser degrees of mens rea, countless questions remain about the way it should operate in such cases. (Pet. Supp. 30 n. 16) (detailing disagreement about status of seemingly violent crimes with recklessness mens rea).[1] Accordingly, *Sykes* has not unified the residual clause's interpretive landscape as the government suggests; perhaps it has actually led to more confusion. In reality, each of the Court's residual clause decisions resolved the question then before it, but those disparate opinions fail to cohere into a workable framework that cures the clause's inherent vagueness.

1. In support of its efforts to sideline *Begay*'s qualitative test, the government renews its argument that the Minnesota offense of possession of a short-barreled shotgun has a knowing mens rea, citing *State v. Salyers*, 858 N.W. 2d 156 (Minn. 2015). (Govt. Supp. 52.) However, that decision does not support the government's position because the court did not address whether the defendant had to know of the characteristics of the weapon that rendered it unlawful. (Pet. Rep. Br. 15-20).

2. Lower Courts Are Enmeshed in Frustration and Disagreement.

Not only did *Sykes* fail to unify this Court's residual clause jurisprudence, it also did not resolve the disagreements and frustration in the lower courts. Mr. Johnson identified numerous conflicts among the lower courts — ranging from retaliation against government officials, to conspiracy, to crimes involving reckless harm — that remain today and will not be answered by the present case. (Pet. Supp. 29-34.) The government's suggestion (Govt. Supp. 48) that these disagreements would vanish if lower courts would just properly apply the government's understanding of *Sykes* is an oversimplification of the reality on the ground.[2] If *Sykes*, decided four years ago, were going to bring uniformity to residual clause analysis, it surely would have done so by now.

The government references "easy cases" which purportedly demonstrate the lack of disagreement among lower courts. (Govt. Supp. 8-9, 44, 45.) However, even some of these carefully selected cases are revealed to be neither easy nor settled on closer examination. For instance, although child abuse in violation of Missouri law has been found to be a violent felony (Govt. Supp.

2. In its effort to minimize the confusion wrought by the residual clause, the government dismisses one clear disagreement among the Circuits by confidently asserting that the Sixth Circuit simply got it wrong, and the government might seek to "correct" that with en banc review in the future. (Govt. Supp. 47.) This disagreement proves the point: courts, parties and counsel are unable to achieve uniform application of the residual clause due to its vagueness.

44), child abuse under Florida law was found not to fall categorically under the residual clause. *See, e.g., Spencer v. United States*, 727 F.3d 1076 (11th Cir. 2013), *vacated on reh'g en banc on procedural grounds*, 773 F.3d 1132 (11th Cir. 2014). Similarly, although the government refers to resisting arrest as being among offenses that clearly count and "do not pose hard questions under the residual clause" (Govt. Supp. 9 & 45), the Sixth Circuit has held that resisting arrest in violation of Michigan law is not categorically covered by the residual clause. *See United States v. Mosley*, 575 F.3d 603, 607-608 (6th Cir. 2009); *United States v. Wilson*, 501 F. App'x 499, 501 (6th Cir. 2012) (affirming *Mosley's* analysis in the wake of *Sykes*).[3] Likewise, "possession of a weapon in prison" is identified by the government as obviously violent. (Govt. Supp. 9.) However, not only does *United States v. Polk*, 577 F.3d 515, 518-20 (3d Cir. 2009), remain good law and reflect a continuing circuit split, but a more recent appellate case included possession of a weapon in prison within the residual clause only over a well-reasoned post-*Sykes* dissent. *United States v. Mobley*, 687 F.3d 625, 632 (4th Cir. 2012) (Wynn, J., dissenting).

In sum, the Court should not dismiss longstanding conflicts and strong disagreements as mere aberrations because even cursory study reveals similar dissonance in nearly every "easy" topic the government cites. Rather,

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3. Indeed, the Massachusetts resisting arrest statute discussed in the case relied upon by the government, *United States v. Weekes*, 611 F.3d 68, 72-73 (1st Cir. 2010), presents a uniquely "easy" situation, but not because the offense sounds violent. Instead, it should qualify because it requires either use or threat of force or substantial risk of bodily injury *as an explicit element* of the offense.

these disagreements reflect how the vague residual clause operates in reality, spawning judicial discord everywhere.

3. The "Ordinary Case" Approach Advocated By the Government Complicates Rather Than Simplifies.

Although the "ordinary case" concept was designed to make applying the residual clause more consistent and less speculative, the reality has been the opposite. (Pet. Supp. 32.) The government, striving to explain away the problems caused by the residual clause's vagueness, suggests that choosing the hypothetical ordinary case is a simple matter of judges consulting "their deep well of experience reviewing criminal convictions and sentencing decisions, fortified by reported decisions, the determinations of the Sentencing Commission, legislative judgments, and empirical data to make a commonsense judgment about what conduct underlies the ordinary conviction." (Govt. Supp. 40.) Despite the superficial appeal of this tidy list, upon closer examination it fails to bring clarity to a complex problem.

The government's position from earlier briefing in this case amply demonstrates that its hypothetical checklist for selecting the "ordinary case" often does not answer the question. For instance, none of the items listed above support the bald assertion that the ordinary case of possession of a short-barreled shotgun is possession "to threaten, maim and kill other people." (Govt. Supp. 53.) No empirical data was presented by the government that could help a court select a representative "ordinary case," and indeed empirical data is often unavailable. Likewise, most of the lower court decisions to which the Court's

attention has been directed addressing convictions for possession of this weapon describe mere possession and nothing more.[4] (Pet. Rep. Br. 14.) Similarly, "legislative judgments" largely support Mr. Johnson's position because possession of a short-barreled shotgun is often legal and increasingly common, undermining the claim that citizens or governments agree it is a weapon without legitimate purpose. Even the Sentencing Commission's work fails to support the government's view.[5]

Therefore, the predicate offense currently before the Court proves that the "simple" approach to selecting the ordinary case advocated by the government falls short in real application. Indeed, the government's radical expansion of the ordinary case doctrine in this case exposes the lack of limits provided by the vague residual clause.

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4. The government notes that the relevant pool for consideration is the "subset of violations where the offender has been apprehended, prosecuted and convicted" of the offense at issue. (Govt. Supp. 40.) Therefore, the parade of horribles from the government's first Brief detailing sixteen cases describing crimes committed with short-barreled shotguns should play little role in this Court's analysis, because only two of those cases actually involved convictions for possession of a short-barreled shotgun. (Pet. Rep. Br. 8.)

5. As noted in oral argument, when the Commission decided, in 1991, that being a felon in possession of a firearm should not count as a crime of violence under the guidelines' residual clause, it based that conclusion on careful study of empirical data. U.S.S.G. Amendment 433; Report of Criminal History Working Group. In contrast, when the Commission concluded in 2004 that possession of a short-barreled shotgun should qualify, it referred to no empirical data or case analysis. U.S.S.G. Amendment 674.

B. Constitutionally Protected Values Are Violated By The Vagueness of the Residual Clause.

The lack of clarity inherent in the residual clause implicates all three of the constitutional values underpinning the void-for-vagueness doctrine: the right to fair notice; prevention of arbitrary enforcement; and protection of separation of powers.[6] The fact that it is a sentencing statute should not lessen the Court's concern with its vagueness.

1. The Residual Clause Deprives Citizens of Fair Notice.

The residual clause fails to provide the fair notice that due process requires. The government suggests that vagueness doctrine is only concerned with providing "innocent" citizens enough information about what conduct is unlawful to permit them to avoid it, and any lack of clarity in a sentencing provision does not raise constitutional alarms. (Govt. Supp. 18-19.) This Court has disagreed, applying vagueness analysis to sentencing provisions. *See, e.g., United States v. Batchelder*, 442 U.S. 114, 123 (1979); *United States v. Evans*, 333 U.S. 483 (1948). The residual clause's vagueness raises even greater constitutional concerns than the statutes those cases considered.

First, the residual clause does not merely direct judges regarding how to use their discretion within a

6. The government fails to discuss separation of powers, probably because Congress has undeniably failed to answer this Court's repeated calls to revise the residual clause.

prescribed range of punishment. Instead it is part of a definition that triggers a severe mandatory penalty. Such mandatory sentencing laws raise serious constitutional concerns and require greater notice than non-mandatory provisions. This Court's ruling that the Sixth Amendment requires notice in an indictment of any fact that raises the maximum penalty or the mandatory minimum demonstrates the constitutional significance of such statutes. *See Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (noting the importance of learning the possible punishment from the indictment, a safeguard, in part, of fair notice); *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013) (same).

Likewise, the ex post facto clause is violated by a retroactive increase in criminal penalties, in part because fair notice is undermined when a newly available sentence is applied to a previously committed crime. *Peugh v. United States*, 133 S. Ct. 2072, 2082 (2013). "Because increasing the punishment affixed to the crime deprives people of the opportunity to plan their conduct in light of the law, '[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty; and therefore they may be classed together.'" *Id.* at 2095 (quoting *Calder v. Bull,* 3 U.S. 386, 397 (1798))(Thomas, J., dissenting). "Thus, almost from the outset, we have recognized that central to the ex post facto prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (internal quotation omitted).

Both the ex post facto clause's unquestioned application to sentencing provisions and the Sixth Amendment's relevance to mandatory penalties reinforce what this Court's vagueness jurisprudence already demonstrates: the Constitution requires citizens, whether "innocent" or "criminal" to have clear notice of what conduct the law forbids *and* of the consequences for committing the crime.

The residual clause's vagueness creates notice problems for more than just "prospective criminals." Even after indictment it can be impossible for courts and learned counsel to predict whether a defendant charged with violating 18 U.S.C. § 922(g) will face the ACCA's enhanced penalties when his prior convictions might or might not qualify as predicate offenses under the residual clause. Indeed, in many cases the governing circuit has not recently decided whether a particular state statute qualifies under the always-in-flux provision, and the parties can only guess whether a conviction will expose a defendant to no more than ten years in prison, or to no less than fifteen. If the attorneys guess wrong, the consequences are enormous. *See, e.g.*, *United States v. Miller*, 371 F. App'x 646 (6th Cir. 2010) (affirming ACCA sentence although the defendant was unaware of ACCA enhancement until after conviction at trial); *United States v. O'Neal*, 180 F.3d 115, 125-126 (4th Cir. 1999) (collecting cases holding that a defendant need only be advised about the ACCA enhancement before sentencing, not before trial). The guesswork and speculation caused by the vague residual clause plainly preclude the fair notice the Constitution requires.

2. The Residual Clause's Vagueness Permits Arbitrary Enforcement And Contradictory Outcomes.

Vagueness doctrine also serves to prevent arbitrary and discriminatory enforcement of laws. The government suggests that this concern is not implicated by the residual clause because it "applies at sentencing of its own force" and is administered by courts rather than prosecutors (Govt. Supp. 20), but this analysis is both untrue and unsupported by vagueness jurisprudence.

First, the fact that judges are the "deciders" in applying the ACCA does not diminish the constitutional problems created by the residual clause's vagueness. This Court has as often bemoaned the arbitrariness and lack of uniformity created by vague statutes when applied by judges as when invoked by police officers and prosecutors. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (finding Florida vagrancy statute unconstitutionally vague in part due to the arbitrariness it permits by "police and the courts"); *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) (statute leaves "judges and jurors" too much discretion), *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (analyzing whether deportation statute was vague even though immigration judges rather than police apply it). And de novo appellate review has done little to alleviate widespread disparity in the law's application.

Second, the government plays a significant role in the operation of the residual clause, which is almost always triggered because prosecutors argue at sentencing that a particular predicate offense qualifies under its language. The government also bears the evidentiary burden to

support the ACCA. *See United States v. Barbour*, 750 F.3d 535, 542 (6th Cir. 2014) (noting that burden to establish violent felony status of a prior conviction rests with the government); (Govt. Supp. 43.) The residual clause provides few limitations on the exercise of this prosecutorial power: any state statute that has not recently been specifically ruled upon by this Court or the appellate court can be urged as a basis for the enhancement.

In sum, the residual clause violates due process by depriving citizens of notice of the penalties for violating the law, by permitting arbitrary enforcement, and by violating the essential separation of powers inherent in the Constitution. Regardless of its status as a sentencing provision, this Court should declare it unconstitutionally vague.

II. SIMILAR LANGUAGE IN OTHER STATUTES HAS NO BEARING ON THE VAGUENESS OF THE RESIDUAL CLAUSE.

The residual clause is vague because its text and structure are unclear, because this Court's efforts to create a consistent interpretive framework have been unsuccessful, and because lower courts are unable to apply it consistently to a wide variety of state-court offenses. The government refers the Court to one hundred pages of statutes which it claims are so similar to the residual clause that it cannot be vague. The comparison does not hold up to scrutiny.

First, the overwhelming majority of laws cited by the government are so different in language and operation from the residual clause that they have no bearing on the

Court's decision in this case. The simple fact that other statutes include the words "serious risk" does not make them relevant.

It almost goes without saying that the same words, even "identical language," can have different meanings in different statutes. *See Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (Ginsburg, J., plurality opinion); *id.* at 1092 (Kagan, J., dissenting) (agreeing with the plurality that "context matters in interpreting statutes"). In the specific arena of vagueness, both the statutory context surrounding challenged language and clarifying judicial interpretations can insure that a statute with imperfect text is nonetheless constitutional. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (finding that statute is not vague in part because it is not a general "breach of peace" ordinance, but is narrowly tailored to schools); *Skilling v. United States*, 561 U.S. 358, 409 n. 43 (2010) (finding that a vague statute may be saved by a "reasonable narrowing interpretation"). The context alone prevents almost every one of the identified statutes from being vulnerable to a vagueness challenge, unlike the residual clause.

A quick examination of several statutes found in the government's appendix demonstrates the differences. D.C. Code § 22-404.03(a)(2) uses the term "creates a grave risk of serious bodily injury" in a narrowly crafted statute criminalizing assault on a public vehicle inspector. (App'x 24a.) Not only is the risk language part of an element that must be committed by the defendant, but the risk must result from specific actions (i.e., assaulting, impeding, intimidating) and actual "serious bodily injury" must occur. In addition, the statute requires the defendant to act

"under circumstances manifesting extreme indifference to human life." Every aspect of this statute is more precise than the residual clause, and therefore it is not unconstitutionally vague.

Similarly, N.Y. Penal Law § 156.26 (App'x 60a-61a), which criminalizes computer tampering, requires a showing of actual "serious physical injury," ties it to very specific acts of the defendant, and requires the defendant to be "aware of and consciously disregard[]" the risk. Likewise, Cal. Penal Code § 11417(b) (App'x 18a) could not be more different from the vague residual clause. It criminalizes "intentional release of a dangerous chemical" with the specific intent to "cause harm" as an element.

Indeed, even the state statutes which operate somewhat like the residual clause, *e.g.* Ohio Rev. Code Ann. § 2901.01(A)(9)(c) (App'x 65a), do so with far greater clarity. The Ohio definition of "offense of violence" requires the offense to be "committed purposely or knowingly" and to involve either actual harm or a risk of "serious physical harm," a greater degree of harm than the residual clause. Likewise, although the Louisiana recidivism statute cited by the government (App'x 34a), uses language similar to the residual clause to define crime of violence, it does what the ACCA fails to, by including a specific list of 46 offenses which qualify.[7] Moreover, the definition requires that the offense has *as an element* the use of force.

Two statutes referenced by the government, 18 U.S.C. § 16 and § 924(c) (App'x 1a), are admittedly more comparable to the residual clause. However, they have

7. La. Rev. Stat. Ann. § 14:2(B) (Supp. 2015).

different language (discussing the risk of use of force rather than the risk of injury) and both statutes operate in ways that reduce their potential vagueness. For instance, the Court has construed § 16(b)'s crime of violence definition to include an offense only when (1) it naturally involves a disregard of the substantial risk that physical force may be used; (2) the risk arises while committing the offense; and (3) it is a "violent, active" offense. *Leocal v. Ashcroft*, 543 U.S. 1, 10-11 (2004); *United States v. Serafin*, 562 F.3d 1105, 1108 (10th Cir. 2009). These requirements are meaningfully different than the ACCA's residual clause and make § 16(b) narrower. *Leocal*, 543 U.S. at 10 & n. 7. Moreover, § 16(b)'s risk "must arise in the course of committing the crime and not merely as a possible result." *Serafin*, 562 F.3d at 1109.

Section 924(c) is likewise very different from the residual clause. The language of § 924(c)(3)(b) is materially identical to § 16(b), so the above analysis applies with equal force. Even more critically, § 924(c) defines a separate crime and uses the phrase "crime of violence" as an element, not merely as a way to categorize previous offenses. To be found guilty, the defendant must commit a crime of violence *and* must use or carry a firearm while doing so, or must possess a firearm in furtherance of the crime. The requirement that the firearm be intrinsically related to the crime of violence necessarily narrows its application.

In sum, a cursory review demonstrates that few of the statutes listed in the appendix are even textually similar to the residual clause, let alone similar in context and application. And the government has not demonstrated that *any* of the statutes suffer from the other infirmities

of the residual clause: an inability of the highest Court to craft a coherent interpretive framework, combined with turmoil among lower courts. In terms of fatally defective vagueness, the residual clause stands alone.

III. STARE DECISIS DOES NOT CONTROL THE COURT'S DECISION.

Although the doctrine of stare decisis is important, it does not tie the Court's hands in this case. Stare decisis has been recognized as "a principle of policy and not a mechanical formula." *See, e.g., Patterson v. McLean Credit Union*, 485 U.S. 617, 618-19 (1988) (listing a "host of cases" in which the Court has overruled previous "statutory precedents"). It is "not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).[8]

For several reasons, stare decisis does not prevent the Court from holding the residual clause to be unconstitutionally vague, despite the Court's exploration of the vagueness issue in *James v. United States*, 550 U.S. 192, 210 n. 6 (2007), and *Sykes*, 131 S. Ct. at 2277. First, the doctrine has much less force in a case, such as this, where the precedent at issue has proven unworkable, where "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). "When a decision has been questioned by Members of the Court in later decisions, and has defied consistent application by lower courts, these factors weigh in favor

8. It is ironic that the government relies so heavily upon the doctrine of stare decisis while at the same time repeatedly advocating an interpretation of this Court's decision from *Sykes* that would all but overrule the Court's holding in *Begay*.

of reconsideration." *Id.* at 235 (quotations omitted); *see also Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). The residual clause has resisted consistent application, and has been the subject of criticism by Members of this Court and myriad lower courts. It has been proven unworkable.

Moreover, the doctrine of stare decisis exerts less control where, as here, the challenged precedent is recent and the reliance interests at stake are minimal. In less than a decade the Court has battled the residual clause five times: the first precedent declining the invitation from three Members to declare it unconstitutionally vague was only eight years ago. In *Montejo,* 556 U.S. at 792-93, this Court rejected an argument that stare decisis prevented it from overruling precedent, noting that the rule in question was "only two decades old." *See also Pearson*, 555 U.S. at 233 (overruling an eight-year-old decision).

Likewise, the reliance interests here are slight. *See Alleyne v. United States*, 133 S. Ct. 2151, 2164 (2013) (Sotomayor, J., concurring) (describing reliance interests as minimal even where decision would make sentences based upon mandatory minimums vulnerable to challenge). It appears that on average between five and six hundred defendants are sentenced under the onerous provisions of the ACCA each year, although it is unknown how many of those massive sentences depend upon the residual clause for effect.[9] In each residual clause case,

9. Even if the Court rules the residual clause unconstitutionally vague, "serious drug offenses," enumerated offenses, and offenses that contain an element related to force will all remain lawful ACCA predicates. Under each definition, the *elements* of the underlying offense, rather than speculation about what it might entail under imagined circumstances, determine whether it

even if the Court's determination of vagueness is given retroactive effect, the defendants' convictions will not be vacated, nor will they go unpunished. Instead those defendants will remain convicted of violating 18 U.S.C. § 922(g) and will be resentenced, likely to significant prison terms of up to ten years. Moreover, the government does not substantiate its assertion that "many" charging decisions (allowing a plea to the "lesser" ACCA charge) have been made in reliance on the Court's decision not to declare the statute unconstitutionally vague. Indeed, the more common reality is that defendants are charged only with being felons in possession of a firearm, and not with greater offenses. And the reliance of courts and parties on the Court's rejection of the vagueness challenge in *James* and *Sykes* has been limited because in neither case was the issue briefed or argued by the parties. Instead, it was raised by Members of the Court and dismissed by the majority without extensive exploration of its merits.

Finally, while stare decisis may deserve greater weight in questions of statutory interpretation, where "Congress remains free to alter what [the Court] has done," *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), that rationale actually supports Mr. Johnson's position regarding vagueness. Here, Congress has been free to fix the residual clause; indeed it has been repeatedly asked to do so by this Court and has done nothing. This silence in the face of clear need for revision is a unique reason that this Court's earlier discussions do not control the day on the issue of vagueness.

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triggers the ACCA. This clear textual, elements-focused analysis protects these provisions from vagueness, unlike the residual clause.

Stare decisis is not sacrosanct, but rather a "principle of policy," and "[w]hen considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions decided against the importance of having them decided right." *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). Mr. Johnson respectfully urges that this balancing supports both overruling the Court's conclusion that the residual clause is amenable to clear interpretation and consistent application, and declaring it unconstitutionally vague.

IV. WHAT IS THE PROPER REMEDY FOR THE VAGUENESS OF THE RESIDUAL CLAUSE?

Although the Court should not lightly declare a statute unconstitutionally vague, this case presents a unique set of circumstances that strongly support applying the doctrine.

A. Facial Invalidation of the Residual Clause Is Justified.

The residual clause's vagueness is glaring and unique, justifying a declaration that it is facially unconstitutional. The government's efforts to resist such a conclusion must be rejected.

First, it is an overstatement that a statute can only be declared unconstitutionally vague if the Court finds it to be vague in every imagined application. (Govt. Supp. 15-16.) This absolutist articulation of the standard for finding facial vagueness is not scrupulously followed in practice. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 64 (1999)

(finding a statute facially vague without determining that it is vague in every application); *United States v. Jones*, 689 F.3d 696, 703 (7th Cir. 2012) (noting that the Supreme Court "regularly decides due-process vagueness claims without regard to the facts of the case," and identifying six examples); Pet. Supp. 54-56. Moreover, the important concerns of separation of powers that partially motivate such a rule are simply inapplicable here. Congress has not only been given ample opportunity to correct the statute's flaws, but has been repeatedly beseeched to do so and has not.

Second, the text, interpretation and application of the residual clause stand out among previous statutes explored by this Court for vagueness. Although facial invalidation of a vague statute is an infrequent remedy, the situation before the Court justifies use of that remedy. No other statute of which Mr. Johnson is aware, let alone a mere segment of a subdivision of a statute, has received as frequent attention from this Court in as short a period of time, with almost every decision marked by disagreement. Likewise, Mr. Johnson is unaware of any statute previously considered under this Court's vagueness doctrine that has given rise to so many expressions of frustration and confusion from lower courts, and to so many different and evolving circuit splits.[10]

Third, a facial declaration — or at least an as-applied declaration with strong language — serves the interests

10. In *Jordan v.DeGeorge*, in contrast to the cacophony of judicial frustration regarding the residual clause, the Court rejected a vagueness challenge, noting that it could not "find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process." 341 U.S. at 230.

of judicial economy and separation of powers here in a way that it may not in other cases. If the Court decides that the residual clause is unconstitutionally vague only as to possession of a short-barreled shotgun then, instead of facing a long queue of circuit disagreements about whether given offenses fall within the residual clause as it does today, it will substitute a queue of as-applied vagueness claims. A clear facial decision will avoid such an outcome and will put the onus for fixing the statute where it belongs: on Congress.[11] And because the clause is so unique in text, operation, and jurisprudential history, the Court can narrowly tailor its holding to invalidate only this provision and no others.

B. Samuel Johnson's ACCA Sentence Must Be Vacated.

At a minimum the Court should vacate Samuel Johnson's fifteen-year sentence. Whether the Court accomplishes this by ruling the residual clause unconstitutionally vague facially or as-applied, through operation of the rule of lenity, or simply by deciding that the clause's definition does not cover mere possession of a short-barreled shotgun, the result must be remand for a new sentence of no more than ten years in prison.

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11. The government criticizes Mr. Johnson for not endeavoring to rewrite the residual clause in a way that will correct its vagueness. (Govt. Supp. 33) Defining crimes and setting their possible punishments is within the unique purview of Congress. *See United States v. Evans*, 333 U.S. 483, 495 (1948). Although alternative formulations, such as utilizing an elements-based approach or expanding the list of enumerated offenses, can be readily imagined, Congress is far better positioned to craft criminal legislation than a defendant or his counsel.

The government concedes that in cases where a "grievous ambiguity or uncertainty about [the residual clause's] application to a particular offense" exists, the dispute should be resolved in favor of the defendant through operation of the rule of lenity. (Govt. Supp. 17.) The government also concedes that in cases where a court cannot decide what sort of conduct represents the ordinary case (Govt. Supp. 41), or where a court is left uncertain about the degree of risk posed by a particular offense, the "defendant must prevail." (Govt. Supp. 43.) Each of these concessions applies to Mr. Johnson's case. There is nothing in the residual clause's text, its legislative history, or this Court's jurisprudence that plainly supports its application to mere possession of a short-barreled shotgun; indeed, the opposite is true. The government is unable to support its assertion that the ordinary case of this mere possession offense is possession during a serious crime by a violent criminal. And the government has failed to carry *its* burden of proving that this offense entails the requisite risk. In light of the government's own concessions, Mr. Johnson must win.

CONCLUSION

In sum, the Court should use its power to hold the residual clause of the ACCA unconstitutionally vague. The unclear language of the provision combined with this Court's unsuccessful efforts to create an interpretive framework, and the frustration and disagreement among the lower courts all strongly support such a finding.

Respectfully submitted,

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