No. 20-7188

IN THE
Supreme Court of the United States

SEDRIC RASHAD MARION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The petition asks this Court to resolve a circuit conflict about the scope of this Court's holding in *United States v. Stitt*, 139 S. Ct. 399 (2018). There, this Court addressed whether a state burglary statute criminalizing the burglary of a "residential occupiable structure" was broader than generic burglary as included in ACCA's enumerated-offenses clause. *Id.* at 404. The state statute defined "residential occupiable structure" to include "a vehicle, building, or other structure" where someone lives or that "is customarily used for overnight accommodation of persons." *Id.* In holding that the statute was no broader than generic burglary, this Court observed that Congress included burglary as a "violent felony" because of the risk of "violent confrontation between the offender and an occupant" when someone burglarizes *an occupied structure*. *Id.* at 406. And it distinguished the much lower risk of violence that exists when individuals break into structures that are "used for storage or safekeeping," rather than for lodging. *Id.* at 407.

The focus of the discussion in *Stitt* was on vehicles customarily used for overnight accommodation, but even the Fourth Circuit has recognized that *Stitt*'s reasoning was plainly not limited to vehicles. Consequently, at least two circuits have held, post-*Stitt*, that state burglary statutes fall within generic burglary only if they are limited to burglaries of buildings or structures *that house people*. In an opinion by Judge Niemeyer, the Fourth Circuit has acknowledged that such a conclusion may be correct—that this Court's "language in *Stitt* implies that generic federal burglary is concerned with violent confronta-

tions that might arise *when people are present*, whether in buildings, structures, or vehicles." *United States v. Dodge*, 963 F.3d 379, 384 (4th Cir. 2020). Nevertheless, it has repeatedly declined to revisit its contrary pre-*Stitt* precedent absent a "superseding contrary decision" from this Court. *Id.* at 383.

The government makes no attempt to reconcile the Fourth Circuit's interpretation of generic burglary with that of its sister circuits. And aside from a single sentence asserting that *Stitt* has no bearing on "the scope of generic burglary with respect to permanent structures," Opp. 10, the government provides no argument that the other circuits have read *Stitt* incorrectly. Nor does the government defend the Fourth Circuit's refusal to revisit its prior contrary holdings in light of *Stitt*.

The reasons the government *does* offer for opposing certiorari are meritless. The government contends that the construction of North Carolina's "breaking or entering" statute, N.C. Gen. Stat. § 14-54, is "fundamentally a question of state law." But there is no dispute about how § 14-54 should be construed; North Carolina courts have already done that. The only dispute is over the scope of *generic burglary* under ACCA—a question of *federal* law.

The government also contends that petitioner's argument regarding the overbreadth of § 14-54—that "breaking *or* entering" convictions cannot qualify as generic burglary, which requires "breaking *and* entering"—is not properly before this Court. But as the government has pointed out when *seeking* certiorari, "once a federal claim is properly presented"—here, that § 14-54 is broader than generic burglary—"a

party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (brackets and citation omitted). Furthermore, the Fourth Circuit already made clear in *Dodge*—issued before its decision here—that it will not entertain *any* argument that § 14-54 is broader than generic burglary, for *any* reason, without a contrary superseding opinion from this Court. And on the merits, the government barely defends treating "breaking *or* entering" as no broader than "breaking *and* entering."

The question presented is important and recurring. Because ACCA can drastically increase a defendant's sentence, its enumerated-offenses clause is limited to "violent felonies." North Carolina *has* a burglary statute that qualifies—§ 14-51 ("Burglary"), which criminalizes the burglary of a dwelling house or sleeping apartment. Section 14-51 requires entry as an element, and it applies only to burglaries of buildings *designed for habitation by people*. But the statute at issue here—§ 14-54 ("Breaking or entering buildings generally")—does not require entry, and it broadly applies to any structure with "one or more walls and a roof," *State v. Gamble*, 286 S.E.2d 804, 806 (N.C. Ct. App. 1982), including structures that store animals; construction trailers that store tools; and locked storage facilities. The statute is broader than generic burglary, and those who are convicted under it should not be subject to an ACCA sentencing enhancement.

The Fourth Circuit has made clear that this Court's intervention is needed. The Court should grant certiorari.

I. The circuits are in conflict over whether state statutes criminalizing intrusions of structures that do not house people qualify as "burglary" under ACCA.

A. The government does not dispute that the Fourth Circuit is an outlier among the circuits regarding whether generic burglary covers the burglary of structures that do not house people. As the petition describes (at 12-16), some circuits have held, post-*Stitt*, that state statutes of this nature are broader than generic burglary. In *United States v. Jones*, for example, the Ninth Circuit applied *Stitt*'s reasoning to two state burglary provisions, one applying to breaking and entering a *building* and another applying to breaking and entering a *dwelling*. 951 F.3d 1138 (2020). It held that, post-*Stitt*, conviction for breaking and entering a "building" "covers significantly more than" generic burglary because it "includes vehicles adapted for the overnight accommodation of people *or animals*, as well as structures that are designed to shelter only property"; but conviction for burglary of a "dwelling" "covers no more than" generic burglary because it is limited to structures that are "used, intended to be used, or usually used by a person for habitation." *Id.* at 1141 (citation omitted). Because the defendant was convicted under the burglary-of-a-dwelling provision, his ACCA enhancement was upheld. *Id.*

Similarly, in *Greer v. United States*, the Sixth Circuit acknowledged that *Stitt* addressed "whether the statutory term 'burglary' includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." 938 F.3d 766, 772 (2019) (citation omitted). And it held

that the Ohio burglary law at issue, which criminalizes "trespass in an occupied structure," satisfied *Stitt* because the statute's "presence requirement" "restricts the statute's scope to only those structures that carry an increased risk of a violent encounter between perpetrator and occupant." *Id.* at 771, 779.

The Fourth Circuit, in contrast, has rejected this interpretation of *Stitt*. It has repeatedly held that, even post-*Stitt*, § 14-54 convictions qualify as an ACCA predicate even though the statute applies when someone breaks or enters a wide variety of structures that do not house people. *Dodge*, 963 F.3d at 383; App. 2a (citing *Dodge*). It applies to a "storage trailer" holding tools at "[a] construction site," *State v. Bost*, 286 S.E.2d 632, 634 (N.C. Ct. App. 1982), a "storehouse," or a "shelter for animals"—any structure with "one or more walls and a roof." *Gamble*, 286 S.E.2d at 806. Indeed, a key distinction between § 14-54 and North Carolina's *actual* "burglary" statute (§ 14-51) is that only § 14-51 is limited to dwellings. *See State v. Fields*, 337 S.E.2d 518, 521 (N.C. 1985) (vacating conviction for "burglary" of "an unoccupied toolshed"); *State v. Taylor*, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993) (distinguishing these statutes).

The government does not distinguish or even mention the cases discussed above and in the petition. Instead, it faults petitioner for failing to identify a circuit split regarding the specific "North Carolina breaking-and-entering statute" at issue. Opp. 14. And it suggests that a decision by the Ninth Circuit supposedly "reach[ing] the same conclusion as the court below" with respect to § 14-54 is reason to deny certiorari. *Id.* (citing *Mutee v. United States*, 920

F.3d 624 (2019)). But in *Mutee*, the court was addressing an argument specifically about "movable structures," and the court relied heavily on the fact that North Carolina courts criminalize breaking or entering "truly mobile structures" under a different statute. 920 F.3d at 627-628. The court did not consider whether intrusions of buildings (whether permanent or movable) that are not designed to house people fall within generic burglary. *That* question was squarely addressed in *Jones*, which cited *Mutee* before going on to hold that a statute criminalizing the burglary of buildings designed to house "animals" or "property" "covers significantly more than" generic burglary. 951 F.3d at 1141. Petitioner's position would prevail in the Ninth Circuit under *Jones*.

Moreover, a circuit split regarding *a particular State's criminal statute* is not the kind of conflict this Court requires; each circuit is most likely to address the state laws in effect *within that circuit*. And it is certainly not the kind of conflict the government has relied on in seeking certiorari in ACCA cases. *See, e.g.*, Pet. 18-19, *Stitt* (No. 17-765) (identifying circuit split with respect to the Fourth, Eighth, Ninth, and Tenth Circuits' interpretation of "generic burglary" when addressing a variety of state burglary statutes).

B. The government addresses the merits of petitioner's argument only in passing, spending several pages refuting an argument not made in the petition. Opp. 7-9 (disputing, as a matter of state law, whether § 14-54 applies to mobile structures). Once the government finally turns to petitioner's argument, its entire response is to simply assert that the occupancy element discussed in *Stitt* is categorically in-

applicable to non-mobile structures. Opp. 9-10.

This unexplained assertion is at odds with the language and reasoning of *Stitt*, as the Fourth Circuit itself has acknowledged. *Dodge*, 963 F.3d at 384 ("*Stitt* indicates that it very well may be" that § 14-54 is broader than generic burglary). But it nonetheless held that it is foreclosed by circuit precedent from reaching that conclusion until this Court squarely addresses the question, *id.* at 385, and it then declined to reconsider that precedent en banc, Order, *Dodge*, No. 18-4507 (4th Cir. July 28, 2020).

Given that the Fourth Circuit is an outlier and even acknowledges that its position is in tension with *Stitt*, this Court may wish to summarily reverse or GVR in light of *Stitt*. But if it does not do so, it should grant the petition and consider the respective arguments on the merits.

II. Extending ACCA to convictions for "breaking *or* entering" conflicts with this Court's precedents and decisions from other circuits recognizing that entry is an element of generic burglary.

A. The government does not dispute that generic burglary requires both breaking *and* entering. *See Descamps v. United States*, 570 U.S. 254, 264-265 (2013). Nor does the government meaningfully dispute that § 14-54 does not. The text of the statute—prohibiting "breaking or entering"—makes this clear, employing "disjunctive" language, which is "broader" than a conjunctive prohibition. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229-230 (1993).

The government does not, for example, argue that North Carolina courts have interpreted the phrase "breaking or entering" conjunctively. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (noting rare situations where "or" is interpreted conjunctively). Nor could it—North Carolina courts have uniformly held that proof "of *either* a breaking *[o]r* an entering is sufficient" for a conviction under § 14-54. *State v. Boyd*, 214 S.E.2d 14, 22 (N.C. 1975) (emphases added); *see also State v. Myrick*, 291 S.E.2d 577, 579 (N.C. 1982) (same, focusing on the statute's "disjunctive language").

Given this clarity, one might expect the government to confess error and begin applying ACCA enhancements only to convictions under North Carolina's "burglary" statute—which actually *does* require both "breaking" *and* "entering." *See State v. Watkins*, 720 S.E.2d 844, 847-848 (N.C. Ct. App. 2012). Instead, the government ignores the plain text of the statute and, no less than 15 times, characterizes § 14-54 as a "breaking-and-entering" statute, as if by simply repeating this enough times the government can will it to be so. Pet. 4, 5, 6, 7, 8, 9, 10, 12, 13, 14.

B. Next, the government contends that it is sufficient for state-law burglary to "'substantially correspond[]' to generic burglary," which requires only a *modest* level of entry—such as the intrusion of a hand or a foot into the burglarized structure. Opp. 11-12 (citing the LaFave and Blackstone treatises). But North Carolina courts have adopted *the same definition* of entry (even relying on the same treatises), and have *still* held that *no entry*—not even a modest one—is required for a "breaking or entering" conviction, as opposed to a "burglary" conviction un-

der § 14-51. *E.g.*, *State v. Watkins*, 720 S.E.2d 844, 848-850 (N.C. 2012) (vacating burglary conviction where there was no evidence of entry and remanding for judgment under § 14-54).

C. The government suggests that decisions from other circuits rejecting "attempted burglary" as an ACCA predicate do not create a circuit split because attempted burglary can apply to a variety of acts that fail to effect a burglary. Opp. 13. That misses the point—the reason other circuits have held that attempted burglary does not fall within generic burglary is that "attempted burglary does not require entry into a building or habitation." *United States v. Martinez*, 954 F.2d 1050, 1053 (5th Cir. 1992). So too of § 14-54.

D. Finally, the government contends that this argument is not properly before the Court because petitioner did not brief it below. Not so. As the government has repeatedly argued *when seeking or supporting* certiorari,[1] this Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*, 513 U.S. at 379 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). Courts have long applied that principle in rejecting arguments for plain-error review under Rule 52(b), *e.g.*, *United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008)—including when the gov-

[1] *E.g.*, Br. in Support of Pet'r 27 n.8, *Sossamon v. Texas* (No. 08-1438); Reply Br. for U.S. 8 n.4, *United States v. Exxon Corp.* (No. 96-1127); Reply Br. for Pet'r 7-8, *U.S. Dep't of Treasury v. Rapaport* (No. 95-738).

ernment argued that it need not satisfy plain-error review in a cross-appeal approved by the Solicitor General, *see United States v. Brown*, 934 F.3d 1278, 1306-1307 (11th Cir. 2019).

Petitioner asserted the same consistent claim below as it does here—that North Carolina's "breaking or entering" statute is broader than generic burglary and thus cannot qualify as an ACCA predicate. Sent. Tr. 3-4; C.A. Br. 2. Offering additional points in support of that claim fully accords with this Court's precedents.

Nor would imposing a more stringent standard serve any purpose here. The Fourth Circuit has made clear that its precedents preclude it from reversing its "unequivocal[]" conclusion that § 14-54 is no broader than generic burglary, even where new arguments are offered. *Dodge*, 963 F.3d at 383. And just a month before its decision in this case, it declined to reconsider those precedents en banc even when *both* of the arguments made here were presented in the en banc petition. *See* Pet. for Rehearing En Banc 10-14, *Dodge*, No. 18-4507 (4th Cir. July 12, 2020). As the government has argued since then, any "entry" argument is plainly "foreclosed by" *Dodge*. U.S. Br. 8, *United States v. Lowery*, No. 20-4458 (4th Cir. Apr. 7, 2021). Only this Court can intervene.

III. This case is an excellent vehicle to address this important and recurring question.

The government does not dispute that the question presented is important and recurring. Section 14-54

is *the* most common felony offense of conviction in North Carolina, which means the Fourth Circuit's decision exposes potentially thousands of criminal defendants who did not commit violent felonies to fifteen-year mandatory minimums. Dozens of defendants have already challenged whether § 14-54 convictions are ACCA predicates. *See, e.g.*, *Dodge*, 963 F.3d at 382-383 (citing 17 decisions). Given ACCA's massive sentencing enhancement, and the Fourth Circuit's own acknowledgment that its holding may be wrong, defendants will not stop doing so until this Court grants review. And as the split described above demonstrates, questions about the scope of *Stitt* are frequently raised outside of the Fourth Circuit too.

The government's remaining reasons for opposing certiorari are meritless. The government suggests that this case involves a statutory-construction issue that is "fundamentally a question of state law." Opp. 13. But there is no dispute about the meaning of state law. The government contests neither that § 14-54 covers uninhabited structures, nor that it does not require entry. All that remains is a dispute about the scope of ACCA—a question of *federal* law.

Nor do the denials of certiorari the government cites (at 5) provide reason to deny certiorari. Three of the six petitions cited by the government (*Maham*, *Street*, and *Alexis*) raised no circuit split—and *Street* was briefed before any split existed, while *Alexis* predated *Stitt*. *Edwards* was a pro se petition arguing that "violent felony" and "generic burglary" are vague concepts. *Davidson* did not address any of the arguments raised in Mr. Marion's petition; instead, it contested solely whether § 14-54 (as a matter of state

law) requires entry that is *unlawful* rather than *permitted*. And *Dodge* presented a suboptimal vehicle because the petitioner was sentenced below ACCA's 15-year mandatory minimum, 963 F.3d at 381, which is perhaps why this Court did not even order a response. This case contains none of those infirmities to review.

Finally, granting review and reversing the decision below will not allow career burglars to escape ACCA on a technicality—North Carolina already has a burglary statute that *does* fall within generic burglary, and anyone convicted of burglary may be subject to ACCA's sentencing enhancement. "Breaking or entering," however, is not burglary, and the government should not be permitted to continue imposing 15-year mandatory minimums on criminal defendants with prior convictions under § 14-54.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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