No. 17-1445

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL HERROLD

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

REPLY BRIEF FOR THE PETITIONER

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The en banc court of appeals held, by a vote of 8-7, that "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B), requires that a defendant have the intent to commit a crime at the precise moment he first enters or remains in a building or structure without authorization. As the dissent below explained, that decision incorrectly "render[s] all burglary convictions" in Texas—"the second-most populous state in the country"—"nullities" for purposes of the ACCA. Pet. App. 48a (Haynes, J., dissenting); see *ibid.* (noting that in 2015, "Texans reported 152,444 burglaries, all of which now escape the ACCA's reach") (citation omitted). The decision also deepens an entrenched circuit conflict. This Court's intervention is warranted.

1. As the petition for a writ of certiorari (at 10-11) and the government's response to the petition (at 7-10) in *Quarles* v. *United States*, No. 17-778 (filed Nov. 24,

2017) explain, the court of appeals' contemporaneous-intent requirement is wrong. In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court construed "burglary" under the ACCA to encompass any "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. The statute at issue here, Texas Penal Code Annotated § 30.02(a)(3) (West Supp. 2017), makes it a crime to, without permission, "enter[] a building or habitation and commit[] or attempt[] to commit a felony, theft, or assault." As apparently construed by the court of appeals and as interpreted by Texas's highest court for criminal cases, see *infra*, pp. 5-6, Section 30.02(a)(3) qualifies as generic burglary under *Taylor* because it requires that a defendant form the intent to commit a felony, theft, or assault, either before his unauthorized entry of a building or habitation or during his unauthorized presence there. Pet. 10; see Gov't Br. at 8-10, *Quarles*, *supra* (No. 17-778).

Respondent's attempts to defend the decision below lack merit. Respondent errs in relying (Br. in Opp. 7, 10-12) on the original version of the ACCA, which 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," *Taylor*, 495 U.S. at 581 (quoting ACCA, Pub. L. No. 98-473, 98 Stat. 2185 (18 U.S.C. App. 1202(c)(9) (Supp. III 1985)) (repealed in 1986 by the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 459). As an initial matter, contrary to respondent's suggestion, the inclusion of the word "surreptitiously" does not imply a temporal limitation on when a defendant's criminal intent must be

formed. A defendant could, for example, "remain[] surreptitiously" in a bank to seek shelter during a storm and only later decide to steal money from the vault while he remained inside. In any event, Congress deleted the statutory definition of "burglary" in 1986, see *id.* at 582, and when this Court construed the term in *Taylor*, it did not resurrect all of the prior limitations (*e.g.*, coverage only of "building[s]") and it did not require that the defendant's "remaining in" be surreptitious. See *id.* at 599.

Respondent acknowledges (Br. in Opp. 7) that *Taylor*'s definition of "burglary" reflects that, by 1986, "most states had expanded" their burglary provisions to criminalize a defendant's unauthorized remaining in a building or structure with the intent to commit a crime. But respondent assumes (*ibid.*) that those provisions applied only where "the defendant planned to commit another crime at the moment he commenced a trespass." That assumption lacks foundation. The fact that many States recognized a "remaining in" variant of burglary does not demonstrate that *Taylor*'s reference to "remaining in" refers to a precise moment in time when the defendant's presence first became unauthorized, rather than—as the common meaning of "remain" would indicate, see Gov't Br. at 9, *Quarles*, *supra* (No. 17-778)—to the entire period of the defendant's continued presence in a building or structure without authorization. For the same reason, it is of little moment that in 1986, few States worded their burglary statutes in precisely the same way as Texas. See Resp. Br. in Opp. 8. The existence of alternative formulations does not dictate that the alternatives differ in respect to whether criminal intent must be contemporaneous with

the defendant's initial decision to enter or remain in a building or structure without authorization.

2. Respondent does not dispute (Br. in Opp. 14-15) that the courts of appeals are divided on the question presented. Three courts of appeals have held that a statute can satisfy *Taylor*'s definition of generic burglary if it requires that a defendant "develop[] the intent to commit the crime while remaining in the building, [even] if he did not have it at the moment he entered," *United States* v. *Bonilla*, 687 F.3d 188, 194 (4th Cir. 2012), cert. denied, 571 U.S. 829 (2013); see also *United States* v. *Quarles*, 850 F.3d 836, 840 (6th Cir. 2017), petition for cert. pending, No. 17-778 (filed Nov. 24, 2017); *United States* v. *Reina-Rodriguez*, 468 F.3d 1147, 1156 (9th Cir. 2006), overruled on other grounds, *United States* v. *Grisel*, 488 F.3d 844 (9th Cir.) (en banc), cert denied, 552 U.S. 970 (2007), while three courts of appeals have held that ACCA burglary is limited to burglary offenses requiring that the defendant intend to commit a crime at the time of his initial entry or decision to remain in a building or structure without authorization, Pet. App. 25a-36a; *Van Cannon* v. *United States*, No. 17-2631, 2018 WL 2228251, at *7-*8 (7th Cir. May 16, 2018); *United States* v. *McArthur*, 850 F.3d 925, 939 (8th Cir 2017). See generally Pet. 10; Gov't Br. at 10-12, *Quarles*, *supra* (No. 17-778). Respondent also does not dispute that the Fourth Circuit's decision in *Bonilla*, *supra*, concerned Section 30.02(a)(3), the same provision at issue here, or that the Fifth and Sixth Circuits have similarly divided over whether a particular Tennessee burglary statute, Tenn. Code Ann. § 39-14-402(a) (2014), constitutes generic burglary for purposes of the ACCA. See Pet. 11.

Instead, respondent contends (Br. in Opp. 14-15) that the question presented does not warrant "the resources that would be expended after a plenary grant of certiorari" because on his count, only six States have adopted burglary statutes "in which commission (or attempt) of a second offense eliminates the need to prove contemporaneous intent at the time of trespass." But even assuming respondent's tally is correct, that six courts of appeals have considered and divided on the question presented demonstrates that it is frequently recurring and sufficiently important to warrant this Court's review. Respondent's reliance on the asserted rarity of Texas's particular formulation of burglary erroneously assumes that the question presented arises only under burglary statutes that are phrased in a similar manner. To the contrary, the same issue also arises under differently worded burglary provisions. See, *e.g.*, *Reina-Rodriguez*, 468 F.3d at 1155 (addressing Utah Code Ann. § 76-6-202(1)-(2) (West 2006), which makes it a crime to "enter[] or remain[] unlawfully in a building or any portion of a building with intent to commit" a felony or certain other, enumerated offenses).

3. Respondent suggests (Br. in Opp. 9) that the question presented is not implicated in this case because "Texas Penal Code § 30.02(a)(3) does not require proof that the defendant *ever* formed 'the intent to commit a crime.'" In particular, respondent argues (*ibid.*) that certain predicate crimes may be "committed by recklessly or even negligently causing a victim to suffer pain or experience risk after the [unauthorized] entry." But respondent did not make that argument in the court of appeals, which appears to have construed Section 30.02(a)(3) as in fact requiring the formulation of intent

to commit a crime. See, *e.g.*, Pet. App. 26a, 31a, 36a; see also *id.* at 56a-57a (Hayes, J., dissenting).

This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004); see *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). Respondent provides no reason to depart from that practice here. Indeed, the interpretation of Section 30.02(a)(3) on which the decision below was premised is consistent with the construction of Texas's highest criminal court. In *DeVaughn* v. *State*, 749 S.W.2d 62 (1988), the Texas Court of Criminal Appeals described Subsection (a)(3)'s requirement of an attempt or completed crime as "supplant[ing] the specific intent which accompanies entry" in Subsection (a)(1) and (2). *Id.* at 65. The court then quoted with approval the Practice Commentary, which provides that "Section 30.02(a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, *subsequently forms that intent* and commits or attempts a felony or theft." *Ibid.* (emphasis added; citation omitted).

Respondent also suggests that certiorari is unwarranted because even if generic burglary does not include the contemporaneous-intent requirement he advocates, Section 30.02(a)(3) "is non-generic" for the separate reason that it "does not require proof of anything similar to breaking and entering or similar conduct." Resp. Br. in Opp. 12 (internal quotation marks omitted). The court of appeals did not address that argument (see

Pet. App. 1a-47a), which should be considered, if at all, on remand.

In any event, respondent is wrong to contend that generic burglary requires a breaking and entering. Respondent relies (Br. in Opp. 12) on one line in *Descamps* v. *United States*, 570 U.S. 254, 259 (2013). But *Descamps* concerned the divisibility of a particular state burglary statute, rather than the definition of generic burglary, see *id.* at 260-261, and the language on which respondent relies states only that a defendant, like a shoplifter, whose entry into and continued presence in a location are lawful has not committed generic burglary. *Id.* at 259. *Descamps* did not cast doubt on provisions, like Subsection (a)(3), that make it a crime to remain in a building or structure without authorization and with the intent to commit a crime.

4. Finally, respondent argues (Br. in Opp. 16-25) that certiorari is unwarranted because, even if the court of appeals' holding on the contemporaneous-intent issue was wrong, the judgment was nonetheless correct. In particular, respondent contends that Section 30.02(a) is overbroad because it criminalizes burglary of a "habitation," defined to include "a structure or vehicle [that is] adapted for the overnight accommodation of persons." Resp. Br. in Opp. 17 (quoting Tex. Penal Code Ann. § 30.01(1) (West Supp. 2017)) (emphases omitted). On respondent's view, generic burglary "excludes all vehicle[s]." *Ibid.* (emphasis omitted).

The court of appeals did not decide that issue, see Pet. App. 37a-46a, which is also the subject of respondent's conditional cross-petition for a writ of certiorari, see 17-9127 Cross-Pet. 4-10. A similar question is currently before this Court in *United States* v. *Stitt*, cert. granted, No. 17-765 (Apr. 23, 2018), and *United States*

v. *Sims*, cert. granted, No. 17-766 (Apr. 23, 2018), which present the question whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the ACCA. Unless and until this Court resolves that issue in the manner that respondent would prefer, it does not provide a reason to deny certiorari on the distinct question presented here.

Whatever the outcome of *Stitt* and *Sims*, however, this Court's decision in those cases may provide guidance on the proper scope of ACCA burglary and thus on the question presented in this case and in *Quarles*. For that reason, as an alternative to granting certiorari in this case or *Quarles*, the government has suggested that this Court may wish to hold the petitions in this case and *Quarles* pending its decision in *Stitt* and *Sims*. See Pet. 11-12. In addition, and as the government explains in its response to respondent's cross-petition for a writ of certiorari, if the Court grants the petition in this case, it should hold respondent's cross-petition pending the Court's decision in *Stitt* and *Sims* and then dispose of it as appropriate. See 17-9127 Gov't Resp. to Cross-Pet. 9-11.[*]

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[*] Respondent suggests (Br. in Opp. 23-25) that if this Court holds in *Stitt* and *Sims* that burglary of a non-permanent or mobile structure adapted or used for overnight accommodation can constitute ACCA burglary, that holding could not constitutionally be applied in his case. As the government explains in response to respondent's cross-petition for a writ of certiorari (at 11-13) (No. 17-9127), that argument lacks merit.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted or held pending the Court's disposition of the petition for a writ of certiorari in *Quarles* v. *United States*, No. 17-778 (filed Nov. 24, 2017). In the alternative, the petition should be held pending the Court's decision in *United States* v. *Stitt*, cert. granted, No. 17-765 (Apr. 23, 2018), and *United States* v. *Sims*, cert. granted, No. 17-766 (Apr. 23, 2018), and then disposed of as appropriate.

Respectfully submitted.

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