No. 20-400

IN THE

Supreme Court of the United States

JAMES AVERY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government provides no sound basis to deny certiorari in this case, which implicates an acknowledged circuit conflict. The government admits the division in authority, but it tries to minimize that division by asserting that the circuits involved in the conflict considered different versions of the Georgia burglary statute. That assertion fails due to the government's concession (Opp. 15) that the difference between the versions is "not substantial[]." In fact, that difference is wholly immaterial—which is why the Fourth and Eleventh Circuits recognized their disagreement over the question presented. There is, moreover, a separate though closely related conflict between the Eleventh and Sixth Circuits over how to conduct the divisibility inquiry under *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), a conflict the government does not address.

The government also seeks to minimize the importance of the case, asserting that it merely concerns one particular state statute. But the likelihood that similarly situated defendants with prior convictions under that statute may be subject to enhanced sentences under the Armed Career Criminal Act (ACCA) based on the fortuity of where they are prosecuted is enough to warrant certiorari. Indeed, the government's assertion could have described *Mathis* and *Descamps* v. *United States*, 570 U.S. 254 (2013), which also involved particular state statutes. Like those cases, this one raises a question that goes beyond the state statute at issue: how to apply *Mathis*—for ACCA purposes, as well as in other criminal and immigration contexts—to statutory features that are common to criminal laws across the country.

As to the merits, the government offers nothing more than a recitation of the Eleventh Circuit's analysis, the flaws of which the petition fully addressed.

Finally, the government notes the possibility that Mr. Avery's sentence could be sustained on remand on alternative grounds. That possibility is no obstacle to this Court's review, given that the Eleventh Circuit's decision clearly turned on its resolution of the question presented. The circuits are divided on an issue that the government does not deny underlay the Eleventh Circuit's judgment, and the Court's resolution of that division will provide critical guidance in numerous other cases. That is ample reason to grant the petition.

ARGUMENT

I. THE GOVERNMENT'S ARGUMENTS REGARDING THE CIRCUIT CONFLICT ARE UNAVAILING

The government admits (Opp. 10) that there is "disagreement" between the Fourth Circuit, on the one hand, and the Eleventh and Sixth Circuits, on the other, about the divisibility of the Georgia burglary statute. The government contends, however (Opp. 15), that Mr. Avery "overstates the [circuit] conflict" because the Fourth Circuit "did not consider the same version of the Georgia burglary statute … at issue here." That argument is meritless.

As an initial matter, the government agrees that the versions of the Georgia statute that the Eleventh and Sixth Circuits addressed are "virtually identical." Opp. 11 n.1, 14; *accord* Pet. 11 n.2. That alone warrants review because, as Mr. Avery explained (Pet. 15-16), the Sixth Circuit "disagree[d] with" much of the Eleventh Circuit's reasoning in *United States* v. *Gundy*, 842 F.3d 1156 (11th Cir. 2016). *Richardson* v. *United*

States, 890 F.3d 616, 628 (6th Cir. 2018); *see also id.* at 623, 625-626. The government does not address this basis for review at all.

Beyond that, the government is of course correct that "the divisibility analysis under *Mathis* turns in part on the statutory text and state court decisions interpreting that text." Opp. 15. But it does not follow that different outcomes on the question of divisibility do not conflict simply because the government may point to an immaterial difference in versions of a statute. This case illustrates the point: The differences between the versions of the Georgia statute did not stop the Fourth and Eleventh Circuits from concluding that their decisions conflict with each other. Pet. App. 7a n.6; *United States* v. *Cornette*, 932 F.3d 204, 213 n.2 (4th Cir. 2019).

That conclusion was for good reason. As the petition pointed out (at 11-12 n.2), the most significant difference between the version of the Georgia burglary statute addressed by the Fourth Circuit, on the one hand, and the versions at issue here and in the Sixth Circuit, on the other hand, is whether the statute prohibits entering or remaining in "aircraft." The government does not suggest that this distinction has any meaningful effect on the divisibility analysis. To the contrary, the government acknowledges (Opp. 15) that the version the Fourth Circuit addressed is "not substantially different" from those that the Eleventh and Sixth Circuits considered. That concession confirms the substantiality of the circuit conflict.

The government insists, however (Opp. 15), that the Fourth Circuit "refused to consider [a] Supreme Court of Georgia[] decision … and other Georgia appellate decisions"—cases on which the Eleventh Circuit

had relied—"in part because they were issued after the defendant's conviction there." But the government ignores *why* the Fourth Circuit did not consider those cases: the Fourth Circuit concluded they were not relevant to the question whether, "at the time of [the defendant's] conviction," the Georgia burglary statute "criminalized more conduct than ACCA generic burglary." 932 F.3d at 213, 215. That is not the question here, as it is undisputed that Georgia's definition of burglary is "broader than the generic definition of burglary," Pet. App. 7a; *see* Pet. 19. As to the issue presented here, which is whether the Eleventh Circuit erred in concluding that the Georgia burglary statute's list of locations identifies elements of the crime rather than means of commission, the Fourth Circuit *did* consider the Georgia decisions; indeed, it devoted several paragraphs to them. And it correctly concluded (as had the Sixth Circuit) that they do not support the Eleventh Circuit's analysis. *See Cornette*, 932 F.3d at 212-213; *Richardson*, 890 F.3d at 624-626; Pet. 20.

II. THE GOVERNMENT DEFENDS THE DECISION BELOW ONLY BY REPEATING ITS ANALYSIS

The government's claim that the decision below properly applied *Mathis* consists of little more than a recitation of the Eleventh Circuit's analysis. As the petition showed, that analysis did not comport with *Mathis* in several ways. The government does not engage with those points.

A. Regarding the text of the Georgia statute, the government first relies (Opp. 12) on the Eleventh Circuit's assertion that the statute is divisible merely because it (supposedly) contains "three [alternative] categories of locations." But as the petition explained (at 23), *Mathis* explicitly rejected the government's conten-

tion there that "a statute is divisible, and therefore amenable to use of the modified categorical approach, if it is phrased in the 'disjunctive,'" 136 S. Ct. at 2249. The pertinent question is instead whether the "items" in an "alternatively phrased statute" are "elements or means." *Id.* at 2256. A disjunctive list therefore raises the question whether the statute is divisible; it does not answer that question. *See* Pet. 4-5. The government's continued adherence to the position that this Court rejected in *Mathis* only underscores the need for the Court's intervention here. In any event, the petition also explained (at 24-25) both that the Georgia burglary statute does *not* actually identify "three categories of locations," Opp. 12, and that even if it did, such a structure would be irrelevant. The government does not respond to either point.

Next, the government repeats (Opp. 12) the Eleventh Circuit's assertion that the Georgia burglary statute differs from the Iowa law at issue in *Mathis* (and the Alabama law at issue in *United States* v. *Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014)), in terms of whether the locational list appears in the main criminal provision or is incorporated by reference to a separate provision. The petition already explained (at 24) why that purely formal difference "proves nothing," *Gundy*, 842 F.3d at 1175 (Pryor, J., dissenting). Again, the government does not respond.

B. The government also contends (Opp. 13) that "Georgia case law confirms *Gundy*'s understanding of the Georgia burglary statute" as being divisible. On the contrary, Georgia precedent establishes that the statute is indivisible because a jury need not find (nor a defendant admit) any particular location in order to permit a conviction. *See Hart* v. *State*, 517 S.E.2d 790, 792-793 (Ga. Ct. App. 1999), *cited in* Pet. 20. The gov-

ernment concedes this (Opp. 14), and also concedes that *Hart* is "precedential," *id.* The government argues only that *Hart* "cannot supersede" the Georgia Supreme Court's earlier decision in *DeFrancis* v. *Manning*, 271 S.E.2d 209 (Ga. 1980). But that elementary proposition is meaningless here, because *Hart* was in no way contrary to *DeFrancis*, a decision the government misunderstands just as the Eleventh Circuit did. Although the government contends (Opp. 13) that *DeFrancis* shows that the Georgia burglary statute's locational list identifies distinct elements, the Fourth Circuit explained that "[a]ll *DeFrancis* tells us is that burglary requires a dwelling." *Cornette*, 932 F.3d at 213; *see also* Pet. 16, 18, 20. The Sixth Circuit reached the same conclusion. *See Richardson*, 890 F.3d at 624 (citing *Gundy*, 842 F.3d at 1176-1177 (Pryor, J., dissenting)). Put simply, *DeFrancis* said nothing about whether the jury had to agree on the specific type of location. Again, the government has no answer. Nor does the government respond to Mr. Avery's related argument (Pet. 21) that, whatever *DeFrancis* says about what can be *charged*, it is error to infer divisibility—that is, the elements the prosecution must *prove*—solely from what the prosecution may charge.

C. Finally, the government relies on indictments under the Georgia burglary statute, observing that they "reference[] only one of the several alternative locations listed" in the statute. Opp. 13 (quotation marks omitted). As an initial matter, because Georgia case law and the burglary statute's text make "clear" that the statute is indivisible, there is no license to examine any records of conviction. *Mathis*, 136 S. Ct. at 2256. In any event, as the petition explained (at 25), the inclusion of a single locational element in an indictment is not probative, let alone conclusive, of whether a jury

must agree on a single location from the Georgia burglary statute's disjunctive list, just as an indictment charging that "the defendant burgled a house at 122 Maple Road" would not turn that address into an element of the crime. *Mathis*, 136 S. Ct. at 2255. Once again, the government does not respond.

III. THE GOVERNMENT'S REMAINING ARGUMENTS FAIL

A. The government urges (Opp. 10) that review should be denied because this Court "has twice denied … certiorari in cases raising the same issue." But the government cites no authority for the notion that prior denials are relevant, likely because the Court regularly grants review of an issue after previously denying it. *See, e.g.*, *NCAA* v. *Alston*, No. 20-512 (U.S. Dec. 16, 2020) (granting review of an issue on which the Court denied review in *NCAA* v. *O'Bannon*, No. 15-1388 (U.S. Oct. 3, 2016)); *Hurst* v. *Florida*, 577 U.S. 92 (2016) (reviewing an issue on which review had previously been denied multiple times, *see* Br. in Opp. 16 & n.3, *Hurst*, No. 14-7505 (U.S. Jan. 12, 2015)). That is true even when a prior denial was relatively recent. *See Dutra Group* v. *Batterton*, 139 S. Ct. 2275 (2019) (reviewing an issue on which the Court had denied review during the preceding Term, *see American Triumph LLC* v. *Tabingo*, 138 S. Ct. 648 (2018) (mem.)).[1]

B. Seeking to minimize the importance of the question presented, the government speculates (Opp. 16) that the circuit conflict is "unlikely to affect a significant number of cases." It also asserts (*id.*) that the

[1] One of the two prior denials the government cites—in *Gundy*—has particularly little probative value because at the time of the petition in *Gundy*, there was no circuit conflict on the question presented.

Court's review would not likely "provide meaningful … guidance to the lower courts in their application of *Mathis*" because this case involves (in the government's view) only "the proper application of *Mathis* to one specific state statute." Neither argument has merit.

First, even if it were true that this case involved only the application of *Mathis* to one state statute, the question presented would still be important and recurring. As the petition explained (at 26-27), courts in the Sixth and Eleventh Circuits have already applied their respective circuit precedent regarding the Georgia burglary statute numerous times, erroneously enhancing several sentences. Those circuits, and possibly others, will likely encounter more such cases in the future.

But more importantly, this case is not just about the Georgia burglary statute. It is about the correct divisibility analysis of disjunctively phrased statutes under *Mathis*, both in the ACCA context and in other criminal and immigration contexts. Pet. 28-31. And many criminal statutes around the country contain features similar to the relevant features of the Georgia burglary statute. *See* Pet. 28-29; *Brown* v. *United States*, 929 F.3d 554, 557 (8th Cir. 2019) (analyzing one such statute); *United States* v. *Hamilton*, 889 F.3d 688, 692, 696 (10th Cir. 2018) (analyzing another such statute).

The government's response (Opp. 16) is to invoke this Court's supposed "custom" of deferring to a regional circuit court's interpretation of the law of a state within the circuit. That is untenable for two reasons. First, the issues here relate not to the meaning of the Georgia statute in isolation, but to the lower federal courts' application to that statute (and other similar

laws) of a *federal* standard—the divisibility inquiry—that implements a *federal* law, ACCA. Second, the government's point does not change the fact that there is an entrenched circuit conflict, one that results in similarly situated defendants receiving disparate sentences, that in all likelihood only this Court can resolve. Hence, to the extent any deference to the Eleventh Circuit were appropriate here—though none is—the time to apply it would be at the merits stage in resolving the conflict.[2]

The government's argument that certiorari is unwarranted because the case involves only one state statute is further refuted by the fact that this Court has repeatedly taken up cases to decide whether a prior conviction under one particular state law qualified as an ACCA predicate offense, and in doing so has provided further guidance on the proper mode of analysis for the divisibility inquiry. *See Mathis*, 136 S. Ct. at 2250-2251, 2256-2257; *Descamps*, 570 U.S. at 258-259, 277. There is no reason not to take the same approach here.

C. Finally, the government speculates (Opp. 16) that petitioner "would not be entitled to relief even if he prevailed" in this Court. But as the government acknowledges (Opp. 9-10), the Eleventh Circuit did not address the alternative grounds that the government advances, much less resolve them against Mr. Avery.

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[2] The government adds (Opp. 16) that the Court should "particularly" defer to the decision below because the Georgia burglary statute was "substantially amended in 2012." As the Sixth Circuit recognized, however, the 2012 amendment did not materially change the relevant statutory language. Pet. 11-12 n.2 (citing *Richardson*, 890 F.3d at 627 & n.6). The amendment thus provides no basis to defer or to discount the importance of resolving the circuit conflict over the question presented.

And the government does not offer any authority for the notion that the possibility of an affirmance on other grounds on remand is a basis to deny certiorari. Nor does it even offer any explanation why that would be so. Indeed, this Court has previously vacated court of appeals decisions that rest on incorrect rulings, even where the respondent could—and ultimately did—prevail on an alternative ground on remand. *See, e.g.*, *Limelight Networks, Inc.* v. *Akamai Technologies, Inc.*, 572 U.S. 915 (2014) (vacating decision favoring Akamai); *Akamai Technologies, Inc.* v. *Limelight Networks, Inc.*, 797 F.3d 1020 (Fed. Cir. 2015) (en banc) (ruling for Akamai on alternative ground on remand).[3]

What matters, therefore, is whether the judgment below rests on a ground that the Court could reach and reverse. Here, it indisputably does. What follows after is a matter for remand; it is not a reason to decline review of an important issue that is the subject of a recognized circuit split.

[3] In any event, the government's two alternative grounds are not the foregone conclusions it hopes for. For example, the district court expressly declined to decide whether Mr. Avery had any other conviction that could qualify as an ACCA predicate because it considered those to be "thornier issues." Pet. App. 20a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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