

# FOREWORD

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In the summer of 2015, when the Supreme Court declared unconstitutional a law that dictated lengthy terms of incarceration for certain repeat offenders,<sup>1</sup> the Eleventh Circuit and other federal courts across the country were tasked with interpreting that decision and applying it to individual cases. Of course, this task falls squarely within the core functions of the lower federal courts. But what we faced in 2016 was rather unique: Immediately following the Supreme Court's decision, we received scores of requests for relief from inmates potentially affected by the decision.<sup>2</sup> Our review of these requests brought into vivid relief the impact of our work on the lives of individuals who populate our Circuit.

In the landmark decision of *Johnson v. United States*, the Supreme Court held that the so-called “residual clause” of the Armed Career Criminal Act (“ACCA”),<sup>3</sup> a statute that imposes a mandatory minimum sentence of 15 years for individuals with certain prior criminal convictions, was unconstitutionally void for vagueness.<sup>4</sup>

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<sup>1</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

<sup>2</sup> Under 28 U.S.C. § 2255(f)(3), federal inmates have one year from the date that the Supreme Court initially recognizes a new right in which to file a 28 U.S.C. § 2255 motion.

<sup>3</sup> 18 U.S.C. § 924(e). Under ACCA, an individual convicted of unlawful possession of a firearm who has three previous convictions “for a violent felony or a serious drug offense, or both,” is subject to a mandatory minimum sentence of 15 years’ imprisonment. *Id.* § 924(e)(1). ACCA’s definition of “violent felony” included the now-void “residual clause,” which defined an offense as a violent felony if it “involves conduct that presents a serious potential risk of physical injury to another.” *Id.* § 924(e)(2)(B)(ii).

<sup>4</sup> *Johnson*, 135 S. Ct. at 2557.

This ruling left no doubt that some persons sentenced under the residual clause—namely, those whose direct appeals were pending—could pursue relief from their ACCA enhanced sentences.<sup>5</sup> However, the Supreme Court’s decision necessarily was limited to the facts and procedural posture of Mr. Johnson’s case. Federal courts, including the Eleventh Circuit, devoted extraordinary effort to evaluating the breadth of *Johnson*’s ruling and sorting out who might benefit from the Supreme Court’s pronouncement. Faced with an unprecedented number of applications from federal inmates seeking relief under *Johnson*,<sup>6</sup> our Court analyzed issues such as whether: *Johnson* applies to cases on collateral review (yes);<sup>7</sup> the similarly-worded career offender enhancement in the Sentencing Guidelines also is unconstitutionally vague (no);<sup>8</sup> the similarly-worded enhancement in 18 U.S.C. § 924(c) is unconstitutionally vague (maybe);<sup>9</sup> and an inmate’s request for authorization to file a second

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<sup>5</sup> *Id.*

<sup>6</sup> In 2016 we reviewed 2,108 *Johnson*-based requests for authorization to file second or successive 28 U.S.C. § 2255 motions (“RFAs”)—by far the most common vehicle for a *Johnson*-based claim in this Circuit. In June of 2016 alone, over 1,000 RFAs were filed. These 2,108 *Johnson*-based RFAs constituted 26.2% of all Eleventh Circuit cases initiated in 2016. By contrast, in 2015 RFAs of all kinds, numbering 446, constituted a mere 7.3% of all cases opened in the Eleventh Circuit that year. I thank Deputy Clerk of Court Amy Nerenberg and Statistical Analyst Michael Pizarek of the Eleventh Circuit Clerk’s Office for providing these statistics.

<sup>7</sup> *Mays v. United States*, 817 F.3d 728, 728 (11th Cir. 2016) (holding that *Johnson*’s rule applies retroactively to first § 2255 motions). Subsequently, the Supreme Court held that *Johnson*’s rule applies retroactively to second or successive § 2255 motions. *Welch v. United States*, 136 S. Ct. 1257 (2016).

<sup>8</sup> *United States v. Matchett*, 802 F.3d 1185, 1189 (11th Cir. 2015) (holding that the advisory guidelines cannot be void for vagueness), *reh’g en banc denied*, 837 F.3d 1118, 1119 (11th Cir. 2016); *see also In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016) (extending *Matchett*’s holding to conclude that the formerly mandatory guidelines cannot be void for vagueness). The Supreme Court recently agreed with our Court’s holding in *Matchett*. *See Beckles v. United States*, 137 S. Ct. 886 (2017). As Justice Sotomayor noted in her concurrence in the judgment, *Beckles* did not answer whether individuals sentenced under the mandatory guidelines before the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), could attack their sentences as void for vagueness. *See id.* at 903 n.4 (Sotomayor, J., concurring in judgment). In our Circuit, *Griffin* still controls this issue.

<sup>9</sup> *In re Pinder*, 824 F.3d 977, 978 (11th Cir. 2016); *see* 18 U.S.C. § 924(c)(1)(A) (imposing a mandatory five-year sentence, to run consecutively to

or successive § 2255 motion may be granted even though it was filed more than one year after *Johnson* was decided (yes).<sup>10</sup> We also addressed whether certain crimes may serve as predicate convictions for an ACCA enhancement after *Johnson*'s striking of the residual clause from the statute: Florida burglary (no),<sup>11</sup> Georgia burglary (yes),<sup>12</sup> South Carolina burglary (no),<sup>13</sup> Florida felony battery (yes),<sup>14</sup> and Florida armed robbery with a firearm (yes).<sup>15</sup> These are but some of the many issues we decided in the wake of *Johnson*.

Our work on *Johnson*-related cases had a significant impact.<sup>16</sup> With the unconstitutional portion of their sentences now void, some inmates in our Circuit were resentenced to significantly lower terms of imprisonment.<sup>17</sup> Others, having paid their debt to society by serving the entirety of their lawful sentences, were released from federal penitentiaries.<sup>18</sup>

Although *Johnson* issues undoubtedly commanded significant attention in 2016, we also decided a wide range of other important civil and criminal matters. With respect to the scope of religious accommodations, we decided that inmates of state prisons whose

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any other sentence imposed, for use of a firearm during a "crime of violence," the definition of which includes a residual clause).

<sup>10</sup> *In re Jackson*, 826 F.3d 1343 (11th Cir. 2016). In *Jackson*, we held that the one-year statute of limitations under 28 U.S.C. § 2255(f)(3) will not factor into our decision whether to grant an inmate permission to seek relief based on *Johnson* in the district court.

<sup>11</sup> *United States v. Esprit*, 841 F.3d 1235 (11th Cir. 2016).

<sup>12</sup> *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016).

<sup>13</sup> *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016).

<sup>14</sup> *United States v. Green*, 842 F.3d 1299 (11th Cir. 2016).

<sup>15</sup> *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016).

<sup>16</sup> For example, burglary frequently serves as a predicate offense for an ACCA enhanced sentence, and it is among the most common crimes of conviction for incarcerated persons in our Circuit. Our decisions analyzing whether convictions under state burglary statutes can serve as ACCA predicates after *Johnson* thus stand to have a substantial impact on numerous federal inmates in Alabama, Georgia, and Florida. See *Gundy*, 842 F.3d at 1179 (Jill Pryor, J., dissenting).

<sup>17</sup> Without the 15-year ACCA enhancement, the maximum term of incarceration for these inmates is 10 years. See 18 U.S.C. § 924(a)(2).

<sup>18</sup> See, e.g., *Jackson v. United States*, No. 16-CV-22649-UU, 2016 WL 7756625, at \*11-12 (S.D. Fla. Sept. 9, 2016); *Brand v. United States*, No. 8:16-CV-1799-T-30TGW, 2016 WL 4247912, at \*2 (M.D. Fla. Aug. 11, 2016); *Battle v. United States*, No. 2:16-CV-471-WKW, 2016 WL 3946779, at \*2 (N.D. Ala. July 20, 2016).

sincerely held religious beliefs require them to keep kosher are entitled to kosher meals under the Religious Land Use and Institutionalized Persons Act.<sup>19</sup> We issued a trio of decisions addressing the scope and substance of rights under the federal employment discrimination laws, holding that the Age Discrimination in Employment Act does not create a disparate impact cause of action for job applicants as opposed to employees;<sup>20</sup> that an employer who rescinded a job offer to a candidate who refused to cut her dreadlocks did not discriminate on the basis of race within the meaning of Title VII of the Civil Rights Act of 1964;<sup>21</sup> and that, when examining Title VII claims for adverse employment actions taken based on a mix of lawful and unlawful motives, the employee need only show that the employer took an adverse employment action against her and that a protected characteristic was a motivating factor in the adverse action, instead of having to satisfy the widely used *McDonnell-Douglas* burden shifting framework.<sup>22</sup> The second of these cases, *EEOC v. Catastrophe Management Solutions*, is the subject of one of the articles in this issue.

Our Court also clarified the scope of the Security and Exchange Commission's enforcement authority and the manner by which parties subject to enforcement actions can challenge that authority.<sup>23</sup> In

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<sup>19</sup> See *United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341, 1343-44 (11th Cir. 2016).

<sup>20</sup> See *Villareal v. R.J. Reynolds*, 839 F.3d 958, 961 (11th Cir. 2016) (*en banc*).

<sup>21</sup> *Equal Employment Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, No. 14-13482, 2016 WL 7210059, at \*1 (11th Cir. Dec. 13, 2016).

<sup>22</sup> *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1240 (11th Cir. 2016).

<sup>23</sup> See *Hill v. SEC*, 825 F.3d 1236, 1237 (11th Cir. 2016) (holding that a respondent in an SEC administrative enforcement action cannot file a collateral challenge to the proceeding's constitutionality in district court without first adjudicating its claim in the proper administrative forum); *SEC v. Graham*, 823 F.3d 1357, 1362-64 (11th Cir. 2016) (holding that the five-year statute of limitations on government lawsuits to enforce "any civil fine, penalty, or forfeiture," 28 U.S.C. § 2462, applies to actions for declaratory relief and disgorgement, but not to actions seeking injunctions). The Supreme Court recently agreed with our holding that § 2462's statute of limitations applies to claims for disgorgement. See *Kokesh v. SEC*, No. 16-529, 2017 WL 2407471 (U.S. June 5, 2017). The issue in *Hill* may also one day reach the Supreme Court because the circuits are split on the question. Compare *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. Dec. 27, 2016) (holding unconstitutional the manner in which SEC Administrative Law

the immigration context, we addressed the remedies available to aliens subject to unlawful government detention, holding that “the mandatory civil detention of criminal aliens under [8 U.S.C.] § 1226(c) is constitutional for a reasonable period of time to complete the removal proceedings, but” that “at some point such detained aliens become entitled to an individualized bond hearing.”<sup>24</sup>

This summary of 2016 would be incomplete without at least mentioning an election law development, given that this was a presidential election year. In a decision likely to reverberate beyond this past election cycle, we rejected a First Amendment challenge to an Alabama statute banning political action committees from raising money from other political action committees.<sup>25</sup>

The articles in this 10th edition of the *University of Miami Law Review's* Eleventh Circuit issue address timely, important, and diverse topics certain to be of interest to academics, practitioners, and the judiciary alike. These topics include the Supreme Court's role in developing admiralty and maritime law,<sup>26</sup> the significance of our opinion addressing the scope of Title VII protections in the dreadlocks case, *Catastrophe Management Solutions*,<sup>27</sup> and our Circuit's treatment of Florida's Involuntary Civil Commitment of Sexually Violent Predators Act.<sup>28</sup> I trust readers will find that these commentaries provide illuminating insight into the present state and development of the law in the Eleventh Circuit.

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Judges are appointed), with *Raymond J. Lucia Co. v. SEC*, 832 F.3d 277, 280 (D.C. Cir. 2016) (affirming the constitutionality of this process).

<sup>24</sup> *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1202 (11th Cir. 2016).

<sup>25</sup> *Ala. Democratic Caucus v. Att'y Gen., Ala.*, 838 F.3d 1057, 1060, 1603 (11th Cir. 2016) (“A law limiting contributions is valid ‘if the State demonstrates a sufficiently important interest’ and the law is ‘closely drawn’ to serve that state interest, even if there is a ‘significant interference’ with political association.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976))).

<sup>26</sup> Michael Sevel, *Lost at Sea: The Continuing Decline of the Supreme Court in Admiralty*, 71 U. MIAMI L. REV. 938 (2017).

<sup>27</sup> See *infra* n.21; D. Wendy Greene, *Splitting Hairs: The 11<sup>th</sup> Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987 (2017).

<sup>28</sup> Lindsey Lazopoulos Friedman, *Striking a Balance Between the Paramount Importance of the Safety of Children and Constitutionally-Imposed Limits on State Power*, 71 U. MIAMI L. REV. 1037 (2017).