Nos. 17-765 and 17-766

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

VICTOR J. STITT, II,

Respondent.

UNITED STATES,

Petitioner,

v.

JASON DANIEL SIMS,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Tennessee's aggravated burglary statute, Tenn. Code Ann. § 39-14-403, qualifies as a generic "burglary" under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(ii).

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INTEREST OF AMICUS CURIAE[1]

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A (recodified at 18 U.S.C. § 3599), and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the NAFD is to promote the interests of justice by appearing as amicus curiae in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. Each year, federal defenders represent tens of thousands of individuals in federal court, including hundreds who are subject to the Armed Career Criminal Act (ACCA). In many of those cases, federal defenders have argued, as respondent does here, that, for purposes of the ACCA, generic burglary involves entry into a "building," as set forth in this Court's decision in *Taylor v. United States*, 495 U.S. 575, 589-90 (1990). *See, e.g., Smith v. United States*, 877 F.3d 720 (7th Cir. 2017); *United States v. Byas*, 871 F.3d 841 (8th Cir.

1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Letters of consent to the filing of this *amicus* brief from counsel for Petitioner and Respondent Stitt are on file with the author. Respondent Sims has submitted a a letter to the Court granting a blanket consent to *amicus curiae* briefs. *See* Supreme Court Rule 37.2(a).

2017); *United States v. White*, 836 F.3d 437 (4th Cir. 2016); *United States v. Grisel*. 488 F.3d 844 (9th Cir. 2007).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief addresses an issue that the Court should ignore: Is a burglary of a "habitation" as defined by Tennessee law an inherently violent crime? The Court should ignore the issue because it is irrelevant: until very recently, the ACCA's residual clause captured crimes that presented an inherent risk of violence. Yet this irrelevant issue guides the government's entire approach to this case. The government implicitly asks the Court to expand its definition of generic "burglary" to compensate for the loss of the residual clause because it believes that breaking into a tent or Recreational Vehicle (RV), which are Tennessee "habitations," is so inherently violent that Congress must have wanted to classify those crimes as "burglary."

That belief is misguided because Congress had no reason to try to reach all inherently violent break-in offenses with the term "burglary," and, moreover, residential burglary is not actually an inherently violent crime. A recent study conducted under a grant from the U.S. Department of Justice revealed that, according to certain historical data, "violence or threats of it occurred in only 1.2% of residential burglaries[.]" Richard S. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007*, at 68 (2015) [hereinafter "Culp Report"], available at https://www.ncjrs.gov/pdffiles1/nig/grants/248651.pdf. The Culp Report further explains that, in the rare burglary that does trigger violence, the offender will be prosecuted for the additional violent crime, making it unnecessary to treat the burglary as a proxy for violence. Partly due to the Culp Report, the

U.S. Sentencing Commission has decided to no longer classify the offense of "burglary of a dwelling" as a "crime of violence." U.S.S.G. Appx Amend. 798 (Aug. 1, 2016) ("burglary offenses rarely result in physical violence").

Since even core residential burglaries so rarely result in violence or threats of it, it would be especially unwarranted for the Court, after nearly thirty years, to redefine the statutory term "burglary" to encompass a crime that could be as minor as stealing from an unoccupied tent or from an RV. When the government repeatedly talks about the inherent dangerousness of residential burglaries, it waives a red herring that, in addition to being irrelevant, is insubstantial.

ARGUMENT

I. Congress Intended for the Term "Burglary" to Cover Typical Burglaries and for the Residual Clause to Cover Atypical Ones.

When assessing Congress's intended scope of the term "burglary," the government ignores that Congress, when amending the ACCA in 1986, added a broader definition of violent felony that included a "catch-all provision," *Sessions v. Dimaya,* 138 S. Ct. 1204, 1222 n.12 (2018), known as the residual clause. The residual clause reached any offense that "presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

That clause helped to greatly expand the reach of the ACCA because, as originally enacted in 1984, the ACCA reached only "robbery or burglary," 18 U.S.C. § 1202 (1984), and Congress had defined "burglary" in a generic way, as pertaining to breaking into any "building" with

the requisite intent. 18 U.S.C. § 1202(c)(9) (1984). Although that statutory definition was broader than the common-law definition (since it reached all types of buildings, not just "dwelling house[s]"[2]), it reached only burglaries that were typical. That is, it certainly did *not* reach atypical burglaries involving places like a live-aboard sailboat, RV, or tent.

In 1986, Congress used that same simple term "burglary" as a component of its new violent-felony definition. Pub. L. No. 99-570 § 1402(a), 100 Stat. 3207-39 (Oct. 27, 1986). At that time, it omitted from the ACCA its express definition of burglary, while also creating the residual clause as a new component. *Id.*; *see Taylor,* 495 U.S. at 582. Going forward, Congress expected that the enumerated term "burglary" would reach typical burglaries, just as it had since 1984, and that the residual clause would reach atypical ones, *e.g.,* crimes involving the invasion – or attempted invasion – of an occupied RV or live-aboard sailboat. *See id.* at 600 n.9 (explaining that the residual clause might reach break-in offenses falling beyond the scope of "burglary"); *James v. United States*, 550 U.S. 192, 203 (2007) (relying on residual clause to reach attempted burglary); *see also, e.g., United States v. Ghoston,* 530 F. App'x 468, 469-70 (6th Cir. 2013) (relying on residual clause to reach Tennessee attempted aggravated burglary).

2. "Burglary was defined by the common law to be the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." *Taylor v. United States*, 495 U.S. 575, 580 n.3 (1990).

After the 1986 amendments, the federal courts of appeals debated how to define the now-undefined term "burglary." None arrived at the complicated definition that the government now proposes. The courts broke essentially into three camps, respectively concluding that Congress meant: (1) to retain the 1984 statutory definition ("building"); (2) to adopt the common-law definition, which would restrict burglaries to dwelling houses in nighttime; or, (3) to accept as a burglary whatever any state happened to label "burglary," which would make the ACCA reach offenses as slight as "shoplifting." *Taylor*, 495 U.S. at 580 n.2, 591.

In 1990, this Court resolved the disagreement by siding with the first camp. It found that Congress's deletion of the 1984 definition of burglary seemed "inadvertent," that Congress must have intended a single generic definition like its 1984 definition, and that modern burglary statutes "'typically describe the place as a 'building' or 'structure.'" *Taylor*, 495 U.S. at 589-90, 598 (quoting 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(c) (1986)). Accordingly, it decided Congress meant burglary to reach typical burglaries – those that occur in any "building or other structure." *Id.* And it explained that the term "burglary" did not reach atypical burglaries, *e.g.* a Missouri burglary statute that covered "'any booth or tent, or any boat or vessel, or railroad car.'" *Id.* at 599 (quoting Mo. Rev. Stat. § 560.070 (1969)).

The government, studiously ignoring the residual clause,[3] now asks the Court to redefine "burglary" to reach

3. The government characterizes the term "burglary" as a "critical statutory term" as it quotes only the violent-felony definition that remains "in effect" today, *viz.*, the definition absent the residual clause. U.S. Br. at 4, 14.

atypical burglaries whenever the offense involves "some sort of sleeping area." U.S. Br. at 37. Pressing the point, the government harps on the fact that residential burglaries – even atypical ones – presumably present a greater risk of violence than do nonresidential ones, regardless whether they involve buildings or vehicles. U.S. Br. at 16, 17, 20, 21, 27, 37. But that fact – that degree of risk of violence – is irrelevant. In 1986, that fact would have simply made it all the clearer to Congress that its newly minted residual clause would reach those atypical residential burglaries. Thus, that fact is all the more reason to conclude that in 1986, Congress assumed burglary would continue to have its same generic meaning from 1984. Congress reasonably believed that its preexisting term "burglary" would reach typical burglaries of any building or structure, while its new residual clause would reach burglaries that were atypical yet "present[ed] a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

So when the government talks about the risk of violence associated with residential burglaries – or any burglary for that matter – it waives a red herring. In 1986, the residual clause handled that problem. It is only to compensate for the recent loss of the residual clause, *see Johnson v. United States,* 135 S. Ct. 2551 (2015), that the government now resorts to proposing a definition that is a hodgepodge of the views of the original three interpretative camps. According to the government, "burglary" should be a combination of the 1984 definition ("building), plus the common-law definition ("dwelling house"), but without the common law's nighttime requirement and without the common law's requirement that a "dwelling house" be a stationary structure, rather than something like a mobile "tent or booth." 4 William

Blackstone, Commentaries *226.[4] Congress did nothing so complicated. It left the outliers to the residual clause. Since that clause existed to reach irregular cases, the fact that atypical residential burglaries might be more dangerous than the typical burglary of a building is no reason to assume a broader definition for the enumerated offense "burglary."

II. The Risk of Violence in Burglaries, Even Residential Ones, Is Relatively Low, and When Violence Does Occur, It Usually Triggers a Separate Conviction for a Violent Crime.

The subtext of the government's brief – in repeatedly decrying the risk of violence in residential burglaries – is that if offenses like Tennessee aggravated burglary[5] are no longer classified as "violent felonies" (after the loss of the residual clause), then the ACCA will fail to reach inherently violent predicate offenses. The government hopes to use that "fact" to prompt the Court into rashly changing a statutory interpretation that has stood for nearly 30 years.

Not only does that argument lack relevance, *see* Section I, *supra*, but it lacks substance because burglaries,

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4. Blackstone's Commentary states: "Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices."

5. Tennessee ordinary burglary remains a "burglary" for ACCA purposes, notwithstanding the *Stitt* decision and the nullification of the residual clause. *United States v. Ferguson*, 868 F.3d 514, 515-16 (6th Cir. 2017).

even residential ones, are not inherently violent. In 2015, funded by a U.S. Department of Justice grant, a team led by Dr. Robert Culp reviewed historical data collected from 1998 through 2007 to determine whether burglary resulted in violence frequently enough that it should be classified as a violent crime. *See* Richard S. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007*, at 68 (2015) [hereinafter "Culp Report"], available at https://www.ncjrs.gov/pdffiles1/nig/grants/248651.pdf. The Culp Report says the "short" answer is "no." (Id. at 58.) Its reasons for so concluding are worth considering since the government harps on the perceived violence of burglary. The Culp Report makes three findings of special relevance.

First, data shows that burglary results in violence or threats of it "only rarely." *See also Tennessee v. Garner,* 471 U.S. 1, 21 (1985) (stating burglary "only rarely" involves violence since data showed it occurred in just 3.8% of burglaries). The Culp Report reviewed two sources that compiled data, as follows.

- *National Incident-Based Reporting System (NIBRS).* The NIBRS data set contains detailed information on crimes, including burglary, reported to the police. (Culp Report at 26.) According to that data, violence or threats of it accompanied only 0.9% of burglaries. (*Id.* at 31 & Table 3.) According to that same data, they accompanied only 1.2% of residential burglaries, and .17% of nonresidential ones. (*Id.* at 40.)

- *National Crime Victimization Survey (NCVS).* The U.S. Census Bureau surveys a nationally

> representative rotating sample of U.S. households gathering detailed information regarding crime, including burglaries. (Culp Report at 21.) According to the NCVS, between 2003 and 2007, residential burglaries resulted in violence or threats of it in 7.2% of the cases. (*Id.* at 22, 26.)

The Report explained the difference in these figures: since the NIBRS captured data only from jurisdictions with fewer than 250,000 residents, and since violent crime is less common in such jurisdictions, the NIBRS figure serves as a reliable "lower boundary" estimate, while the NCVS figure serves as a reliable "upper boundary" estimate. (Culp Report at 34.) The Culp Report also presented data showing that "violent residential burglary accounted for only .8% . . . of all burglaries that occurred over the study period," and that there was a decline from 1980 to 2011 in burglaries of "approximately 50% . . . in absolute terms and even more steeply per capita." (Culp Report at 7, 40.)

Those figures are comparatively low when viewed beside those for more typically violent offenses, particularly the figure estimating that violence or threats of it occur in residential burglaries in about 1 to 7 percent of the cases. Robbery or assault offenses will involve violence in virtually 100 percent of the cases. Indeed, in *Garner*, *supra,* this Court characterized a home burglary as "nonviolent" when statistics showed violence occurred in 3.8 percent of such burglaries. *Garner,* 471 U.S. at 10, 21. That characterization reflects common sense because a classification system *that is wrong approximately 95 percent of the time* must be deemed unacceptable in any field, not just in the one responsible for issuing mandatory

prison sentences. *Cf. Schlup v. Delo,* 513 U.S. 298 (1995) (discussing the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free") (internal quotation marks and citation omitted). "Considering that over 96.4% of all burglaries do not result in actual violence," it "appears overly punitive" to classify burglary as a violent crime. (Culp Report at xv.)

Second, the Culp Report explained that in practice "[w]hen burglary does co-occur with a violent crime, offenders are charged not only with the violent offense but also with burglary, or sometimes 'aggravated' burglary." (Culp Report at xii.) The Model Penal Code endorses this same practice. (*See* Culp Report at 2.) When an offender's prior burglary actually did trigger violence, his record will likely include a conviction for a violent offense, *e.g.,* robbery, that will be classified as a violent felony under the "force clause," *viz.,* 18 U.S.C. § 924(e)(2)(B)(i). Therefore, the classification of the actually violent burglary as "violent" due to it being a burglary tends to be superfluous. Worse yet, that independent classification of a burglary as violent can cause something akin to double-counting, as in *United States v. Schieman,* 894 F.2d 909 (7th Cir. 1990), where the defendant was previously convicted for burgling a building and also for assaulting the police officer who approached him three blocks away to investigate the burglary; that defendant received two ACCA strikes for violent offenses from this one burglary leading to an assault. "[T]o regard burglary as a violent crime – especially when separate charges for the violent acts are prosecuted in addition to the burglary charge – is to inflate the severity of the offense." (Culp Report at 58.)

Third, consistent with these two findings, a survey of "justice professionals and members of the public" shows they do not "rank burglary as a violent crime." (Culp Report at 15; *see also id.* at 17 ("All rank burglary at the low end of the felony severity scale, clearly as a crime against property.")). Unless the burglary actually gave rise to a violent crime, those surveyed considered it on a par with vehicle theft. (*Id.* at 15.) Tellingly, "[a]ll thirty-two states which divide their criminal codes into categories of crimes against persons, property, etc., classify burglary as a crime against property." (*Id.* at 3.)

The Culp Report shows that *Johnson* has not triggered a crisis with respect to burglary predicates because burglaries are only rarely violent, even when they involve dwellings. Indeed, partly due to the findings of the Culp Report, the U.S. Sentencing Commission has chosen to remove "burglary of a dwelling" from its list of "crimes of violence" for the career-offender statute. U.S.S.G. Appx Amend. 798 (Aug. 1, 2016) ("burglary offenses rarely result in physical violence"). Consequently, it is especially unwarranted for the government to now be asking this Court to redefine burglary to include burglaries of all dwellings, even the atypical ones formerly reached by the residual clause.[6]

6. Even if an atypical burglary of a dwelling carries with it only a five percent risk of violence, it would be covered by the (former) residual clause because the term "serious potential risk of injury" demands a "degree of risk" of violence that is merely "roughly similar" to that of the enumerated offenses, like burglary. *Begay v. United States*, 553 U.S. 137, 143 (2008).

CONCLUSION

In *Taylor*, this Court correctly concluded that Congress intended the term "burglary" to reach only typical burglaries, *viz.*, those involving buildings or structures. As for atypical burglaries, such as those involving boats, vehicles, or tents, Congress expected the residual clause to reach them as long as they presented a roughly similar degree of risk. The fact that residential burglaries tend to present a greater risk of violence than nonresidential burglaries – even, presumably, when the residence is a boat, vehicle, or tent – only serves to confirm that Congress expected the residual clause to reach those offenses when atypical.

Moreover, the Culp Report shows that even residential burglaries result in violence only rarely, in as few as one percent of cases. As the Sentencing Commission has recognized, it is unfair to classify all residential burglaries as violent crime when so few of them are actually violent. The nullification of the residual clause has not created any crisis that remotely justifies this Court redefining what Congress meant by the word "burglary" in 1986.

Respectfully submitted,

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