No.

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), imposes a mandatory fifteen-year prison term upon any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony or * * * serious drug offense." The definition of a "violent felony" includes a burglary conviction that is punishable by imprisonment for a term exceeding one year. See § 924(e)(2)(B)(ii). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that § 924(e) uses the term "burglary" in its generic sense, to cover any crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id*. at 598-599.

The question presented is:

Whether (as two circuits hold) *Taylor*'s definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining, or whether (as the court below and three other circuits hold) it is enough that the defendant formed the intent to commit a crime at any time while "remaining in" the building or structure.

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The opinion of the court of appeals, App., *infra*, 1a-8a, is reported at 850 F.3d 836.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017, and a timely petition for rehearing en banc was denied on June 28, 2017. On September 13, 2017, Justice Kagan extended the time in which to file a petition for writ of certiorari to and including November 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix.

INTRODUCTION

The Armed Career Criminal Act (ACCA) imposes a mandatory 15-year sentencing enhancement on any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony or * * * serious drug offense." ACCA defines a "violent felony," in relevant part, as any crime "punishable by imprisonment for a term exceeding one year" that "is burglary." 18 U.S.C. § 924(e)(2)(B)(ii). This Court has held that ACCA uses the term "burglary" in its generic sense, meaning it has the "basic elements of [1] unlawful or unprivileged entry into, or remaining in, [2] a building or structure, [3] with intent to commit a crime." *Taylor* v. *United States*, 495 U.S. 575, 599 (1990).

There is a deep and entrenched "circuit split on the question of whether an intent to commit a crime must be present at the moment one unlawfully enters

or remains in a building." Gov't Mot. to Stay Mandate Pending Filing of Pet. for Writ of Cert. 5, *United States* v. *Morris*, 850 F.3d 925 (8th Cir. 2017) (No. 14-3336) (*Morris* Gov't Stay Mot.). Both the Fifth and Eighth Circuits have correctly concluded that *Taylor* requires a showing that the defendant had criminal intent when he or she unlawfully entered or first unlawfully remained inside the building. Put simply, these circuits require "contemporaneous intent." *United States* v. *McArthur*, 850 F.3d 925, 939 n.* (8th Cir. 2017). The Fourth, Sixth, Ninth, and Tenth Circuits have reached the opposite conclusion, transforming any trespass into a burglary if the defendant decides at any point to commit a crime. Moreover, this split is unlikely to resolve itself, with circuits solidifying their positions in recent years. As the government acknowledged in opposing en banc review in this case, "if a midstream correction is needed, it is needed elsewhere." Gov't Resp. to Reh'g Pet. 10.

The time has come for this Court to make that "midstream correction." As the United States itself has explained, this is a question "of extraordinary importance to the federal sentencing structure" because the "[c]ircuit split gravely undermines the uniform application of the [ACCA]'s enhanced sentencing provisions," causing sentencing disparities for burglary, "a frequently-used ACCA predicate." Gov't Pet. for Reh'g En Banc, *United States* v. *Morris*, 836 F.3d 931 (8th Cir. 2016) (No. 14-3336) (*Morris* Gov't Reh'g Pet.). The decision below was incorrect. By not requiring contemporaneous intent, the Sixth Circuit allows a fifteen-year enhancement to be imposed based on a predicate conviction that required mere trespass with a subsequent crime. This reading dis-

regards the language of *Taylor*, which requires that the defendant have intent to commit a crime at the time unlawful occupation begins. It also ignores the authorities on which this Court relied in *Taylor* (including Congress' purpose in enacting the statute), which emphasized that contemporaneous intent is a key reason that generic burglary is understood to carry an inherent risk of violence. By reversing the decision below, this Court can resolve a deep split that has led to the "splinter[ed] application" of ACCA, ensure that the use of this severe enhancement conforms to this Court's precedents and congressional intent, and prevent further injustice to criminal defendants.

STATEMENT

1. In 1984, Congress enacted the Armed Career Criminal Act (ACCA). Pub. L. No. 98-473, ch. 18, 98 Stat. 2185, 18 U.S.C. App. § 1202(a) (1982 ed., Supp. III). The law imposed a mandatory fifteen-year prison term upon any convicted felon who unlawfully possessed a firearm and who had three or more prior convictions for robbery or burglary. *Ibid.* 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." § 1202(c)(9).

Congress enacted the provision because of concerns about "the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem." *Taylor* v. *United States*, 495 U.S. 575, 583 (1990). In particular, the 1984 Congress "singled out burglary (as opposed to other frequently committed

property crimes such as larceny and auto theft) for inclusion as a predicate offense * * * because of its inherent potential for harm to persons." *Id.* at 588. Not only does the offender's entrance into a building "often create[] the possibility of a violent confrontation between the offender and an occupant," but the fact that the offender enters "aware[] of this possibility may mean that he is prepared to use violence if necessary to carry out his plans." *Ibid.*

In 1986, Congress amended ACCA to expand the predicate offenses triggering the sentence enhancement from simply "robbery or burglary" to any "violent felony or * * * serious drug offense." Pub. L. No. 99-570, § 1402, 100 Stat. 3207–39 (codified as amended at 18 U.S.C. § 924(e)). The amended statute defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that also "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). At the same time, Congress deleted the statutory definition of burglary.

In *Taylor,* this Court addressed the meaning of the term "burglary" in the absence of a statutory definition. The Court held that, as used in § 924(e), "burglary" refers to "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. Generic burglary includes any crime, "regardless of its exact definition or label, having the basic elements of unlawful or unprivileged

entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.[1]

To find that a predicate offense qualifies as generic burglary for the purposes of § 924(e), a court must use a "categorical approach," which "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* v. *United States*, 136 S. Ct. 2243, 2248 (2016). A crime cannot qualify as an ACCA predicate if its elements are broader than those of the generic offense. *Id.* at 2251. This is true "even if [the defendant's] conduct fits within the generic offense." *Ibid.* In such a case, "the mismatch of elements saves the defendant from an ACCA sentence." *Ibid.* This elements-focused approach avoids unfairness to defendants. In *Mathis*, this Court explained that:

> Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law[.] * * * When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant

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[1] Numerous circuits have relied on *Taylor*'s definition of generic burglary in interpreting the term "crime of violence" under the career offender provision of the U.S. Sentencing Guidelines § 4B1.1 (2016), whose definition is "identical to those found in the Armed Career Criminal Act * * * except that the statutory definition leaves out 'of a dwelling.'" *United States* v. *Evans*, 576 F.3d 766, 767 (7th Cir. 2009) (per curiam).

> many years down the road by triggering a lengthy mandatory sentence.

136 S. Ct. at 2253.

When a single statute lists elements in the alternative, this Court has approved use of a "modified categorical approach," under which sentencing courts can look to a limited class of documents to determine the version of the crime of which the defendant was convicted, and its basic elements.[2] *Mathis*, 136 S. Ct. at 2249. When the predicate offense was decided by a jury, the sentencing court may look to the charging document and jury instructions. *Taylor*, 495 U.S. at 602. When the predicate offense results from a guilty plea, the sentencing court may look to "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

The class of approved documents is necessarily limited to those "approaching the certainty of the record of conviction" so that the sentencing judge can avoid making a disputed finding of fact that implicates Sixth Amendment concerns. *Shepard*, 544 U.S. at 23-25 ("[A]ny fact other than a prior conviction sufficient to raise the limit of the possible federal sen-

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[2] Although petitioner argued below that his conviction under Mich. Comp. Law § 750.110a(4) does not constitute a conviction for generic burglary under the modified categorical approach, neither the District Court nor the Sixth Circuit had occasion to reach the issue, having resolved his challenge on the threshold question presented here.

tence must be found by a jury, in the absence of any waiver of rights by the defendant.") (citing *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)).

2. a. Petitioner Jamar Quarles pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). R.21. Before his guilty plea, petitioner sought the court's determination whether a prior conviction for Home Invasion in the Third Degree under Michigan law constituted a "violent felony" for the purposes of ACCA. R.15. The Michigan statute reads, in relevant part:

> A person is guilty of home invasion in the third degree if the person * * *
>
> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

Mich. Comp. Law § 750.110a(4). The court declined to make that determination before sentencing. R.19 at 65. Petitioner pleaded guilty.

b. At sentencing, petitioner's final presentence report identified only three convictions as crimes of violence, including petitioner's Michigan conviction for Home Invasion in the Third Degree. R.25 at 102. Petitioner argued that the Michigan conviction does not satisfy the elements of generic burglary as required by *Taylor* and thus does not qualify as a "vio-

lent felony" under ACCA.[3] R.50 at 377 (Sentencing Memorandum). Petitioner contended that § 750.110a(4) lacks the requisite *Taylor* elements because it does not require proof of intent to commit a crime at the moment the defendant entered or first unlawfully remained inside the building. *Ibid.*

The district court concluded that a conviction under § 750.110a(4)(a) constitutes generic burglary under ACCA, R.60 at 437, and on May 16, 2016, sentenced petitioner to 204 months' imprisonment. R.57 at 405. The court recognized, however, that "the cases go[] in many different directions," and that whether generic burglary requires proof of contemporaneous intent "isn't going to be settled here and * * * whoever wins needs to take it up and get it resolved in the Sixth Circuit, because * * * there's room to argue both directions." R.60 at 432, 437.

c. The court of appeals affirmed. App., *infra*, 1a-8a. The court acknowledged that "[t]he question of whether generic burglary requires intent at entry has resulted in a circuit split * * * [that] hinges on whether the 'remaining in' language allows for the development of intent at any point or whether the intent must exist" at the time the defendant enters or first unlawfully remains inside the building. *Id.* at 7a. But according to the court of appeals, "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will neces-

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[3] The District Court originally ruled that petitioner's Michigan conviction was a violent felony under ACCA's residual clause. R.40 at 256. Petitioner successfully appealed, and the Sixth Circuit remanded for resentencing under *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). See R.43.

sarily have remained inside the building or structure to do so." *Id.* at 8a. Thus, the court held that "generic burglary * * * does not require intent at entry." *Ibid.*

Petitioner sought rehearing en banc. Pet. for Reh'g En Banc. Petitioner maintained that generic burglary requires intent to be formed at the time the person unlawfully enters or first unlawfully remains in the building, and argued that the panel's decision brought the Sixth Circuit into conflict with decisions of the Fifth and Eighth Circuits. *Id.* at 7-11. Although the government conceded that "a circuit split exists as to whether generic burglary requires intent to commit a crime" at the time of unlawful entry or remaining, it argued that rehearing en banc was not warranted because a change of position by the Sixth Circuit could not eliminate the split. Gov't En Banc Opp. at 6. The Sixth Circuit summarily denied the petition. App., *infra*, 9a-10a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exacerbates An Entrenched Circuit Split

In holding that a prior conviction can serve as an ACCA predicate if the defendant developed the intent to commit a crime at any point "while 'remaining in'" a building, the Sixth Circuit has confirmed an established rift among the circuit courts. App., *infra*, 8a. While that decision accords with Fourth, Ninth, and Tenth Circuit rulings, it directly contravenes precedent of the Fifth and Eighth Circuits, which require criminal intent contemporaneous with the unlawful entry or decision to remain in the building.

The Sixth Circuit expressly recognized in this case that "[t]he question of whether generic burglary requires intent at entry has resulted in a circuit split focusing on *Taylor*'s 'remaining in' language." App., *infra*, 7a. Other circuits have likewise acknowledged this pervasive split, noting "two competing views" over "the meaning of the phrase 'remaining in.'" *United States* v. *Bernel-Aveja*, 844 F.3d 206, 215 (5th Cir. 2016) (Higginbotham, J., concurring in the judgment); see also *id*. at 243 (Owen, J., concurring) (noting "division among the Circuit Courts * * * as to when the intent to commit a crime on the premises must be formed"). Indeed, the government conceded here that "a circuit split exists as to whether generic burglary requires intent to commit a crime at entry, or if intent may arise at any time when the perpetrator is unlawfully present." Gov't En Banc Opp. at 6; see also *Morris* Gov't Stay Mot. at 5 (noting "circuit split on the question of whether an intent to commit a crime must be present at the moment one unlawfully enters or remains in a building"). This Court should grant review in order to restore "fundamental fairness" by ensuring that "the same type of conduct is punishable on the Federal level in all cases." *Taylor* v. *United States*, 495 U.S. 575, 582 (1990) (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983)).

A. Two Circuits Have Held That *Taylor* Requires Contemporaneous Intent

The Fifth and Eighth Circuits have held that, to satisfy *Taylor*'s definition of generic burglary, a statute must require proof that the defendant intended to commit a crime at the time of unlawful entry or first unlawful remaining in a building. See, *e.g.*, *United States* v. *McArthur*, 850 F.3d 925 (8th Cir. 2017);

United States v. *Constante*, 544 F.3d 584 (5th Cir. 2008) (per curiam).

In *Constante*, 544 F.3d at 587, the Fifth Circuit "definitively * * * conclude[d]" that the defendant's convictions under the Texas burglary statute[4] were not "violent felonies" under ACCA since the statute "d[id] not contain an element of intent to commit a felony, theft, or assault at the moment of entry." Similarly, the court ruled in *United States* v. *Herrera-Montes*, 490 F.3d 390 (5th Cir. 2007), that the Tennessee burglary statute[5] was not subject to the Sentencing Guidelines' career offender enhancement for "crime[s] of violence," Sentencing Guidelines § 2L1.2, whose definition "'closely tracks' [ACCA's] definition of 'violent felony,'"[6] *Constante*, 544 F.3d at 586 (quoting *James* v. *United States*, 550 U.S. 192, 206 (2007)). The *Herrera-Montes* court reasoned that, since "*Taylor* requires that the defendant intend to commit a crime at the time of unlawful entry or remaining in," the statute failed to satisfy the generic definition of

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[4] Tex. Penal Code Ann. § 30.02(a)(3) (West 2011) (person commits burglary if "without the effective consent of the owner, the person * * * enters a building or habitation and commits or attempts to commit" a crime).

[5] Tenn. Code Ann. § 39-14-402(a)(3) (2014) (person commits burglary who "without the effective consent of the property owner * * * [e]nters a building and commits or attempts to commit" crime).

[6] The Fifth Circuit "treats cases dealing with the career offender guideline 'interchangeably' with cases dealing with [ACCA]." *United States* v. *Wilson*, 622 F. App'x 393, 404 (5th Cir. 2015) (per curiam) (quoting *United States* v. *Moore*, 635 F.3d 774, 776 (5th Cir. 2011) (per curiam)) (applying *Constante* to hold that Tex. Penal Code Ann. § 30.02(a)(3) also does not qualify as a crime of violence under Sentencing Guidelines § 4B1.1 (2015)).

burglary because it did not require contemporaneous intent. 490 F.3d at 392. As the court explained, to assume that "intent could be formed anytime" would be a radical expansion of the common meaning of burglary because "then every crime committed after an unlawful entry or remaining in would be burglary." *Id*. at 392 n.1.

Most recently, in *Bernel-Aveja*, 844 F.3d at 212, the Fifth Circuit, in a decision by Judge Priscilla Owen, reaffirmed that "the generic definition of burglary * * * in *Taylor v. United States* 'requires that the defendant intend to commit a crime at the time of unlawful entry or remaining in.'" Because Ohio law permitted a burglary conviction based on a "find[ing] that the defendant unlawfully entered a dwelling and thereafter formed the intent to commit a crime," *id*. at 214, the Fifth Circuit held that the Ohio burglary statute "[was] overly broad because it [was] not congruent with generic burglary." *Ibid*.[7]

The decision elicited concurrences from Judge Patrick Higginbotham and Judge Priscilla Owen, who disputed whether *Herrera-Montes* had resolved the issue correctly. Judge Higginbotham argued that "the act of 'remaining in' occurs at a discrete point in time, and to constitute burglary, the perpetrator

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[7] Incorporating the elements of "criminal trespass," the Ohio burglary statute provides in pertinent part: "No person, by force, stealth, or deception, shall * * * [without privilege to do so, knowingly enter *or remain* on the land or premises of another] in a permanent or temporary habitation of any person * * * with purpose to commit in the habitation any misdemeanor that is not a theft offense." *Bernel-Aveja*, 844 F.3d at 210 (quoting Ohio Rev. Code Ann. §§ 2911.12(A)(2), 2911.21(A)(1) (West 1990) (emphasis added) (amended 1996)).

must have intended to commit a further crime at that discrete point." *Id.* at 215. To suggest that "remaining in" encompasses "every crime committed while trespassing inside a building, regardless when intent to commit that crime was formed" would render superfluous the "unlawful entry" prong of generic burglary since, under this view, "every unlawful entry becomes unlawful remaining in immediately on entry." *Id.* at 218. Moreover, Judge Higginbotham contended that this overbroad approach would "dispense with the most fundamental character of burglary: that the perpetrator trespass while already harboring intent to commit a further crime." *Id.* at 218.

"Because of the importance of the issue," Judge Owen concurred separately in her panel opinion to argue that the rule set forth in *Herrera-Montes* "[wa]s not supported by the Supreme Court's opinion in *Taylor*." *Id.* at 219-220. Recognizing "a split among the Circuit Courts" on this very issue, Judge Owen urged the court to "join the Fourth and Ninth Circuits" in concluding that "intent to commit a crime * * * can be formed before or after the trespass initially occurs." *Id.* at 221. Since the Ohio statute explicitly contained a "remaining in" provision, Judge Owen posited that intent to commit a crime at the time of unlawful entry was not required. Instead, a defendant could develop criminal intent at any point during the trespass. *Id.* at 224-225.

The Eighth Circuit likewise recognized in *McArthur*, 850 F.3d at 939, that generic burglary "requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." Writing for the court, Judge Steven Colloton explained that "[t]he act of 'remaining

in' a building, for purposes of generic burglary, is not a continuous undertaking," but a "discrete event that occurs at the moment when a perpetrator, who at one point was lawfully present, exceeds his license and overstays his welcome." *Id*. at 939. "If the defendant does not have the requisite intent at the moment he 'remains,' then he has not committed the crime of generic burglary." *Ibid*. The court thus determined that the defendant's conviction under Minnesota's third-degree burglary statute[8] did not support an ACCA sentencing enhancement because the statute "d[id] not require that the defendant have formed the 'intent to commit a crime' at the time of the nonconsensual entry or remaining in." *Id*. at 940.

Although the Eleventh Circuit has yet to consider the issue, one of its constituent district courts relied on Fifth Circuit precedent in holding that convictions under Tex. Penal Code Ann. § 30.02(a)(3) were "not violent felonies under the enumerated clause of the ACCA" because the statute "d[id] not contain the element of specific intent required to meet the definition of generic burglary." *United States* v. *Munoz-Morales*, No. 3:10-cr-80, 2016 WL 4424975, at *6 (N.D. Fla. July 11, 2016), *report and recommendation adopted*, 2016 WL 4414801 (N.D. Fla. Aug. 17, 2016).

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[8] Minn. Stat. § 609.582, subd. 3 (2016) (whoever "enters a building without consent and steals or commits a felony or gross misdemeanor while in the building * * * commits burglary in the third degree").

B. Four Other Circuits Maintain That *Taylor* Permits Sentence Enhancement Even When Contemporaneous Intent Is Not Required

In sharp contrast, the Fourth, Sixth, Ninth, and Tenth Circuits have interpreted *Taylor*'s "remaining in" language broadly to apply to a defendant who forms the intent to commit a crime at any point when trespassing in a building.

In *United States* v. *Priddy*, 808 F.3d 676 (2015), the Sixth Circuit ruled that the Tennessee burglary statute—the same provision at issue in *Herrera-Montes*—qualified as an ACCA predicate offense because it was a "'remaining-in' variant of generic burglary." *Id.* at 685. In the court's view, "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." *Ibid.* Following *Priddy*, the Sixth Circuit held below that generic burglary "does not require intent at entry; rather the intent can be developed while 'remaining in.'" App., *infra*, 8a. Furthermore, the court viewed *Taylor*'s "remaining in language" as not referring to a discrete moment in time. *Ibid.* Instead, in the Sixth Circuit's view, it "allows for the development of intent at any point" while the defendant trespasses on the premises. *Id.* at 7a.[9]

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[9] The Sixth Circuit recently held that the Tennessee burglary statute is overbroad because it includes entry into locations such as trailers, tents, and vehicles. *United States* v. *Stitt*, 860 F.3d 854, 860 (2017) (en banc). That court has since confirmed that "nothing in *Stitt* * * * undermined *Priddy*'s holding" with respect to when the defendant must have the necessary intent.

The Fourth Circuit reached the same conclusion in *United States* v. *Bonilla*, 687 F.3d 188, 194 (2012), in affirming the defendant's sentence enhancement under § 2L1.2 of the Sentencing Guidelines based on his violation of the Texas burglary statute.[10] Explicitly parting ways with the Fifth Circuit in addressing the very same state statutory provision, the Fourth Circuit dismissed *Constante*'s reading of *Taylor* as "too rigid." *Ibid.* Since "proof of a completed or attempted felony *necessarily* requires proof that the defendant formulated the intent to commit a crime either prior to his unlawful entry or while unlawfully remaining in the building," the court determined that the statute "substantially correspond[ed]" to *Taylor*'s generic definition—even though it did not contain an express intent element. *Id.* at 193. In dissent, Chief Judge William Traxler explained that *Taylor*'s "with-intent-to-commit phrasing" retained the "requirement of contemporaneous intent * * * [that] was the essence of burglary at common law, as it was the element that distinguished the offense from trespass." *Id.* at 196-197.

The Ninth Circuit has likewise concluded that "*Taylor* allows for burglary convictions so long as the defendant formed the intent to commit a crime while

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United States v. *Ferguson*, 868 F.3d 514, 516 (2017) (reaffirming that Tenn. Code Ann. § 39-14-402(a)(3) constitutes generic burglary).

[10] The Fourth Circuit "rel[ies] on precedents evaluating whether an offense constitutes a 'crime of violence' under the Guidelines interchangeably with precedents evaluating whether an offense constitutes a 'violent felony' under the ACCA, because the two terms have been defined in a manner that is "substantively identical." *United States* v. *King*, 673 F.3d 274, 279 n.3 (2012) (internal quotation marks omitted).

unlawfully remaining on the premises, regardless of the legality of the entry." *United States* v. *Reina-Rodriguez*, 468 F.3d 1147, 1155 (2006), overruled on other grounds by *United States* v. *Grisel*, 488 F.3d 844 (9th Cir. 2007). According to the court, requiring intent solely at entry "would render *Taylor*'s 'remaining in' language surplusage." *Ibid.* But the Ninth Circuit concluded, without explanation, that "remaining in" must refer to a continuing course of conduct rather than a discrete point in time. As such, the court ruled that the Utah second-degree burglary statute[11] was a crime of violence[12] under the Sentencing Guidelines.[13] *Id.* at 1157.

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[11] Utah Code Ann. § 76-6-202(1) (West 2015) ("An actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building with intent to commit [a crime].").

[12] Because a "violent felony as defined in the ACCA is nearly identical to a 'crime of violence' as defined in the Sentencing Guidelines," the Ninth Circuit has "used [its] analysis of the [latter] * * * to guide [its] interpretation of [the former]." *United States v. Prince*, 772 F.3d 1173, 1176 (9th Cir. 2014).

[13] *Reina-Rodriguez* significantly curtailed the reach of the Ninth Circuit's earlier ruling in *United States* v. *Bonat*, 106 F.3d 1472 (1997). *Bonat* held that the Arizona burglary statute failed to satisfy the definition of generic burglary because state courts had interpreted it "to allow a conviction even if the intent to commit the crime was formed after entering the structure." *Id.* at 1475. But as the court clarified in *Reina-Rodriguez*, Arizona state courts had construed its burglary statute so broadly as to eliminate the requirement of unlawful presence in a building. 468 F.3d at 1155 (noting that, "under Arizona law, a person may be convicted of burglary merely by committing the crime of shoplifting"). In Utah, however, unlawful presence was still a necessary element of burglary. *Id.* at 1156 (citing *State* v. *Rudolph*, 970 P.2d 1221, 1229 (Utah 1998)).

Lastly, the Tenth Circuit has held that intent to commit a crime may be formed at any point while the defendant is unlawfully present in the building. In *United States* v. *Dunn*, 96 F. App'x 600, 605 (2004), the court rejected the defendant's argument that the Texas burglary statute at issue in *Constante* and *Bonilla* did not support an ACCA sentencing enhancement because it "lack[ed] the coincidence of unprivileged entry and intent to commit a crime." See Appellant's C.A. Br. at 16, *United States* v. *Dunn*, 96 F. App'x 600 (2004) (No. 03-5011) (arguing that the statute "does not require intent to commit a crime at the time of entry"). Writing for the court, Judge Michael McConnell held that "this Court has squarely held that the elements of the Texas statute at issue 'substantially correspond to the generic elements of burglary contained in *Taylor*.'" *Id.* at 605 (citing *United States* v. *Spring,* 80 F.3d 1450, 1462 (10th Cir. 1996)). The court was thus "bound by circuit precedent" to conclude that criminal intent could be developed at any time while the defendant unlawfully remains on the premises. *Ibid.*

C. Review Is Necessary To Resolve This Entrenched Split

This split is unlikely to dissipate without the Court's intervention. It involves six of the regional courts of appeals—four, even if cases construing the virtually identical career offender Sentencing Guidelines provision are eliminated.[14] Compare *Constante*,

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[14] Cases construing the Guidelines provision should be considered as part of the split. Circuit courts routinely rely on ACCA and Sentencing Guidelines cases interchangeably when interpreting the *Taylor* definition of generic burglary. Even after the

544 F.3d at 587, and *McArthur*, 850 F.3d at 939, with *Priddy*, 808 F.3d at 684, and *Dunn*, 96 F. App'x at 605. But rather than taking steps to reconcile the disagreement, circuit courts have doubled down in recent rulings. See, *e.g.*, App., *infra*, 8a; *United States* v. *Ferguson*, 868 F.3d 514, 516 (6th Cir. 2017); *Bernel-Aveja*, 844 F.3d 206. That trend has persisted despite heated intra-circuit disagreement. See *Bernel-Aveja*, 844 F.3d at 215, 220 (opinions of Higginbotham & Owen, JJ.); *Bonilla*, 687 F.3d at 194 (Traxler, C.J., dissenting). Moreover, the circuit courts have repeatedly declined to grant rehearing en banc despite the urgings of judges and litigants, including the United States. See, *e.g.*, *Bernel-Aveja*, 844 F.3d at 245 (Owen, J., concurring) (what "unlawfully remaining in requires with regard to when intent must be formed" is an "important question[] that our court should decide en banc"); App, *infra*, 9a-10a; Order Denying Reh'g En Banc, *McArthur*, 850 F.3d 925 (8th Cir. No. 14-3335); Order Denying Reh'g En Banc, *Dunn*, 96 F. App'x 600 (10th Cir. No. 03-5011). Even those courts that have undertaken rehearing have not altered their position. See *McArthur*, 850 F.3d at 840 (on panel rehearing, reaffirming the initial panel decision in *United States* v. *McArthur*, 836 F.3d 931, 944 (8th Cir. 2016)).

Sentencing Commission removed the term "burglary of a dwelling" from the Guidelines' definition of "crime of violence" in 2016, see Amendments to the Sentencing Guidelines 1 (U.S. Sentencing Comm'n 2016), the courts of appeals have continued to cite former Guidelines cases in the ACCA context. See, *e.g.*, App., *infra*, 7a (discussing the Fourth Circuit's *Bonilla* ruling in the Guidelines context when addressing the intent requirement under *Taylor* and ACCA); *McArthur*, 836 F.3d at 939 (same).

In light of such intractable disagreement, "[o]nly the Supreme Court can resolve the split among the Circuit Courts as to when formation of intent for purposes of generic burglary must occur." 844 F.3d at 245 (Owen, J., concurring); accord Gov't Resp. to Reh'g Pet. at 10 (suggesting that because of the depth of disagreement, "[i]f a midstream correction is needed" to address the split, "it is needed elsewhere" than in the courts of appeals).

II. The Decision Below Is Wrong

To qualify as "burglary" under ACCA, a prior state conviction must have required proof of contemporaneous intent. That conclusion follows from this Court's precedent, ACCA's text and purpose, and better-reasoned circuit court decisions. The Sixth Circuit's contrary position conflicts with *Taylor*, undermines Congress' purpose of deterring violent crime, and leads to illogical results.

In *Taylor*, this Court rejected the notion that ACCA reaches any crime that happens to carry the title "burglary." Instead, the Court concluded that Congress had adopted "the generic, contemporary meaning of burglary," with three elements: "[1] an unlawful or unprivileged entry into, or remaining in, [2] a building or other structure, [3] with intent to commit a crime." 495 U.S. at 598 (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(a), (c), (e), at 466, 471, 474 (1986)). This definition is "practically identical" to ACCA's original statutory definition of "burglary," *ibid.*, which covered "any felony consisting of entering or remaining surreptitiously within a building * * * *with intent to engage* in conduct constituting a Federal or State of-

fense." See p. 3, *supra* (emphasis added); accord *Taylor*, 495 U.S. at 590 (finding "nothing in the history to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different").

"The most natural reading of *Taylor* and the sources on which it relied show that a generic burglary requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." *McArthur*, 850 F.3d at 939 (citations omitted). First, by using the word "with," this Court "can only be understood as requiring the intent to accompany the other elements" of generic burglary. *Bonilla*, 687 F.3d at 197 (Traxler, C.J., dissenting) (citing *Webster's Encyclopedic Unabridged Dictionary of the English Language* 2183 (2001) (defining "with" as "accompanied by; accompanying")); see also *McArthur*, 850 F.3d at 939 (emphasizing the *Taylor* definition's use of "with"). If this Court had intended the elements to be independent of one another, it could have used "and" instead of "with."

Second, requiring contemporaneous intent aligns with the historical and other sources on which *Taylor* relied in determining the "generally accepted contemporary meaning" of burglary at the time of ACCA's enactment, including "the Model Penal Code." *Taylor*, 495 U.S. at 596-598 n.8. Those authorities support a contemporaneous intent requirement. See *McArthur*, 850 F.3d at 939. Looking to the same sources, Judge Colloton, writing for the Eighth Circuit, concluded that intent must either "exist at the time the defendant unlawfully remained within," *ibid.* (quoting 2 LaFave & Scott § 8.13(b), (e), at 468,

473-474 & n.101), or "accompany" the "entry" or "intrusion," *ibid.* (quoting Model Penal Code § 221.1 cmt. 3 (Am. Law Inst. 1980)). Accord *Herrera-Montes*, 490 F.3d at 392 (reaching the same conclusion after analyzing Black's Law Dictionary and the Model Penal Code). For instance, the Model Penal Code definition referenced in *Taylor* reads: "A person is guilty of burglary if he enters a building or occupied structure * * * *with* purpose to commit a crime therein." Model Penal Code § 221.1(1) (emphasis added). This understanding of intent is deeply rooted in the definition of burglary and distinguishes it from lesser property offenses, such as trespass. See 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769) ("As to the *intent*; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass."); see also *Bonilla*, 687 F.3d at 196-197 (Traxler, C.J., dissenting) (quoting Blackstone); *Bernel-Aveja*, 844 F.3d at 218 (maintaining that "the most fundamental character of burglary" is that "the perpetrator trespass[es] while already harboring intent to commit a further crime.").

This position is also the most faithful to ACCA's purpose. "Congress singled out burglary * * * because of its inherent potential for harm to persons." *Taylor*, 495 U.S. at 588; see also H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) ("The Subcommittee agreed to add the crimes * * * that involve conduct that presents a serious potential risk of physical injury to others * * * such as burglary."). This Court has recognized that contemporaneous intent is closely tied to the risk of violence because "[t]he fact that an offender enters a building *to commit a crime* often creates the possibility of a violent confrontation be-

tween the offender and an occupant." *Taylor*, 495 U.S. at 588 (emphasis added). Without such a requirement, ACCA's severe sentencing enhancements could be applied to any trespass with a subsequent crime, no matter the context or risk of harm.

There is a clear difference between breaking into a home *with the intent* to steal, or surreptitiously concealing oneself in a jewelry store until the close of business *with the intent* to take merchandise, on the one hand, and a hiker who enters an unoccupied cabin for protection from the cold and only later opportunistically decides to take food or supplies. The first two—each squarely within the generic meaning of burglary—can be said to pose a high risk of danger to persons; the latter does not. To the contrary, the entire rationale for defining burglary as a separate offense collapses if the crime sweeps so broadly. As the Model Penal Code aptly describes, "burglary is by hypothesis an attempt to commit some other crime" and was used at common law because of the difficulty of punishing inchoate offenses. Model Penal Code § 221.1 cmt. 1. Because modern criminal law has largely abandoned rigid limits on criminal attempt, burglary is only justifiable as an independent offense if it is limited to conduct that creates more danger than the underlying crime. The existence of criminal intent at the time of unlawful entry is a key factor that "creates the possibility of a violent confrontation." See *Taylor*, 495 U.S. at 588; cf. Model Penal Code § 221.1 cmt. 1 ("[E]ntry into a home at night in order to commit a theft is surely a more aggravated offense than an attempted theft alone, because of the additional element of personal danger that attends such conduct.").

"The ultimate absurdity," according to the authors of the Model Penal Code, would be "a provision * * * making it burglary to commit an offense 'in' a building, regardless of * * * *the intent with which he entered*." Model Penal Code § 221.1 cmt. 1 (emphasis added). To avoid this, the Code deliberately "exclude[s] from burglary [those] situations" that involve "no element of aggravation of the crime the actor proposes to carry forward." *Id.* cmt. 3(a) (discussing the need for an unlawful entry requirement); see also 2 LaFave & Scott § 8.13(a), at 467 (citing this definition as a "sound approach"). Michigan's statute allows for such an "ultimate absurdity" because it does not require that criminal intent accompany the unlawful occupation. By bringing this statute within generic burglary under ACCA, the Sixth Circuit would make a "career criminal" out of a Michigan hiker who seeks shelter and later commits a theft of opportunity, while outdoorsmen in a neighboring state may face no consequence beyond a petty misdemeanor. This approach clearly undermines both of Congress' objectives: deterring violent crime and guarding against unfair or disproportionate sentencing enhancements. See S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983) ("[ACCA] should ensure * * * that the same type of conduct is punishable on the Federal level in all cases.").

Circuits adopting the Sixth Circuit's view have relied on *Taylor*'s "remaining in" language, reasoning that "proof of a completed or attempted felony *necessarily* requires proof that the defendant formulated the intent to commit a crime either prior to his unlawful entry or while unlawfully remaining in the building." *Bonilla*, 687 F.3d at 193 (quoting Gov't

C.A. Br. at 7-8, *United States* v. *Bonilla*, 687 F.3d 188 (2012) (No. 11-4765)); see also App., *infra*, 8a. This argument, which sees "remaining in" as a continuous process, is inconsistent with *Taylor* and would lead to draconian results.

First, such a reading renders *Taylor's* "unlawful entry" language superfluous. The definition of generic burglary refers separately to "unlawful entry" and "remaining in." If it were true that the commission of a crime during an unlawful occupation "necessarily" proves that the requisite intent formed while "remaining in" the premises, then "every unlawful entry with intent would become 'remaining in' with intent as soon as the perpetrator enters" and the "unlawful entry" prong would be meaningless. *McArthur*, 850 F.3d at 939 (citations omitted). To give full weight to the Court's definition, both "unlawful entry" and "remaining in" must be read as discrete moments when an unlawful occupation begins. Therefore, a crime is only generic burglary if this specific act is done "with intent to commit a crime."

Second, the decision below pushes ACCA beyond its logical limits, triggering a fifteen-year mandatory sentencing enhancement not only for the hypothetical hiker, but also for a homeless person who sleeps in a warehouse and steals a coat on his way out or "teenagers who unlawfully enter a house only to party, and only later decide to commit a crime." *Herrera-Montes*, 490 F.3d at 392. The Sixth Circuit's approach would similarly punish a defendant who entered a neighbor's home for a glass of water after having been hired to mow her lawn, but who later decided to steal some food. *Cf. State* v. *Wesemann*, No. 03C01-9407-CR-00260, 1995 WL 605442, at *1-2

(Tenn. Crim. App. Oct. 16, 1995). These defendants may perhaps be fairly punished as thieves. These prior transgressions, however, would not be proof that they are the individuals targeted by ACCA: "career offenders * * * who commit * * * serious crimes as their means of livelihood." *Taylor*, 495 U.S. at 587.

This Court has consistently imposed a demanding standard for ACCA enhancements, requiring that prior crimes be "the same as, or narrower than, those of the generic offense" to avoid "unfairness to defendants." *Mathis* v. *United States*, 136 S. Ct. 2243, 2247, 2253 (2016). This exacting analysis ensures that only convictions that clearly constitute generic burglary trigger the mandatory enhancements. A failure to require contemporaneous intent misreads *Taylor* and broadens generic burglary beyond the strict confines provided by Congress.

* * * * *

Once the Sixth Circuit's definitional error on contemporaneous intent is corrected, it is clear that the Michigan statute at issue here sweeps far beyond the definition of generic burglary. The statute applies to a defendant who "breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor." Mich. Comp. Laws § 750.110a(4)(a). This provision allows conviction for nothing more than "commit[ing] a misdemeanor" while "present in" "a dwelling" "without permission." *Ibid.* While the district court and Sixth Circuit did not have occasion to reach this question, petitioner has demonstrated (and would show on remand) that the government cannot carry its burden

of showing that he was convicted of generic burglary. See pp. 6-9, *supra*.

III. This Case Presents An Ideal Vehicle For Resolving An Issue Of Unquestionable Importance

As the Government has conceded, the question presented here is one of "exceptional importance," and "has broad and important implications" for federal sentencing. *Morris* Gov't Reh'g Pet. at I; *Morris* Gov't Stay Mot. at 4. And the Government has acknowledged "the Supreme Court's singular role in answering [that question]." *Morris* Gov't Stay Mot. at 7. The sheer number of ACCA cases litigated at every level of the federal court system shows the issue is a recurring one that warrants further review. This Court has interpreted ACCA ten times in just the past decade. See U.S. Sentencing Comm'n, *Selected Supreme Court Cases on Sentencing Issues* 3 (July 2015); see also, *e.g.*, *Mathis*, 136 S. Ct. 2245; *Johnson*, 135 S. Ct. 2553.

Moreover, as the Government recently emphasized, "burglary is * * * a frequently-used ACCA predicate." *Morris* Gov't Reh'g Pet. at 6. In fiscal year 2016 alone, the government prosecuted more than three hundred § 924(e) cases. U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* 2 (2017). The question whether a state-law burglary conviction qualifies as an ACCA predicate affects a significant number of these cases. As the House Report accompanying ACCA pointed out, "robbery and burglary are the crimes most frequently committed by * * * career criminals." *Taylor*, 495 U.S. at 581 (discussing H.R. Rep. No. 1073, 98th Cong., 2d Sess.

1, 3 (1984)). That statement is no less true today; as the government itself observed in seeking en banc review of the same question presented here, "the importance of burglary" as an ACCA predicate "is only magnified following the invalidation of the residual clause [in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)]." *Morris* Gov't Reh'g Pet. at 6.

As Judge Owen has explained, at least 29 jurisdictions have burglary statutes that include unlawful "'remaining in.'" *Bernel-Aveja*, 844 F.3d at 229-230 (Owen, J. concurring). Out of those 29 state statutes, "at least fourteen States currently have 'remaining in' offenses that do not have as an element the timing requirement." *Id.* at 237. In other words, there are at least 14 states—and potentially as many as 21—where convictions under those state statutes may be ACCA predicates. *Id.* at 240.[15] That question "significantly impacts the federal sentencing regime, particularly given the centrality of burglary as one of four enumerated predicates has been amplified following *Johnson*'s invalidation of the residual clause." *Morris* Gov't Stay Mot. at 5.

The implications of the widespread disagreement on this frequently recurring issue are severe. As the Government itself has urged, "the Circuit split gravely undermines the uniform application of [ACCA]'s enhanced sentencing provisions," resulting in the uneven administration of justice. *Morris* Gov't Stay

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[15] In addition to the fourteen states discussed above, Judge Owen identified seven more states whose burglary statutes on their face potentially present the "contemporaneous intent" issue, but which state courts have not yet interpreted to decide whether intent is required. *Bernel-Aveja*, 844 F.3d at 240.

Mot. at 6. Indeed, the circuits are imposing drastically different sentences based on identical predicate burglary convictions. The Fifth and Sixth Circuits have diverged over whether a single Tennessee burglary statute supports ACCA enhancements. Compare *Priddy*, 808 F.3d at 684, with *Herrera-Montes*, 490 F.3d at 392. Likewise, the Fifth Circuit split from the Fourth and Tenth Circuits regarding enhancements for the very same Texas burglary statute. Compare *Constante*, 544 F.3d at 587, with *Bonilla*, 687 F.3d at 194, and *Dunn*, 96 F. App'x at 605. Thus, whether a defendant incurs a 15-year mandatory-minimum sentence enhancement under ACCA depends entirely on the jurisdiction in which he is federally prosecuted.

As the government has explained,

> The disagreement between the circuits on the timing of criminal intent question splinters application of burglary as an ACCA predicate nationwide. * * * [T]he split yields deeply disuniform treatment of the same burglary convictions in different jurisdictions. Given the significant enhanced sentencing penalties that attend the ACCA, the disparate treatment in varying jurisdictions of defendants who are convicted under the same state burglary statutes raises substantial concerns.

Morris Gov't Stay Mot. at 6-7. The Sentencing Commission has also recognized the difficulty courts have experienced in applying ACCA's statutory definitions of "crime of violence" or "violent felony," resulting in an increased "potential for inconsistent application of the mandatory minimum penalties." U.S. Sentencing Comm'n, *2011 Report to the Congress: Mandatory*

Minimum Penalties in the Federal Criminal Justice System 363 (Oct. 2011).

This result subverts ACCA's purposes of providing a "uniform definition" of burglary, and ensuring that the same type of conduct receives similar treatment at the federal level. *Taylor*, 495 U.S. at 592. The circuit split thus has produced the very arbitrariness that both Congress and this Court have long sought to avoid. Additionally, the significance of § 924(e)(1) for any individual defendant is also undoubtedly profound, imposing "a mandatory minimum sentence of imprisonment for 15 years." *Id.* at 581. In this case, reversal would almost certainly result in a sentence reduction of seven years. Where Circuits have found cotemporaneous intent to be necessary to satisfy generic burglary, the significance of the holding is evidenced by the resulting flood of defendants raising the issue.[16]

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[16] *E.g.*, *United States* v. *Emeary*, 794 F.3d 526, 529-530 (5th Cir. 2015) (holding that it was plain error to treat an offense under Tex. Penal Code Ann. § 30.02(a)(3) as a violent felony under ACCA); *United States* v. *St. Clair*, 608 F. App'x 192, 194 (5th Cir. 2015) (plain error to treat an offense under Tex. Penal Code Ann. § 30.02(a)(3) as a crime of violence under the Sentencing Guidelines); *United States* v. *Castaneda*, 740 F.3d 169, 175 (5th Cir. 2013) (same); *United States* v. *Trevino-Rodriguez*, 463 F. App'x 305, 307-308 (5th Cir. 2012) (same); *United States* v. *House*, 394 F. App'x 122, 124 (5th Cir. 2010) (granting defendant's 28 U.S.C. § 2255 motion for a sentence reduction in light of *Constante*); *United States* v. *Schleper*, No. CR 07-167 (01) (MJD), 2017 WL 2560916, at *2 (D. Minn. June 13, 2017) (granting post-conviction relief in light of *McArthur* because the burglary statute lacked the element of contemporaneous intent); *Stoner* v. *United States*, No. 1:16-CV-156 CAS, 2017 WL 2535671, at *5 (E.D. Mo. June 12, 2017) (same); *United States* v. *Willis*, No. CR 11-13 (DSD/JJK), 2017 WL 1288362, at *2 (D. Minn. Apr. 6,

This case presents a highly suitable vehicle for resolving the question presented. At each stage of the proceedings, petitioner preserved his claim that the prior conviction for home invasion did not qualify as "generic burglary" under ACCA because it lacked the contemporaneous intent element required by generic burglary. See App., *infra*, 1a, 7a. The panel conceded the existence of a circuit split on whether generic burglary requires intent at entry, App, *infra*, 7a, and treated that issue as dispositive of petitioner's claim on appeal, *ibid*. In opposing rehearing en banc, the Government conceded the split, identified no vehicle issues, and made no suggestion that petitioner had other prior convictions that would support the same enhancement—while nonetheless arguing that the panel correctly rejected a contemporaneous intent requirement under *Taylor*. See generally Gov't Resp. to Reh'g Pet.

2017) (same); *United States* v. *Latimore*, No. CR 12-83 ADM/JJG, 2017 WL 963142, at *1 (D. Minn. Mar. 9, 2017) (same); *United States* v. *Rodriguez*, No. CR 5-312 (MJD/AJB), 2017 WL 933024, at *2 (D. Minn. Mar. 8, 2017) (same); *United States* v. *Gardea-Hernandez*, No. 8:10CR405, 2011 WL 3563283, at *3-4 (D. Neb. Aug. 12, 2011) (accepting the Fifth Circuit's ruling in *Constante* to hold that a "conviction under Texas Penal Code § 30.02(a)(3) does not meet the generic, contemporary definition of burglary").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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