No. 15-8544

In the Supreme Court of the United States

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF *AMICUS CURIAE* BY INVITATION OF THE COURT

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QUESTIONS PRESENTED

Johnson v. *United States*, 135 S. Ct. 2551 (2015), deemed unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony"). The residual clause invalidated in *Johnson* is identical to the residual clause in the career-offender provision of the United States Sentencing Guidelines, USSG § 4B1.2(a)(2).

The questions presented are:

1. Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in USSG § 4B1.2(a)(2)?

2. Whether *Johnson*'s constitutional holding applies to the residual clause in USSG § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review?

3. Whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to USSG § 4B1.2, remains a "crime of violence" after *Johnson*?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Adam K. Mortara was appointed by the Court to brief and argue the second question presented in support of the judgment below. Court-appointed *amicus curiae* has taught federal courts, federal habeas corpus and criminal procedure at the University of Chicago Law School since 2007, and in that capacity supports the position the Court has instructed him to take. The arguments made herein are solely those of counsel and not necessarily the views of the University of Chicago Law School or its other faculty.

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

U.S. CONST. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 3553(a) provides:

Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of

Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

United States Sentencing Guideline § 4B1.2(a) (Nov. 2015) provides:

Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

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

INTRODUCTION

The vagueness doctrine requires that laws punishing private conduct do so with sufficient clarity for the public and the prosecutors to know the score. The residual clause of the Armed Career Criminal Act mandated a heightened sentence upon a defendant meeting conditions the Court found vague and therefore failed this test. *Johnson* v. *United States*, 135 S. Ct. 2551 (2015).

Outside of the capital context, even a purely discretionary sentencing regime is unassailably constitutional. The addition of non-binding guidance to this *per se* constitutional foundation cannot reduce notice to defendants or increase arbitrariness. The advisory Guidelines are one such non-binding factor courts need to consider in exercising sentencing discretion. 18 U.S.C. § 3553(a). And while the Court's evolution of the *Booker* remedy has assigned modest weight to the advisory Guidelines as compared to other factors, that does not alter their advisory nature. The residual clause of the career offender guideline, § 4B1.2(a)(2), thus cannot be unconstitutionally vague. Only regulations of private conduct are subject to vagueness challenges.

To hold otherwise would cause significant harm. The Sentencing Commission is charged with determining whether a guideline is too problematic to administer in practice and whether any corrective amendment should be retroactive—*i.e.*, the practical analogues to the constitutional questions presented in this case. As to § 4B1.2(a)(2), the Commission has already answered, eliminating the residual clause and electing not to make that change retroactive. Permitting vagueness challenges

to existing and new guidelines will impede the important and expert work of the Commission, as well as its sister state sentencing commissions.

It is no answer for Beckles and the United States to point to the Court's decision in *Peugh* v. *United States*, 133 S. Ct. 2072 (2013). In contrast to the vagueness doctrine, the Court has interpreted the Ex Post Facto Clause to reach even non-binding changes—the "sufficient risk" of increased punishment test. This prophylactic test exists because Congress could otherwise abuse its power by retroactively discriminating against disfavored groups using indirect means—those not guaranteed to increase punishment but presenting a sufficient risk of doing so. That is why the Court held in *Peugh* that retroactive application of harsher guidelines—procured through a congressional request to the Commission—violated the Ex Post Facto Clause. While an ex post facto law (or even a guideline) can be a tool for impermissible legislative targeting of disfavored groups, a vague law evidences the absence of any such targeting. Thus, there is no "sufficient risk" test in the void-for-vagueness doctrine.

The advisory Guidelines cannot be unconstitutionally vague.

SUMMARY OF ARGUMENT

Non-binding guidelines do not implicate the twin concerns of the vagueness doctrine: (1) providing adequate notice of prohibited conduct and the punishment for it and (2) constraining arbitrary enforcement of the law. *Johnson*, 135 S. Ct. at 2556 ("[T]he Government violates [Due Process] by taking away someone's life, liberty, or prop-

erty under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

It is long-accepted that a pure discretionary sentencing regime (outside of the capital punishment context) is constitutional. *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."). In such a system, a defendant has no Due Process notice rights as to what specific sentence he might receive within the range set by the legislature, however broad. And while that sounds as if it might invite "arbitrary enforcement," it is constitutional because the exercise of sentencing discretion, properly understood, is not "enforcement."

If total discretion does not offend the Due Process Clause, then how can non-binding efforts to guide the exercise of that discretion transform what is constitutional into what is not? How do defendants get even less notice when guidance (however abstract or vague) is given than if sentencing judges are permitted to do as they please, for whatever reason? How is the potential for arbitrariness increased when guidance is provided, as compared to no guidance at all? The parties have yet to explain how the concerns of vagueness doctrine are more deeply felt in this case than the alternative of pure sentencing discretion—a fixed point of constitutionality.

While § 4B1.2(a)(2)'s residual clause shares the same text as the invalidated ACCA, the vagueness analysis differs because the legal effect of the words is different. Which is why, unlike with the ACCA, the Court has already held that the advisory Guidelines do not implicate

Due Process notice rights. *See Irizarry* v. *United States*, 553 U.S. 708, 714 (2008).

The other twin concern of vagueness, arbitrary enforcement, is merely the same problem viewed from the opposite side of the line that separates the Government from the People. It is hard to understand how a law that does not offend the Due Process Clause on notice grounds could nevertheless invite arbitrary enforcement. *See, e.g.*, *City of Chicago* v. *Morales*, 527 U.S. 41, 58-64 (1999) (plurality) (holding Chicago's gang loitering ordinance invalid on both grounds); *but cf. id.* at 65-69 (O'Connor, J., concurring in part and concurring in the judgment) (resting conclusion of unconstitutionality on arbitrary enforcement). The application of non-binding guidance to the foundation of *per se* constitutional discretionary sentencing does not implicate "arbitrary enforcement" because there is still discretion to act, or not. This is why the Court has upheld pure sentencing discretion in the non-capital context and struck down laws for vagueness only when they proscribe or punish private conduct.

The United States and Beckles take somewhat different approaches to escape the Court's vagueness case law, both of which are wrong. The United States wishes to thread an eyeless needle. On two consecutive pages it tells the Court the post-*Booker* Guidelines function as "advice" and are "therefore not substantive," but then that the "substantial effect that Guidelines advisory ranges exert" requires that vagueness challenges be permitted. *Compare* Resp. Br. 12 *with id.* at 13. If the effects are so substantial, the United States will be hard-pressed to explain how the *Booker* remedy actually remedied anything—for "any thumb on the scales" in favor of the Guidelines would

violate the Sixth Amendment. *Kimbrough* v. *United States*, 552 U.S. 85, 113 (2007) (Scalia, J., concurring).

Beckles, for his part, leads with *Peugh*. The Ex Post Facto Clause has been interpreted by this Court to reach retroactive changes that present a "sufficient risk" of an increased sentence. 133 S. Ct. at 2082. While both ex post facto and vagueness precedents discuss notice, the former is additionally concerned with retrospective legislative interference with newly disfavored groups. *Id.* at 2085 (plurality opinion). This is why the Court forbids ex post facto changes that merely pose a "sufficient risk" of increasing punishment, because legislatures can use indirect or imperfect means to target those disfavored groups. Not so with vague measures, which legislatively target no one. There is no "sufficient risk" halo around the vagueness doctrine and *Peugh* does not control here.

Where the parties agree, they make too much of too little. Both try to build momentum for their novel vagueness theory by reference to the number of circuit courts that have agreed with them. Pet. Br. 29 & n.7 (invoking the "majority view" that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague); Resp. Br. 46 (noting that only the Eleventh Circuit has held that the advisory Guidelines cannot be unconstitutionally vague). But the United States conceded this issue and allowed those courts to proceed without the benefit of the adversary process. Opp. 15-16. When courts have heard only one side of the story, it should surprise no one when that side wins more often than not. *Cf.* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 Yale L.J. 1346 & n.42 (2015) ("Indeed, the Supreme Court has

treated decisions rendered without full adversarial briefing as entitled to less precedential weight than decisions rendered on fully developed records.").

What is worthy of due consideration, however, are the diverse array of respected jurists concluding that the United States is wrong and the advisory Guidelines cannot be unconstitutionally vague. *See United States* v. *Hurlburt*, No. 14-3611, 2016 WL 4506717, at *8 (7th Cir. Aug. 29, 2016) (Hamilton, J., joined by Posner, Flaum, and Easterbrook, JJ., dissenting) ("[H]ow can non-binding advice be unconstitutionally vague?"); *United States* v. *Matchett*, No. 14-10396, 2016 WL 4757211, *1 (11th Cir. Sept. 13, 2016) (William Pryor, J., joined by Julie Carnes, J., respecting the denial of rehearing en banc) ("[T]he vagueness doctrine applies only to laws that regulate the primary conduct of private citizens."); *United States* v. *Lee*, 821 F.3d 1124, 1135 (9th Cir. 2016) (Ikuta, J., dissenting) ("[T]he discretionary Sentencing Guidelines do not raise the same constitutional concerns as mandatory sentencing provisions…."); *United States* v. *Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127, at *11 (5th Cir. Aug. 5, 2016) (Jones, J., joined by Smith, J., concurring) ("I would hold the Guidelines categorically immune from vagueness challenges."); *see also In re Embry*, 831 F.3d 377, 380 (6th Cir. 2016) (Sutton, J.) ("The answer to this … question is not self-evident.").

Many of these rightly skeptical judges have noted that § 3553(a) instructs sentencing courts to consult their consciences as to "the seriousness of the offense," what "promote[s] respect for the law," and "protect[s] the public from further crimes of the defendant," as well as what would be "just punishment" and "adequate deterrence." 18 U.S.C. § 3553(a)(2). These provisions are no less vague

than the residual clause of § 4B1.2(a)(2) or other guidelines (state and federal) that will assuredly fall if this Court opens the door, to say nothing of future guidelines the Commission may wish to enact. Those future guidelines will become mired in constitutional challenges before the Commission even has a chance to assess how they are being implemented and deploy its expertise in making necessary adjustments.

Pragmatism and consideration for the special role of the Commission therefore counsel in favor of rejecting the parties' position. The Commission has the capability, the information, and the statutory responsibility to decide when the Guidelines should be changed, as it did in January of this year when it amended § 4B1.2(a)(2) to remove the residual clause. The Commission also has the power to make amendments that reduce suggested sentencing ranges retroactive, and decided not to do so when it eliminated the residual clause. Congress has charged an expert agency, partly composed of judges, to assess the impact and administrability of the Guidelines, as well as the retroactivity of any amendment. This Court should therefore exercise caution when acting to solve a problem that no longer exists, for "not every problem was meant to be solved by the United States Constitution." *Herrera* v. *Collins*, 506 U.S. 390, 428 n.* (1993) (Scalia, J., concurring).

The advisory Guidelines are not subject to vagueness challenges. The Court should affirm the judgment of the Eleventh Circuit.

ARGUMENT

I. THE ADVISORY SENTENCING GUIDELINES ARE NOT SUBJECT TO VAGUENESS CHALLENGES

If pure discretionary sentencing is constitutional, then so too is guided discretionary sentencing. It is not possible for an advisory Guideline, however abstract, to make sentencing more arbitrary or less predictable than a system of bare, unguided discretion. At worst, a vague Guideline has no effect at all. But the guideline at issue in this case is not a worst case. "Crime of violence" has meaning and there are at least some clear applications, as *Johnson* acknowledged.

Approaching the problem from the other direction, the advisory Guidelines are safe because only measures that regulate private conduct can be unconstitutionally vague. *Johnson*, 135 S. Ct. at 2556 ("Our cases establish that the Government violates [Due Process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."); *see also* Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953 (1995) ("[T]he 'void for vagueness' doctrine requires the state to set forth clear guidance before it may punish private conduct.").

The advisory Guidelines do not tell the public what is lawful and what is not or guarantee what sentence a defendant must receive. They cannot invite arbitrary enforcement—they are not in force. Because the advisory Guidelines do not dictate a criminal sentence, defendants have no Due Process expectation in a Guidelines range. To say otherwise would conflict with *Irizarry* and call into question the validity of other guidelines, the remaining

statutory factors set out in § 3553(a), the sentencing regimes of many states, and the constitutionality of the *Booker* remedy itself, as well as that of discretionary sentencing generally.

A. Because Pure Discretionary Sentencing Is Constitutional, So Is Guided Discretionary Sentencing

Prior to the Sentencing Reform Act of 1984 and the creation of the Commission and the Guidelines, pure discretionary sentencing (within a statutory range) was the norm. *See generally Matchett*, 2016 WL 4757211, at *2 (William Pryor, J., respecting the denial of en banc review). The Court has never questioned the constitutionality of giving judges such unbridled discretion outside of the capital punishment context. *Lockett* v. *Ohio*, 438 U.S. 586, 603 (1978) ("[L]egislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases"); *Booker*, 543 U.S. at 233 ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); *compare Furman* v. *Georgia*, 408 U.S. 238, 257 (1972) (Douglas, J., concurring) (concluding that the pure discretionary capital sentencing violates the Eighth Amendment); *id.* at 310 (Stewart, J., concurring) (same); *id.* at 313 (White, J. concurring) (same).

The reason that discretionary sentencing does not invite "arbitrary enforcement" for purposes of the vagueness doctrine is that the exercise of discretion is not "enforcement." To conclude otherwise would render traditional sentencing unconstitutional—as what could be more arbitrary? *Hurlburt*, 2016 WL 4506717, at *12 (Hamilton, J., dissenting) ("Such unguided discretion would be the vaguest regime of all. Defendants would face

even greater uncertainty about potential sentences and even greater risk of arbitrary variation in sentences. Yet that is all perfectly constitutional."); *Matchett*, 2016 WL 4757211, at *5 (William Pryor, J., respecting the denial of rehearing en banc) (same).[1]

Section 4B1.2(a)(2), whatever its faults, does not make things worse. *Johnson* stated that there would be some "straightforward cases under the [ACCA] residual clause." 135 S. Ct. at 2560. Even if only those straightforward cases lead to clear guidance, § 4B1.2(a)(2) does not provide less notice or more arbitrariness in the remainder, because it binds sentencing courts in none of them. Discretionary sentencing, pure or guided, is not unconstitutionally vague because that discretion and non-binding guidance do not regulate private conduct. The Court's cases permit vagueness challenges only to such regulations.

B. Vagueness Doctrine Is Limited To Measures That Directly Regulate Private Conduct; This Court Has Never Held Otherwise

This Court's vagueness precedents have come close to this case only in the superficial sense that *Johnson* dealt with language identical to the residual clause of § 4B1.2(a)(2). This likeness is superficial because the legal

[1] It is in this regard that Petitioner's *amici* have confused discretionary *judicial* sentencing (constitutional) with unfettered *prosecutorial* discretion (constitutionally problematic if the criminal law is vague). *See* Brief *Amicus Curiae* of Scholars of Criminal Law, Federal Courts, and Sentencing in Support of Petitioner 7-9 (arguing that judicial discretion in sentencing does not save the Guidelines because prosecutorial discretion to not charge certain persons under an unconstitutionally vague statute does not save that statute).

effect of the words matters. In *Johnson*, the words mandated a disjunctive sentencing range—with a new minimum higher than the previous maximum. Here the residual clause is meant to help judges employ their discretion. With or without the career offender Guidelines enhancement the lawful sentencing range remains the same. It is in this sense that *Johnson* comfortably fits within this Court's vagueness cases and a similar holding for § 4B1.2(a)(2) would not.

The lion's share of vagueness cases involves statutes or other laws that regulate private conduct by imposing criminal penalties. *See, e.g., Morales*, 527 U.S. at 47; *Int'l Harvester Co. of Am.* v. *Kentucky*, 234 U.S. 216, 222 (1914) (Kentucky laws that simultaneously banned horizontal combinations and authorized combinations for tobacco producers, as interpreted by courts of that state); *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89-93 (1921) (federal statute criminalizing "unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"); *Connally* v. *Gen. Const. Co.*, 269 U.S. 385, 393 (1926) (state law imposing fines and imprisonment for paying wages "less than the current rate of per diem wages in the locality where the work is performed" unconstitutional because "[t]he dividing line between what is lawful and unlawful cannot be left to conjecture."); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 456 (1927) (criminal antitrust statute that generally banned combinations but then made lawful combinations for purposes of obtaining a "reasonable profit"); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 458 (1939) (criminal statute criminalizing being a "gangster," defined further as a person "not engaged in any lawful occupation," "known to be a member of any

gang," and having certain prior convictions); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972) (ordinance defining the offense of vagrancy as including "rogues and vagabonds … common night walkers … persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers …."); *Smith* v. *Goguen*, 415 U.S. 566, 570 (1974) (criminal statute that prohibited, *inter alia*, "treat[ing] contemptuously the flag of the United States"); *Kolender* v. *Lawson*, 461 U.S. 352, 354 n.1 (1983) (criminal statute directed to those who "loiter[] or wander[] … and refuse[] to identify" themselves).

Johnson would fit exactly within the above string cite if it were not for the continuing validity of *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (holding that recidivism sentencing facts are not subject to the Sixth Amendment jury trial right). Even with *Almendarez-Torres* still good law, it fits comfortably. The ACCA required a 15-year minimum sentence for those felons-in-possession where the additional element of three prior "violent felony" convictions was present. 18 U.S.C. § 924(e)(1). This defined a separate crime from the general felon-in-possession statute, 18 U.S.C. § 922(g), and its 10-year maximum sentence, 18 U.S.C. § 924(a)(2), with an additional fact-finding necessary for a disjunctive sentence. *Johnson*, 135 S. Ct. at 2555.

Where the void-for-vagueness doctrine has been applied outside of the criminal context, it is still in connection with regulation of private conduct. *See, e.g., Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1033 (1991) (attorney regulation that prohibited "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or

reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding" with safe harbor for statements describing the "general nature of the … defense"); *Keyishian* v. *Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 597, 599 (1967) (statutes requiring removal from state employment if employee makes "treasonable or seditious" utterances or acts, or "advocates, advises or teaches the doctrine" of forceful overthrow of the government); *F.C.C.* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2313 (2012) ("*Fox II*") (indecency policy, enunciated by FCC at direction of Congress, and enforced by the FCC against broadcasters). The common thread through all of these decisions is that measures were void because the public could not know what was proscribed. Concomitantly, the executive could take advantage of the confusion to arbitrarily do whatever it liked.

The advisory Guidelines do not purport to set any line between legal and illegal conduct or mandate a specific sentence. Once the superficial textual identity of § 4B1.2(a)(2) to the ACCA is put aside, Beckles and the United States have a difficult task to place their proposed extension of vagueness doctrine within the ambit of this Court's cases. Each takes a different approach, and both efforts fail.

Beckles and the United States rely on different authorities to justify their retooling of vagueness doctrine. Beckles focuses on *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), *Gentile*, and *Fox II*. Pet. Br. 23-24. The United States makes its move with *Espinosa* v. *Florida*, 505 U.S. 1079 (1992) (per curiam). Resp. Br. 43-44. Beckles's cases just confirm that the Court has never found a non-binding measure unconstitutionally vague. And *Espinosa* is an

Eighth Amendment death penalty case, which says it all. For capital punishment, the Court has said that the Eighth Amendment will not tolerate the pure discretionary sentencing regime that is *per se* constitutional for non-capital sentencing. *Lockett*, 438 U.S. at 603. The United States is building its argument on the wrong foundation.

In *Giaccio*, the Court invalidated a Pennsylvania statute that empowered juries to award costs to the state even where a criminal defendant had been acquitted. While the statute on its face permitted this punishment for any reason, 382 U.S. at 403, judicial interpretation and the instructions in the specific case told the jury to award costs only if it found the defendant "guilty of some misconduct less than the offense which is charged … [that] has given rise to the prosecution." *Id.* at 404. The statute granted an enforcement power to the jury to punish out-of-court conduct. That law, even with its judicial gloss, was unconstitutionally vague because it punished such an indiscernibly broad class of conduct and was not just an "administrative cost imposed upon all." *Schilb* v. *Kuebel*, 404 U.S. 357, 370 (1971) (distinguishing *Giaccio* on this basis). Beckles is wrong to say that *Giaccio* does not concern a "criminal statute prohibiting conduct or prescribing penalties." Pet. Br. 23.

Beckles's observation that the vagueness doctrine has applied to regulations of the bar in *Gentile* and regulations of broadcasters in *Fox II* in no way addresses the question of whether the unconstitutional measures in those cases regulated private conduct. In both, they did. In *Gentile* the Nevada Supreme Court restricted what lawyers could say, which is private conduct. 501 U.S. at 1033. In *Fox II* the FCC was both legislature and prosecutor, creating indecency guidelines and then enforcing

them against the broadcasters—*i.e.*, regulating what could and could not be broadcast, also private conduct. 132 S. Ct. at 2312-13. Beckles's argument amounts to: "Look, § 4B1.2(a)(2) is a regulation and vagueness doctrine has applied to regulations, so I win." But not all regulations define what is lawful and what is not. *Nyeholt* v. *Sec'y Of Veterans Affairs*, 298 F.3d 1350, 1357 (Fed. Cir. 2002) (upholding liver disability regulation that provided guidance to DVA medical examiners because "a void-for-vagueness challenge must be directed to a statute or regulation that purports to define the lawfulness or unlawfulness of speech or conduct"); *Woodruff* v. *U.S. Dep't of Labor*, 954 F.2d 634, 642 (11th Cir. 1992) (upholding interpretive rule in Federal Employees Compensation Act manual against vagueness challenge because it "does not attempt to guide conduct").

In *Espinosa*, the Court invalidated a death sentence because the jury had been instructed on a vague aggravating factor in rendering its decision. 505 U.S. at 1082. The Court decided that Florida's regime of permitting a judge and jury to each weigh aggravating and mitigating factors did not rescue the death sentence where the first decision-maker had been instructed on the invalid aggravator. *Id.* The United States relies on *Espinosa* because it purportedly shows that if a vague statute has even "indirect" effects it should be held unconstitutional. Resp. Br. 43. But the United States has lifted *Espinosa* from the Eighth Amendment capital punishment context, where the major premise for this case—pure discretionary sentencing is constitutional—does not operate. *See Furman*, 408 U.S. at 257 (Douglas, J., concurring) (concluding that pure discretionary capital sentencing violates the Eighth Amendment); *id.* at 310 (Stewart, J., concurring) (same);

id. at 313 (White, J., concurring) (same); *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (same); *see supra* 13-14. That alone makes *Espinosa* of no relevance.[2]

The Court's void-for-vagueness precedents do not stray from invalidating only measures that regulate private conduct. While the *Booker* remedy has evolved to anoint the advisory Guidelines first among equals with respect to the factors set out in § 3553(a), they are still advisory, do not regulate private conduct, and therefore cannot be unconstitutionally vague.

C. The Advisory Guidelines Do Not Regulate Private Conduct And Therefore Cannot Be Unconstitutionally Vague

Both Beckles and the United States make much of the role of the advisory Guidelines in sentencing today, a role which is the result of the Court's evolution of the *Booker* remedy. Pet. Br. 25; Resp. Br. 40-42. In fact, their position appears to depend on it, but still they offer no principle to determine when a non-binding measure becomes "binding enough" to risk being unconstitutionally vague.

There is a peculiar path-dependence to the parties' arguments. The Guidelines are the "essential framework,"

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[2] Aggravating factors today should be understood as elements of a separate offense of capital murder, subject to the *Apprendi* doctrine. *Ring* v. *Arizona*, 536 U.S. 584 (2002). In that sense a vague aggravating factor is the same thing as a vague element of a criminal offense. *Espinosa* is the product of an era where the Court grappled with the uniqueness it had imposed on capital sentencing, sometimes creating case law that only could be reconciled with non-capital cases in light of later developments. *See Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 110-112 (2003) (plurality opinion of Scalia, J.) (describing pre-*Ring* capital sentencing Double Jeopardy cases that had "tripped over the text of the Double Jeopardy Clause" as having been "illuminated" by *Apprendi* and *Ring*).

with a "central role" and a "real and pervasive effect," *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1345-46 (2016), not because of the *Booker* remedial opinion, which says none of these things, but because of the Court's subsequent cases further defining that remedy. With just *Booker* and the un-severed portions of the Sentencing Reform Act, the Guidelines range is just one of ten factors a district court must consider when sentencing.[3] 18 U.S.C. § 3553(a). Everything else the parties say about the role of the advisory Guidelines comes from the Court's later cases.

For starters, no particular sequence for consideration of the § 3553(a) factors is prescribed by the statute or the *Booker* remedial opinion, but the Court in *Gall* v. *United States*, 552 U.S. 38 (2007) decided that "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Id.* at 49.[4] And even though *Booker* placed no specific emphasis on the Guidelines over any other factor in § 3553(a), the Court has also decided that failure to calculate a Guidelines range correctly can be plain error, *Molina-Martinez*, 136 S. Ct. at 1346, and that appellate

[3] While there are only seven sub-clauses to § 3553(a), there are four separate considerations in § 3553(a)(2), and thus the total number of factors for a court to consider when imposing a sentence is ten.

[4] The authority cited for this mandatory order of operations was the Court's earlier decision in *Rita* v. *United States*, 551 U.S. 338, 351 (2007), wherein the majority only said that sentencing "will *normally* begin" with the Guidelines calculation. *Id.* (emphasis added). *Gall* also provided, in a footnote, the full list of advisory factors in § 3553(a), noted that the Guidelines were in the fourth clause, and then concluded that this "supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." 552 U.S. at 50 n.6.

courts are permitted to presume a within-Guidelines sentence is reasonable, *Rita*, 551 U.S. at 347.

The parties' reliance on this post-*Booker* structure raises the question of whether these refinements would exist had the vagueness argument presented itself first. In that sense, relying on judicially crafted additions to the *Booker* remedy—additions that find no home in the statutory text—is remarkable. Before concluding that the work of the Commission is void, this Court should consider the compatibility of these post-*Booker* decisions with additional alternatives that could obviate the concerns expressed by the parties.[5] This Court needs no reminder regarding the canon of constitutional avoidance. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). This case is even easier than the ordinary one where the canon is deployed. Here it is decisional law regarding the *Booker* remedy, not a statute, that the United States and Beckles say forces the constitutional issue—decisional law this Court is far more free to add to or revise than it is the words of a federal statute.

However, there is no need to revisit those precedents, because even under them the advisory Guidelines remain advisory—they do not regulate private conduct because

[5] As just one example of how that might work, the Second Circuit permitted district courts, in the face of complex or close questions regarding the advisory Guidelines, to calculate two possible ranges and select either, or neither, of them based on the other factors in § 3553(a). *United States* v. *Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). A simpler solution to the conundrum of § 4B1.2(a)(2) could hardly be imagined—calculate the range both ways and then decide, based on what Congress has said should be considered, which sentence best effectuates the remaining factors.

they do not dictate a defendant's sentence. As Judge Hamilton observed:

> [T]he definition in the advisory Sentencing Guidelines leads to no direct consequences of any kind. It simply gives the sentencing judge advice about an appropriate sentence. Unlike in statutory cases, the parties are free to argue that the Guidelines' advice about the defendant's criminal history is either too harsh or too lenient. The judge may accept the Guidelines' advice or reject it. In fact, the law *requires* the judge to treat the advice as only advice. A judge who presumes the Guidelines' advice produces a reasonable sentence commits reversible error.

Hurlburt, 2016 WL 4506717, at *9 (Hamilton, J., dissenting) (emphasis in original) (citing *Gall*, 552 U.S. at 50 and *Rita*, 551 U.S. at 351). A court can even reject the advisory Guidelines if it finds itself in a policy disagreement with them. *Kimbrough*, 552 U.S. at 109-11; *Spears* v. *United States*, 555 U.S. 261, 265-66 (2009) (per curiam).

The realities of sentencing under the advisory Guidelines confirm Judge Hamilton's point. The fraction of sentences within the Guidelines range has fallen steadily. Last year that proportion was only 47%. *See* U.S. Sentencing Commission, *2015 Sourcebook of Federal Sentencing Statistics* table N. By contrast, from December 11, 2007 to September 30, 2011 the percentage of defendants receiving a within-Guidelines sentence was 54%. United States Sentencing Commission, *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing* 5 (2012). For career offenders that percentage is even lower—only 28% of them received within-Guide-

lines sentences in 2014. U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements* 36 (2016).

In *Johnson*, the ACCA imposed a completely disjunctive sentence, with a new, higher, minimum of 15 years' imprisonment, and a new maximum of life imprisonment. 18 U.S.C. §§ 922(g), 924(a)(2), 924(e)(1). The career offender enhancement, by contrast, dictates nothing and resentencing without it can lawfully result in no change at all. This is particularly so given that courts are commanded to consider "history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1); *see Hurlburt*, 2016 WL 4506717, at *9 (Hamilton, J., dissenting) ("[I]n every case that is remanded the district court will be free to impose exactly the same sentence again. In fact the district courts probably *should* do so") (emphasis in original).[6]

It is for this reason that the Court concluded in *Irizarry* that there was no Due Process expectation in an advisory Guidelines sentencing range. *Irizarry* held that the constitutional notice concerns that had driven *Burns* v. *United States*, 501 U.S. 129, 138 (1991) were no more in light of *Booker*. In the pre-*Booker* binding Guidelines era, *Burns* identified a "serious" constitutional question about

[6] A recent online essay by the author of an *amicus* brief in this case conducts a decidedly unscientific sampling of re-sentencing in the circuits that have invalidated § 4B1.2(a)(2) and concludes, from just eight examples, that the effect of invalidation has been significant. Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in* Beckles v. United States, 165 U. PA. L. REV. ONLINE 33, 38-39 (2016). This is hardly telling as to how re-sentencings would go generally, and in any event does not address the issue of whether the Guidelines regulate private conduct.

whether notice of upward departures was "mandated by the Due Process Clause." *Id.* To avoid this question, the Court construed Federal Rule of Criminal Procedure 32 to require such notice. *Id.* The rules were subsequently amended to reflect *Burns*. *See Irizarry*, 553 U.S. at 709.

When faced with the question of whether notice was required for a guidelines variance under *Booker* and the new Rule 32(h), *Irizarry* dispensed with the due process issue:

> Any expectation subject to due process protection at the time we decided *Burns* that a criminal defendant would receive a sentence within the presumptively applicable Guidelines range did not survive our decision in *United States* v. *Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), which invalidated the mandatory features of the Guidelines. Now faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of "expectancy" that gave rise to a special need for notice in *Burns*.

Irizarry, 553 U.S. at 713-14. When the Guidelines had the "force and effect of laws," *Booker*, 543 U.S. at 234, Due Process demanded that notice be provided before a court deviated from the dictates of those mandatory Guidelines. After *Booker*, Due Process demands nothing regarding notice because a "judge may accept the Guidelines' advice or reject it." *Hurlburt*, 2016 WL 4506717, at *9 (Hamilton, J., dissenting).

The United States responds to *Irizarry* by saying that "[t]he problem with a vague guideline is not that it upsets an expectation that a defendant will receive a within-

Guidelines sentence." Resp. Br. 47.[7] No, instead the issue is that it becomes "impossible for courts and litigants to calculate the Guidelines range in a non-arbitrary manner." *Id.* 48. Why would a defendant want to calculate his Guidelines range except in the (constitutionally unprotected) expectation that it will allow him to learn his sentence or clues about it? And what Due Process interest does the Government (the other litigant) have in the calculation itself? (The Government does not have Due Process interests, and neither does the judiciary.) Finally, if it is true that a vague guideline leads to "sentences that depend in part on an inscrutably vague recommendation by the Sentencing Commission," *id.* 48, then that is a problem for all of the other § 3553(a) factors, which are equally "inscrutably vague." *See infra* at 30-32. *Irizarry* holds that there are no constitutional notice issues regarding the advisory Guidelines because they are advisory. Calling the advisory Guidelines a "legal text," Resp. Br. 42, whatever that means, does not make them law.

As earlier mentioned, the notice and arbitrary enforcement prongs of the vagueness doctrine reflect connected issues viewed from differing perspectives—respectively, the People and the Government. *Fox II*, 132 S. Ct. at 2317 ("[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do

[7] Petitioner does not even cite *Irizarry*, which is curious given that it is one of the primary reasons judges have concluded that the advisory Guidelines are not subject to vagueness challenges. *See, e.g., Matchett*, 2016 WL 4757211, at *4 (William Pryor, J., respecting the denial of rehearing en banc); *Lee*, 821 F.3d at 1134 (Ikuta, J., dissenting).

not act in an arbitrary or discriminatory way."). Thus *Irizarry*'s notice holding presages the resolution of the question of arbitrary enforcement.

A measure cannot invite arbitrary enforcement when it does not purport to regulate private conduct, but is instead internally directed to another department of the government. *Nyeholt*, 298 F.3d at 1357; *Woodruff*, 954 F.2d at 642. Essentially, the parties wish to deconstruct the phrase "arbitrary enforcement" so that it applies when something looks "arbitrary" irrespective of whether there is "enforcement." Advisory sentencing factors are not to be "enforced," and can therefore be more abstract than a criminal statute. Considering how judges typically speak to one another and the tests courts are called upon to implement illustrates this point.

It is a constitutional truism that judges are equipped to deal with standards that, if they defined criminal offenses, would be void for vagueness. The Fourth Amendment forbids "unreasonable searches." U.S. CONST. amend. IV. The Court's case law nullifies state legislation that places an "undue burden" on access to abortion. *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2309, (2016). Closer to this case, § 3553(a) instructs judges to consider whether a sentence is "just punishment." 18 U.S.C. § 3553(a)(2)(A); *see infra* 30-33. To the public, these may be impossibly vague standards, but judges are made of sterner stuff in at least this regard. *Cf. also Doe ex rel. Doe* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (en banc) (Easterbrook, C.J., dissenting) ("If the current establishment-clause doctrine had been announced by Congress or an administrative agency, the Supreme Court would declare it unconstitutionally vague."). The Court's case law is not unconstitutionally vague and

neither is the Commission's advisory guidance to sentencing courts.

Finding no refuge in the Court's vagueness cases, the parties retreat to *Peugh*, which held that the advisory Guidelines were subject to the Ex Post Facto Clause. But the Ex Post Facto Clause addresses legislative vindictiveness with a distinct test, and *Peugh* does not control this case.

D. *Peugh* Does Not Control Here, Because The Ex Post Facto Clause Addresses Legislative Vindictiveness With A Distinct Test

Like the void-for-vagueness doctrine, the Ex Post Facto Clause is concerned with notice. *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981) ("[T]he Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"). But the Clause also addresses the danger of legislative vindictiveness, *id.* at 29, as well as "a fundamental fairness interest … in having the government abide by the rules of law it establishes …." *Carmell* v. *Texas*, 529 U.S. 513, 533 (2000). Because legislatures can act to target disfavored groups through indirect or imperfect means, the Court's touchstone for an ex post factor violation is "whether a given change in law presents a *sufficient risk* of increasing the measure of punishment attached to the covered crimes." *Peugh*, 133 S. Ct. at 2082 (internal quotation omitted) (emphasis added).

In *Peugh*, Congress had increased the statutory maximum penalties for fraud in the Sarbanes-Oxley Act. To effectuate this harsher punishment of fraudsters, it directed the Commission to reconsider whether its guidelines were appropriate, and the Commission obeyed.

Amendment 653 to the Sentencing Guidelines 4-5 (effective Nov. 1, 2003)[8]; *see also* Amendment 617 to the Sentencing Guidelines (effective Nov. 1, 2001) (implementing other amendments increasing guidelines ranges for fraud).[9] These amendments occurred after Peugh had committed his offenses. The question was whether he would be sentenced in consultation with the Guidelines as they were written when he committed his crimes, or the harsher Guidelines that Congress procured through its request to the Commission.

Peugh explained that even the advisory Guidelines' non-binding role in post-*Booker* sentencing ran afoul of the Court's Ex Post Facto Clause cases. 133 S. Ct. at 2084. Because the Court's post-*Booker* cases made them an "anchor," a "framework," and a "lodestone of sentencing," "[a] retrospective increase in the Guidelines range applicable to a defendant creates a *sufficient risk* of a higher sentence to constitute an *ex post facto* violation." *Id.* at 2083, 2084 (emphasis added).

There is no "sufficient risk" test in the void-for-vagueness doctrine, because there is no possibility of legislative targeting or vindictiveness with a law that is impermissibly vague. If the legislature wants to target a group for harsher treatment, it will identify the group with enough precision to make sure they are targeted—fraudsters, for example. That is why the sufficient risk test is arguably necessary in the ex post facto context but not here—it blocks Congress from accomplishing through a stacked deck or imperfect means what it also cannot do directly.

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[8] http://bit.ly/2dXGIs5 (last visited, October 21, 2016).

[9] http://bit.ly/2etjzAo (last visited, October 21, 2016).

By definition, a vague measure targets no one because no one knows what it means. Thus vagueness doctrine should be confined to actual regulations of private conduct, not shot into the universe of half-measures and non-binding standards that *might* affect a sentence.

The consequences of such a move are extreme. To hold that § 4B1.2(a)(2) is unconstitutionally vague would doom the other factors in § 3553(a) and similarly abstract provisions of the Guidelines, and raise the question of why there is not a "sufficient risk" test for the jury trial right—a threat to the *Booker* remedial opinion itself. Distinction-without-a-difference lawyering may permit the parties to wave off these problems, but the Court should not.

E. Applying The Vagueness Doctrine To § 4B1.2(a)(2) Calls Into Question The Other Advisory Sentencing Factors In § 3553(a), Other Guidelines, And Whether This Court's *Booker* Remedy Itself Complies With The Sixth Amendment

If the residual clause of § 4B1.2(a)(2) is hopelessly and unconstitutionally vague, then what will the courts do with the other non-binding sentencing factors in § 3553(a)? They instruct a court to "impose a sentence sufficient, but not greater than necessary" to: "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed … correctional treatment." 18 U.S.C. § 3553(a)(2); *see Hurlburt*, 2016 WL 4506717, at *11 (Hamilton, J., dissenting) ("Section 3553(a)(2) tells judges in a vague and contradictory way to follow several conflicting theories of punishment at once…."). But that is not all. Courts are also instructed to consider six other factors, of which the

Guidelines range is one. 18 U.S.C. §§ 3553(a)(1), (3)-(7) (including "the nature and circumstances of the offense and the history and characteristics of the defendant"). Imposition of a sentence that is "sufficient, but not greater than necessary" to "promote respect for the law" by itself would be the sort of "impossible" endeavor the United States frets about. Resp. Br. 43.[10] And that is before considering the other potentially countervailing factors. It is a good thing, therefore, that these instructions are to guide judicial discretion and not to provide notice to the public, do not regulate private conduct, and are therefore not subject to the vagueness doctrine. Just as Congress spoke broadly in § 3553(a), and just as the Court sometimes enunciates standards for lower courts to follow in equally broad terms, *Doe*, 687 F.3d at 869 (Easterbrook, C.J., dissenting), the Commission should be permitted to do its work—using terms that if the Guidelines were statutes might be considered vague.

Should § 4B1.2(a)(2) fall, many other provisions of the Guidelines will share its fate. To name a few examples: The "vulnerable victim" enhancement, § 3A1.1, applies if the defendant knew or should have known that his victim was "unusually vulnerable due to age, physical or mental condition, or *who is otherwise particularly susceptible to the criminal conduct*." U.S. Sentencing Commission, Guidelines Manual, Application Note 2 (emphasis added).

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[10] The only possible distinction that the parties can draw between the other § 3553(a) factors and the Guidelines is the work of the Court in *Booker*'s progeny. But it cannot be the case that the Court itself transformed the Guidelines from something immune to vagueness challenges (like the other non-binding factors in § 3553(a)) into something so weighty that they can be unconstitutionally vague.

Hundreds of federal prisoners each year are sentenced by courts taking into account this advisory enhancement. U.S. Sentencing Commission Chapter 3 Adjustments 2015 2 (showing 516 such adjustments).[11] Other enhancements are similar. *See* USSG, § 3B1.1 (Nov. 2015) (an enhancement where the defendant was "an organizer or leader of a criminal activity that involved five or more participants *or was otherwise extensive*") (emphasis added); *id.* at § 3B1.3 (an enhancement if the defendant "abused a position of public or private trust" and defining that as a position "characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." It is no answer to distinguish these on the grounds that they are not subject to the categorical approach of the residual clause that the Court found so objectionable in *Johnson*. *See Hurlburt*, 2016 WL 4506717, at *7 (majority opinion). The laws in *Papachristou*, *Morales*, and *Connally*, did not require any categorical approach. *Johnson* did not establish it as the *sine qua non* of vagueness, and these other Guidelines, under the rule the parties advocate, are doomed.

Lastly, if the problem is how much of an "anchor," or "lodestone," the Guidelines are, then why does the guillotine of the vagueness doctrine fall but the Sixth Amendment jury trial right and Due Process right to proof of guilt beyond a reasonable doubt are still appeased? As Justice Scalia observed in *Kimbrough*, placing too much weight on the Guidelines means the *Booker* remedy remedied nothing at all. *Kimbrough*, 552 U.S. at 113 (Scalia, J., concurring); *see also Hurlburt*, 2016 WL 4506717, at *12 (Hamilton, J., dissenting) ("Why not allow some

[11] http://bit.ly/2etjlJI (last visited October 21, 2016).

vagueness in the Guidelines, whose advisory status is essential to avoid Sixth Amendment violations?"). How much weight is "too much" should not differ between the vagueness doctrine and the right to a trial by jury.

II. SUBJECTING THE GUIDELINES TO VAGUENESS CHALLENGES WILL INTERFERE WITH THE WORK OF THE COMMISSION AND WITH THE STATES THAT EMPLOY SIMILAR GUIDELINES

Permitting vagueness challenges to existing and new Guidelines threatens the work of the Commission and could wreak havoc on the states that use sentencing guidelines.

"Congress established the Commission to formulate and constantly refine national sentencing standards." *Kimbrough*, 552 U.S. at 108. Congress instructed the Commission to "review and revise [the Guidelines], in consideration of comments and data coming to its attention" in consultation with "various aspects of the Federal criminal justice system" including the Justice Department and the Federal Public Defender. 28 U.S.C. § 924(o). The Commission also has the power to make its amendments retroactive (if they relax sentences not if they increase them, per *Peugh*). *Dorsey* v. *United States*, 132 S. Ct. 2321, 2336 (2012) (citing 28 U.S.C. § 924(u)).

In other words, the Commission is charged with addressing the same questions that this Court is asking in this case, in substance if not in legal form—*i.e.*, is § 4B1.2(a)(2)'s residual clause still fit for its intended purpose and, if not, should an amendment eliminating it be retroactive? The difference between the ACCA and § 4B1.2(a)(2) is that, for the latter, the Commission "has the capacity courts lack to 'base its determinations on em-

pirical data and national experience, guided by a professional staff with appropriate expertise.' " *Kimbrough*, 552 U.S. at 109 (quoting *United States* v. *Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)). And the Commission has already made its decisions on these questions for the residual clause—eliminating it and not making that amendment retroactive. *See* U.S. Sentencing Commission, *Amendment to the Sentencing Guidelines* 2 (Jan. 21, 2016). In making that determination the Commission considered some of the same points that drove *Johnson*, but also all of the data it had collected regarding career-offender enhancements. *Id.* Vagueness challenges like this one are, in a fashion, an attempt to obtain judicial second-guessing of the Commission's expert decisions.[12]

In the future, if the Court rules in the parties' favor, every time the Commission enacts a new guideline that might remotely suggest a vagueness problem, defendants will challenge it out of the gate. The consequences are easy to predict—first to mind are circuit splits that this Court will have to resolve. More importantly, the Com-

[12] The author of an *amicus* brief in this case attempts, in an online essay, to call into question the process by which the Commission made its decision against retroactivity. Litman & Beasley, 165 U. PA. L. REV. ONLINE 33 at 44-45 (noting that the Commission "opted not to investigate the possibility of making its amendment retroactive at all—a decision that appears to have been based on incomplete reasoning and supposition"). This unwarranted critique of the Commission denies the possibility that it already had the data and the expertise it needed to make a retroactivity decision without an additional investigation. The Commission's members, several of whom are federal judges, deserve more deference than their armchair critics have given them.

mission's ability to evaluate the effects of these new guidelines in practice will be substantially impaired if data collection is cut off by constitutional challenges. Just look at how quickly after *Johnson* (with the United States' enthusiastic cooperation, to be sure) courts found § 4B1.2(a)(2) unconstitutionally vague. It is not unrealistic to predict that the Commission may never be able to collect much data on a new standards-based guideline in certain fast-moving and sympathetic circuits. And if this Court imposes retroactivity as a necessary consequence of a vagueness finding, the Commission will be without the discretion to decide otherwise—as it did here.

That is not to mention the potential mischief that a vagueness finding here could work on the nearly twenty states that have similar sentencing guidelines. *See generally* Neal Kauder & Brian Ostrom, National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (2008).[13] For example, the Minnesota Sentencing Guidelines say that assessing prior convictions from outside of the state requires a sentencing court to "[f]ind the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense." Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary*, August 1, 2016 at 31. That endeavor sounds categorical, "equivalent" sounds vague, and this exercise could result in the very same issues that *Johnson* identified with the ACCA. Of course, Minnesota's guidelines are advisory.

And advisory guidelines cannot be unconstitutionally vague.

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[13] *See also* http://sentencing.umn.edu/jurisdictions (last visited Oct. 21, 2016).

CONCLUSION

The Court should hold that the advisory Sentencing Guidelines cannot be unconstitutionally vague, and on that basis should affirm the judgment of the court of appeals.

Respectfully submitted,

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