No. 18-6671

IN THE

Supreme Court of the United States

JIMMY DAVID MALONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Government's Opposition defends the decision below without confronting the issues Mr. Malone raised in his petition. The Government does not deny that the Sixth Circuit's approach sets it apart from other courts of appeal. Nor does it deny the variety of approaches the courts of appeal employ when confronted with an ambiguous state criminal statute for ACCA purposes. The Government does not respond to Mr. Malone's argument that this variation leads to arbitrary results with grave consequences for criminal defendants. Nor does it dispute the seriousness of the federalism problems that arise when federal courts independently construe ambiguous state criminal laws without a meaningful review of state court decisions. In other words, the Government does not dispute the importance of the recurring question presented.

Instead, the Government argues that Mr. Malone's challenge to his sentence is foreclosed by this Court's decision in *United States* v. *Stitt,* 139 S. Ct. 399 (2018), and that the decision below was correctly decided. But *Stitt* did not construe the Kentucky statute at issue, which sweeps more broadly than burglary of structures customarily used or adapted for overnight accommodation. And *Stitt* did not answer the question presented or permit federal courts to independently construe ambiguous state criminal statutes for ACCA purposes.

On the contrary, *Stitt* distinguished between the Tennessee statute in Respondent Stitt's case and the Arkansas statute in Respondent Sims' case, and remanded the Arkansas case to the lower courts for a decision consistent with Arkansas state law. The implication is that differently-worded statutes in differ-

ent states should not be treated as though they are identical for ACCA purposes. Just as Mr. Sims' challenge under Arkansas law survived the decision in *Stitt*, so too does Mr. Malone's challenge under Kentucky law.

The Government's defense of the decision below only emphasizes persistent confusion about the appropriate inquiry in ACCA cases that turn on the interpretation of an ambiguous state statute that has yet to be construed by the state's highest court.

I. *STITT* NEITHER ANSWERED THE QUESTION PRESENTED NOR FORECLOSED MR. MALONE'S CHALLENGE TO HIS SENTENCE

In *Stitt*, this Court considered a narrow question of federal law: Whether "burglary" as used in 18 U.S.C. § 924(e) includes burglary of a structure or vehicle that has been "adapted or is customarily used for overnight accommodation." 139 S. Ct. 399 (2018).

a. The answer to that question has no bearing on the question presented in Mr. Malone's petition. His question is not about the federal definition of burglary but about how federal courts should conduct the ACCA analysis when confronted with an ambiguous state statute and no state supreme court decision directly on point.

That question is not a matter of state law interpretation, as the Government suggests. Opp'n at 12. Instead, it follows in a long line of critically important questions about how federal courts can conduct an ACCA analysis in a way that minimizes arbitrary results and respects the primacy of the state courts in matters of state law. See, *e.g., Johnson* v. *United States*, 559 U.S. 133, 138 (2010) (federal courts con-

ducting an ACCA analysis are "bound by" on-point decisions of state supreme courts).

b. Nothing in *Stitt* forecloses Mr. Malone's challenge to his sentence.

Stitt held that federal burglary encompasses burglary of "vehicles or structures customarily used or adapted for overnight accommodation." 139 S. Ct. at 407. That holding resolved Mr. Stitt's case because he was convicted under a Tennessee statute that refers to burglary of structures "designed or adapted for the overnight accommodations of persons." *Id.* at 404.

Stitt did not resolve the issue for the other respondent in that case – Mr. Sims. Mr. Sims was convicted under an Arkansas statute that covers burglary of "a vehicle . . . [i]n which any person lives." *Id.* at 407. Mr. Sims argued that the Arkansas statute was overbroad for ACCA purposes because it could apply to places where people happen to live, even if those places are not customarily used or adapted for overnight accommodations. *Id.* This Court decided not to reach the issue, noting that Mr. Sims' argument "rests in part upon state law." *Id.* It therefore remanded the case for further consideration.

Just as *Stitt* did not resolve Mr. Sims' case, it does not resolve Mr. Malone's. The Kentucky statute does not refer to structures "designed or adapted for the overnight accommodation of persons." Instead, it refers to structures and vehicles that are "usually occupied by a person lodging therein." Pet. App. at 17a. Therefore, for the same reasons that the Arkansas statute is potentially too broad to be an ACCA predicate, so too is the Kentucky statute in Mr. Malone's case.

II. THE GOVERNMENT'S DEFENSE OF THE DECISION BELOW IS UNTENABLE

Instead of addressing the question presented, the Government's brief defends the Sixth Circuit's decision on the merits.

The core of that defense is the Government's assertion that the Sixth Circuit merely analyzed the "plain language" of the statute. Opp'n at 17. But that cannot be correct. If the meaning of the statute had been plain on its face, it would not have been necessary for the Sixth Circuit to resort to "principles of statutory construction" to discern the statute's meaning. Pet. App. at 4a.

Nor is it correct that the Sixth Circuit "consulted" state law to reach its conclusion. Instead, the decision is clear that the Sixth Circuit arrived at its interpretation of the statute independently and then noted cases cited by the government that were not directly on point but "corroborate[d]" the interpretation the court had already adopted. *Id.* at 5a.

The government also fails to acknowledge that *Malone* is not an isolated example of the Sixth Circuit's independent constructions of ambiguous state statues without first conducting a survey of state law. As the Petition explains, a similar issue arose in *United States* v. *Quarles*, 850 F.3d 836, 838-40 (6th Cir. 2017), *cert. granted*, 2019 WL 166873 (2019). There, the Sixth Circuit relied on tools of statutory interpretation, dictionary definitions, and legislative intent to construe the "plain language" of a home invasion statute. As in *Malone*, it relied on its own interpretation of ambiguous state law instead of consulting state court authorities.

That approach cannot be squared with this Court's precedents or the approach of any other fed-

eral court of appeal. The Government's defense of the decision on the merits bypasses this fundamental issue at the heart of Mr. Malone's petition.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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