No. _____

IN THE

Supreme Court of the United States

LARRY LOWERY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether North Carolina breaking or entering is categorically broader than generic burglary and cannot be a violent felony under the Armed Career Criminal Act when it can be committed by breaking into vehicles and structures that house only property and no people and thus does not present the necessary risk of violent confrontation.
2. Whether North Carolina breaking or entering and breaking or entering a place of worship are categorically broader than generic burglary and cannot be violent felonies under the ACCA because entry is not a required element of either offense.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:
United States v. *Lowery*, No. 20-4458 (4th Cir. Jan.7, 2022)

United States District Court for the Eastern District of North Carolina:
United States v. *Lowery*, No. 7:18-CR-120-D (E.D.N.C. Sept. 1, 2020)

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Petitioner Larry Lowery respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is not reported. Pet. App. 1a-3a. The District Court's judgment is available at Pet. App. 4a-10a.

JURISDICTION

The District Court entered final judgment on September 1, 2020. Pet. App. 4a-10a. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on January 7, 2022. Pet. App. 1a-3a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(2)(B) (2006) provides, in pertinent part, that a "violent felony" under the Armed Career Criminal Act is:

> Any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another;
>
> or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

N.C. Gen. Stat. § 14-54 (2013) defines breaking or entering as follows:

> (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.
>
> (a1) Any person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony.
>
> (b) Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor.
>
> (c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

N.C. Gen. Stat. § 14-54.1 (2005) defines breaking or entering a place of worship as follows:

> (a) Any person who wrongfully breaks or enters any building that is a place of religious worship with intent to commit any felony or larceny therein is guilty of a Class G felony.
>
> (b) As used in this section, a "building that is a place of religious worship" shall be construed to include any church, chapel, meetinghouse, synagogue, temple, longhouse, or mosque, or other building that is regularly used, and clearly identifiable, as a place for religious worship.

INTRODUCTION

North Carolina's breaking or entering and breaking or entering a place of worship statutes are categorically broader than generic burglary in the Armed Career Criminal Act. For starters, breaking or entering criminalizes breaking into buildings and vehicles designed to store property and no people. Under this Court's decisions in *United States* v. *Stitt*, 139 S. Ct. 399 (2018), *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), and *Taylor* v. *United States*, 495 U.S. 575 (1990), such a statute does not present the requisite risk of violent confrontation and thus is categorically overbroad. And both North Carolina statutes are categorically overbroad for another reason: They do not even require entry, a key element of generic burglary as defined in *Taylor*. This Court and six courts of appeals that have considered analogous attempted burglary statutes have held they are categorically broader than generic burglary.

In the face of this precedent, the Fourth Circuit nonetheless upheld its prior decisions, *United States* v. *Dodge* and *United States* v. *Mungro*, in which it held that North Carolina breaking or entering is a violent felony under the ACCA. In *Dodge*, the court recognized "tension" with this Court's precedents but refused to resolve it.

This Court's guidance is sorely needed to clarify that state breaking or entering crimes that do not categorically present a risk of violent confrontation and do not even require entry cannot be used to dramatically increase a defendant's mandatory minimum sentence under the Armed Career Criminal Act.

This Court should grant certiorari and reverse. But even if this Court believes plenary review is unwarranted, it should summarily reverse in light of *Stitt*, *Mathis*, and *Taylor*.

STATEMENT

A. Statutory Background

The Armed Career Criminal Act has drastic consequences for criminal defendants. Although violations of the federal felon-in-possession statute, 18 U.S.C. § 922(g), are normally subject to a maximum penalty of ten years of imprisonment and no mandatory minimum, the Act provides that district courts must sentence defendants with three prior convictions for "violent felonies" to a term of at least fifteen years. 18 U.S.C. § 924(e)(1). Such persons are also subject to an increased offense level and criminal history category under the Guidelines. U.S.S.G. § 4B1.4(b),(c).

A violent felony under the ACCA includes any crime punishable by more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or is "burglary, arson, or extortion, [or] involves the use of explosives." *Id.* § 924(e)(2)(B). These provisions are known as the "force clause" and the "enumerated-offense clause." A third clause, the residual clause, has been struck down as unconstitutionally vague. *Johnson* v. *United States*, 576 U.S. 591, 606 (2015). Because North Carolina's breaking or entering statutes do not categorically require the "use, attempted use, or threatened use of physical force against the person of another," *see Johnson* v. *United States*, 559 U.S.

133, 140 (2010), they are only violent felonies if they qualify under the enumerated-offense clause as generic "burglary."

To determine whether a crime qualifies as a predicate felony under the ACCA, courts apply the "categorical approach," which focuses on "the fact of conviction and the statutory definition of the prior offense." *Taylor*, 495 U.S. at 602. Under that approach, the court "focus[es] 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*, 136 S. Ct. at 2248. The prior state conviction is a proper ACCA predicate only if it is defined more narrowly than, or has the same elements as, the generic federal crime. *Descamps* v. *United States*, 570 U.S. 254, 261 (2013). If, however, the prior offense sweeps more broadly than the generic crime, it cannot serve as a predicate regardless whether the defendant actually committed the offense in its generic form. *Id.*

At issue in this case is whether North Carolina breaking or entering and breaking or entering a place of worship are a categorical match for generic burglary. Because the ACCA does not define "burglary," this Court in *Taylor* determined that generic burglary has "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. In *United States* v. *Stitt*, this Court explained that generic burglary encompasses only statutes that criminalize "burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation" because such

statutes "more clearly focus upon circumstances where burglary is likely to present a serious risk of violence." 139 S. Ct. 399, 407 (2018).

North Carolina breaking or entering encompasses "break[ing] or enter[ing] any building with the intent to commit any felony or larceny." N.C. Gen. Stat. § 14-54(a). The statute defines "building" as "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." *Id.* § 14-54(c).

North Carolina breaking or entering a place of worship encompasses "wrongfully break[ing] or enter[ing] any building that is a place of religious worship with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-54.1(a). The statute defines "a building that is a place of religious worship" as including "any church, chapel, meetinghouse, synagogue, temple, longhouse, or mosque, or other building that is regularly used, and clearly identifiable, as a place for religious worship." *Id.* § 14-54.1(b).

B. Facts and Procedural History

In July 2018, Larry Lowery was indicted for possessing a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year. A superseding indictment was filed in November 2019, to make conforming changes in response to this Court's decision in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). Pet. App. 63a-65a. Mr. Lowery pleaded guilty, without a written plea agreement, and the District Court sentenced him as an armed career criminal

under 18 U.S.C. § 924(e). It reached that conclusion based solely on prior convictions for breaking or entering and breaking or entering a place of worship under North Carolina law. Pet. App. 16a, 25a.

Mr. Lowery objected to his designation as an armed career criminal, both in the presentence report and at sentencing, arguing that the North Carolina breaking or entering statutes under which he was convicted are categorically broader than generic burglary and thus are not violent felonies. *See* Pet. App. 16a.

The District Court sentenced Mr. Lowery as an armed career criminal because it felt constrained by the Forth Circuit's prior decisions in *United States* v. *Mungro*, 754 F.3d 267, 272 (4th Cir. 2014), and *United States* v. *Dodge*, 963 F.3d 379, 385 (4th Cir. 2020). Pet. App. 14a-15a. In *Mungro*, decided before this Court's decisions in *Mathis* and *Stitt*, the Fourth Circuit purported to hold that North Carolina breaking or entering, N.C. Gen. Stat. § 14-54(a), was not broader than generic burglary and therefore qualified as an ACCA predicate. *Mungro*, 754 F.3d at 272. The *Mungro* court focused only on whether North Carolina breaking or entering was broader than generic burglary because it does not require an unprivileged entry. *Id.* at 270.

In *Dodge*, the Fourth Circuit panel acknowledged that "*Mungro* did not explicitly consider § 14-54(a)'s 'building' element," the basis of Mr. Dodge's argument on appeal. 963 F.3d at 383. The panel further acknowledged that after *Mungro* was decided, this Court's decisions in *Mathis*, 136 S. Ct. 2243, and *United States* v. *Stitt*, 139 S. Ct. 399, cast doubt on the continued validity of *Mungro's* holding. *Dodge*, 963

F.3d at 383-384. The panel recognized that *Mungro* "could be read as being in tension with intervening Supreme Court reasoning." *Id.* at 384. But it explained that "as a three-judge panel, we are precluded from overruling *Mungro*," and because *Mungro* stated broadly that North Carolina breaking or entering qualified as an ACCA predicate, the panel viewed itself as "bound to follow" that decision. *Id.* at 381, 384-385.

Mr. Lowery was sentenced to 192 months of imprisonment, to be followed by three years of supervised release, a sentence that was possible only because he was deemed to be an armed career criminal. Pet. App. 5a-6a; 27a.

Mr. Lowery appealed, renewing his challenge to his armed career criminal designation and arguing that the discretionary conditions of supervised release orally announced by the district court were inconsistent with those listed in the written judgment and required a plenary resentencing. The panel affirmed Mr. Lowery's designation as an armed career criminal, explaining that "*Mungro* and *Dodge* foreclose" his challenges, but vacated and remanded his case for resentencing to address the court's error regarding supervised release conditions. Pet. App. 2a-3a.

This timely petition followed.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IS WRONG AND CONTRAVENES THIS COURT'S DECISIONS IN *STITT, TAYLOR,* AND *MATHIS* BECAUSE IT COUNTS AS A VIOLENT FELONY A BREAKING OR ENTERING STATUTE THAT INCLUDES BREAKING INTO STRUCTURES AND VEHICLES THAT HOUSE PROPERTY AND NO PEOPLE

The touchstone of generic burglary's locational element is whether committing the offense in a particular vehicle or structure "present[s] a serious risk of violence" to another person, *Stitt*, 139 S. Ct. at 407; *see Quarles*, 139 S. Ct. at 1879 ("Congress 'singled out burglary' because of its 'inherent potential for harm to persons.' ") (quoting *Taylor*, 495 U.S. at 588); *Jones* v. *United States*, 550 U.S. 192, 203 (2007), *overruled by Johnson*, 576 U.S. 591 ("The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate."); *Taylor*, 495 U.S. at 588 ("The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.").

For that reason, in *Stitt*, the Court held that generic burglary "includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation" precisely because breaking into such structures "runs a similar or greater risk of violent confrontation." *Stitt*, 139 S. Ct. at 403-404, 406. By contrast, the statutes analyzed in *Mathis* and *Taylor* were categorically overbroad because they included burglary of structures and vehicles that are "ordinary boats and vessels * * * (and railroad cars often filled with cargo, not people)" (*Taylor*) and vehicles that are "used for storage or safekeeping" (*Mathis*), which did not present the same risk of violent confrontation. *Stitt*, 139 S. Ct. at 407.

By entrenching its pre-*Stitt* and *Mathis*-precedent, the Fourth Circuit ignored the clear command of those cases and failed to wrestle with the fact that North Carolina breaking or entering—like the statutes at issue in *Taylor* and *Mathis*—includes breaking into structures and vehicles that house property and no people. Its conclusion that *Mathis* and *Stitt* do not represent "superseding contrary decisions" of this Court that require reconsideration of prior precedent contravenes those decisions and diverges from the holdings of its sister circuits, who have faithfully applied *Stitt*, *Mathis*, and *Taylor* to arrive at the conclusion that statutes that allow for conviction based on burglary of structures and vehicles that house only property and no people are categorically broader than generic burglary and are not violent felonies.

A. The Fourth Circuit ignored the clear command of this Court's precedents.

Time and again, this Court has explained that burglary, for purposes of the ACCA, cannot be committed just anywhere. In *Taylor*, the Court defined burglary as "an unlawful or unprivileged entry into, or remaining in, *a building or other structure*, with intent to commit a crime." *Taylor*, 495 U.S. at 597 (emphasis added). And it went on to note that state burglary statutes were broader than this generic definition if they included "places, such as automobiles and vending machines, other than buildings." *Id.* at 599. Indeed, in *Mathis*, the Court noted that the Iowa burglary statute at issue "cover[ed] more conduct than generic burglary does" because it "reache[d] a broader range of places"—namely, "any

building, structure, *[or] land, water, or air vehicle*"—than what *Taylor*'s definition would allow. *Mathis*, 136 S. Ct. at 2250.

In *Stitt*, this Court clarified that generic burglary's locational element is not limited to "building[s]" in the ordinary sense. Instead, the Court held that generic burglary also includes "burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *Stitt*, 139 S. Ct. at 403-404. Generic burglary encompasses certain vehicles, the Court reasoned, because "break[ing] into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging" runs the same risk of "violent confrontation" between the intruder and potential occupants that prompted Congress to include burglary among the ACCA's enumerated offenses in the first place. *Id.* at 406.

Illustrating this focus on the risk of "violent confrontation," the Court reaffirmed that the Missouri statute at issue in *Taylor* was "beyond the scope" of the ACCA because the law "criminalized breaking and entering '*any* boat or vessel, or railroad car' " and thus included "ordinary boats and vessels, often at sea (and railroad cars often filled with cargo, not people)." *Stitt*, 139 S. Ct. at 407. The Court also reasserted that the Iowa burglary statute in *Mathis* was similarly overbroad because it covered "ordinary vehicles" and other structures that were used "for the storage or safekeeping of anything of value." *Id.* Yet unlike these two statutes, the one at issue in *Stitt* was no broader than generic burglary, the Court noted, because it was limited to burglaries of vehicles or other structures "customarily used or

adapted for overnight accommodation" and was therefore "more clearly focus[ed] upon circumstances where burglary is likely to present a serious risk of violence." *Id.*

Thus, in confirming that the scope of generic burglary's "building or other structure" element hinges on the risk of violent confrontation with another person, *Stitt* also clarified that this same element does not necessarily include burglaries committed in *any* building or vehicle—especially those where the likelihood of violent confrontation is virtually nonexistent. *See id.* (explaining that the burglary statute at issue in *Taylor* was broader than generic burglary because its scope was not limited to "circumstances where burglary is likely to present a serious risk of violence").

Given this clear rule, the Fourth Circuit should have recognized that *Stitt* and *Mathis* superseded its decision in *Mungro*. *See Mungro*, 754 F.3d at 272 (holding that North Carolina breaking or entering "sweeps no more broadly than generic burglary" without addressing the scope of the statute's building element). Indeed, North Carolina's breaking or entering statute suffers from the very same flaws that rendered those in *Taylor* and *Mathis* fatally overbroad. Like the Missouri breaking and entering statute in *Taylor*, North Carolina's covers "*any* dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and *any* other structure designed to house or secure within it any activity or property," N.C. Gen. Stat. § 14-54(c) (emphasis added), and "nowhere restrict[s] its coverage * * * [only] to vehicles or structures customarily

used or adapted for overnight accommodations." *See Stitt*, 139 S. Ct. at 407 (noting that the Missouri statute's "use[] [of] the word 'any' " rendered it broader than generic burglary). And just like the Iowa statute in *Mathis*, which was overbroad for encompassing structures and vehicles used "for the storage or safekeeping of anything of value," *id.*, North Carolina's breaking or entering statute expressly covers structures that are "designed to house or secure within it any activity or *property*," N.C. Gen. Stat. § 14-54(c) (emphasis added); *see State* v. *Bost*, 286 S.E.2d 632, 634 (N.C. Ct. App. 1982) (breaking into a storage trailer for tools and equipment on a construction site); *State* v. *Batts*, 617 S.E.2d 724, at *2-*3 (N.C. Ct. App. 2005) (breaking into a permanent, locked storage facility used to transport musical equipment); *State* v. *Taylor*, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993) (breaking into a travel trailer temporarily made "an area of repose").

But the Fourth Circuit below believed it was bound by its prior holdings in *Mungro* and *Dodge*. It did so even though *Mungro* never addressed North Carolina breaking or entering's capacious locational element and did not assess whether that element "clearly focus[es] upon circumstances where burglary is likely to present a serious risk of violence," *Stitt*, 139 S. Ct. at 407, flouting *Stitt*'s clear command in the process. And it did so even though *Dodge* acknowledged the evident tension between *Mungro* and this Court's decisions in *Mathis* and *Stitt*. *Dodge*, 963 F.3d at 384 (noting that "[t]here is * * * explanatory language in *Stitt* suggesting, but not holding, that the locational element of generic burglary might not encompass structures intended for the storage of property rather than for occupancy"). *Dodge*

even acknowledged *Stitt*'s rule that "generic federal burglary is concerned with violent confrontations that might arise *when people are present*, whether in buildings, structures, or vehicles." *Id.* But it then mischaracterized *Stitt*'s holding as "limited to the vehicle context" alone and therefore not "directly applicable" to *Mungro*, entrenching its prior precedent. *Id.* ("At bottom, we conclude that *Mathis* and *Stitt* do not overrule our prior holding in *Mungro* that a conviction under N.C. Gen. Stat. § 14-54(a) qualifies as an ACCA predicate conviction under 18 U.S.C. § 924(e)(2)(B)(ii).").

In sum, the Fourth Circuit below felt bound by its outdated and under-reasoned decision in *Mungro* not because that case remains good law—post-*Stitt*, it decidedly does not—but instead because it felt obligated to do so given the Fourth Circuit's rules regarding prior precedent. *See Dodge*, 963 F.3d at 384-385 (observing that accepting Petitioner's argument would demand that the Fourth Circuit "no longer follow [*Mungro*'s] holding" but noting that a three-judge panel is "precluded from overruling" a prior decision). But that sense of obligation has now led to the entrenchment of a lower court decision that contravenes this Court's precedents. Accordingly, this Court should intervene so that the Fourth Circuit, freed from its reliance on erroneous prior precedent, can properly apply *Stitt*, *Mathis*, and *Taylor* moving forward.

B. The Fourth Circuit's decision departs markedly from how other federal courts of appeals analyze burglary offenses under the ACCA post-*Stitt*.

The Fourth Circuit's failure to analyze whether North Carolina breaking or entering's locational element encompasses only those structures in which burglary

presents a "risk of violent confrontation," *see Stitt*, 139 S. Ct. at 406, also represents a marked departure from how other courts of appeals compare state offenses to generic burglary under the ACCA post-*Stitt*.

Start with *United States* v. *Jones*, 951 F.3d 1138 (9th Cir. 2019). There, the Ninth Circuit held that a defendant's prior Colorado conviction for second degree burglary of a dwelling was a predicate offense under the ACCA because it "cover[ed] only conduct within the generic offense of burglary as defined by the Supreme Court in *Stitt*." *Id.* at 1141. The court made clear that the burglary conviction at issue was no broader than generic burglary only because the defendant had been specifically convicted of the standalone offense of burglarizing a *dwelling*, and a "dwelling" was limited by state law to include only "building[s] which [are] used, intended to be used, or usually used by a person for habitation." *Id.* Because second degree burglary of a dwelling was so limited, it could not cover a structure used only "'for the storage or safekeeping' of property," and therefore was not overbroad. *Jones*, 951 F.3d at 1141 (quoting *Stitt*, 139 S. Ct. at 407). The habitation requirement ensured that the statute solely encompassed structures in which the likely presence of an occupant enhanced the "risk of violent confrontation." *Stitt*, 139 S. Ct. at 406.

The court made plain it would have reached the opposite conclusion had the defendant instead been convicted of general second degree burglary, which state law defined in relevant part as "break[ing] an entrance into, or enter[ing], or remain[ing] unlawfully in a *building* or occupied structure." *Jones*, 951 F.3d at

1140 (emphasis added). Because the statutory definition of "building," includes "structures that are designed to shelter only property," it covered "significantly more than the generic [burglary] element of 'building or other structure.' " *Id.* at 1141.

Consider next *Greer* v. *United States*, 938 F.3d 766 (6th Cir. 2019). In that case, the Sixth Circuit held that an Ohio aggravated burglary statute that "cover[ed] an expansive array of structures" nonetheless aligned with the generic definition of burglary because the additional statutory requirement that a person either be "present" or "likely to be present" in the burglarized structure "restrict[ed] the statute's scope to only those structures that carry an increased risk of a violent encounter between perpetrator and occupant." *Id.* at 775, 779. The Sixth Circuit cited this Court's decisions in *Stitt*, *Mathis*, and *Taylor* for the proposition that a "burglary statute is broader than generic burglary if it (1) covers a multitude of location types, including vehicles, and (2) does not limit its coverage to even remotely residential uses." *Id.* at 776. It then noted that this proposition could be explained in large part by *Stitt*'s focus on "circumstances where burglary is likely to present a serious risk of violence." *Id.* at 777 (quoting *Stitt*, 139 S. Ct. at 407). And because it extended "only to habitations 'in which at the time [of the burglary] any person is present or likely to be present,' " the Ohio statute at issue targeted the "core of the generic offense of burglary" and those instances, as emphasized in *Stitt*, "where the risk of violence is the greatest." *Id.*

The Eighth Circuit reached a similar conclusion in *United States* v. *Sims*, 933 F.3d 1009 (8th Cir. 2019), one of the two cases this Court addressed in *Stitt*. On remand, the Eighth Circuit considered whether the fact that an Arkansas burglary statute "might cover a car in which a homeless person occasionally sleeps" meant that it swept more broadly than generic burglary. *Id.* at 1013 (quoting *Stitt*, 139 S. Ct. at 407-08). Relying on "*Stitt*'s straightforward focus on the potential for violent confrontation," the court decided that the Arkansas statute did not. *See id.* at 1013, 1015 (holding that the statute matched generic burglary and therefore qualified as a violent felony under the ACCA). The Eighth Circuit emphasized that, "as *Stitt* recognizes, a statute that prohibits breaking and entering into *any* vehicle does not qualify as generic burglary." *Id.* at 1014 (emphasis in original). Such a statute, the court noted, would encompass vehicles and other structures that merely stored property, thus moving beyond generic burglary's ambit. *See id.* (highlighting the distinction between Arkansas's residential burglary statute, which matched generic burglary, and its more expansive breaking and entering statute that encompassed structures "not used for residential purposes"). But the Arkansas burglary statute at issue was more limited: It "applie[d] only to vehicles in which someone lives or that are customarily used for overnight accommodation," and therefore, in accordance with *Stitt*, "addresse[d] the risk of violence that concerned Congress when it passed the ACCA." *Id.* at 1015.

And then there is *United States* v. *Montgomery*, 974 F.3d 587 (5th Cir. 2020). In that case, the Fifth Circuit rejected the contention that Louisiana simple burglary

of an inhabited dwelling "cover[ed] more places than does the 'building or structure' definition of generic burglary." *Id.* at 592-593. To the contrary, the court suggested, the Louisiana statute at issue was "arguably narrower than generic burglary" because it required that the building or structure where the offense occurred be "used in whole or in part as a home or place of abode." *Id.* at 593. Put another way, "because the place burglarized must be one where a person lives," the statute targeted offenses where there was a "greater 'possibility of a violent confrontation between the offender and an occupant' than in a generic burglary." *Id.* (quoting *Taylor*, 495 U.S. at 588). And given this focus on the risk of violence, the parallels to *Stitt* could not be clearer. *See Stitt*, 139 S. Ct. at 406-407 (recognizing that burglary is an "inherently dangerous crime" because of the likelihood of "violent confrontation").

In sum, these cases collectively demonstrate that, when comparing an offense to generic burglary, other courts of appeals faithfully apply *Stitt*'s command by considering whether an offense's locational element "focus[es] upon circumstances where burglary is likely to present a serious risk of violence." *Stitt*, 139 S. Ct. at 407. The Fourth Circuit's failure to do the same contravenes *Stitt*, *Taylor*, and *Mathis*, and cries out for this Court's intervention.

II. THE FOURTH CIRCUIT'S DECISION CONTRAVENES *TAYLOR* FOR ANOTHER REASON, NAMELY THAT IT COUNTS AS VIOLENT FELONIES STATUTES THAT DO NOT REQUIRE ENTRY, AN ESSENTIAL ELEMENT OF GENERIC BURGLARY

North Carolina breaking or entering and breaking or entering a place of worship are distinct from generic burglary in yet another way: They can be completed

without entry. In *Taylor*, this Court defined generic burglary as having "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598. This understanding of generic burglary has been repeatedly reaffirmed since then. *See Mathis*, 136 S. Ct. at 2248 (noting that generic burglary consists of "unlawful or unprivileged entry into * * * a building or other structure, with intent to commit a crime." (quoting *Taylor*, 495 U.S. at 598); *Shepard* v. *United States*, 544 U.S. 13, 17 (2005) (same); *James*, 550 U.S. at 197 (same); *Begay* v. *United States*, 553 U.S. 137, 145 (2008) (same); *Stitt*, 139 S. Ct. at 405 (same); *Quarles*, 139 S. Ct. at 1875, 1877 (same). And this Court has further explained that if a statute permits conviction without requiring an entry, it cannot be a match for generic burglary. *See Descamps*, 570 U.S. at 277 ("Because generic unlawful entry is not an element, or an alternative element, of [California Penal Code Ann.] § 459, a conviction under that statute is never for generic burglary."). To qualify as generic burglary, a statute must require entry.

But North Carolina breaking or entering can be completed by breaking alone. The plain text of Sections 14-54(a) and 14-54.1(a) permit conviction on a finding of *either* breaking or entering. And the North Carolina Supreme Court has explained that "by the disjunctive language of [14-54(a)], the state meets its burden by offering substantial evidence that defendant either 'broke' or 'entered' the building with the requisite unlawful intent." *State* v. *Myrick*, 291 S.E.2d 577, 579 (N.C. 1982). *See also State* v. *Jones*, 157 S.E.2d 610, 611 (N.C. 1967) (per curium) (holding

that breaking a window with the intent to commit a felony "therein completes the offense even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building").

North Carolina courts of appeals continue to permit breaking or entering convictions based solely on a finding of breaking. *See State* v. *Watkins*, 720 S.E.2d 844, 850 (N.C. Ct. App. 2012) (vacating a first-degree burglary conviction and entering judgment on the lesser included offense of breaking or entering because the State presented evidence of breaking but not of entry); *State* v. *Lucas*, 758 S.E.2d 672, 678 (N.C. Ct. App. 2014) ("Although * * * the State failed to prove that either Defendant actually entered the home * * * the entry of judgment on felonious breaking or entering is appropriate."). North Carolina courts do not require proof of entry to satisfy felonious breaking or entering. Because conviction under North Carolina breaking or entering and breaking or entering a place of worship do not require proof of entry, they are broader than generic burglary.

North Carolina's breaking or entering statutes permitting conviction solely on proof of breaking, while rare, are not unique. Arkansas and Iowa also have statutes whose text can be satisfied by proof of breaking alone. *See* Ark. Stat. Ann § 5-39-202(a) ("A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or enters into any [enumerated structure or vehicle]."); Iowa Code Ann. § 713.1 ("[O]r any person having such intent [to commit a felony, assault, or theft therein] who breaks an occupied structure, commits burglary."). These statutes have been deemed categorically broader than

burglary, albeit on other grounds. *See Mathis*, 136 S. Ct. at 2257 ("Because the elements of Iowa's burglary law are broader than those of generic burglary [by covering vehicles in addition to structures], Mathis's convictions under that law cannot give rise to an ACCA sentence."); *United States* v. *Livingston*, 442 F.3d 1082, 1087 (8th Cir. 2006) ("We hold that breaking or entering a vehicle for purposes of committing a theft under Arkansas law [§ 5-39-202] is not a violent felony for purposes of the ACCA.").

Courts considering attempted burglary statutes provide more guidance. Like North Carolina breaking or entering and breaking or entering a place of worship, these statutes do not require entry. Indeed, the North Carolina Supreme Court has described North Carolina breaking or entering in terms strikingly similar to attempt, finding that when defendants "opened the door[,] although [defendants] had not entered" the building, felonious breaking or entering "was complete upon the finding by the jury of the overt act and felonious intent which was amply supported by the evidence." *State* v. *Nichols*, 150 S.E.2d 21, 22 (N.C. 1996). Breaking, but not entering, is typically categorized as attempted burglary or attempted breaking and entering. *See, e.g.*, *Commonwealth* v. *Cotto*, 752 N.E.2d 768, 772 (Mass. App. Ct. 2001) ("[A]ssume in the case at bar that the defendant had broken the window, but upon seeing [a witness], dropped the infernal device and ran. In this scenario, he may be found guilty of attempted breaking and entering as well as attempted arson, but not of arson or breaking and entering."); *People* v. *Austin*, 799 P.2d 408, 409 (Colo. App. 1990) (finding that "[t]ampering with doors"

without entry is either attempted burglary or attempted trespass, depending on the intent); *State* v. *Ison*, 744 P.2d 416, 418 (Alaska Ct. App. 1987) (finding that using a credit card to jimmy a lock but never physically entering was not burglary because there was no entry; instead the defendant committed only attempted burglary); *State* v. *McCurdy*, 487 P.2d 764, 764 (Ariz. App. Ct. 1971) (upholding conviction where "[t]he court ruled as a matter of law there was insufficient proof of actual entry but held there was sufficient proof to go to the jury on the included offense of attempted burglary").

Attempted burglary is not a violent felony under the ACCA. This Court, in *James*, 550 U.S. 192, explained that Florida attempted burglary "is not 'burglary' because it does not meet the definition of burglary under ACCA that this Court set forth in *Taylor v. United States*." *James*, 550 U.S. at 197[1]. This was so because Florida attempted burglary could be satisfied when a defendant committed an act towards commission of burglary but fell short of "entering or remaining in a structure or conveyance with the intent to commit an offense therein." *Id.*; Fla. Stat. §§ 810.02(1), 777.04(1); *see James*, 550 U.S. at 227 (Scalia, J., dissenting) ("the full extent of the risk that burglary poses—the entry into the home that makes burglary such a threat to the physical safety of its victim—is necessarily absent in attempted burglary, however 'attempt' is defined").

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[1] Although the Court ultimately held that the offense qualified as a violent felony under the residual clause, that holding has necessarily been abrogated by *Johnson*, 576 U.S. at 606.

The Second, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, analyzing attempted burglary statutes, have held that those statutes similarly do not qualify as enumerated burglary. *See United States* v. *Evans*, 924 F.3d 21, 24 (2d Cir. 2019) (defendant's New York attempted burglary had "qualified as a violent felony only under ACCA's voided residual clause"); *United States* v. *Thomas*, 2 F.3d 79, 80 (4th Cir. 1993) (holding that New Jersey's attempted burglary statute "does not contain the elements required for 'burglary' as that term is used in 924(e)" and therefore could not qualify as enumerated burglary); *United States* v. *Martinez*, 954 F.2d 1050, 1053 (5th Cir. 1992) (explaining that Texas's attempted burglary statute "does not require that the offender enter (or remain in) a building or structure" and therefore cannot qualify as enumerated burglary); *Van Cannon* v. *United States*, 890 F.3d 656, 658 (7th Cir. 2018) (explaining that '[t]he Iowa attempted burglary was a residual-clause offense and no longer counted toward Van Cannon's ACCA total" following *Johnson*); *United States* v. *Smith*, 645 F.3d 998, 1003 (8th Cir. 2011) (Minnesota attempted burglary could only qualify as a violent felony under the residual clause because "[a]ttempted burglary is not an enumerated offense"); *United States* v. *Strahl*, 958 F.2d 980 (10th Cir. 1992) (holding that Utah's attempted burglary statute did not qualify as enumerated burglary because the Tenth Circuit could "not conclude that Congress intended implicitly to include attempted burglary as a violent offense when it specified burglary as a violent felony under § 924(e)(2)(B)(ii)").

Attempted burglary is not a qualifying violent felony under the ACCA. And because North Carolina breaking or entering and breaking or entering a place of worship permit conviction for conduct equivalent to generic attempted burglary, those crimes also cannot be qualifying violent felonies under the ACCA.

III. THIS ISSUE IS IMPORTANT AND RECURS FREQUENTLY

The Fourth Circuit's holding that North Carolina breaking or entering is a categorical match for generic burglary and therefore a violent felony under the ACCA is an important and recurring issue warranting this Court's review.

North Carolina breaking or entering continues to be used to drastically enhance prison sentences under the ACCA, despite being broader than generic burglary on two grounds. This erroneous designation has enormous consequences for Mr. Lowery and the many other defendants in his position. In Mr. Lowery's case, his classification as an armed career criminal increased his offense level from 17 to 30. U.S.S.G. § 4B1.4(b)-(c). His advisory guideline range went from fifty-one to sixty-three months to *fifteen to seventeen-and-a-half years* as a result of ACCA's mandatory minimum sentence. 18 U.S.C. § 924(e)(1).

The issue presented here also has ramifications well beyond Mr. Lowery's case. To offer a stark illustration of this point, breaking or entering is *the second most common* felony offense charged in North Carolina. *See* N.C. Judicial Branch, Felony Case Activity Report FY 2020–21 (2021).[2] Indeed, more than 4,700 cases involving a felony count of breaking or entering were filed between July 2020 and

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[2] https://www.nccourts.gov/documents/publications/felony-case-activity-report.

June 2021, *id.*, and another 4,800 breaking or entering cases were filed the prior year, *see* N.C. Judicial Branch, Felony Case Activity Report FY 2019–20 (2020).[3] Consequently, the Fourth Circuit's disregard of this Court's ACCA precedents places tens of thousands of individuals with a North Carolina breaking or entering conviction on their record one step closer to being deemed an armed career criminal. And the risk that these same individuals will be subject to the ACCA's drastic sentencing enhancement is hardly speculative. At least five pending Fourth Circuit appeals raise this issue, *United States* v. *Wright*, No. 18-4215; *United States* v. *Goins*, No. 21-4686; *United States* v. *Enyinnaya*, No. 18-4400; *United States* v. *Boddie*, No. 20-4307; *United States* v. *Atkinson*, No. 17-4589. And the court has resolved twenty-three additional cases raising this issue since *Mungro*, including this one. *United States* v. *Molette*, No. 18-4209, 2022 WL 563256 (4th Cir. 2022); *United States* v. *Lowery*, 2022 WL 72724 (4th Cir. 2022); *United States* v. *Fayson*, 834 F. App'x 48 (4th Cir. 2021); *United States* v. *Dunlow*, 834 F. App'x 47 (4th Cir. 2021); *United States* v. *Marion*, 821 F. App'x 264 (4th Cir. 2020); *Dodge*, 963 F.3d 379; *United States* v. *Davidson*, 802 F. App'x 800 (4th Cir. 2020); *United States* v. *Denton*, 773 F. App'x 134 (4th Cir. 2019); *United States* v. *Joy*, 771 F. App'x 307 (4th Cir. 2019); *United States* v. *Hill*, 771 F. App'x 195 (4th Cir. 2019); *United States* v. *Maham*, 767 F. App'x 532 (4th Cir. 2019); *United States* v. *Ingram*, 758 F. App'x 332 (4th Cir. 2019); *United States* v. *Street*, 756 F. App'x 310 (4th Cir. 2019); *United States* v. *McNatt*, 727 F. App'x 68 (4th Cir. 2018); *United States* v. *Robinson*, 714 F.

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[3] https://www.nccourts.gov/documents/publications/felony-case-activity-report.

App'x 275 (4th Cir. 2018), *vacated on other grounds by Robinson* v. *United States*, 140 S. Ct. 129 (2019); *United States* v. *Alexis*, 697 F. App'x 239 (4th Cir. 2017); *United States* v. *Solomon*, 694 F. App'x 186 (4th Cir. 2017); *United States* v. *Beatty*, 702 F. App'x 148 (4th Cir. 2017); *United States* v. *Jones*, 669 F. App'x 110 (4th Cir. 2016); *United States* v. *Thompson*, 615 F. App'x 160 (4th Cir. 2015); *United States* v. *Lockamy*, 613 F. App'x 227 (4th Cir. 2015); *United States* v. *Ingram*, 597 F. App'x 151 (4th Cir. 2015); *In re Whitley*, 577 F. App'x 212 (4th Cir. 2014).

The Fourth Circuit's failure to follow this Court's precedents, and its departure from the analysis of its sister circuits in the wake of those precedents, demands this Court's intervention to ensure that unlawful ACCA designations do not enhance the sentences of those who are not armed career criminals.

IV. THIS IS AN EXCELLENT VEHICLE TO DECIDE THE QUESTION PRESENTED

This case also presents an excellent vehicle for deciding the question presented. As an initial matter, the issue was pressed and passed upon at every stage of this litigation. During his sentencing hearing and as an objection to his presentence report, Mr. Lowery argued to the District Court that his prior convictions for North Carolina breaking or entering, N.C. Gen. Stat. § 14-54, do not qualify as predicate offenses under the ACCA because Section 14-54 is categorically broader than generic burglary. *See* Pet. App. 14a. And this same issue was both pressed to and passed upon by the Fourth Circuit in the decision below: The Fourth Circuit panel explicitly held that "*Mungro* and *Dodge* foreclose Lowery's challenges to his ACCA enhancement." Pet. App. 3a.

Moreover, the question presented here is outcome-determinative. Absent the sentencing enhancement under the ACCA, Mr. Lowery's advisory guideline range in this case would have been fifty-one to sixty-three months. But the District Court's decision to designate Mr. Lowery an armed career criminal subjected him to a mandatory minimum sentence of fifteen years. His 192-month sentence would not have been possible absent the armed career criminal designation.

V. EVEN IF THIS COURT BELIEVES PLENARY REVIEW IS UNWARRANTED, IT SHOULD SUMMARILY REVERSE

The Fourth Circuit's decision so plainly conflicts with this Court's precedents that the Court should, in the alternative, summarily reverse. *See Maryland* v. *Kulbicki*, 136 S. Ct. 2, 3 (2015) (per curiam) (summarily reversing where the court applied governing Supreme Court case "in name only"); *Grady* v. *North Carolina*, 575 U.S. 306, 311 (2015) (per curiam) (summarily reversing a judgment inconsistent with the Court's Fourth Amendment precedents); *Martinez* v. *Illinois*, 572 U.S. 833, 843 (2014) (per curiam) (summarily reversing a holding that "r[an] directly counter to [this Court's] precedents"). This Court's cases, especially *Mathis*, *Taylor*, and *Stitt*, already adequately explain why North Carolina breaking or entering is categorically broader than generic burglary in the Armed Career Criminal Act. This Court should set the issue to rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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