NO. _____

In the Supreme Court of the United States

DYLAN GREGORY KERSTETTER,

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.

Petitioner pleaded guilty to an indictment alleging all the elements necessary for conviction under 18 U.S.C. § 922(g)(1) and punishment up to 120 months in prison under § 924(a)(2) (2018), including the existence of a prior felony conviction. The district court imposed a sentence of 190 months in prison after making additional factual findings required by the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

Does the Constitution require an indictment to allege, and a jury to find (or a defendant to admit), the extra facts necessary to impose an ACCA sentence?

2.

The Texas statutes defining Petitioner's prior offenses explicitly prohibit conduct outside the ACCA's "serious drug offense" and "violent felony" definitions. The lower courts applied the ACCA anyway because Petitioner did not prove to the courts' satisfaction that Texas had prosecuted and convicted someone for the exact same crime whose actual conduct fell outside the relevant definitions.

When analyzing a state statute under the categorical approach, and that statute is explicitly broader than the relevant federal definition, does the defendant bear a burden of proving that the state had convicted someone for non-qualifying conduct?

DIRECTLY RELATED PROCEEDINGS

United States v. Dylan Gregory Kerstetter, No. 3:20-cr-35 (N.D. Tex. Mar. 3, 2022)

United States v. Dylan Gregory Kerstetter, No. 22-10253 (5th Cir. Sept. 25, 2023), *reh'g denied*, Jan. 11, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Dylan Gregory Kerstetter 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 below was published at 82 F.4th 437. The district court did not issue any written opinions. The Appendix includes two excerpts of the sentencing transcript memorializing the relevant oral rulings. Pet. App. 7a–16a.

JURISDICTION

The Fifth Circuit entered its judgment on September 25, 2023. Pet. App. 1a. The court denied rehearing on January 11, 2024. Pet. App. 17a. This petition is timely under S. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves interpretation and application of the Fifth and Sixth Amendments to the Constitution, and the Armed Career Criminal Act (18 U.S.C. § 924(e)). The predicate crimes at issue are defined in Texas Health & Safety Code §§ 481.112(a) & 481.102, and Texas Penal Code § 30.02(a).

The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

Title 18, United States Code, § 922(g) provides, in pertinent part:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year …
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The Armed Career Criminal Act is codified at 18 U.S.C. § 924(e). The Act provides, in pertinent part:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection--
>
> (A) the term "serious drug offense" means--
>
> * * * *
>
> (ii) an offense under State law, 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)), for which a maximum term of imprisonment of ten years or more is prescribed by law;
>
> (B) the term "violent felony" means 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 . . .

Texas Health & Safety Code § 481.112(a) provides:

> Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.

Texas Health & Safety Code § 481.102 provides, in pertinent part:

> Penalty Group 1 consists of:
>
> * * * *
>
> (3) the following substances, however produced, except those narcotic drugs listed in another group:
>
> * * * *
>
> (D) Cocaine, including:
>
> (i) its salts, its optical, position, and geometric isomers, and the salts of those isomers;
>
> (ii) coca leaves and a salt, compound, derivative, or preparation of coca leaves;
>
> (iii) a salt, compound, derivative, or preparation of a salt, compound, or derivative that is chemically equivalent or identical to a substance described by Subparagraph (i) or

> (ii), other than decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine; and
>
> * * * *
>
> (6) Methamphetamine, including its salts, optical isomers, and salts of optical isomers;

Texas Penal Code § 30.02(a) provides:

> Sec. 30.02. BURGLARY. (a) A person commits an offense if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

STATEMENT

After months of back-and-forth legal wrangling and an hours-long sentencing hearing, the district court sentenced Petitioner Dylan Gregory Kerstetter to 190 months of imprisonment under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The Fifth Circuit affirmed. Pet. App. 1a–6a. This petition focuses on two deficiencies in the lower courts' reasoning. First, the Fifth Circuit allowed the

sentencing court to impose an aggravated punishment under the ACCA based on the court's findings about non-elemental facts underlying prior convictions. Pet. App. 4a. Second, the Fifth Circuit insisted that a defendant must point to an actual prosecution under the very same state statute involving non-qualifying facts, even when the text of the statute "sweeps more broadly than" the federal definition. Pet. App. 6a.

A. Background

Federal law bans firearm possession by anyone who has been convicted of a felony offense. 18 U.S.C. § 922(g)(1). In August 2019, when Petitioner violated this statute, the crime carried a punishment range of up to ten years in prison. *See* 18 U.S.C. § 924(a)(2) (2018).[1]

The ACCA dramatically increases the punishment for defendants with *three* prior convictions for "serious drug offenses" or "violent felonies," committed on different occasions. 18 U.S.C. § 924(e). For various reasons grounded in the Constitution, statutory text, and pragmatics, the ACCA focuses on the *statutory elements* of a prior conviction, rather than underlying facts or labels: "For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements." *Mathis v. United States*, 579 U.S. 500, 519 (2016).

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[1] Congress raised the statutory maximum to fifteen years in prison for offenses committed after June 25, 2022. Pub. L. 117-159, div. A, tit. II, § 12004(c) (2022), *codified at* 18 U.S.C. § 924(a)(8) (2018 & supp. IV).

1. Under this Court's Fifth and Sixth Amendment jurisprudence, *any* fact that aggravates the statutory punishment range constitutes an "element" of an aggravated offense that must be proven to a jury. *Alleyne v. United States*, 570 U.S. 99, 107–08 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000). In a federal prosecution, the Fifth Amendment requires all elements to be found by a grand jury and pleaded in the indictment.

For several years, this Court departed from that historic understanding and permitted legislatures to create "sentencing factors"—facts shielded from jury consideration that nonetheless trigger aggravated statutory punishment. Near the end of that sojourn, the Court held that the Constitution allowed Congress to make "recidivism" a statutory sentencing factor for the crime of illegal reentry after removal, 8 U.S.C. § 1326(a)–(b). *See Almendarez-Torres v. United States*, 523 U.S. 224, 239–47 (1998). The Court described recidivism is a "typical" sentencing factor and cited the ACCA in support. 523 U.S. at 230. Thus far, the Court has continued to acknowledge *Almendarez-Torres*'s precedential status, even as it undermined the principles and overruled the cases on which *Almendarez-Torres* relied.

To the extent that this exception remains alive,[2] it is very "narrow." *See Alleyne*, 570 U.S. at 112 n.1. The

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[2] Petitioner pressed the argument below that *Almendarez-Torres* should be overruled. Kerstetter C.A. Br. 11 n.3. The Court can resolve the petition without reaching that question,

only facts a sentencing court can find are "the simple fact of a prior conviction," and any facts *necessarily* established by the existence of that conviction. *Mathis v. United States*, 579 U.S. 500, 511 (2016). In those rare instances where a federal crime (or statutory sentencing enhancement) requires proof of a non-elemental fact about a previous conviction, that fact becomes an "element" of the current federal offense. *See Nijhawan v. Holder*, 557 U.S. 29, 40 (2009) (non-elemental "loss amount" under 8 U.S.C. § 1101(a)(43)(M) & § 1326(b)(2)); *United States v. Hayes*, 555 U.S. 415, 426 (2009) (domestic relationship between defendant and victim under 18 U.S.C. § 921(a)(33)(A) & § 922(g)(8)).

2. The "categorical approach" to analyzing prior convictions applies in multiple statutory contexts, including criminal sentencing (e.g. the ACCA) and immigration (e.g. the definition of "aggravated felony," 8 U.S.C. § 1101(a)(43)). When the categorical approach applies, "the facts of a given case are irrelevant. The focus is instead on whether the elements of the statute of conviction meet the federal standard." *Borden v. United States*, 593 U.S. 420, 424 (2021); *see also Shular v. United States*, 589 U.S. 154, 157–58 (2020); *Mathis*, 579 U.S. at 519; *Mellouli v. Lynch*, 575 U.S. 798, 804–10 (2015); *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

3. Many categorical-approach definitions require a comparison between state and federal drug schedules.

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but Petitioner urges the Court to overrule the case if it poses any barrier to relief here.

For example, 8 U.S.C. § 1227(a)(2)(B)(i) makes an alien deportable after conviction for a state crime "relating to a controlled substance (as defined in section 802 of Title 21)." In *Mellouli*, this Court held that the petitioner's drug-paraphernalia conviction from Kansas did *not* fit the federal definition because "[a]t the time of Mellouli's conviction, Kansas' schedules of controlled substances included at least nine substances—e.g., salvia and jimson weed—not defined in § 802." 575 U.S. at 808.

4. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), this Court rejected the respondent's argument that his California theft conviction did not satisfy a different part of the "aggravated felony" definition. *See* 8 U.S.C. § 1101(a)(43)(G). Duenas-Alvarez had been convicted of stealing a car under California Vehicle Code § 1851(a). That state statute closely resembled the generic "theft" definition in almost all other jurisdictions. *Id.* at 187, 189. That made it hard for Duenas-Alvarez to argue that the crime was non-generic.

Undeterred, he argued that California car theft was non-generic because the offense included accomplices. *Id.* at 187. That, too, is typical. *Id.* at 190. But Duenas-Alvarez argued that California's judicial interpretation of the aiding-and-abetting statute transformed the otherwise generic-looking theft statute into a non-generic crime that would not satisfy 8 U.S.C. § 1101(a)(43)(G).

This Court rejected Duenas-Alvarez's argument, holding that California's conception of abettor liability did not "extend significantly beyond the concept as set

forth in the cases of other States." *Id.* at 193. Aside from that, the Court explained that a party relying on a judicial construction of an ordinary-looking statute would need to show

> 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 (emphasis added). The italicized language eventually led to a pernicious circuit split, discussed below.

B. District Court Proceedings

1. After Dallas police searched his car and found two handguns, Petitioner pleaded guilty to a federal indictment charging him with violation of 18 U.S.C. § 922(g)(1) & § 924(a)(2). Pet. App. 2a. The indictment alleged—and Petitioner would later admit—that he knowingly possessed the firearms on August 20, 2019, and that he knew that "he had been convicted of a crime punishable by imprisonment for a term exceeding one year, that is, a felony offense." Pet. App. 18a, 23a, 26a. The indictment asserted that the "punishment" for the crime "is found at 18 U.S.C. § 924(e)(1)," but did not allege that Petitioner had been convicted of multiple "violent felonies" or "serious

drug offenses," nor did it assert that three predicate offenses had been committed on different occasions. Pet. App. 18a.

2. Petitioner's stipulation of guilt specifically argued that any sentence exceeding 120 months "would violate his right to Due Process, his right to have an indictment that includes the relevant and elemental facts of the charge against him, and his right to have his guilt proven beyond a reasonable doubt regarding those facts." Pet. App. 24a n.5. He also acknowledged contrary precedent. *Id.*

3. The parties vigorously disputed whether the Government could meet its burden to invoke the ACCA. The Government relied on four Texas judgments: two were for "delivery" of a controlled substance in "Penalty Group 1," Texas Health & Safety Code § 481.112(a), and two were for "burglary of a building" under Texas Penal Code § 30.02(a). *See* Pet. App. 3a. Petitioner objected to the burglary convictions because § 30.02(a)(3) explicitly applies where a trespasser makes an unlawful entry but *never* forms the specific intent to commit another crime inside the premises. This Court has not decided whether that theory represents a generic burglary. *Cf. Quarles v. United States*, 139 S. Ct. 1872, 1880 n.2 (2019); *see also Gann v. United States*, 142 S. Ct. 1, 2 (2021) (Sotomayor, J., respecting denial of certiorari).

4. Petitioner also argued that the "delivery" convictions were not ACCA predicates because the statute prohibits mere offers to sell a controlled substance and because Texas's Penalty Group 1

includes substances that are not federally controlled, such as the position isomers of cocaine.

In June 2020—before Petitioner pleaded guilty—a panel of the Fifth Circuit recognized that Texas's Penalty Group 1 explicitly includes the position isomers of cocaine, which are not federally controlled. *Alexis v. Barr*, 960 F.3d 722, 726–27 (5th Cir. 2020) (discussing Tex. Health & Safety Code § 481.102(3)(D); 21 U.S.C. § 812(c), Schedule II(a)(4); and 21 U.S.C. § 802(17)). Under the categorical approach, that would mean that Texas Penalty Group 1 sweeps more broadly than the federal CSA, and that many Texas crimes would not satisfy various federal definitions important to immigration and criminal law.

But the Fifth Circuit had extended *Duenas-Alvarez* and required *every* defendant or noncitizen asserting a mismatch under the categorical approach to point to an actual case where the state applied the statute to non-qualifying conduct. *Alexis*, 960 F.3d at 727 (discussing *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017)); *see also United States v. Herrold*, 941 F.3d 173, 179 (5th Cir. 2019). Even though Texas law explicitly prohibited crimes involving position isomers of cocaine, and in fact defined "cocaine" itself to include those extra substances, the Fifth Circuit would *assume* that a Texas crime satisfied the federal definition unless and until proven otherwise.

5. Unlike the noncitizen in *Alexis*, Petitioner did cite two cases in which Texas courts convicted defendants for crimes involving position isomers of

cocaine. In *State v. Ruedaaguilar*, No. 17-15889 (Dallas Cnty., Tex. Dist. Ct. March 10, 2020), and *State v. Santos*, No. 169266001010 (Harris Cnty., Tex. Dist. Ct. Dec. 3, 2020), the defendants pleaded guilty to "Possession of a Controlled Substance in Penalty Group 1" in violation of Texas Health & Safety Code § 481.115, confessing that they illegally possessed position isomers of cocaine. *See* 5th Cir. Sealed R. 795–818. The courts accepted their pleas and entered conviction.

6. Several courts in the Northern District of Texas held that *Santos* and *Ruedaaguilar* proved that Texas courts would apply Penalty Group 1 exactly as written. They declined to apply the ACCA enhancement to Texas convictions involving delivery of cocaine. *United States v. (Nathan) Mathis*, No. 3:19-CR-308-M (N.D. Tex. June 1, 2021); *United States v. Washington*, No. 3:18-CR-231-K (N.D. Tex. Dec. 1, 2021), *appeal dismissed*, No. 22-10009 (5th Cir. Mar. 11, 2022); and *United States v. Johnson*, No. 3:20-CR-214-M (N.D. Tex. Jan. 12, 2022), *appeal dismissed*, No. 22-10134 (5th Cir. Mar. 11, 2022).

7. At Petitioner's sentencing, the district court first determined that "methamphetamine" and all forms of "cocaine" were alternative means, rather than elements, which made Texas Health & Safety Code § 481.112(a) indivisible as to drug-type. Pet. App. 8a–10a. In other words, it would make no difference (under the categorical approach) if Petitioner actually committed crimes with methamphetamine, a salt of cocaine (e.g. cocaine base, "crack"), or a position isomer of cocaine like norcocaethylene.

The court then decided that Petitioner had *not* met his burden of establishing categorical overbreadth because *Santos* and *Rueedaaguilar* were guilty pleas to *possession*, rather than to *delivery*. the various controlled substances listed in Penalty Group 1 are alternative means of proving a single offense, rather than elements of distinct crimes, so Petitioner's two delivery convictions were indivisible. Pet. App. Pet. App. 12a–16a. The court did not reach the Government's alternative argument that it should be allowed to *disprove* the facts admitted by the defendants and accepted by Texas courts and prosecutors in *Santos* and *Ruedaaguilar*.[3] The court also overruled Petitioner's other objections to the ACCA.

C. Appeal

The Fifth Circuit affirmed. Pet. App. 1a.

First, the court rejected Petitioner's argument that the extra facts needed to invoke the ACCA were elements that must be pleaded in the indictment and proven to a jury. Pet. App. 4a. The court rejected that

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[3] The Government's sentencing memorandum included a transcript of a multi-hour evidentiary hearing in *Johnson*, No. 3:20-cr-214 (N.D. Tex.), reprinted at 5th Cir. Sealed R. 598–748. At that hearing, federal prosecutors vigorously challenged the state prosecutors who had agreed to the pleas in *Santos* and *Ruedaaguilar* and attempted to show that the underlying facts of those case involved federally controlled substances. The district court in *Johnson* decided that evidence was irrelevant. *See* Order (ECF doc. 59), *United States v. Johnson*, No. 3:20-cr-214 (N.D. Tex. Dec. 10, 2021).

argument on the merits, citing its recent decision in *United States v. Valencia*, 66 F.4th 1032 (5th Cir. 2023).

Then, the court rejected Petitioner's argument that Texas burglary was non-generic because it applies when a trespasser commits a reckless, negligent, or strict liability crime inside the premises without requiring proof of specific intent. Pet. App. 4a–5a. The court had previously employed its extension of *Duenas-Alvarez* to reject that argument, and the court rejected Petitioner's argument that that precedent had been undermined by *United States v. Taylor*, 596 U.S. 845 (2022). Pet. App. 5a.

Finally, the court rejected Petitioner's argument about the overbreadth of Texas Penalty Group 1 for the same reason—Petitioner did not point to an actual case *involving delivery*: "Kerstetter did not meet that test because he did not identify any actual cases where Texas brought charges against someone under Section 481.112(a) for delivery of position isomers of cocaine." Pet. App. 6a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD VACATE THE DECISION BELOW BECAUSE THE EXTRA FACTS NEEDED TO INVOKE THE ACCA ARE ELEMENTS.

Normally, the worst-case punishment for a felon-in-possession offense committed before June of 2022 would be ten years in prison. 18 U.S.C. § 924(a)(2) (2018). The district court sentenced Petitioner to more than fifteen years in prison after applying the Armed

Career Criminal Act, 18 U.S.C. § 924(e)(1). That statute requires proof of additional facts—that petitioner was convicted of *three* qualifying felony convictions arising from three different occasions. *See Wooden v. United States*, 595 U.S. 360, 363 (2022).

Wooden clarified the meaning of different "occasions," but did not decide whether the Constitution requires a jury determination. *Id.* at 365 n.3. The Court granted certiorari to decide that question in *Erlinger v. United States*, 144 S. Ct. 419 (2023) (No. 23-370).

In this case, the indictment alleged all the facts necessary to convict and punish Petitioner under § 924(a)(2), and Petitioner admitted all those facts. The indictment did *not* allege the additional facts needed to punish him under § 924(e). The lower courts committed harmful constitutional error in imposing and then affirming a 190-month ACCA sentence.

A. The Court already granted certiorari to decide whether the ACCA's different-occasions requirement is elemental.

In *Erlinger*, the Court will decide whether the Constitution requires proof to a jury, beyond a reasonable doubt, that three ACCA predicates were committed on separate occasions. Erlinger and the Government agree that it does. The Court should so hold.

B. *Almendarez-Torres* should not stand in the way of relief.

The parties in *Erlinger* have avoided addressing whether any life remains in this Court's "recidivism" exception to Fifth and Sixth Amendment jurisprudence. At some point, the Court should overrule *Almendarez-Torres*. "[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law." *S. Union Co. v. United States*, 567 U.S. 343, 353 (2012). There is no longstanding tradition justifying an exception for facts about prior convictions.

Even if the precent survives, it should have no application to the ACCA. Everyone agrees that the existence of a prior conviction for a crime punishable by more than one year in prison is an essential element of the federal crime defined in 18 U.S.C. § 922(g)(1), the Government must prove to the jury that the defendant was convicted of a felony offense before possessing the firearm. There is no rational basis for denying that protection to the second and third felonies. This is especially true for the different-occasions inquiry: it looks not to the *existence* of a conviction, nor to any fact *necessarily established* by the existence of the conviction. The recidivism exception does not allow a sentencing court to "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Descamps v. United States*, 570 U.S. 254, 270 (2013).

C. The Constitutional error was harmful.

The Government argued below that any error in applying the ACCA was harmless. But that is hard to stomach.

As Petitioner explained when he entered his guilty plea, he had a right to be sentenced *for the offense charged in the indictment* and *to which he pleaded guilty*. Pet. App. 24a. The lower courts mistakenly believed that the facts necessary for an enhanced punishment were not elements, so they believed they could sentence under § 924(e).

While this case was on appeal, the Government conceded that an ACCA sentence would violate the Fifth or Sixth Amendment if the defendant pleaded guilty to an indictment like Petitioner's. District judges throughout the country—including the judge who sentenced Petitioner—accepted that concession and declined to impose an ACCA-enhanced sentence.[4]

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[4] *See United States v. Lapado*, 3:20-CR-538 (N.D. Tex. Oct. 5, 2022) (Starr, J.) (78 months); *see also United States v. Bowman*, 1:18-cr-628 (D. Md. Oct. 13, 2022) (time served); *United States v. Johnson*, 2:20-cr-206 (W.D. Pa. Oct. 12, 2022) (57 months); *United States v. Rogers*, 1:21-CR-20494 (S.D. Fla. Sept. 30, 2022) (70 months); *United States v. Johnson*, 1:21-cr-10004 (C.D. Ill. Sept. 28, 2022) (92 months); *United States v. Ramos*, 2:21-cr-480 (C.D. Cal. Sept. 27, 2022) (84 months); *United States v. Auguste*, 1:22-cr-20072 (S.D. Fla. Sept. 26, 2022) (48 months); *United States v. Smith*, 4:21-cr-380 (N.D. Ala. Sept. 8, 2022) (44 months); *United States v. Taylor*, 1:21-cr-168 (W.D. Tex. Aug. 29, 2022) (24 months); *United States v. Thomas*, 2:21-cr-85 (N.D. Ala. Aug. 25, 2022) (60 months); *United States v. Watson*, 1:18-cr-537 (D. Md. Aug. 19, 2022) (64

The error here is not convicting Petitioner of a crime he intended to plead guilty to but without proof about one of the elements. The error is in sentencing him for an aggravated offense when he pleaded to the simple form. The 190-month sentence was at least 70 months longer than the statutory maximum, and the cases cited in the margin show that many courts went well below the non-ACCA statutory maximum.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE DIVISION OF AUTHORITY ABOUT THE "ACTUAL CASE" DOCTRINE.

The considers the *elements* of a state crime because those are the only facts necessarily established by the conviction. This Court has held—"over and over"—that the ACCA "does not care about" underlying facts. *Mathis*, 579 U.S. at 519. "If any—even the least culpable—of the acts criminalized do not" satisfy the federal standard, then the statute of conviction "cannot serve as an ACCA predicate." *Borden v. United States*, 593 U.S. 420, 424 (2021).

The Fifth Circuit has set this principle on its ear. When considering state statutes that *plainly* and *explicitly* prohibit actions that are outside the federal

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months); *United States v. Nunez*, 2:21-cr-356 (C.D. Cal. Aug. 10, 2022) (84 months); *United States v. Dutch*, 1:16-cr-1424 (D.N.M. July 28, 2022) (60 months); *United States v. Jackson*, 1:21-cr-69 (W.D.N.C. July 19, 2022) (78 months); *United States v. Kendrick*, 2:18-cr-115 (N.D. Ind. July 14, 2022) (27 months).

definition, the court ignores the mismatch unless the defendant can *prove* that someone was convicted of the exact same offense on non-generic facts. Even after this Court emphasized the "oddity of placing a burden on the defendant to present empirical evidence" about "prosecutorial habits," the Fifth Circuit persisted. *United States v. Taylor*, 596 U.S. 845, 857 (2022); *but see* Pet. App. 5a ("[N]othing in *Taylor* affects how we compare a state statute of conviction with a federal enhancement.").

A. There is an entrenched conflict among the circuits.

1. The First, Second, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits have all held that there is no need to point to an actual prosecution where "a state statute explicitly defines a crime more broadly than the [federal] definition." *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147–48 (9th Cir. 2020); *see also 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 v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (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, 1072 (11th Cir. 2013) (same); *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."); *Gordon v. Barr*, 965 F.3d 252, 261 (4th Cir. 2020) ("[T]he *Moncrieffe* dictum does not require a petitioner to 'find a case' in which the state successfully prosecuted a defendant for the overbroad conduct when, as here, the language of a statute unambiguously is broader than the federal offense under comparison."); *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 450 (7th Cir. 2022) (discussing *United States v. Ruth*, 966 F.3d 642, 647–48 (7th Cir. 2022)) ("To the extent there is any room for doubt in our case law, we reaffirm our statement in *Ruth*: If the statute is overbroad on its face under the categorical approach, the inquiry ends."); *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017) ("This is not a case where we need to imagine hypothetical non-violent facts to take a statute outside the ACCA's ambit. Section 1289.16 reaches conduct undertaken for purposes of 'whimsy, humor or prank' because the statute specifically says so.").

2. Eighth Circuit precedent is a mixed bag, but that is even more recent to grant certiorari and resolve the conflict. For *drug* predicates that incorporate the federal CSA, the Eighth Circuit is firmly on Petitioner's side of the debate. The court rejected the Government's argument that "petitioners must prove through specific convictions that unambiguous laws really mean what they say." *Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (8th Cir. 2021). That approach is "at odds with the categorical approach itself, which asks us to focus on the language of the statutory offense, 'not the facts underlying the case.'" *Id.* (citations omitted).

But in *United States v. Hutchinson*, 27 F.4th 1323, 1327 (8th Cir. 2022), the court followed the Fifth Circuit's lead and found that the defendant failed to "demonstrate[ ] a 'realistic probability'" that Texas Penal Code § 30.02(a)(3) reaches non-generic conduct."

3. The Fifth Circuit—and only the Fifth Circuit—is firmly on the Government's side of the debate. The published decision below continues to insist that a defendant must actually prove that the state has prosecuted someone for non-generic conduct. Pet. App. 4a–6a. What's more, the court totally ignored actual prosecutions where Texas courts *convicted* defendants of Penalty Group 1 offenses after they admitted crimes involving position isomers of cocaine—as though there remained some doubt about the reach of the Texas statute.

4. Judges within and without the Fifth Circuit acknowledge the split. *See Alexis*, 960 F.3d at 731–33 (Graves, J., concurring) (discussing *Hylton*, 897 F.3d at 64, and *Zhi Fei Liao v. Attorney Gen.*, 910 F.3d 714, 723 & n.11 (3d Cir. 2018)). Other courts describe the Fifth Circuit's approach as "demanding and particular," *Hylton*, 897 F.3d at 64, and marked by "confusion," *Salmoran v. Attorney Gen.*, 909 F.3d 73, 81 (3d Cir. 2018). "The majority" of circuit courts "have similarly declined to follow the government's framing of the realistic probability inquiry." *Gonzalez*, 990 F.3d at 661.

B. The conflict is outcome-determinative here.

The Fifth Circuit applied its "demanding and particular" approach to *both* of Petitioner's legal challenges. In a circuit that did not require him to *prove* that Texas had prosecuted explicitly overbroad statutes on overbroad facts, his ACCA sentence would have been reversed.

1. Texas Penal Code § 30.02(a)(3) is a novel theory of burglary liability called "trespass-plus-crime." *See Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018). Only a handful of states have adopted that theory. Rather than requiring formation of intent to commit some other crime inside the premises, this new theory is just a nonconsensual entry "followed by the commission of a crime within the trespassed building at some point thereafter." *Id.* at 664. *Van Cannon* held that a Minnesota crime materially identical to Texas Penal Code § 30.02(a)(3) is non-generic because "the statute doesn't require proof of intent to commit a crime *at all*—not at *any* point during the offense conduct." 890 F.3d at 664. The court refused to consider "*implicit* elements" when performing the ACCA analysis. *Id.* at 664; *see also Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019) (reaffirming this holding after *Quarles*).

In *United States v. Herrold*, 941 F.3d at 178–79, the Fifth Circuit rejected the same argument because the defendant could not prove that Texas had applied § 30.02(a)(3) were the defendant (in fact) lacked specific intent. Never mind the fact that the statute plainly allows such liability, and that a burglary

defendant has no incentive to contest whether his conduct was reckless or negligent rather than intentional. The burden is on the defendant, and he could not satisfy the burden.

2. The divergent outcomes are even more apparent for drug crimes. In *United States v. Minter*, 80 F.4th 406, 408 (2d Cir. 2023), the defendant was convicted in a state that controlled *all* isomers of cocaine. The Second Circuit reversed his ACCA sentence: the expanded coverage of isomers meant the crime was categorically broader than the "serious drug offense" definition. The court rejected the Government's argument that Minter must prove that New York had convicted someone for a position-isomer crime. *Id.* at 409–12 (citing *Hylton*, 897 F.3d at 65).

In *United States v. Myers*, 56 F.4th 595, 598–99 (8th Cir. 2022), the Eighth Circuit affirmed a non-ACCA sentence and rejected the Government's appeal because Missouri defines "cocaine" to include non-federally-controlled isomers.

And in *United States v. Ruth*, 966 F.3d at 647–50, the Seventh Circuit held that a defendant's Illinois drug conviction was overbroad because the state prohibits additional isomers of cocaine. The Eighth Circuit agreed in *United States v. Oliver*, 987 F.3d 794, 807 (8th Cir. 2021).

The Government even argued below that *Minter* and *Myers* were distinguishable because those circuits do not follow the *Castillo-Rivera* interpretation of *Duenas-Alvarez*. U.S. Resp. to Fed. R. App. P. 28(j) Ltr. (filed Sept. 6, 2023). Surely it will not now dispute that

the different approaches to "realistic probability" yield different results under the ACCA.

C. The issue is recurring and incredibly important.

The categorical approach applies in a wide array of statutory contexts; most of them involve incredibly high stakes. As this case proves, the Armed Career Criminal Act authorizes and often requires years of additional imprisonment compared to what the court would have imposed. In the immigration context, the analysis often makes the difference between deportation and lifetime banishment and remaining in the United States.

The Court is currently considering two consolidated cases where it will decide *which* federal drug schedule controls under the ACCA's categorical approach. *See Brown v. United States*, 143 S. Ct. 2458 (2023) (No. 22-6389); *Jackson v. United States*, 143 S. Ct. 2457 (2023) (No. 22-6640). The decision in *Jackson* will likely highlight *another* way Texas's definition of "cocaine" at the time of Petitioner's prior offenses was broader than the current federal definition.

In 2015, the federal and state governments amended their schedules to exclude ioflupane. *See Schedules of Controlled Substances: Removal of [123I] Ioflupane From Schedule II of the Controlled Substances Act*, 80 Fed. Reg. 54715-01 (Sept. 11, 2015); *see also Amend. to the Tex. Controlled Substances Schedule*, 40 Tex. Reg. 8050 (Nov. 13, 2015). Petitioner identified this additional ground of overbreadth in his petition for rehearing en banc. He

urged the Fifth Circuit to reconsider its "actual case" requirement. That petition was denied.

In the absence of Supreme Court intervention, parties with identical criminal records will experience divergent outcomes in criminal and immigration courts based solely on the accident of geography. The Court should grant this petition to resolve the dispute.

CONCLUSION

This Court should grant the petition and set this case for a decision on the merits.

Respectfully submitted,

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