NO. _____

In the Supreme Court of the United States

MICHAEL HERROLD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a state statute explicitly defines "burglary" in a way that does not require proof of an intent to commit a crime, and thus lacks an element necessary to satisfy the Armed Career Criminal Act's generic definition of "burglary," 18 U.S.C. 924(e)(2)(B)(ii), is that facial overbreadth enough to demonstrate that the crime is non-generic, or must a federal defendant also prove that the state has convicted someone who did not, in fact, harbor that intent?

2. The ACCA defines "serious drug offense" to include state offenses "*involving* manufacturing, distributing, or possessing with intent to distribute a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). Does a state offense "involv[e]" distribution of a "controlled substance" where it prohibits a bare offer to sell drugs, even where the suspect has no drugs, no intent to sell drugs, and no ability to obtain drugs?

DIRECTLY RELATED PROCEEDINGS

1. *United States* v. *Herrold*, No. 3:13-CR-225-N (N.D. Tex.) (original judgment entered Dec. 5, 2014; amended judgment entered April 10, 2018)

2. *United States* v. *Herrold*, No. 14-11317 (5th Cir.) (judgments entered Feb. 12, 2016; Feb. 20, 2018; Oct. 18, 2019)

3. *Herrold* v. *United States*, No. 16-5566 (U.S.) (judgment issued Nov. 4, 2016)

4. *United States* v. *Herrold*, No. 17-1445 (U.S.) (judgment issued July 19, 2019)

5. *Herrold* v. *United States*, No. 17-9127 (U.S.) (order denying certiorari issued June 17, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Michael Herrold respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (App. 1a–19a) is published at 941 F.3d 173. There are three previous opinions from the court of appeals: two published, 883 F.3d 517 (App. 20a–95a) and 813 F.3d 595 (App. 100a–108a), and one unpublished, 685 F. App'x 302 (App. 96a–99a).

JURISDICTION

The Fifth Circuit entered judgment on October 18, 2019. On January 9, 2020, Justice Alito extended the time to file a petition to February 17, 2020. Because that was a federal holiday, 5 U.S.C. § 6103, that made the petition due

the following day, February 18, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Armed Career Criminal Act, 18 U.S.C. § 924(e); Texas Penal Code § 30.02(a)(3) (West 1974); and Texas Health & Safety Code §§ 481.002(8) & 481.112 (West Supp. 1990 & 1992). Those provisions are reprinted in the Appendix. App. 114a–118a.

INTRODUCTION

The Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), imposes a mandatory minimum sentence of fifteen years in prison for any convicted felon who unlawfully possesses a firearm and who has three prior convictions for any "violent felony" or "serious drug offense." 18 U.S.C. § 924(e)(1). Absent the ACCA's mandatory minimum, the worst-case prison sentence for a felon-in-possession is ten years, § 924(a)(2), with most sentences falling well below that.[1]

The Questions Presented in this case concern the definitions of "burglary" and "serious drug offense." The ACCA defines "violent felony" to include a conviction for "burglary" punishable by imprisonment for a term exceeding one year. § 924(e)(2)(B)(ii). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that § 924(e) uses the term "burglary" in its generic sense, to cover any

[1] For the past five years, the average sentence for federal firearms offenses nationwide has been between four and five years in prison. See U.S. Sent. Comm'n, *Quarterly Data Report* at fig. 7 (4th Quarter 2019 Preliminary Release), https://bit.ly/3bKnsv7.

crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, *with intent to commit a crime*." *Id.* at 598–599 (emphasis added). The ACCA's definition of "serious drug offense" includes a state crime punishable by at least ten years in prison "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." § 924(e)(2)(A)(ii).

The Questions Presented have led to deep, acknowledged, and entrenched divisions among the circuits along multiple fronts. And these divisions matter here because Texas has chosen to define common crimes—burglary and drug delivery—in uncommonly broad ways.

The first Question Presented concerns a novel theory of burglary first introduced in Texas. The element that has always distinguished burglary from mere trespass is the *intent to commit a crime* inside the building. 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769) ("[I]t is clear, that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass."). Texas's pioneering theory "dispenses with the need to prove intent" when the actor actually commits a predicate crime inside the building after an unlawful entry. *DeVaughn* v. *State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (internal quotation omitted). Judge Sykes has helpfully dubbed this new theory "trespass-plus-crime." *Van Cannon* v. *United States*, 890 F.3d 656, 664 (7th Cir. 2018). For all five trespass-plus-crime statutes—Minnesota, Michigan, Montana, Tennessee, and Texas—the list of predicate offenses includes non-intentional crimes. In these states, prosecutors can convict a defendant for burglary by proving that he committed a reckless, negligent,

or strict liability crime while trespassing. These burglary offenses are broader than *Taylor*'s generic burglary definition, because they lack the "intent" element *Taylor* plainly requires. So they should be deemed non-generic.

This Court explicitly reserved judgment on this issue last term in *Quarles* v. *United States*, 139 S. Ct. 1872, 1880 n.2 (2019). The issue has expressly divided the Fifth and Seventh Circuits. And it is intertwined with a deeper dispute about *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007). Under that case, a defendant claiming a state statute is non-generic cannot rely solely upon "application of legal imagination to a state statute's language," but must demonstrate "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Ibid.* at 193. In at least some circumstances, the defendant must "point to" a case "in which the state courts in fact did apply the statute in the special (nongeneric) manner" before the statute will be regarded as non-generic. *Ibid.*

Following *Duenas-Alvarez*, the circuits are divided about whether a defendant must advance proof in *every* case that a state statute has been applied to non-generic facts, or whether such evidence is unnecessary when the elements of the state crime are plainly broader on their face than the generic crime's. And the circuits are in "nearly unanimous disagreement" with the Fifth Circuit's position. *Hylton* v. *Sessions*, 897 F.3d 57, 65 (2d Cir. 2018). This entrenched dispute affects not only the ACCA, but every criminal and immigration statute that requires analysis of prior convictions.

The second Question Presented concerns Mr. Herrold's drug conviction, and the manner in which states like Texas define "delivery" of drugs. Tex. Health & Safety

Code § 481.002(8). To count as a "serious drug offense" under the ACCA, 18 U.S.C. § 924(e)(2)(A)(ii), a state-law offense must "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." But the Texas crime allows for conviction where the defendant never manufactured, distributed, or possessed a controlled substance, nor even *intended* to take any of those actions. *United States* v. *Vickers*, 540 F.3d 356, 365 (5th Cir. 2008). The Fifth Circuit nevertheless holds that this crime "involves" distribution of controlled substances. Under *Vickers*, anyone who offers to sell drugs has "enter[ed] the highly dangerous drug distribution world," and has therefore self-identified "as a potentially violent person." *Id.* at 365–366. This expansive construction of the term "involving" has likewise divided the circuits. And the Government has chosen not to defend it. See U.S. Br. 10, *Shular* v. *United States*, No. 18-6662 (U.S. filed Nov. 22, 2019) (U.S. *Shular* Br.). *Shular* may shed light on the statute, and thus, it would be appropriate to at least hold this petition for *Shular*. But plenary review of both questions would be preferable.

Only through plenary review can this Court definitively resolve these deep splits, which contribute to the splintered application of the ACCA.

And this is a compelling case to resolve these issues. Mr. Herrold was first sentenced to more than 17 years in prison under the ACCA. App. 23a. After nearly five years in custody, he was released because the appellate court recognized he was *not* an Armed Career Criminal. App. 5a & n.16. Eighteen months later, he was told that a change in the law made him an Armed Career Criminal again. App. 19a. After years of litigation, two district court sen-

tencing hearings, four Fifth Circuit decisions, and two Supreme Court decisions, the answer is still unclear. In the meantime, Mr. Herrold has suffered a debilitating stroke that required a lengthy hospitalization and has left him unable to perform many activities necessary for daily living without assistance.[2] It is well past time to give him a definitive answer about the application of the ACCA.

STATEMENT

1. In November 2012, Dallas police officers found a nine-millimeter pistol in Mr. Herrold's car during a traffic stop. App. 22a. Because Mr. Herrold was a convicted felon, and because the gun was made outside Texas, he was prohibited from possessing it. He pleaded guilty to violating 18 U.S.C. § 922(g)(1). But there was a dispute over whether his prior convictions made him an "Armed Career Criminal" subject to the ACCA's mandatory minimum.

In October 1992, when Mr. Herrold was just seventeen years old, he pleaded guilty to three offenses in Texas state court: two for burglary under Texas Penal Code § 30.02(a), and one for "manufacture or delivery of" lysergic acid diethylamide (LSD) under Texas Health & Safety Code § 481.112(a) (West 1990 & 1992 Supp.).[3] App. 101a–102a, 107a; Sealed 5th Cir. R. 234–235 ¶¶ 31, 33, 34. In his

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[2] Mr. Herrold's stroke and its aftermath are described in his motion to recall the Fifth Circuit's mandate.

[3] Mr. Herrold had other prior convictions, but the two burglaries and the LSD offense are the only three that even arguably satisfy the ACCA. 5th Cir. Sealed R. 233–236. After the November 2012 traffic stop, he was convicted of another burglary under § 30.02(a). Sealed 5th Cir. R. 236. That one did not affect the ACCA because it was not a "previous convictions" as of the date the he "violate[d] section 922(g)." 18 U.S.C. § 924(e)(1).

federal prosecution, the Government asserted that these three convictions triggered the ACCA enhancement.

2. Mr. Herrold contended that none of these offenses satisfied the ACCA's definitions. As relevant here, he argued that the crime Texas labels "burglary"—Tex. Penal Code § 30.02(a)—does not fall within the scope of *Taylor*'s "generic" definition. This inquiry requires a "categorical approach": Courts "focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016) (discussing *Taylor*, 495 U.S. at 600–601). "The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps* v. *United States*, 570 U.S. 254, 257 (2013). And in conducting this analysis, courts "must presume" that the defendant's prior conviction "rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe* v. *Holder*, 569 U.S. 184, 190–191 (2013) (internal quotation omitted).

Applying this framework, Mr. Herrold argued that the elements of Texas burglary were broader than generic burglary. In particular, he argued that the trespass-plus-crime theory, listed in Subsection 30.02(a)(3), was non-generic. 5th Cir. Sealed R. 297. At the time, the Government conceded "that a conviction under [Subsection] 30.02(a)(3), does not qualify as generic burglary as defined by *Taylor*." 5th Cir. Sealed R. 356. The Government argued that § 30.02(a) was "divisible" into separate crimes under this Court's "modified categorical approach." Under the modified approach, where a single

state statute "contain[s] several different crimes, each described separately," the Government may use state-court records to prove the defendant "was convicted of" a separately described offense that is generic. *Moncrieffe*, 569 U.S. at 191. The Government argued that both of Mr. Herrold's burglaries arose under Subsection 30.02(a)(1), which requires proof that the defendant entered a building "*with intent* to commit a felony or theft," and argued in the alternative that convictions under Subsection 30.02(a)(3)'s (concededly) non-generic form of burglary satisfied the ACCA's "residual" clause, 18 U.S.C. § 924(e)(2)(B)(ii). 5th Cir. Sealed R. 356.

As for the drug conviction, Mr. Herrold argued that his crime fell outside the ACCA's definition of "serious drug offense," 18 U.S.C. § 924(e)(2)(A)(ii), which reaches only those state-law offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

This is because in Texas a defendant can be convicted of "delivering" a controlled substance when the crime does not actually "involve" any "controlled substance" at all. Texas defines *delivery* of a controlled substance to include even a *mere offer* to sell a controlled substance—including a fraudulent offer where the putative seller had no drugs to sell and no intent or ability to obtain any to consummate a sale. Tex. Health & Safety Code § 481.002(8). Mr. Herrold therefore argued that his drug offense would not satisfy the ACCA, although he conceded that circuit precedent had broadly interpreted the word "involving" within the definition of "serious drug offense" to reach even a fraudulent offer to sell. *Vickers*, 540 F.3d at 365 (discussing *Francis* v. *State*, 890 S.W.2d 510, 513 (Tex. App. 1994)).

The district court rejected both challenges and sentenced Mr. Herrold under the ACCA to a prison term of 211 months (more than 17 and one-half years). App. 23a.

3. The Fifth Circuit initially affirmed that result—even though, by then, the Government's argument under the residual clause had been foreclosed by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). App. 100a–108a. The court of appeals agreed with the Government that Texas's burglary statute was divisible, that Mr. Herrold's convictions came under Subsection 30.02(a)(1), and that Subsection (a)(1) fit within *Taylor*'s "generic" burglary definition. App. 101a–106a. On the drug conviction, the court reaffirmed its prior precedent that the ACCA incorporates "expansive connotations" for the word "involving" to include even a fraudulent offer to sell drugs. App. 106a–108a (quoting *Vickers*, 540 F.3d at 365).

4. This Court granted Mr. Herrold's petition for certiorari, vacated, and remanded for further consideration in light of *Mathis,* which held that the modified categorical approach only applies where a state statute sets out alternative *elements* of separate crimes. 137 S. Ct. 310. If the statutory alternatives are alternative means, the standard categorical approach governs. *Ibid.*

5. On the first remand from this Court, Mr. Herrold renewed his argument that § 30.02 was indivisible and non-generic. He was buoyed by Texas cases holding that Penal Code Subsections 30.02(a)(1) and (a)(3) were alternative means (about which the jury could disagree), and by the Government's earlier concession that (a)(3) was non-generic. Yet the Fifth Circuit again affirmed. App. 96a–99a. The panel adhered to the circuit's pre-*Mathis* precedent holding that Texas Penal Code § 30.02(a) was

divisible. App. 98a. And it rejected Mr. Herrold's argument that burglary under Subsection 30.02(a)(1) was non-generic. App. 98a–99a.

6. The Fifth Circuit granted rehearing *en banc*. App. 111a–112a. In its final brief filed before the *en banc* argument, the Government reversed course, arguing for the first time that even Subsection (a)(3) described a generic burglary. U.S. Sept. 2017 C.A. Br. 50–57. In response, Mr. Herrold urged the Fifth Circuit to adhere to its longstanding rule that generic burglary required formation of intent prior to or contemporaneous with the initial trespass—an argument this Court would later reject in *Quarles*. But he coupled that with an argument that (a)(3) was also non-generic because it does not require proof of specific intent *at any time*. Subsection (a)(3)'s predicate offenses include "non-intentional felonies," such as "reckless felonies, injury-to-a-child"—which requires only negligence—and "even felony murder which is possibly a strict liability offense." Herrold Aug. 2019 C.A. Br. 17 (quoting Recording of En Banc Oral Arg.).

A divided en banc court reversed the ACCA sentence. The en banc majority agreed with Mr. Herrold that, under *Mathis*, the different theories of burglary found in (a)(1) and (a)(3) were indivisible. App. 28a. And the court solidified its place within the pre-*Quarles* split, "declin[ing] to retreat from [its] previous holding that Texas Penal Code § 30.02(a)(3)—Texas's burglary offense allowing for entry and subsequent intent formation—is broader than generic burglary." App. 59a.

7. While the Government sought review of that adverse decision, the Fifth Circuit issued its mandate and the district court re-sentenced Mr. Herrold in April 2018 to "time served"—just under 5 years in prison. App. 5a.

8. While the Government's petition for certiorari was pending, and after Mr. Herrold suffered a debilitating stroke, this Court held in *Quarles* that a generic burglary "occurs when the defendant forms the intent to commit a crime *at any time* while unlawfully present in a building or structure." 139 S. Ct. at 1877. *Quarles* thus overruled the rationale of the en banc majority. But *Quarles* specifically left open the question presented here, noting that it did "not address" whether the Michigan trespass-plus-crime home invasion statute was non-generic because it did not require proof that the burglar ever formed intent to commit a crime. *Id.* at 1880 n.2.

This Court then vacated the en banc decision and remanded for further consideration in light of *Quarles*. 139 S. Ct. 2712, 2713.

9. On the second remand from this Court, Mr. Herrold renewed his argument that Subsection 30.02(a)(3) went beyond *Taylor*'s generic burglary definition because it lacked generic burglary's specific intent element: the crime "doesn't require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct." Herrold Aug. 2019 C.A. Br. 12 (quoting *Van Cannon*, 890 F.3d at 664). He also preserved for this Court's review his challenge to the "conclusion that that the LSD offense is a 'serious drug offense'" under the ACCA. *Id.* at 7. He acknowledged that the claim was still foreclosed by circuit precedent.

This time, the en banc court unanimously held that all of Texas's burglary statute—including Subsection 30.02(a)(3)—was categorically generic. App. 8a–17a. The court expressly acknowledged that the Seventh Circuit had come to the opposite conclusion about a materially indistinguishable statute in *Van Cannon*, 890 F.3d at 664. App. 9a–10a. But the Fifth Circuit expressly declined to follow *Van Cannon*'s reasoning. The Fifth Circuit did not take issue with the Seventh Circuit's conclusion that generic burglary requires specific intent to commit a crime while trespassing, nor did it identify any material difference between Minnesota's trespass-plus-crime statute and Texas's. To the contrary, the court acknowledged the "similarities" between the two definitions (App. 14a) and conceded that Texas has several "felonies" satisfying Subsection 30.02(a)(3)'s text "that do not require 'the intent to commit a crime.'" App. 9a.

The Fifth Circuit parted ways from the Seventh because of "constraints" imposed by the Fifth Circuit's interpretation of *Duenas-Alvarez*. App. 14a (citing *United States* v. *Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc)). The Fifth Circuit, unlike the Seventh, has interpreted *Duenas-Alvarez* as an across-the-board modification of the categorical approach for determining whether a statute is generic. In the Fifth Circuit, it is no longer enough to show that the *text* of a state statute, "'on its face,'" includes elements broader than generic burglary. App. 11a (quoting *Castillo-Rivera*, 853 F.3d at 223). Even where a state statute is "plainly broader than its federal counterpart," a defendant must prove the statute means what it says by "point[ing] to an actual case in which Texas courts applied the Texas statute's definition to capture

those not included" in the generic offense. *Castillo-Rivera*, 853 F.3d at 223. Because Mr. Herrold had not done that, the Fifth Circuit concluded the Texas burglary definition was generic. App. 10a–11a, 14a.

In a footnote, the court also reaffirmed its earlier conclusion that the "LSD conviction is a serious drug offense." App. 2a n.2. The court affirmed the district court's original judgment, which re-instated the original, ACCA-enhanced sentence. App. 19a. The court ordered its mandate to issue immediately. App. 19a. Mr. Herrold sought reconsideration via a motion to recall the mandate, but the Fifth Circuit denied that motion without written opinion. App. 113a.

REASONS FOR GRANTING THE PETITION

The traditional criteria for certworthiness are all satisfied here. Courts have recognized the multiple, well-developed, and entrenched splits embodied in both Questions Presented. And the Fifth Circuit's stance within each is irreconcilable with this Court's precedent. On the first, the circuits divide on a question the Court deliberately left open in *Quarles*, and they do so because of their respective places within a larger, deeper, and well-entrenched debate about the basic rules for conducting the "categorical" inquiry after *Duenas-Alvarez*. That debate now encompasses all circuits but two, and it is one in which the Fifth Circuit sits as an extreme outlier.

The circuits likewise divide over the second Question Presented, which concerns the meaning of "involving" within the "serious drug offense" definition. § 924(e)(2)(A)(ii). The position of the Fifth Circuit on that question is so broad that it "stop[s] nowhere." *Mellouli* v.

Lynch, 135 S. Ct. 1980, 1990 (2015). Indeed, the Government itself backed away from the Fifth Circuit's interpretation in *Shular*. Thus, the Fifth Circuit's interpretation should not prevail anywhere.

These questions are of obvious national importance—both to the firearm defendants potentially subject to the ACCA, and to the even broader class of parties whose criminal and immigration cases depend upon use of the categorical approach.

A. There are deep, acknowledged, and entrenched circuit splits on both Questions Presented, and the Fifth Circuit is on the wrong end of each.

Given identical inputs—a state crime labeled "burglary" committed whenever a trespasser commits some other crime inside a building, even one with a mental state short of strict criminal intent—the Fifth and Seventh Circuits reached opposite outputs. The Fifth Circuit concluded that Texas's "trespass-plus-crime" variant is generic. The Seventh Circuit concluded that Minnesota's was not. And this direct conflict arises because of a much wider conflict over the categorical approach after *Duenas-Alvarez*. At least six other circuits (besides the Seventh) have explicitly held that a state statute that is broader on its face than the generic equivalent is non-generic, with no need to look for confirming examples. But the Fifth and Eighth Circuits have both demanded proof that state officials have actually prosecuted someone whose criminal conduct was non-generic.

The circuits are also divided over the definition of "involving" as used in 18 U.S.C. § 924(e)(2)(A)(ii), and the Government itself has argued this is a "circuit conflict that warrants resolution by this Court." U.S. B.I.O. 10, *Shular*

v. *United States*, No. 18-6662 (U.S. filed Feb. 19, 2019); see also U.S. Pet. 17–20, *United States* v. *Franklin*, No. 18-1131 (U.S. filed Feb. 28, 2019); U.S. B.I.O. 10–12, *Hunter* v. *United States*, No. 18-7105 (U.S. filed Feb. 19, 2019). While this Court will likely shed some light on this statutory definition in *Shular*, the Government's argument there suggests a retreat from the position of the court below and warrants plenary review here.

1. The circuits are divided over whether trespass-plus-crime offenses are generic burglaries.

"Burglary" is a trespass committed while harboring a culpable intent—specifically, a plan or purpose to commit another crime inside the premises. At common law—and in almost every jurisdiction today—that plan or purpose is what distinguishes "burglary" from a mere trespass. 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13(e), p. 473 (1986). When Congress originally passed the ACCA, it incorporated this specific intent element within its definition of "burglary." Pub. L. 98-473, § 1803(2) (1984). And after that definition was inadvertently deleted, this Court agreed that the *intent* to commit another crime would be an "element" within the "generic" definition of burglary. *Taylor*, 495 U.S. at 598.

But Texas—along with a few other states—has adopted a newer, broader conception of burglary. This newer theory allows conviction *without* any proof about the trespasser's intent. If the trespasser committed another crime once inside the building, he is guilty of burglary. See Tex. Penal Code § 30.02(a)(3).

As of 1986, when the current version of "violent felony" was finalized, Professors LaFave and Scott described Texas as the *only* jurisdiction to adopt this unusual definition, "perhaps to obviate the problems of proof concerning whether the defendant's intent was formed before or after the unlawful reentry or remaining." LaFave & Scott, *supra*, at § 813(e), p. 475. As of today, only four other states have followed Texas's lead, with three expanding "burglary" to include a trespass-plus-crime theory,[4] and one other state grafting that theory onto its "home invasion" crime.[5]

The Seventh Circuit in *Van Cannon* held that one such statute, from Minnesota, was non-generic, because Minnesota, like Texas, permits conviction for burglary whenever a trespasser "commits a crime while in the building." *Id.* at 663 (describing Minn. Stat. § 609.582). And Judge Sykes, writing for the court, recognized that there are numerous ways under this statute for an entry to be "unprivileged but not accompanied by burglarious intent." *Id.* at 664. The *commission of a crime* is not synonymous with forming an intent to commit that crime: in Minnesota, "not all crimes are intentional; some require only recklessness or criminal negligence." *Ibid.*

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[4] Minn. Stat. § 609.582 (eff. Aug. 1, 1988); Mont. Code Ann. § 45-6-204(1)(b) & (2)(a)(ii) (eff. Oct. 1, 2009); and Tenn. Code Ann. § 39-14-402(a)(3) (eff. July 1, 1995). Apart from fourth-degree burglary in Maryland, which requires only "breaking and entering," Md. Code Ann. Crim. Law § 6-205(a)(b), these trespass-plus-crime statutes appear to be the only "burglary" offenses in the entire nation that do not require proof of "intent to commit a crime" inside the premises.

[5] Mich. Comp. L. § 750.110a(2), (3), (4)(a) (eff. Oct. 1, 1999)

The Seventh Circuit therefore held that this "trespass-plus-crime" theory of burglary "covers more conduct than *Taylor*'s definition of generic burglary," *Van Cannon*, 890 F.3d at 665, which requires "intent to commit a crime." *Taylor*, 495 U.S. at 598–599. "[T]he Minnesota statute doesn't require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct." *Van Cannon*, 890 F.3d at 664. The court recently affirmed that this holding survived *Quarles*. See *Chazen* v. *Marske*, 938 F.3d 851, 860 (7th Cir. 2019).

In this case, however, the Fifth Circuit came to the opposite result, holding that Texas's expanded conception of burglary fits within *Taylor*'s generic definition. This was not because it identified any material difference between Texas's burglary statute and Minnesota's. Indeed, the Fifth Circuit parted ways with the Seventh despite "the similarities of the Minnesota and Texas statutes." App. 14a. The reason for the departure was instead the circuits' differing interpretations of this Court's decision in *Duenas-Alvarez*.

2. The Fifth and Seventh Circuits diverged because of a broader split about the basic rules for determining whether offenses are generic after *Duenas-Alvarez*.

Fifth Circuit precedent interprets *Duenes-Alvarez* to demand *proof* that a statute is non-generic in *all* cases—even where the statute is broader on its face than the generic definition. And it held that Mr. Herrold's failure to find "supportive Texas cases" doomed his attempt to show that Texas burglary is non-generic. App. 10a. That cements the Fifth Circuit as maintaining the most extreme interpretation of *Duenas-Alvarez* among the circuits.

1. In *Duenas-Alvarez*, a noncitizen attempted to prove that his prior vehicle-theft conviction under California Vehicle Code § 1851(a) was broader than the generic definition of a "theft offense," and therefore did not subject him to removal under 8 U.S.C. § 1101(a)(43)(G). 549 U.S. at 192–193. This provision is governed by the same categorical approach as the ACCA's "violent felony" definition. *Id.* at 187. But that California statute's text closely resembled most other jurisdictions' "theft" offenses. *Id.* at 187, 189. Yet Duenas-Alvarez still claimed the offense was non-generic, contending that California courts had construed the theft offense's "aiding and abetting" liability broader than other jurisdictions had, holding an accessory responsible for what he intended "and for what 'naturally and probably' result[ed] from his intended crime." 549 U.S. at 190 (internal quotation omitted). He argued that this judicial expansion transformed the otherwise generic-looking statute into a non-generic one.

This Court rejected Duenas-Alvarez's argument, holding that California's conception of abettor liability did not extend the theft offense "significantly beyond the concept as set forth in the cases of other States." *Id.* at 193. The Court went on to explain what Duenas-Alvarez would need to show to prove that a normal-*looking* theft crime was non-generic. That requires

> more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own

> case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Id. at 193. The circuits are divided over whether *Duenas-Alvarez*'s "realistic probability" test requires proof in *every* case that someone has actually been convicted on non-generic facts.

2. The vast majority of circuits—the First, Second, Third, Seventh, Ninth, Tenth, and Eleventh—confine this test to the circumstances that spawned it: where the defendant or immigrant proposes a novel and non-obvious construction for generic-looking statutory language.

Van Cannon falls into the majority. There the court looked only to the *elements* of Minnesota burglary to determine it was non-generic. The *text* of the "Minnesota statute" alone was enough to show that it "covers a broader swath of conduct than generic burglary," with no need to perform a deep dive into the underlying facts of Minnesota burglary prosecutions to confirm that it reached reckless and negligent offenses. *Van Cannon*, 890 F.3d at 658. Indeed, *Van Cannon* resisted *any* effort to judicially narrow the statute to conform to the generic definition—it explicitly rejected the Government's argument that commission of a crime *implied* the formation of intent to do so: "*Taylor*'s elements-based approach does not countenance imposing an enhanced sentenced based on implicit features in the crime of conviction." *Ibid.* The text—and the text alone—should be consulted to determine whether the elements of the crime match the generic definition.

Most circuits agree. Where "a state statute explicitly defines a crime more broadly than the generic definition,"

then the crime is non-generic, period. See *United States* v. *Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), abrogated on other grounds by *United States* v. *Stitt*, 139 S. Ct. 399 (2018). The text of a statute alone can establish the "realistic probability" *Duenes-Alvarez* requires—the probability that someone could be prosecuted for non-generic conduct—without resorting to "legal imagination" or fanciful hypotheticals. See *Lopez-Aguilar* v. *Barr*, No. 17-73153, _F.3d _, 2020 WL 427240, at *3 (9th Cir. Jan. 28, 2020) (citing *Grisel*); accord *Swaby* v. *Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (Where the statutory language "clearly does apply more broadly than the federally defined offense," then the statute is non-generic.); *Hylton*, 897 F.3d at 63 (There is no need to point to actual examples of prosecution "when the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition."); *Ramos* v. *Att'y Gen.*, 709 F.3d 1066, 1071–1072 (11th Cir. 2013) (same); see also *Singh* v. *Att'y Gen.*, 839 F.3d 273, 286 n.10 (3d Cir. 2016) (The "realistic probability" test comes into play only when "the relevant elements" of the state crime and the generic definition are "identical."); *United States* v. *Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017) ("The Government gives no persuasive reason why we should ignore this plain language to pretend the statute is narrower than it is.")

3. Only two circuits—the Fifth and the Eight—require more. In those circuits, even where an element of a state statute is plainly broader on its face than the generic equivalent, the statute is still considered generic unless the defendant can *prove* that state authorities have, in fact, prosecuted someone on non-generic facts.

The Fifth Circuit's approach here is a perfect example. The court below agreed with Mr. Herrold (and *Van Cannon*) that the text of a trespass-plus-crime statute like Subsection 30.02(a)(3), standing alone, embraces situations outside the scope of generic burglary: There are "several" predicate offenses that would satisfy Subsection 30.02(a)(3) but which "do not require 'the intent to commit a crime.'" App. 9a.[6] The court also recognized that the Seventh Circuit held Minnesota's version of trespass-plus-crime to be non-generic for this exact reason. App. 9a. But the Fifth Circuit held that the equivalent crime in Texas was generic burglary. App. 8a–14a. This was because, in the Fifth Circuit, it is not enough for a defendant to show that the text of a statute is broader than generic burglary. App. 11a (quoting *Castillo-Rivera*, 853 F.3d at 222, 224). Even where a state statute is "broader on its face" than the relevant generic federal definition, the defendant must "point to an actual case in which Texas courts applied" the text "to capture those not included under" the generic definition. *Castillo-Rivera*, 853 F.3d at 223. And the Fifth Circuit has acknowledged that its approach in *Castillo-Rivera* departs from other circuits' approaches. *Vazquez* v. *Sessions*, 885 F.3d 862, 873 (5th Cir. 2018).

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[6] Any doubt about whether Subsection 30.02(a)(3) *would* support conviction in the absence of intent can be resolved by comparison with the offense of "murder" under § 19.02(b), which mirrors § 30.02(a)'s structure. Both statutes provide two alternatives explicitly requiring proof of intent, coupled with a third that eliminates the intent element upon proof of another felony. And the Texas Court of Criminal Appeals has held that for murder, the legislature clearly intended to "dispense with a culpable mental state" for the third alternative, and to allow conviction so long as there was proof of all the elements of the predicate felony—even a strict liability offense like driving while intoxicated. *Lomax* v. *State*, 233 S.W.3d 302, 305 (Tex. Crim. App. 2007).

The Eighth Circuit joined the Fifth in *Mowlana* v. *Lynch*, 803 F.3d 923, 925 (8th Cir. 2015). Like *Castillo-Rivera*, *Mowlana* held that the "analysis of realistic probability must *go beyond the text of the statute* of conviction to inquire whether the government actually prosecutes offenses" under the statute for "conduct" that would not satisfy the generic definition. *Ibid.* Even though the federal crime at issue in *Mowlana*—unlawful use or transfer of supplemental nutrition benefits in violation of 7 U.S.C. § 2024(b)—did not require a specific intent to deceive, the court accepted the Attorney General's assurance that the Government only prosecuted defendants under that statute who *in fact* harbored an intent to deceive. *Id.* at 926–928.

These are the only two circuits where defendants must point to actual prosecutions to prove that statutes with non-generic language are prosecuted on non-generic facts.

4. That approach is dead wrong. This Court's categorical approach cases have consistently focused on the *elements* of a state crime as defined in statutory text—what the jury was actually required to find "in order to convict the defendant." *Taylor*, 495 U.S. at 602. In conducting this analysis, federal courts focus on "the least of the acts *criminalized*" by the statute, not the least culpable acts ever *prosecuted*. *Moncrieffe*, 569 U.S. at 190–191 (emphasis added, internal alterations and quotation omitted).

This is because the categorical approach applied in ACCA and elsewhere "involves, and involves only, comparing elements." *Mathis*, 136 S. Ct. at 2257. It "does not care about" facts. *Ibid.* And this Court's categorical approach cases bear this out. The Massachusetts burglary statute

in *United States* v. *Shepard* was non-generic because it applied to "boats and cars" on its face. 544 U.S. 13, 17 (2005). The Iowa burglary statute in *Mathis* was also non-generic because, on its face, it included "a broader range of places" than generic burglary, including any "*land, water, or air vehicle*." 136 S. Ct. at 2250. And the Kansas drug statute in *Mellouli* did not "relat[e] to" controlled substances, as defined in 21 U.S.C. § 802, because the Kansas crime applied to "at least nine substances not included in the federal lists." 135 S. Ct. at 1984.

None of these cases involved an examination of "state enforcement practices," and this Court did not treat any of these state offenses as "narrower than it plainly is." *Swaby*, 847 F.3d at 66; *Titties*, 852 F.3d at 1274. This Court has "*never* conducted a 'realistic probability' inquiry" where "the elements of the crime of conviction are not the same as the elements of the generic federal offense." *Singh*, 839 F.3d at 286 n.10. The closest the Court has ever come was in *Moncrieffe*, 569 U.S. at 206—but that was in *dicta* responding to the Government's worry about an argument someone else might make in a hypothetical case about a different kind of crime.

Time has proven the Court's elements-only approach to be the correct one. And the wisdom of that approach is clear. Consider a state crime that draws no distinction between intentional, knowing, reckless, or negligent mental states. There is no reason to require a federal defendant to *prove* that such a statute reaches negligent or reckless conduct. The statute clearly says so. The only time extrinsic evidence of prosecution should be necessary would be in the narrow circumstance *Duenas-Alvarez* describes: if the defendant attempts to show that the state statute extends *beyond* the plain meaning of its text.

The Fifth Circuit's minority approach is not only unnecessary, it is unwise. An approach that involves judicially narrowing state statutes to make them conform to federally imposed "generic" boundaries is unfaithful to statutory text, casual with the proper division of authority between State legislatures and federal courts, and inconsistent with the rule of law.

Finally, the minority approach tilts the scale unfairly against criminal defendants. It presumes unfairly that the state crime triggers a severe penalty, forcing the defendant (or non-citizen) to *prove* otherwise by showing that the statute actually means what it says. On our facts, Mr. Herrold lost because he could not provide "Texas cases" *proving* that a burglar's predicate offense was (in fact) committed without specific intent. App. 10a.

That is probably an impossible task. There is no "compendium of facts" that synthesizes all Texas burglary prosecutions, a number estimated by Judge Haynes in her 2018 dissent to run into the "hundreds of thousands." App. 85a. The "vast majority" of these prosecutions, like "nearly all" criminal cases, "are resolved through plea bargains," which "are not published, nor are they readily accessible for review." *Betansos* v. *Barr*, 928 F.3d 1133, 1146–47 (9th Cir. 2019).

Even when court documents or appellate opinions are available for other people's convictions, they are unlikely to shed much light on whether a defendant's conduct was *in fact* non-generic. Where a state law like § 30.02(a) expressly prohibits both generic and non-generic conduct, a defendant has neither incentive nor opportunity "to contest what does not matter under the law; to the contrary, he may have good reason not to—or even be precluded

from doing so by the court." *Mathis*, 136 S. Ct. at 2253 (internal quotation omitted). And that is just as true for the "hundreds of thousands" of other people convicted of Texas burglary as it was for Mr. Herrold.

When Texas courts list the "elements" necessary to prove burglary under Subsection 30.02(a)(3), they routinely list the full range of mental states available for proving the predicate offense. E.g., *Duran* v. *State*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016) (aggravated assault could be reckless); *Battles* v. *State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App. Oct. 3, 2013) (injuring an elderly person could be negligent or reckless). Often, the law treats these lesser mental states as "conceptually equivalent" to specific intent. *Gomez-Perez* v. *Lynch*, 829 F.3d 323, 328 (5th Cir. 2016) (quoting *Landrian* v. *State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008)).

Yet the Fifth Circuit demands that defendants like Mr. Herrold glean proof *concerning the brute facts of other people's* cases—facts those other people had no occasion to dispute. This additional requirement, imposed only in the Fifth and Eighth Circuits and nowhere else, is too much to ask.

For all these reasons, other circuits have been harshly critical of the Fifth Circuit's approach. See *Hylton*, 897 F.3d at 64 (The approach has "practical challenges" and "finds little purchase in Supreme Court precedent."); *Salmoran* v. *Att'y Gen.*, 909 F.3d 73, 81 (3d Cir. 2018) (*Castillo-Rivera* reflects "confusion."). And the approach was initially controversial even within the Fifth Circuit. *Castillo-Rivera*, 853 F.3d at 239–241 (Dennis, J., dissenting) ("*Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a

state case.") & 243–244 (Higginson, J., concurring in part and dissenting in part) ("Although I have applied the 'realistic-probability' test announced in *Duenas-Alvarez*, I agree with Judge Dennis's dissenting opinion that this added showing is unnecessary when a state statute is facially broader than its federal analog."). But in the decision below, a unanimous en banc court applied the same extreme approach to reject Mr. Herrold's claim that Texas's unusual burglary statute is non-generic. Plenary review is thus warranted to correct an expansion of *Duenas-Alvares* prevailing in the Fifth Circuit that is unjustified—and unjustifiable.

3. The circuits are likewise divided over what it means for an offense to "involve" distribution of "a controlled substance."

The division among the circuits on the second Question Presented is equally pronounced, and equally determinative. It concerns the definition "serious drug offense" in § 924(e)(2)(A)(ii), which includes any state-law offense, punishable by at least ten years in prison, "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)."

Texas Health & Safety Code § 481.112(a) expressly prohibits a mere offer to sell drugs. § 481.002(8). And state courts have convicted people under this statute for fraudulent offers to sell fake or non-existent drugs. In *Francis*, for example, 890 S.W.2d at 513, the defendant offered to sell "two, $20 pieces of crack cocaine" to officers, but he had no cocaine and there was no proof he even had the ability to obtain cocaine. And in *Stewart* v. *State*, 718 S.W.3d 286, 287–288 (Tex. Crim. App. 1986), the defendant

offered to sell a bag of "brown powdery substance" he claimed was heroin but which was not really a controlled substance. Both were convicted. Accordingly, in Texas, a conviction under § 481.112(a) need not "involve" any "controlled substance" at all, much less manufacture, distribution, or possession with intent.

1. Yet the Fifth Circuit held that § 481.112(a) was a "serious drug offense," App. 2a n.2, applying circuit precedent that assigns such "expansive connotations" to the term "involving" as to slip the bounds of the very words it modifies. In *Vickers*, the Fifth Circuit held that even fraudulent offers under § 481.112(a) "involv[e]" distribution of controlled substances, because that term indicates that Congress meant to reach all "those who intentionally enter the highly dangerous drug distribution world," 540 F.3d at 365, even if they never actually encounter that world. *Vickers* did not focus on the specific crimes enumerated by Congress—manufacturing, distributing, or possessing a federally scheduled controlled substance with intent to manufacture or distribute it. A huckster has not performed any of those actions, and isn't even on the path toward those actions. But, according to the Fifth Circuit, he has made "the kind of self-identification as a potentially violent person that Congress was reaching by the ACCA." *Id.* at 366. And thus, in the Fifth Circuit, an offense "involves" the manufacturing or distribution of a controlled substance under the ACCA, even if the substance being manufactured or distributed, possessed, or simply offered for sale is brown sugar or steak rub.

The Eighth Circuit has explicitly adopted the Fifth Circuit's *Vickers* standard and held that a bare offer to sell drugs—even a fraudulent offer—is an offense "involving" the distribution of drugs. *United States* v. *Bynum*, 669

F.3d 880, 885–887 (8th Cir. 2012) (citing *Vickers*, 540 F.3d at 365) ("We reject Bynum's assertion that an offer to sell drugs must be 'genuine, made in good faith, or be accompanied by an actual intent to distribute a controlled substance' to 'involve' drug distribution.").[7]

2. The Ninth Circuit has explicitly rejected the standard employed in the Fifth and Eighth Circuits, *United States* v. *Franklin*, 904 F.3d 793, 801 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 2690 (2019), recognizing that it would run afoul of this Court's decision in *Mellouli*, 135 S. Ct. at 1990. See *Franklin*, 904 F.3d at 801 n.8.

Mellouli interpreted an analogous immigration provision, 8 U.S.C. § 1227(a)(2)(B)(i), which makes a noncitizen deportable if he has been convicted of a state offense "*relating to* a controlled substance (as defined in section 802 of Title 21)." *Ibid.* (emphasis added). This Court recognized the danger of applying an expansive construction of "relating to"—already a "broad" and "indeterminate phrase," and one that would "stop nowhere" if courts "extended" it "to the furthest stretch of [its] indeterminancy." *Ibid.* (alterations omitted). The Court held that a Kansas drug paraphernalia crime did not "relat[e] to" controlled substances *as defined in* 21 U.S.C. § 802 because "it was immaterial under [the Kansas] law whether the substance

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[7] Relying on *Vickers* and *Bynum*, the First Circuit has held that a *bona fide* offer to sell drugs is a "serious drug offense." *United States* v. *Whindleton*, 797 F.3d 105, 110 (1st Cir. 2015) ("These two requirements for a bona fide sale more closely align the offer to sell a controlled substance with its ultimate distribution."). A bona fide offer is at least a step on the path to actual distribution. Not so with a fraudulent offer.

was" listed as a controlled substance "in 21 U.S.C. § 802." 135 S. Ct. at 1984.

Franklin concluded that § 924(e)'s *involving* required an even closer connection between the state crime and the federal definition: "'Involving' does not have a single, uniform meaning, but it usually signifies something narrower than 'relating to.'" 904 F.3d at 801. And thus the Ninth Circuit held that a state crime must be a categorical, element-for-element match with a generic version of "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." *Ibid.* at 802. This Court has granted certiorari in *Shular* to decide whether the Ninth Circuit's element-for-element match is the correct standard. *Shular* v. *United States*, 139 S. Ct. 2773 (2019). If so, then Mr. Herrold should prevail: federal law does not prohibit offers to sell fake controlled substances.

3. The Government, for its part, has offered still *a third* standard in *Shular*. There it explicitly argues for *Franklin*'s "generic federal equivalent" standard to be overturned. U.S. *Shular* Br. 30–31. But the approach it advocates is also narrower than the standard adopted in the Fifth and Eighth Circuits. Rather than reaching any crime where the participant intentionally enters the dangerous world of drug trafficking, the Government argues that "serious drug offense" includes only those state crimes whose elements "*necessarily entail* manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance." U.S. *Shular* Br. 10. This is similar to the standard this Court adopted in *Kawashima* v. *Holder*, 565 U.S. 478 (2012), which held that a crime "*involves* fraud or deceit," 8 U.S.C. § 1101(a)(43)(M)(i), if its elements "necessarily entail

fraudulent or deceitful conduct." 565 U.S. at 484 (emphasis added).

The Government's new definition might be broad enough to reach traditional inchoate offenses, such as conspiracy and attempt. It might even reach *bona fide* solicitation short of attempt. But it would not reach *fraudulent* offers, as the Fifth and Eighth Circuits' definitions do, because offering to sell steak rub or brown sugar is not even a necessary step toward manufacturing, distributing, or possession of actual controlled substances with intent to manufacture or distribute. A *fraudulent* offer to sell drugs has no actual connection to any enterprise involved in those activities. Accordingly, even under the Government's preferred construction of "involving," the Texas statute under which Mr. Herrold was convicted did not "involv[e]" distribution. And if that construction were to be adopted in *Shular* or elsewhere, Mr. Herrold's sentence would have to be reversed.

B. Both Questions Presented warrant plenary review, or at least a hold for *Shular*.

Certiorari is warranted because the Questions Presented in this case are recurring ones of national significance, making plenary review appropriate.

1. This petition offers an opportunity to resolve several circuit conflicts over the ACCA's application at once, and in the process, get straight the basic doctrinal rules for applying the categorical approach after *Duenas-Alvarez*. And that all-important dispute was determinative. There is no doubt that the Fifth Circuit demanded something extra—empirical evidence—when evaluating whether Texas burglary is generic. And it did this solely because of its

interpretation of *Duenas-Alvarez*. The Fifth Circuit conceded that the text of Texas's statute was not materially different from the Minnesota statute at issue in *Van Cannon*. App. 14a. So without the Fifth Circuit's mistaken interpretation of *Duenas-Alvarez*—and the superfluous demand for empirical proof—Mr. Herrold would obtain the same outcome as the defendant in *Van Cannon*.

2. The national importance of the burglary question is also obvious. The decision below intersects several different strands in the federal criminal and immigration law, exacerbating splits among the circuits in each. Burglary is one of the most "frequently-used ACCA predicate[s]." Morris Gov't Reh'g Pet. That alone makes this "a matter of exceptional importance to the consistent administration of the federal criminal law." U.S. Pet. 17–18, *United States* v. *Stitt*, No. 17-765 (U.S. filed Nov. 21, 2017). Indeed, this is exactly why the Court has in the past granted certiorari to clarify the proper application of the ACCA's "burglary" definition in *Shepard*, *Descamps*, *Mathis*, *Stitt*, and *Quarles*. And while there are only a few states that define burglary like Texas, the federal courts should reach similar conclusions about similar statutes.

3. The doctrinal division over *Duenas-Alverez* may be even more important. The geographic impact is broader—encompassing all circuits but two. And its larger impact in the law is deeper, because the "categorical approach" is not only used for the ACCA, but also in numerous other criminal and immigration contexts, such as the multi-purpose "crime of violence" definition found in 18 U.S.C. § 16 (and its materially identical analogs throughout the criminal code, e.g. §§ 521, 924(c)(3), 3156(a)(4)); the prohibition on firearm possession by those convicted of a "misdemeanor crime of domestic violence," §§ 922(g)(9) &

921(a)(33)(A); the definition of "serious violent felony" in § 3559(c)(2)(F), which was recently incorporated into 21 U.S.C. § 841(b); the definitions of, and classifications for, "sex offenses" under SORNA, 34 U.S.C. § 20911; the U.S. Sentencing Guidelines' definitions of "crime of violence" and "controlled substance offense," U.S.S.G. § 4B1.2; and immigration law's definitions of "aggravated felony," 8 U.S.C. § 1101(a)(43), and "crime of moral turpitude," § 1227(a)(2)(A)(i).

4. The dispute over the meaning of the term "involving" in the "serious drug offense" ACCA predicate is no less important, which is why the Government repeatedly asked this Court to step in and settle the conflict over the meaning of that term. U.S. *Shular* B.I.O. 10; U.S. *Franklin* Pet. 17–20; U.S. *Hunter* B.I.O. 10–12.

Collectively, centuries of prison time turn on the outcome of these difficult legal disputes. Mr. Herrold's case illustrates the danger of applying the wrong rule—with the ACCA, he was sentenced to more than 17 years in prison (App. 23a); without the ACCA, he was released after serving fewer than five years in prison. App. 5a. More than a decade of additional prison time turns on the accident of geography in just this one case. If only he had been prosecuted in the First, Second, Third, Ninth, Tenth, or Eleventh Circuits, he would not be an Armed Career Criminal and there would be no risk of reimprisonment.

That is an intolerable result under federal law that is supposed to be uniform. As long as these divisions remain in place, two federal cellmates might have identical records but vastly different sentences. It is exactly these kinds of divisions that have led many to categorize the ACCA's categorical approach as one of the most "perplex-

ing," "counterintuitive," and "extremely complicated" areas of federal law, in no small part because of the split over *Duenas-Alvarez*. Doug Keller, Causing Mischief for *Taylor*'s Categorical Approach: Applying "Legal Imagination" to *Duenas-Alvarez*, 18 Geo. Mason L. Rev. 625 (2011). And it is important for the Court to step in to correct it.

5. This case is a good vehicle for dealing with these serious problems with the ACCA's application. The issues under both Questions Presented are preserved, cleanly presented, and determinative—a win under either one will require reversal of Mr. Herrold's sentence because his LSD offense and both burglaries are necessary for an ACCA enhancement.

6. The case is therefore unquestionably certworthy on both Questions Presented. Yet the question remains how best to address these questions, because the resolution of this case may depend upon the outcome of *Shular*—this Court's adoption of either the Ninth Circuit's or the Government's definition of "involving" should require a win for Herrold. A hold for *Shular* would thus be appropriate at a minimum.

Even so, a plenary grant is more appropriate. More than seven years after Mr. Herrold illegally possessed a gun, and after more than five years of criminal appellate litigation, he is entitled to a definitive answer on whether these crimes count under the ACCA.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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