No. 17-1445

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

v.

MICHAEL HERROLD,
RESPONDENT,

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

BRIEF IN OPPOSITION

J. MATTHEW WRIGHT
* *COUNSEL OF RECORD FOR MR. HERROLD*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
(806) 324-2370
MATTHEW_WRIGHT@FD.ORG

QUESTION PRESENTED

> Texas Penal Code § 30.02(a)(3) prohibits theft, assault, or other felony after entering a building or habitation "without the effective consent of the owner." Does this provision describe a "generic" burglary under *Taylor v. United States*, 495 U.S. 575 (1990)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. The United States was the plaintiff in the district court, the appellee in the Court below, and is the petitioner here. Michael Herrold was the defendant in district court, appellant in the Fifth Circuit, and is the respondent here.

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BRIEF IN OPPOSITION

Respondent Michael Herrold opposes the Government's petition for certiorari.

STATEMENT

In November of 2012, Dallas Police officers found Michael Herrold in possession of a firearm. Pet. App. 3a. Because he is a felon, he was not allowed to possess that gun. Federal authorities indicted him for violating 18 U.S.C. § 922(g)(1).

At the time he pleaded guilty, neither Mr. Herrold nor the Government could say with certainty whether he faced a *maximum* sentence of ten years in prison (the default punishment for that offense, 18 U.S.C. § 924(a)(2)), or a *minimum* sentence of fifteen years in prison (the enhanced punishment demanded by the Armed Career Criminal Act, 18 U.S.C. § 924(e)). His written admission of guilt could only set out the parties' respective positions regarding the possible punishment. 5th Cir. R. 78–79. As in so many other cases, Mr. Herrold's fate would be determined by the trial and appellate courts' complex (and largely unpredictable) analysis of decades-old state convictions under the enigmatic Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e) (reprinted at Pet. 90a–91a).

The Government identified only three possible ACCA predicate convictions in Mr. Herrold's criminal history. Two of those convictions presented legal hurdles that would be insurmountable in most of the circuits. First, Mr. Herrold argued that his prior Texas conviction for burglary of a "habitation" was not a violent felony because that offense may have been committed against a "*vehicle* that is adapted for the overnight accommodation of persons," Texas Penal Code § 30.01(1) (emphasis added). But the Armed Career Criminal "Act makes burglary a violent felony only if

committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle." *Shepard v. United States*, 544 U.S. 13, 15–16 (2005).

As of today's date, that argument has already prevailed in (at least) five circuits. *See*, *e.g.*, *United States v. Stitt*, 860 F.3d 854, 858 (6th Cir. 2017) (en banc), *pet. for cert. granted*, No. 17-765, 2018 WL 1901589 (April 23, 2018) ("The issue before us, then, is whether a burglary statute that covers vehicles or movable enclosures only if they are habitable fits within the bounds of generic burglary. We hold that it does not."), *United States v. Sims*, 854 F.3d 1037, 1040 (8th Cir. 2017), *pet. for cert. granted*, No. 17-766, 2018 WL 1901590 (April 23, 2018) ("[I]t is inconsequential that Arkansas's statute confines residential burglary to vehicles 'in which any person lives' or 'that are customarily used for overnight accommodation.'") (internal alterations omitted); *United States v. Gundy*, 842 F.3d 1156, 1164–1165 (11th Cir. 2016) (Georgia burglary against a "vehicle . . . designed for use as the dwelling house of another" is non-generic); *United States v. White*, 836 F.3d 437, 445 (4th Cir. 2016) (West Virginia statute prohibiting burglary of a "self-propelled motor home" is non-generic); *United States v. Cisneros*, 826 F.3d 1190, 1194 (9th Cir. 2016) (Burglarizing a vehicle that is "regularly or intermittently is occupied by a person lodging therein at night" is not generic burglary.); *see also* Pet. App. 42a ("The weight of federal case law seems to support the conclusion that the federal generic definition of burglary may not extend to any vehicles, even the narrower subset circumscribed by the Texas burglary of a habitation provision.").

But Mr. Herrold also raised a second argument, and that is the one giving rise to the Government's petition. He argued that both of his Texas burglaries—one of a "habitation" and the other of a "building"—were non-generic because they did not require proof that he planned to commit some other crime at the time he trespassed. As of today's date, at least three circuits have held that generic burglary requires proof that the burglar harbored the criminal plan *when* he trespassed. Pet. App. 36a; *accord Van Cannon v. United States*, __ F.3d __, No. 17-2631, 2018 WL 2228251, at *6 (7th Cir. May 16, 2018) ("On those facts the entry would be unprivileged but not accompanied by burglarious intent—that is, the perpetrator did not commit an unprivileged entry with the present intent to commit a crime in the building."); *United States v. McArthur*, 850 F.3d 925, 940 (8th Cir. 2017) ("Because a conviction under" Minnesota third-degree burglary "does not require that the defendant have formed the 'intent to commit a crime' at the time of the nonconsensual entry or remaining in, it does not satisfy the generic definition of burglary.").

A three-judge panel of the Fifth Circuit initially affirmed the district court's application of ACCA and the 211-month sentence. Pet. App. 74a–81a. This Court vacated the sentence and remanded for further consideration in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See Herrold v. United States*, 137 S. Ct. 310 (2016). On remand, the Fifth Circuit panel again affirmed the sentence, Pet. App. 71a–73a, but the En Banc Fifth Circuit reversed by a vote of 8–7. Pet. App. 1a–47a.

Even after all that litigation, the en banc majority was unable to resolve whether burglary of an automobile adapted for some additional purpose was a generic

burglary. Pet. App. 37a ("There are powerful arguments on both sides of the question; we think it important to describe them in full in order to explain why we ultimately choose not to decide the question."). Ultimately, the court re-affirmed its view that Texas Penal Code § 30.02(a)(3) describes a non-generic burglary, and further recognized that Subsection (a)(3) is merely an alternative means of proving the single, indivisible offense of burglary. Pet. App. 21a, 36a.

The district court then re-sentenced Mr. Herrold to time served. *See* Amended Judgment, Doc. No. 85, *United States v. Herrold*, No. 3:13-CR-225-N (N.D. Tex. April 10, 2018). Mr. Herrold has been freed, but he is subject to re-imprisonment if the Government succeeds in re-instating the original ACCA-enhanced sentence of 211 months.

REASONS TO DENY THE PETITION

I. TEXAS'S EXPANDED DEFINITION OF BURGLARY IN § 30.02(a)(3) IS NON-GENERIC.

This case is about the generic definition of "burglary," which has always been enumerated as an ACCA predicate offense. When Congress first passed ACCA in 1984, there were only two predicate offenses: "robbery" and "burglary." *See* Pub. L. 98-473, § 1802, *reprinted at* BIO App. 1b. The statute defined "burglary" as:

> any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense.

Pub. L. 98-473, § 1803(2), reprinted at BIO App. 2b.

In 1986, Congress expanded the list of ACCA predicates to include "violent felonies" and "serious drug offenses," and defined "violent felony" as:

> 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."

Pub. L. 99-570, § 1402(b) (1986), codified as 18 U.S.C. § 924(e)(2)(B), reprinted at BIO App. 3b; *see generally Taylor v. United States*, 595 U.S. 475, 581–590 (1990) (reviewing the background and legislative history of ACCA's definition of "violent felony"). For unknown reasons, the amended version of ACCA did not preserve the 1984 statutory definition of "burglary." *Taylor*, 495 U.S. at 589–590 ("The legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process.").

Despite this deletion, this Court has held that Congress did not intend any change to the 1984 statutory definition: "there is nothing in the history to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different." *Taylor*, 495 U.S. at 589–590. The Court held that ACCA's enumerated term "burglary" implicitly re-incorporates the same "generic" definition of the offense as in 1984:

> Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.

Id. at 598 (citing 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13 (1986)). This generic definition "is practically identical to the 1984 definition that, in 1986, was omitted from the enhancement provision." *Id.*

In the 28 years since *Taylor* was decided, this Court has not wavered from this definition. Nor has Congress expressed dissatisfaction with the Court's decision to re-use the inadvertently omitted definition of "burglary." Thus, *Taylor*'s statutory construction holding is entitled to a heavy measure of deference, even in this forum. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172–173 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); *accord Shepard v. United States*, 544 U.S. 13, 23 (2005) ("The claim to adhere to case law is generally powerful once a decision has settled statutory meaning."). Furthermore, in the context of a criminal statute imposing very severe mandatory penalties, the doctrine of fair notice preempts application of a new, retroactive interpretation to terms with settled meanings. Any change to the definition should be made by Congress; alternatively, it should apply only *prospectively*.

A. Texas's irregular theory of "burglary" liability—which allows for conviction where a defendant trespasses without any intention of committing another crime—was almost unheard of at the time ACCA was passed.

"Burglary" is a trespass committed while harboring a culpable intent—specifically, a *plan* to commit another crime. What distinguished burglary from

trespassing at common law was the wrongful purpose that accompanied the unlawful entry:

> To have committed the offense of burglary at common law, one must have intended to commit a felony while fulfilling the other requirements. If the actor when he was breaking and entering only intended to commit a simple trespass, he was not guilty of a burglary although he in fact committed a felony after entering.

LaFave & Scott, *supra*, § 8.13(e), p. 473 (1986).

When Congress enacted ACCA, most states had expanded burglary to include an additional kind of trespass: a person who entered a building *with* the owner's permission (such as when a business was open to the public), but then *hid* himself until the business closed and everyone else left. *Id.* at § 8,13(b), p. 468 (discussing "the case of a bank customer who hides in the bank until it closes and then takes the bank's money"). These states preserved the requirement that the requirement that the defendant planned to commit another crime at the moment he commenced a trespass. They simply recognized that some trespasses commence when an offender surreptitiously "remain[s]," notwithstanding a lawful entry. *Id.*

Congress's 1984 statutory definition of "burglary" included both the classic "entering . . . with intent" as well as the newer expansion for "remaining surreptitiously within . . . with intent." Pub. L. 98-473, § 1803(2), BIO App. 2b. But for either kind of trespass to count as burglary under ACCA, that trespass had to be accompanied by a contemporaneous specific "intent to engage in conduct constituting a Federal or State offense." *Id.*

When ACCA was promulgated, Texas recognized both of the common theories of burglary—the classic *entry* with culpable intent (Texas Penal Code § 30.02(a)(1)) and the very common statutory expansion for someone who "remains concealed, with intent to commit a felony, theft, or an assault" (§ 30.02(a)(2)). But Texas went further. It added a *third* theory of committing burglary. It was similar to the classic or common-law theory, because it was triggered upon an unlawful *entry*. Texas Penal Code § 30.02(a)(3). But *unlike* classic burglary, Texas's new theory did not require proof that the trespasser harbored an unlawful plan to commit another crime. Under this third theory, a trespasser is guilty of a so-called "burglary" if he later *commits* or *attempts to commit* a qualifying crime within the structure. Texas Penal Code § 30.02(a)(3).

As of 1986, LaFave and Scott described Texas as the *only* jurisdiction to adopt this unusual definition, "perhaps to obviate the problems of proof concerning whether the defendant's intent was formed before or after the unlawful reentry or remaining." LaFave & Scott, *supra,* at § 813(e), p. 475. Mr. Herrold's attorney has identified one other jurisdiction with a similar burglary law at that time ACCA was enacted: Delaware's second-degree burglary can be committed by trespassing while armed or by causing injury while trespassing. 11 Del. Code 1953 § 825(a)(2) (eff. 1973).

Thus, it is no surprise that Congress chose not to include Texas's newfangled expansion in its 1984 generic definition of "burglary." *See* Pub. L. 98-473, § 1803(2), BIO App. 2b. And, following Congress's lead, this Court in *Taylor* defined "generic

burglary" to include the two *main* theories of liability (entry-with-intent and hiding-with-intent), but not Texas's unique expansion:

> the generic, contemporary meaning of burglary contains at least the following elements: 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 598 (relying heavily on the 1986 version of the Lave & Scott treatise).

B. Contrary to the Government's assertion, burglary under § 30.02(a)(3) does not require proof that the defendant ever formed an "intent to commit a crime."

The Government casts its petition as one focused on "a state offense that criminalizes continued unpermitted presence in a dwelling *following the formation of intent to commit a crime*." (Pet. at I, emphasis added). But Texas Penal Code § 30.02(a)(3) does not require proof that the defendant *ever* formed "the intent to commit a crime." Texas's new theory of burglary merely requires an entry "without the effective consent of the owner," followed by commission of (or an attempt to commit) "a felony, theft, or an assault." Texas Penal Code § 30.02(a)(3).

Subsection (a)(3) does *not* require proof of an unlawful purpose, plan, or intention. On the contrary, there are several predicate crimes that can be committed by recklessly or even negligently causing a victim to suffer pain or experience risk after the entry. *See*, *e.g.*, Texas Penal Code § 22.01(a)(1) ("A person commits" assault if he "recklessly causes bodily injury to another."); § 22.04(a) ("A person commits" the felony of "injury to a child" if he "recklessly, or with criminal negligence" causes a child to suffer "bodily injury"); § 22.041(c) ("A person commits" the state jail felony offense of "endangering a child" if he "recklessly, or with criminal negligence, by act

or omission, engages in conduct that places a child younger than 15 years in imminent danger of . . . bodily injury, or physical or mental impairment."); *cf. Van Cannon*, __ F.3d at __, 2018 WL 2228251, at *7 ("But not all crimes are intentional; some require only recklessness or criminal negligence."). Thus, the premise behind the Government's Question Presented fails. A defendant can be convicted of burglary under § 30.02(a)(3) even if he *never* formed a plan to commit another crime.

As the en banc Fifth Circuit recognized, a burglar who *plans* to commit another crime is both more culpable and more dangerous than a mere trespasser:

> If the federal definition were slackened too much, a defendant who broke into a building to escape the cold and only once inside decided to pilfer a jacket could be subject to the same enhancement as a defendant who planned an elaborate theft of that same building.

Pet. App. 22a–23a. Thus, Texas's expanded definition sweeps in people who should not be considered "Armed Career Criminals."

C. The 1984 statutory definition of "burglary" would exclude § 30.02(a)(3).

As noted previously, at the time ACCA was promulgated, there were two types of trespass that could trigger conviction of a *generic* burglary offense (if they were accompanied by a plan to commit another crime). The first was the classic, common-law form: an unlawful *entry*. The second—generally called unlawful *remaining*—was a "common statutory expansion in the definition of burglary." LaFave & Scott, *supra*, § 8.13 at 468.

> A lawful entry does not foreclose the kind of intrusion burglary is designed to reach, as is illustrated by the case of a bank customer who hides in the bank until it closes and then takes the bank's money. . . . But for this expansion not also to cover certain other situations in which the unlawful remaining ought not be treated as burglary, it is best to

> limit the remaining-within alternative to where that conduct is done surreptitiously.

Id. Congress must have studied this same treatise when it adopted the 1984 statutory definition of burglary; the only "*remaining*" that would count as burglary is *surreptitious* remaining:

> 'burglary' means any felony consisting of *entering* or *remaining surreptitiously within* a building that is property of another with intent to engage in conduct constituting a Federal or State offense.

Pub. L. 98-473, § 1803(2), BIO App. 2b (emphasis added). This definition was later deleted from ACCA, but not through any purpose or design of Congress. *Taylor*, 495 U.S. at 589–590. "[N]othing" in the legislative history suggests "that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different." *Id.* at 590.

In other words, Congress wanted to embrace the theory of burglary described in § 30.02(a)(2)—when a person "remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation." That theory was explicitly embraced as a generic "burglary" in the 1984 statute, and it remained a generic burglary in 1986. But the Government contends that at some point Congress *expanded* ACCA's burglary definition to include a third type of burglary—an unprivileged entry *without* an intention to commit another crime, which was later followed by the commission of a crime.

This was *not* what Congress intended by "remaining *surreptitiously* within" the premises. Pub. L. 98-473, § 1803(2) (emphasis added). The act of remaining must be *surreptitious* because—under this second theory—the initial entry is lawful and open.

The Government would have this Court re-define the "remaining in" alternative to include *every* act that followed an unlawful entry. This would require the Court to hold—in direct contravention of *Taylor*—that the 1986 deletion of the statutory definition of burglary had the effect of *modifying* that definition. That suggestion has been rejected, and there is no need to expend scarce judicial resources reconsidering this well-settled question of statutory interpretation.

D. There are additional and independent reasons to hold that § 30.02(a)(3) describes a non-generic burglary.

More than ten years ago, the Fifth Circuit first recognized that § 30.02(a)(3) described a non-generic burglary. *See, e.g., United States v. Constante*, 544 F.3d 584, 586 (5th Cir. 2008); *accord United States v. Herrera-Montes*, 490 F.3d 390, 391–392 (5th Cir. 2007); *United States v. Castro,* 272 F. App'x 385, 386 (5th Cir.2008); and *United States v. Beltran-Ramirez,* 266 F. App'x 371, 372 (5th Cir.2008). These cases all focus on the lack of a "contemporaneous intent" element.

But there is another reason to hold § 30.02(a)(3) is non-generic.[1] Texas does not require proof of anything similar to "breaking and entering or similar conduct." *C.f. Descamps v. United States*, 570 U.S. 254, 259 (2013). In *Descamps*, this Court recognized that California's burglary statute was non-generic because it covered "a shoplifter who enters a store, like any customer, during normal business hours." *Id.* Texas's § 30.02(a)(3) is similarly overbroad.

[1] Mr. Herrold advanced this additional reason below in his petition for rehearing en banc and at en banc oral argument.

With the sole exception of burglary of a *building* under § 30.02(a)(1), Texas does not require proof of breaking and entering or anything similar. As explained in *Garza v. State*, 522 S.W.2d 693, 694 (Tex. Crim. App. 1975), the only time the State must prove the target was not "open to the public" at the time of the burglary is when the state charges a defendant with burglary of a *building*—not burglary of a habitation—and only under 30.02(a)(1) (entry with intent). *Accord Waller v. State*, 648 S.W.2d 308, 310 (Tex. Crim. App. 1983) (en banc) (op. on reh'g). Thus, a defendant who commits a crime during an *open house*—i.e., when a home is open to the public—has nonetheless committed burglary under § 30.02(a)(3). *See Breed v. State*, 13-13-00382-CR, 2015 WL 3637754, at *2–3 (Tex. App.—Corpus Christi June 11, 2015, pet. ref'd).

Texas courts routinely affirm convictions for burglary where the owner personally *allowed* or *invited* the defendant into the premises. *See Gordon v. State*, 633 S.W.2d 872, 874–875 (Tex. Crim. App. 1982); *see also Griego v. State*, 07-08-00130-CR, 2010 WL 1286464, at *2 (Tex. App.—Amarillo Apr. 5, 2010, no pet.) ("Because at this time of the year it is cold and you immediately have somebody to come in when they're outside and that is what I did at that time."). Likewise, when a co-owner allows a defendant to enter knowing he will commit theft, the consent is deemed ineffective under state law and the defendant is guilty. *See Moore v. State*, 999 S.W.2d 385, 404 (Tex. Crim. App. 1999); *Gonzales v. State*, 931 S.W.2d 574, 575–576 (Tex. Crim. App. 1996).

Texas law also permits conviction for burglary when the defendant had a legal right to occupy the premises. In *Mack v. State*, 928 S.W.2d 219 (Tex. App.—Austin 1996, pet. ref'd), the Court affirmed the defendant's burglary conviction under Subsection (a)(3) even though he was a signatory to the lease and had the same contractual right to possess the apartment as the victim. *Id.* at 223. So long as the victim had an interest deemed *superior* to the defendant's, the defendant could be guilty of burglary. *Id.*

Because Texas "burglary" under § 30.02(a)(3) may be committed without any proof of a breaking or any similar misconduct, then the offense is broader than generic burglary. *C.f. Descamps*, 133 S. Ct. at 2285 (holding California burglary to be non-generic for this same reason). And this is true even if—as the government contends—generic burglary includes Texas's new theory of liability.

II. THIS COURT SHOULD DENY REVIEW BECAUSE THE NEW THEORY OF BURGLARY LIABILITY REMAINS EXCEEDINGLY UNCOMMON, EVEN TODAY.

As noted previously, at the time ACCA was enacted, Texas and Delaware were the only two jurisdictions that defined a trespass *followed by* some other crime as a "burglary." Since then, four states subsequently joined Texas and Delaware to adopt a similar theory of "burglary" or "home invasion" in which commission (or attempt) of a second offense eliminates the need to prove contemporaneous intent at the time of trespass:

- Michigan "home invasion"; *see* Mich. Comp. L. § 750.110a(2), (3), (4)(b) (eff. Oct. 1, 1999);
- Minnesota burglary, *see* Minn. Stat. § 609.582 (eff. Aug. 1, 1988);

- Montana burglary, *see* Mont. Code Ann. § 45-6-204(1)(b) & (2)(a)(ii) (eff. Oct. 1, 2009); and

- Tennessee burglary, *see* Tenn. Code Ann. § 39-14-402(a)(3) (eff. July 1, 1995).

Because the new theory of burglary liability remains unusual and uncommon, it is by definition not *generic* burglary. The limited distribution of this new theory confirms that it is non-generic.

More importantly, the rarity of this new theory shows that the matter isn't worth the resources that would be expended after a plenary grant of certiorari. Given that only six states classify a crime committed while trespassing converts that trespass to a "burglary" or "home invasion"—and given that some of these crimes might be non-generic for other reasons, such as an overbroad locational element—there is no pressing need for this Court to decide whether the nationwide generic definition should expand to include the new theory.

The Government may point out in Reply that some state courts have affirmed conviction under *traditional* burglary statutes where the offender formed a specific intent to commit another crime at some point subsequent to the initial trespass. *See* Pet. App. 32a–34a n.107 (describing a "mixed bag" of state-court interpretations); *see also* NACDL *Amicus* Br. 9–10, *Quarles v. United States*, No. 17-778 (filed Dec. 28, 2017). But Texas is not one of those states. The Government's petition here concerns a *new* form of burglary liability, triggered by an unlawful *entry*, but not requiring any proof of a criminal plan (contemporaneous or otherwise). The state legislatures in Texas and five other states recognized that the conduct described in § 30.02(a)(3) is

different from that described in (a)(1) (entry-with-intent) and (a)(2) (remaining-with-intent). These states decided to broaden their own burglary crimes to include the new theory.

Assuming that the conflict over *contemporaneous* intent persists after lower courts respond to the forthcoming decisions in *Stitt* and *Sims*, the Court should choose a more suitable vehicle to resolve that conflict. At a minimum, a proper vehicle would involve a state burglary crime that *actually requires* proof of a plan to commit another crime *after* the initial trespass. Texas Penal Code § 30.02(a)(3) does not require formation of intent *at any time*. It is a poor vehicle for addressing the question posed by the Government's petition.

III. THIS COURT SHOULD DENY REVIEW BECAUSE THE FIFTH CIRCUIT'S JUDGMENT WAS CORRECT.

Even if the Fifth Circuit were *wrong* about the non-generic characterization of Texas's unusually broad burglary statute, this case would not be a suitable vehicle for resolving the disagreement. The judgment below was correct for an entirely independent reason. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions."); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (The Court's "power is to correct wrong judgments, not to revise opinions.").[2]

[2] Mr. Herrold has continually pressed the overbreadth of Texas's definition of "habitation" throughout this litigation. And though the Fifth Circuit majority "ultimately [chose] not to decide the question," Pet. App. 37a, it was fully briefed below. In any event, this Court may affirm the judgment "on any ground permitted by the law and record." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017).

Mor specifically, Texas's burglary of a *habitation* can be committed against a "a structure or *vehicle* adapted for the overnight accommodation of persons." Texas Penal Code § 30.01(1) (emphasis added). In December of 1991, at the age of twenty-one, Mr. Herrold burglarized a "habitation." That much is known from the indictment, judicial confession, and judgment for the conviction that followed. 5th Cir. R. 384, 385, 251. But these documents do not tell us whether that habitation was a "structure" or a "vehicle."

This should defeat the enhancement. ACCA "makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), *not in a boat or motor vehicle*." *Shepard*, 544 U.S. at 15–16 (emphasis added).This principle has been reaffirmed many times, and there is now wide agreement among the circuit courts that generic burglary excludes *all* vehicle burglaries, even when the vehicle is adapted or used for some additional purpose, such as sleeping or storage. *See*, *e.g.*, *Stitt*, 860 F.3d at 858 ("The issue before us, then, is whether a burglary statute that covers vehicles or movable enclosures only if they are habitable fits within the bounds of generic burglary. We hold that it does not."), *Sims*, 854 F.3d at 1040 ("[I]t is inconsequential that Arkansas's statute confines residential burglary to vehicles 'in which any person lives' or 'that are customarily used for overnight accommodation.'") (internal alterations omitted); *Gundy*, 842 F.3d at 1164–1165 (Georgia burglary against a "vehicle . . . designed for use as the dwelling house of another" is non-generic); *White*, 836 F.3d at 445 (West Virginia statute prohibiting burglary of a "self-

propelled motor home" is non-generic); *Cisneros*, 826 F.3d at 1194 (Burglarizing a vehicle that is "regularly or intermittently is occupied by a person lodging therein at night" is not generic burglary.").

This wide agreement should be expected. Congress's 1984 statutory definition of "burglary" was limited to crimes against a "building," Pub. L. 98-473, § 1803(2), BIO App. at 2b. And the amendments in 1986 did not replace that "definition of burglary with something entirely different." *Taylor*, 495 U.S. at 589–590.

A. This Court has repeatedly recognized that generic burglary is committed in a building, not in a motor vehicle.

Burglary of a "motor vehicle" is not a violent felony under ACCA. *Shepard*, 544 U.S. at 15–16. This rule is derived from *Taylor*'s definition of generic burglary, but *Shepard* made the point most clearly. In *Taylor*, this Court laid out the basic definition of generic burglary: "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 598 (emphasis added). The Court contrasted this "generic" definition with the Texas burglary statute, which (like California's) expanded burglary to reach crimes against "automobiles." *Id.* at 591.

In 2006, this Court crystallized this principle into an easy-to-apply rule: "[t]he [Armed Career Criminal] Act makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle." *Shepard*, 544 U.S. at 15–16. In that decision, the Court also identified a narrow range of documents courts can consult when deciding whether the Government has proven that a defendant pleaded guilty to a generic burglary. *Id.* at 20–21. If the offense (as

defined by those documents) does not match generic burglary, the crime is not a violent felony.

After *Shepard,* the "building"-versus-"vehicle" dichotomy became the textbook illustration of the categorical approach. *See Stitt*, 860 F.3d at 858 ("[T]he Supreme Court has held fast to the distinction between vehicles and movable enclosures versus buildings and structures in every single post-*Taylor* decision."). Even in cases that weren't about "burglary," this Court has returned to the building-versus-vehicle distinction to illustrate the operation of the categorical approach:

- "[B]reaking into a 'vehicle' . . . falls outside the generic definition of 'burglary,' for a car is not a 'building or structure.'" *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 187 (2007).

- "[T]he behavior underlying, say, breaking into a building differs so significantly from the behavior underlying, say, breaking into a vehicle that for ACCA purposes a sentencing court must treat the two as different crimes." *Chambers* v. *United States*, 555 U.S. 122, 126 (2009)

- "A single Massachusetts statute section . . . criminalizes breaking into a 'building, ship, vessel or vehicle.' In such an instance, we have said, a court must determine whether an offender's prior conviction was for the violent, rather than the nonviolent, break-ins that this single five-word phrase describes (e.g., breaking into a building rather than into a vessel)." *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009)

- "One of those alternatives (a building) corresponds to an element in generic burglary, whereas the other (an automobile) does not." *Descamps* v. *United States*, 133 S. Ct. 2276, 2284 (2013)

In the confusing world of prior-conviction analysis, few rules are so clear, and none so clearly established. A straightforward application of this rule to Texas's definition of "habitation" yields a straightforward answer: burglary of a *vehicle* is not a violent felony, and that is true regardless of how that vehicle has been "adapted."

B. Even when a vehicle is "adapted" or "used" for some additional purpose, it remains a "vehicle" for purposes of ACCA.

Despite this rule's repetition and clarity, the Government has argued that the analysis is quite a bit more complicated. The Government has argued here and elsewhere that burglary of *some* vehicles is generic burglary. *See*, e.g., U.S. Supp. Br. at 11 & n.7, *United States v. Herrold*, No. 14-11317 (5th Cir. filed Oct. 28, 2015) (arguing that "a movable structure used for personal occupancy is entitled to the same protection as a brick-and-mortar house,"), and citing burglary laws of "41 states" (including both Iowa and Texas) in support.

Not so. This Court has repeatedly, and without exception, held that burglarizing a vehicle is not generic burglary. And this Court's decision in *Mathis* puts the matter to bed. In *Mathis*, the Iowa burglary statute did not prohibit burglary of all vehicles indiscriminately. Rather, it only applied to burglary of an "occupied structure." *Id.* at 2250 (discussing Iowa Code § 702.12 (2013)). Iowa's definition of "occupied structure" included only *some* vehicles: those "adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." Iowa Code § 702.12; s*ee State v. Sanford*, 814 N.W.2d 611, 617 (Iowa 2012) ("Not all land vehicles will qualify for occupied-structure status under the statute.").

Despite Iowa's decision to include only *some* vehicles within its crime of burglary, this Court held (and the Government agreed) that Iowa burglary was non-generic:

> Iowa's burglary statute, all parties agree, covers more conduct than generic burglary does. The generic offense requires unlawful entry into a "building or other structure." Iowa's statute, by contrast, reaches a broader range of places: "any building, structure, *[or] land, water, or air vehicle*."

Mathis, 136 S. Ct. at 2250 (citations omitted). Justices Ginsburg and Breyer, who dissented from *Mathis*'s divisibility holding, agreed with the majority about the scope of the *Shepard* rule:

> The problem arises because, as we have previously held, if the structure that an offender unlawfully entered (with intent to commit a felony) was a "building," the state crime that he committed counts under the federal statute as "burglary." But if the structure that the offender unlawfully entered was a land, water, or air vehicle, the state crime does not count as a "burglary." Thus, a conviction for violating the state statute may, or may not, count as a "burglary," depending upon whether the structure that he entered was, say, a "building" or a "water vehicle."

Mathis, 136 S. Ct. at 2260 (Ginsburg, J., dissenting, and joined by Justice Breyer) (citations omitted).

Even so, the Government persisted in arguing that Texas's burglary of a "habitation" was a generic burglary, even when committed against an adapted automobile. It took the same approach in other circuits. *See* U.S. Supp. Br. 12, 15, *United States v. Stitt*, No. 14-6158 (6th Cir. filed Aug. 29, 2016), available at 2016 WL 4539607 ("*Stitt* Brief"). Fortunately, *Mathis* preempts all these approaches.

In *Mathis*, this Court considered a burglary statute that applied to vehicles that are *used* or *adapted* for building-like purposes. Under the *Mathis* majority's view (and Justice Ginsburg's), it simply does not matter how a vehicle is used or adapted. Vehicles are *vehicles*, not "*movable structures*," and they fall outside the scope of generic burglary. The Court did not discuss the *uses*, *adaptations*, or *occupation* of

these vehicles—those facts were irrelevant. *C.f. Sanford*, 814 N.W.2d at 617 (The victim's car became an "occupied structure" because the victim used it to seek shelter from an attacker.) Vehicles, even those that have additional adaptations, are still vehicles and outside the generic definition of burglary. *Mathis*, 136 S. Ct. at 2250.

The *Taylor-Shepard* rule, oft-repeated and easily applied, settles the dispute: burglary committed against a *vehicle* or *automobile* is not generic burglary. *Id. Mathis* went on to provide "a good rule of thumb for reading" Supreme Court decisions: "what they say and what they mean are one and the same." *Mathis*, 136 S. Ct. at 2254. *Shepard*, *Duenas-Alvarez*, *Chambers*, *Nijhawan*, *Descamps*, and *Mathis* all say the same thing: burglary of a *vehicle* is not generic burglary.

In other words, there is an independent reason to affirm the Fifth Circuit's judgment. Burglary of a vehicle—even a vehicle "adapted" for overnight accommodations—is not a generic burglary.

C. If a Texas defendant vandalizes a mothballed motor home, he is guilty of burglary of a "habitation."

One might suppose that Texas prosecutors would utilize the "vehicle" part of the habitation statute only in the most dangerous, risky moments, such as when someone burglarizes an RV *being used as a home*. But Mr. Herrold demonstrated below that Texas prosecutors utilize this statute to its full, non-generic extent. As one example of the statute's non-generic application, Texas prosecutors charged several defendants with multiple counts of "burglary of a habitation" when they broke into "[s]even motor homes being warehoused at Staton Storage." K. Young, "RVs Vandalized on Tena Street," *Jacksonville Daily Progress* (Mar. 26, 2008), available at

2008 WLNR 5773562 and reprinted at 5th Cir. R. 307. In other words, the site of the crime was not an RV park, campground, Wal-Mart parking lot, or even the curtilage of a house. These were mothballed vehicles being "warehoused" at a storage facility. *Id.* Yet the defendants were convicted of multiple counts of burglary of a "habitation" because the vandalized RV's were "adapted" for overnight accommodation. *See* Indictment, Order of Deferred Adjudication, and Judgment Adjudicating Guilt, *State v. Sandoval*, No. 17752-1 (2d Dist. Ct. Cherokee, Co., Tex. Sept. 24, 2013), reprinted at 5th Cir. R. 311–324.[3] Did these vandals commit a "generic" burglary? The Government says yes, but a straightforward application of the *Taylor-Shepard* rule begs to differ.

D. Even if this Court were to re-define generic burglary in *Stitt* and *Sims*, that interpretation could not be retroactively applied against Mr. Herrold.

There is no reason to await the outcome of *Sims* and *Stitt* before denying the Government's petition for certiorari. If the Government somehow prevails in those cases, it will effect a *change* in the definition of generic burglary. That change cannot be applied retroactively to Mr. Herrold's case.

Congress presumably knew, at the time it passed ACCA, that "*[s]ome* burglary statutes" extended beyond buildings "to still other places, such as all or some types of vehicles." LaFave & Scott, *supra*, § 8.13(c), p. 471. Yet Congress chose to limit the statutory definition to crimes against a "building." Pub. L. 98-473, § 1803(2), BIO

[3] These documents are also available on pages 32a–49a of the (sealed) Appendix to Mr. Herrold's previous petition for certiorari in *Herrold v. United States*, No. 16-5566.

App. 2b. Nor did it express any intention to *expand* the reach of "burglary" when it inadvertently deleted the definition. Thereafter, this Court consistently distinguished between crimes against *automobiles and vehicles* (non-violent) and crimes against *buildings* (violent felonies).

This holding has a strong claim to *stare decisis*. *See Patterson*, 491 U.S. at 172–173 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); *accord Shepard*, 544 U.S. at 23 ("The claim to adhere to case law is generally powerful once a decision has settled statutory meaning.").

At the time Mr. Herrold committed the instant offense, no federal appellate court since *Shepard* had held that a crime against a *vehicle* or *automobile* was a generic burglary under ACCA. The Tenth Circuit had held otherwise prior to *Shepard*. *See United States v. Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996). But after *Shepard*, no federal appellate decision gave the "slightest indication" that burglary of an automobile, even one adapted for additional purposes, could somehow still count as a generic burglary for purposes of ACCA. *Bouie v. City of Columbia*, 378 U.S. 347, 357 (1964). In other words, the Court need not await the outcome of *Stitt* and *Sims* because any *expansion* of generic burglary into territory so long forbidden would—if given retroactive effect to Mr. Herrold's offense—violate the principle of fair notice.[4]

[4] The same could be said for any decision that would delete the requirement that the trespass be accompanied by an intention to commit some other crime.

Thus, the appropriate decision here is to deny the Government's petition for certiorari.

CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

J. MATTHEW WRIGHT
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
MATTHEW_WRIGHT@FD.ORG
(806) 324-2370

MAY 21, 2018

The Armed Career Criminal Act of 1984

Pub. L. 98-473, §§ 1801–1803 (Oct. 12, 1984)

CHAPTER XVIII — ARMED CAREER CRIMINAL

SEC. 1801. This chapter may be cited as the "Armed Career Criminal Act of 1984". "18 USC app. 1201 note"

SEC. 1802. Section 1202(a) of title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. App. 1202(a)) is amended by adding at the end "In the case of a person who receives, possesses, or transports in commerce or affecting commerce any firearm and who has three previous convictions by any court referred to in paragraph (1) of this subsection for robbery or burglary, or both, such person shall be fined not more than $25,000 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 this subsection, and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.".

SEC. 1803. Section 1202(c) of title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. App. 1202(c)) is amended —

(1) by striking out the period at the end of paragraph (7) and inserting a semicolon in lieu thereof; and

(2) by adding at the end the following:

"(8) 'robbery' means any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing

another person in fear that any person will imminently be subjected to bodily injury; and

"(9) 'burglary' means any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense."

Career Criminals Amendment Act of 1986

Pub. L. 99-570, §§ 1401–1402 (Oct. 27, 1986)

Subtitle I — Armed Career Criminals

SEC. 1401. SHORT TITLE.

This subtitle may be cited as the "Career Criminals Amendment Act of 1986". "18 USC 921 note"

SEC. 1402. EXPANSION OF PREDICATE OFFENSES FOR ARMED CAREER CRIMINAL PENALTIES.

(a) IN GENERAL. — Section 924(e)(1) of title 18, United States Code, is amended by striking out "for robbery or burglary, or both," and inserting in lieu thereof "for a violent felony or a serious drug offense or both,".

(b) DEFINITIONS. — Section 924(e)(2) of title 18, United States Code, is amended by striking out subparagraph (A) and all that follows through subparagraph (B) and inserting in lieu thereof the following:

"(A) the term 'serious drug offense' means —

"(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the first

section or section 3 of Public Law 96–350 (21 U.S.C. 955a et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law;or

"(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; and

"(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, or otherwise involves conduct that presents a serious potential risk of physical injury to another.".