No. 11-9540

In the Supreme Court of the United States

MATTHEW ROBERT DESCAMPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the modified categorical approach can be used to decide whether petitioner's previous conviction for burglary under California Penal Code § 459 (West Supp. 1978) qualifies as a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), when Section 459 encompasses both offenses that are generic burglary under *Taylor* v. *United States*, 495 U.S. 575 (1990), as well as offenses that are not.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 1
Statement 2
Summary of argument 9
Argument:
Petitioner's conviction under California Penal Code § 459 was for generic burglary 12
A. Under the ACCA, the modified categorical approach permits a sentencing court to classify a previous conviction as a violent felony if the jury was actually required to find, or the defendant necessarily admitted, the elements of a generic offense in connection with the previous conviction 13
1. The categorical and modified categorical approaches 13
2. Judicial interpretations of state criminal statutes are often functionally equivalent to the explicit divisions in statutes this Court has used to illustrate the application of the modified categorical approach 17
3. No sound justification supports limiting the modified categorical approach to convictions under explicitly divisible statutes 23
4. Petitioner's constitutional and practical concerns have no force when the modified categorical approach is properly defined and applied based on *Shepard*-approved records 30

Table of Contents—Continued: Page

B. Some convictions under California Penal Code § 459 are for generic burglary 35
1. A conviction under California Penal Code § 459 requires an entry, into one of an enumerated list of places, that invades a possessory right in that place, with the intent to commit theft or another felony 35
2. Two elements of California Penal Code § 459 categorically correspond to the elements of generic burglary, while two elements are broader, calling for application of the modified categorical approach 40
C. The *Shepard* records in petitioner's case establish that his conviction was for generic burglary 46
Conclusion 50

TABLE OF AUTHORITIES

Cases:

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 31
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 31
Begay v. *United States*, 553 U.S. 137 (2008) 24
Chambers v. *United Sta*tes, 555 U.S. 122 (2009) 20
Chavez, *In re*, 68 P.3d 347 (Cal. 2003) 48
Clark v. *Commonwealth*, 472 S.E.2d 663 (Va. Ct. App. 1996) 39
Commissioner v. *Estate of Bosch*, 387 U.S. 456 (1967) 26
Commonwealth v. *Boyd*, 897 N.E.2d 71 (Mass. App. Ct. 2008), review denied, 901 N.E. 2d 137 (Mass. 2009) 20
Davis v. *Commonwealth*, 110 S.E. 356 (Va. 1922) 39

Cases—Continued: Page

Fortes v. *Sacramento Mun. Court Dist.*, 170 Cal. Rptr. 292 (Cal. Ct. App. 1980) 45
Gonzales v. *Duenas-Alvarez*, 549 U.S. 183 (2007) 16
Hernandez v. *State*, 50 P.3d 1100 (Nev. 2002), cert. denied, 537 U.S. 1197 (2003) 39
Higgins v. *Holder*, 677 F.3d 97 (2d Cir. 2012) 23
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 16
James v. *United States*, 550 U.S. 192 (2007) 27, 32
Johnson v. *United States*, 130 S. Ct. 1265 (2010) 15, 17, 19, 29
Li v. *Ashcroft*, 389 F.3d 892 (9th Cir. 2004) 25
Magness v. *Superior Court*, 278 P.3d 259 (Cal. 2012) 37
McNeill v. *United States*, 131 S. Ct. 2218 (2011) 35
Nijhawan v. *Holder*, 557 U.S. 29 (2009) 16, 18
Parke v. *Raley*, 506 U.S. 20 (1992) 48
People v. *Barry*, 29 P. 1026 (Cal. 1892) 37, 38
People v. *Deptula*, 373 P.2d 430 (Cal. 1962) 42
People v. *Felix*, 28 Cal. Rptr. 2d 860 (Cal. Ct. App. 1994) 44
People v. *Frye*, 959 P.2d 183 (Cal. 1998), cert. denied, 526 U.S. 1023 (1999), overruled on other grounds, *People* v. *Doolin*, 198 P.3d 11 (Cal.), cert. denied, 130 S. Ct. 168 (2009) 38, 42
People v. *Gauze*, 542 P.2d 1365 (Cal. 1975) ..... *passim*
People v. *Holmes*, 84 P.3d 366 (Cal. 2004) 48
People v. *Montoya*, 874 P.2d 903 (Cal. 1994) 36
People v. *Pendleton*, 599 P.2d 649 (Cal. 1979) 38
People v. *Salemme*, 3 Cal. Rptr. 2d 398 (Cal. Ct. App. 1992) 39, 41, 43

Cases—Continued: Page

People v. *Sherow*, 128 Cal. Rptr. 3d 255 (Cal. Ct. App. 2011) 44, 45
People v. *Superior Court* (*Granillo*), 253 Cal. Rptr. 316 (Cal. Ct. App. 1988) 39
People v. *Waidla*, 996 P.2d 46 (Cal.), cert. denied, 531 U.S. 1018 (2000) 37, 45
Shepard v. *United States*, 544 U.S. 13 (2005) ..... *passim*
Southern Union Co. v. *United States*, 132 S. Ct. 2344 (2012) 32
State v. *Baker*, 161 N.W.2d 864 (Neb. 1968), cert. denied, 394 U.S. 949 (1969) 39
State v. *Bull*, 276 P. 528 (Idaho 1929) 39
State v. *Cavallo*, 513 A.2d 646 (Conn. 1986) 23
Taylor v. *United States*, 495 U.S. 575 (1990) ..... *passim*
United States v. *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) ..... *passim*
United States v. *Booker*, 543 U.S. 220 (2005) 16
United States v. *Fife*, 624 F.3d 441 (7th Cir. 2010), cert. denied, 131 S. Ct. 1536 (2011) 22
United States v. *Gibbs*, 656 F.3d 180 (3d Cir. 2011), cert. denied, 132 S. Ct. 1125 (2012) 22
United States v. *Gomez*, 690 F.3d 194 (4th Cir. 2012) 20, 27, 28
United States v. *Gonzalez-Terrazas*, 529 F.3d 293 (5th Cir. 2008) 41
United States v. *Harris*, 964 F.2d 1234 (1st Cir. 1992) 33
United States v. *Hart*, 578 F.3d 674 (7th Cir. 2009) 22
United States v. *Hayes*, 555 U.S. 415 (2009) 32
United States v. *Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2005) 49

Cases—Continued: Page

United States v. *Holloway*, 630 F.3d 252 (1st Cir. 2011) 20
United States v. *Huizar*, 688 F.3d 1193 (10th Cir. 2012) 41, 48
United States v. *Koufos*, 666 F.3d 1243 (10th Cir. 2011), cert. denied, 132 S. Ct. 2787 (2012) 22
United States v. *Lopez-DeLeon*, 513 F.3d 472 (5th Cir.), cert. denied, 553 U.S. 1099 (2008) 26
United States v. *Mahone*, 662 F.3d 651 (3d Cir. 2011) 49
United States v. *Mangos*, 134 F.3d 460 (1st Cir. 1998) 20
United States v. *Painter*, 400 F.3d 1111 (8th Cir.), cert. denied, 546 U.S. 1035 (2005) 36
United States v. *Parks*, 620 F.3d 911 (8th Cir. 2010), cert. denied, 132 S. Ct. 125 (2011) 20, 22
United States v. *Rodriguez-Rodriguez*, 393 F.3d 849 (9th Cir.), cert. denied, 544 U.S. 1041 (2005) 47
United States v. *Taylor*, 659 F.3d 339 (4th Cir. 2011), cert. denied, 132 S. Ct. 1817 (2012) 49
United States v. *Torres-Gonzalez*, 1 Fed. Appx. 834 (10th Cir. 2001) 47
United States v. *Woods*, 576 F.3d 400 (7th Cir. 2009) 25

Constitution, statutes and guidelines:

U.S. Const. Amend. VI 31, 33
Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) 2, 3
18 U.S.C. 924(e)(1) 4, 5, 17
18 U.S.C. 924(e)(2)(B) 4, 13, 17
18 U.S.C. 924(e)(2)(B)(i) 7, 18
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 16
8 U.S.C. 1101(a)(43) 16

Statutes and guidelines—Continued: Page

18 U.S.C. 751(a) 20, 22
18 U.S.C. 921(a)(20) 17
18 U.S.C. 922(g) 4
18 U.S.C. 922(g)(1) 2, 3
18 U.S.C. 922(g)(9) 32
18 U.S.C. 924 3
18 U.S.C. 924(c) 22
18 U.S.C. 2252A(b) (2006 & Supp. V 2011) 16
18 U.S.C. App. 1202(c)(9), at 107 (Supp. II 1984) 44
Cal. Penal Code (West):
§ 261.5(a) (Supp. 2012) 26
§ 261.5(c) (Supp. 2012) 26
§ 1192.5 (Supp. 1978) 48
1977 Cal. Stat. 2220 (Cal. Penal Code § 459 (effective Jan. 1, 1978)) ....*passim*
Del. Code Ann. tit. 11, § 1449 (2007) 22
Fla. Stat. Ann. § 784.03(1)(a) (West 2007) 18
720 Ill. Comp. Stat. Ann.:
§ 5/31-6(a) (West Supp. 2008) 20
§ 5/33A-2 (West 2010) 22
Mass. Ann. Laws ch. 265, § 13A(a) (LexisNexis 2010) 20
United States Sentencing Guidelines:
§ 2L1.2(b)(1)(A)(ii) 26
§ 2L1.2, comment. (n.1(B)(iii)) 16, 26
§ 4B1.2(a) 16
§ 4B1.4(a) 5
§ 4B1.4(b)(3)(A) 4, 5
§ 4B1.4(c)(2) 5

Miscellaneous: Page

Cal. Crim. Jury Instructions No. 1700 (2012).....37
Wayne R. LaFave, *Criminal Law* (5th ed. 2010) 24
2 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* (1986) 38, 40, 42, 43, 44
Model Penal Code § 221.1 cmt. (1980) 43
S. Rep. No. 190, 98th Cong., 1st Sess. (1983).....25

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OPINIONS BELOW

The memorandum opinion of the court of appeals (J.A. 70a-74a) is not published in the *Federal Reporter*, but is reprinted at 466 Fed. Appx. 563. The findings and conclusions of the district court at sentencing (J.A. 47a-56a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2012. The petition for a writ of certiorari was filed on March 19, 2012. The petition for a writ of certiorari was granted on August 31, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at Pet. Br. App. 1a-5a. Section 459 of the

California Penal Code (as effective on January 1, 1978) provides:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this section, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

1977 Cal. Stat. 2220.[1]

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to 262 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. J.A. 70a-74a.

1. On March 25, 2005, the Stevens County, Washington, Sheriff's Office received a 911 call reporting that petitioner had fired a handgun at another person.

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[1] As relevant to the authorities cited in this brief, the version of California Penal Code § 459 enacted in 1977 and effective January 1, 1978, is materially identical to prior and subsequent versions of that statute.

Presentence Investigation Report (PSR) ¶ 13, J.A. 81a. Police responded and saw petitioner driving from the scene. After a chase, petitioner, carrying a black coat, ran from his vehicle into a bus that was being used as a residence. Petitioner emerged from the bus about ten seconds later, without the coat. Petitioner was arrested. PSR ¶ 14, J.A. 81a-82a. Several witnesses told the police that petitioner had fired a gun into the radiator of a truck in which another person, Ken McCrady, was sitting. PSR ¶ 15, J.A. 82a. A search of the bus found, inside the coat petitioner had carried into the bus, a .32 caliber handgun loaded with one fired casing and four live rounds, along with additional rounds of ammunition. *Ibid.* When petitioner was transferred to the Stevens County Jail, a jailer found another .32 round in petitioner's pants pocket. PSR ¶ 16, J.A. 82a. After being advised of his rights, petitioner admitted that McCrady owed him $700 for methamphetamine, that he had drawn the handgun to frighten McCrady, and that he had fired the gun. PSR ¶¶ 19-21, J.A. 83a-84a.

2. On May 10, 2005, a grand jury in the Eastern District of Washington charged petitioner with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924. On December 19, 2005, the United States filed an information alleging that petitioner had five prior violent felony convictions and therefore qualified as an armed career criminal under 18 U.S.C. 924(e). The information listed a 1977 California first degree robbery offense, a 1978 California burglary offense, two Washington third-degree assault offenses (one from 1991 and one from 1998), and a 2000 Washington offense for felony harassment with threat to kill. J.A. 11a-13a. Following a jury trial, peti-

tioner was convicted of the felon-in-possession offense. J.A. 1a, 57a-58a.

3. The PSR recommended that petitioner be sentenced under the ACCA, which, as relevant here, provides for an increased sentence for a person who violates 18 U.S.C. 922(g) and "has three previous convictions * * * for a violent felony." 18 U.S.C. 924(e)(1). The ACCA defines a "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.

18 U.S.C. 924(e)(2)(B). The PSR determined that petitioner had at least three previous convictions that qualified as violent felonies, including the robbery, burglary, and felony-harassment convictions. PSR ¶¶ 52, 66, 71, 103, J.A. 92a-93a, 96a, 97a, 106a.[2]

The PSR determined that because petitioner was subject to the ACCA and had used his firearm "in connection with either a crime of violence * * * or a controlled substance offense," Sentencing Guidelines

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[2] The PSR also classified petitioner's third-degree assault offenses as violent felonies, PSR ¶¶ 44, 52, 75, 89, J.A. 91a-92a, 92a-93a, 98a, 102a, but the district court concluded otherwise, J.A. 34a-36a, 51a-52a. The government did not offer as a violent felony petitioner's 1997 Washington fourth-degree assault conviction, which arose from petitioner's drunken beating of his 13-year-old son. See PSR ¶¶ 86-88, J.A. 101a-102a.

§ 4B1.4(b)(3)(A), his total offense level was 34 and his criminal history category was VI, resulting in an advisory sentencing guidelines range of 262 to 327 months of imprisonment. PSR ¶¶ 52, 124, 178, J.A. 92a-93a, 112a-113a, 131a; see Sentencing Guidelines § 4B1.4(a), (b)(3)(A) and (c)(2). Under the ACCA, petitioner was subject to a mandatory minimum sentence of 15 years of imprisonment. PSR ¶ 177, J.A. 131a; see 18 U.S.C. 924(e)(1).

At sentencing, petitioner acknowledged that his robbery conviction was for a violent felony. Sent. Tr. 27. Petitioner disputed, however, that his burglary and felony-harassment convictions were for violent felonies. *Id.* at 27-31. With respect to the burglary conviction, petitioner conceded that "clearly a modified categorical approach" should be applied, but pointed out that at the plea colloquy in the prior case, petitioner had admitted only to "a breaking and entering" without specifically stating his intent to commit a felony. *Id.* at 28. The government responded that the charging document in the burglary case specified that petitioner "willfully and unlawfully enter[ed] into * * * CentroMart with the intent to commit theft therein" and that the court could consider the charging document in conjunction with the plea colloquy to determine that the California burglary offense was an ACCA predicate. *Id.* at 56.

With respect to the felony-harassment conviction, petitioner's counsel asserted that petitioner's threat to kill a judge "[wa]s just simple talk, just simple words" and that "there[] [was] sufficient question as to whether or not simply the statement, with obviously the inability to do anything [to carry out the threat]" qualified as a violent felony. Sent. Tr. 30-31.

4. The district court determined both on the record and in written findings and conclusions that petitioner's robbery, burglary, and felony-harassment convictions were for violent felonies. J.A. 32a-34a, 36a-38a, 47a-50a, 53a-54a. The district court agreed with petitioner's concession that his robbery conviction was a violent felony. J.A. 32a, 48a-49a.

With respect to petitioner's burglary conviction, the court accepted the government's concession that "the definition of the term 'burglary' in [California Penal Code] § 459 is broader than the generic definition" of "burglary" in the ACCA that this Court announced in *Taylor* v. *United States*, 495 U.S. 575 (1990). J.A. 49a. The court therefore agreed with the parties that it should use the "modified categorical approach and look at the documents" detailing petitioner's conviction, J.A. 33a, as permitted by *Shepard* v. *United States*, 544 U.S. 13 (2005), see J.A. 50a. The district court considered both the charging document and petitioner's plea colloquy, explaining:

> The Information charged the defendant with unlawfully entering a building, which it described as "CentroMart," with "the intent to commit theft therein." During the change-of-plea hearing, the prosecutor stated that the crime "involve[d] the breaking and entering of a grocery store." Read together, these statements demonstrate that the defendant necessarily admitted the elements of a generic burglary.

Ibid. (brackets in original; footnote omitted); see J.A. 33a-34a (stating that the court was "satisfied that the documentation in this matter does show that" petitioner's burglary conviction was for generic burglary "under the modified categorical approach").

Likewise, the district court looked at the amended criminal information for petitioner's prior felony harassment conviction, which charged that petitioner "did knowingly threaten to kill Judge Philip J. Van de Veer," J.A. 37a, and concluded that the conviction on that charge "qualifies as a violent felony" under ACCA because it involved the "'threatened use of physical force against the person of another.'" J.A. 54a (quoting 18 U.S.C. 924(e)(2)(B)(i)); see J.A. 36a-37a.

Because the district court concluded that petitioner had three previous convictions for violent felonies, it agreed with the PSR's Sentencing Guidelines computation and the PSR's determination that petitioner should be sentenced under the ACCA. The court sentenced petitioner to 262 months of imprisonment, to be followed by five years of supervised release. J.A. 59a-60a.

5. The court of appeals affirmed in an unpublished memorandum opinion. J.A. 70a-74a. As relevant here, petitioner conceded that "the court may use the modified categorical approach to determine whether * * * [he] was convicted of the generic crime of burglary," and argued only that the record of his California burglary conviction "does not unequivocally establish that [he] was convicted of the generic crime of burglary." Pet. C.A. Br. 45-46. In particular, petitioner argued that, although the criminal information alleged that he had entered a building "with intent to commit a theft," his plea colloquy explicitly noted only that he had broken and entered into a grocery store, and had not specifically stated that he had "the requisite 'generic' intent." *Id.* at 46.

The court of appeals concluded that petitioner's California burglary conviction qualified as a violent felony. J.A. 72a-73a. Under *Taylor*, the court explained, "[t]he

generic definition of burglary is 'an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.'" J.A. 72a (quoting *Taylor*, 495 U.S. at 598). The court of appeals recognized that California Penal Code § 459 is "broader than generic burglary" in two respects. *Ibid.* First, Section 459 encompasses entries into places other than a building or other structure, such as "a tent." *Ibid.* Second, Section 459 "permits a conviction for burglary of a structure open to the public and of a structure that the defendant is licensed or privileged to enter if the defendant enters the structure with the intent to commit a felony." *Ibid.* (quoting *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915, 944 (9th Cir. 2011) (en banc) (opinion of Bybee, J.)).

Because the California statute at issue encompassed both generic burglary and offenses that are not generic burglary, the court of appeals "appl[ied] the modified categorical approach" by "look[ing] at the 'statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.'" J.A. 73a (quoting *Shepard*, 544 U.S. at 16). Based on the charging document and plea colloquy, the court of appeals "h[e]ld that the guilty plea and conviction necessarily rested on facts that satisfy the generic definition of burglary." *Ibid.* With respect to the "building" element of generic burglary, the criminal information alleged that petitioner had entered "a building, to-wit: CentroMart," and during the plea colloquy, petitioner had not objected to the categorization of CentroMart as "a grocery store." *Ibid.* With respect to the "unlawful" entry element of generic burglary, "the plea colloquy establishe[d] that [petitioner had entered the building]

in an unlawful way (by 'breaking and entering') in the generic sense." *Ibid.* Accordingly, the court concluded, "[petitioner's] conviction necessarily rested on facts identifying the burglary as generic." *Ibid.*

SUMMARY OF ARGUMENT

Under the modified categorical approach, petitioner's conviction for burglary under California Penal Code § 459 qualifies as a violent felony under the ACCA.

A. The ACCA defines a "violent felony" to include the generic crime of "burglary," which *Taylor* v. *United States*, 495 U.S. 575 (1990), interpreted to mean a 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 599. When the state statute underlying a defendant's previous conviction is coextensive with or narrower than generic burglary, the previous conviction categorically qualifies as a violent felony. But when the state statute is broader than generic burglary—*i.e.*, when some (but not all) of the offenses that qualify as the state crime qualify as generic burglary—this Court has recognized a modified categorical approach that asks whether, in connection with the previous conviction, "a jury was actually required to find all the elements of generic burglary," *id.* at 602, or whether "a plea of guilty to [an offense] defined by a nongeneric statute necessarily admitted elements of the generic offense," *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

Petitioner contends (Pet. Br. 19-26) that the modified categorical approach can be applied only to statutes of conviction that—unlike the statute of petitioner's previous conviction, Cal. Penal Code § 459—are textually divisible into separate provisions, some of which categorically qualify as the generic crime. Although this

Court has occasionally illustrated the modified categorical approach with such statutes, nothing in this Court's precedent limits the modified categorical approach to such statutes. Nor would a divisible-statute limitation have a sound basis in principle: Sometimes the crimes embraced by a statute are broken into separate textual phrases, but often judicial decisions articulating the elements of common law crimes or interpreting statutory text will clarify that some (but not all) of the offenses that qualify as the state crime also qualify as a violent felony under the ACCA. Those judicial decisions are as much a part of state law as the text of the state statute. Because the ACCA focuses on the special danger presented when repeat violent offenders possess guns, and not on how a State chooses to announce its criminal law, accepting petitioner's limitation would result in arbitrary and unwarranted sentencing disparities among offenders whose past criminal conduct is indistinguishable.

In practice, the modified categorical approach applies in the same manner whenever the state crime is broader than the generic crime: An ACCA sentencing court looks to a limited set of *Shepard*-approved records of the previous conviction to ascertain whether a jury was actually required to find, or the defendant entering a guilty plea necessarily admitted, the elements of the generic crime. That analysis examines the circumstances of a previous conviction only to undertake a legal inquiry into the basis for the previous conviction. It does not entail a free-ranging inquiry into the factual circumstances of the prior crime. That process protects defendants' rights and satisfies "*Taylor*'s demand for certainty when identifying a generic offense," *Shepard*, 544 U.S. at 21.

Applying the modified categorical approach in that fashion resolves petitioner's central concern about "missing" elements: that a court will resort to fact-finding to fill in the missing element. If the crime of which a defendant was previously convicted is truly "missing altogether" an element corresponding to an element of the generic crime, then the defendant cannot have "necessarily admitted" the generic element, because it had no relevance to the previous conviction—whether or not the factual record might support finding such an element. When the modified categorical approach is properly defined and applied based on *Shepard*-approved records, convictions under statutes that are truly missing elements will not qualify, and petitioner's constitutional and practical concerns about supposed judicial fact-finding have no force.

B. As applied to this case, petitioner's principal argument is that his California burglary conviction cannot qualify as generic burglary because California Penal Code § 459 is "missing altogether," Pet. Br. 7, generic burglary's element of unlawfulness of entry. The premise of petitioner's argument is faulty. The Supreme Court of California's controlling interpretation of Section 459 is that "burglary [requires] an entry which invades a possessory right in a building." *People* v. *Gauze*, 542 P.2d 1365, 1367 (1975). That requirement corresponds to (but is broader than) generic burglary's element of unlawfulness of entry. Because the California element is broader than the generic element, the modified categorical approach can be used to determine whether a particular defendant's conviction under Section 459 was for generic burglary.

C. Applying the modified categorical approach, petitioner's conviction under California Penal Code § 459

was for generic burglary because petitioner's guilty plea—which *Shepard* records show was based on offense conduct of "breaking and entering of a grocery store," J.A. 25a—necessarily admitted the elements of generic burglary.

ARGUMENT

PETITIONER'S CONVICTION UNDER CALIFORNIA PENAL CODE § 459 WAS FOR GENERIC BURGLARY

Petitioner contends that California Penal Code § 459 is "missing altogether," Pet. Br. 7, an element of generic burglary, and, therefore, convictions under that statute can never qualify as generic burglary under *Taylor* v. *United States*, 495 U.S. 575 (1990). Petitioner also insists (Pet. Br. 19-26) that the modified categorical approach can be applied only to statutes of conviction that, unlike Section 459, explicitly separate the broader state crime into textually separate provisions, some of which categorically qualify as the generic crime. Petitioner's contentions are incorrect: The modified categorical approach is not confined to explicitly divisible statutes, but is instead applicable to statutes of all forms that include (but are broader than) generic offenses. And properly understood, California Penal Code § 459 is not "missing altogether" an element of generic burglary, but instead contains a broader version of the element of unlawfulness of entry. Accordingly, the modified categorical approach properly applies here and, under it, petitioner's previous conviction qualifies as generic burglary under the ACCA.

A. Under The ACCA, The Modified Categorical Approach Permits A Sentencing Court To Classify A Previous Conviction As A Violent Felony If The Jury Was Actually Required To Find, Or The Defendant Necessarily Admitted, The Elements Of A Generic Offense In Connection With The Previous Conviction

This Court has recognized since *Taylor*, 495 U.S. at 602, that because some state burglary statutes criminalize a broader range of conduct than generic burglary—or more precisely, the elements of some state burglary crimes are broader than the corresponding elements of generic burglary—a sentencing court must apply a principled method to identify with "certainty," *Shepard* v. *United States*, 544 U.S. 13, 21 (2005), which convictions under those broader statutes were for the offense of generic burglary. That method has been referred to as the modified categorical approach. A correct application of that approach is informed not only by the statutory definition of the state crime in question, but also by judicial interpretations of the crime. And the ultimate inquiry under the modified categorical approach is whether "a jury was actually required to find all the elements of [a] generic [offense]," *Taylor*, 495 U.S. at 602, or whether "a plea of guilty to [an offense] defined by a nongeneric statute necessarily admitted elements of the generic offense," *Shepard*, 544 U.S. at 26.

1. The categorical and modified categorical approaches

The ACCA defines a "violent felony" to include "burglary." 18 U.S.C. 924(e)(2)(B). In *Taylor*, this Court held that the ACCA's reference to "burglary" includes "ordinary burglaries," 495 U.S. at 597, which the Court specified as "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.

The Court understood that Congress classified such burglaries as violent felonies because "[t]he fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Id.* at 588.

This Court saw no difficulty in applying that definition of generic burglary when the statute of conviction is "narrower than the generic view," because "the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary." *Taylor*, 495 U.S. at 599. The Court referred to that analysis as a "categorical approach." *Id.* at 600. The Court pointed out that some States, however, "define burglary more broadly [than the generic definition], *e.g.*, by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings," presenting "the problem of applying [the definition of 'burglary'] to cases in which the state statute under which a defendant is convicted varies from the generic definition of 'burglary.'" *Id.* at 599. In that situation, the Court explained, the inquiry should turn "not [on] the facts of each defendant's conduct," but instead on "the elements of the statute of conviction." *Id.* at 601; see *id.* at 600 (noting that the ACCA refers to "convictions" for crimes, "not to the facts underlying the prior convictions").

This Court anticipated that, with respect to convictions under such broader state burglary statutes, the "categorical approach * * * may permit the sentencing court to go beyond the mere fact of conviction" and examine whether, for example, "a jury was actually required to find all the elements of generic burglary."

Taylor, 495 U.S. at 602. As an example of an offense that would on this approach qualify as "burglary" under the ACCA, the Court offered a conviction under a state burglary law that permits conviction for a burglary of an automobile (which is not a generic burglary), but in which "the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict." *Ibid.* The Court "therefore h[e]ld that an offense constitute[d] 'burglary' for purposes of [the ACCA] if * * * the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Ibid.* The Court has since referred to that analysis as the "modified categorical approach." *Johnson* v. *United States*, 130 S. Ct. 1265, 1273 (2010) (citation omitted).

In *Shepard*, this Court applied the modified categorical approach to a conviction entered upon a guilty plea. In that situation, *Shepard* held that the modified categorical approach permits the sentencing court to consider not only the charging instrument but also "the statement of factual basis for the charge" as shown by a plea colloquy, a written plea agreement, or "a record of comparable findings of fact adopted by the defendant upon entering the plea." 544 U.S. at 20, 26. *Shepard* explained that the sentencing court would examine those materials to "tell whether the plea had 'necessarily' rested on the fact identifying the burglary as generic." *Id.* at 21 (quoting *Taylor*, 495 U.S. at 602).

To vindicate "*Taylor*'s demand for certainty," 544 U.S. at 21, however, *Shepard* rejected the view that the modified categorical approach permitted a sentencing court to consider other records—such as a police report

submitted to the state court in the prior proceedings in support of the issuance of a complaint—that do not shed light on the facts on which the court relied in accepting the plea. *Id.* at 21-23. To achieve a high level of assurance that the defendant's previous conviction was for the generic offense, *Shepard* "require[d] that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State." *Id.* at 23.[3]

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[3] This Court developed the categorical and modified categorical approaches in cases arising under the "burglary" provision of the ACCA, and it has principally discussed those approaches in cases arising under the ACCA. Lower courts have also applied those approaches to provisions of the Sentencing Guidelines and other statutory recidivist sentencing provisions that in some respects resemble the ACCA. See, *e.g.*, 18 U.S.C. 2252A(b) (2006 & Supp. V 2011) (providing increased sentences for child pornography offenses committed by defendants with, *inter alia*, a previous conviction for child sexual abuse); Sentencing Guidelines § 2L1.2 comment. (n.1(B)(iii)) (illegal reentry guideline enhancement commentary defining "crime of violence"); *id.* § 4B1.2(a) (career offender guideline defining "crime of violence"). The Sentencing Commission, however, is free to adopt guidelines that operate in a manner different from the ACCA in considering a defendant's criminal record. In particular, the advisory Sentencing Guidelines operate only within statutory minimum and maximum terms and thus raise no danger of impermissible judicial fact-finding. See *United States* v. *Booker*, 543 U.S. 220 (2005).

In addition, this Court and lower courts have sometimes applied (*e.g.*, *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007)) and sometimes rejected (*e.g.*, *Nijhawan* v. *Holder*, 557 U.S. 29 (2009)) those approaches in cases reviewing decisions of the Board of Immigration Appeals (BIA) under certain provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, such as 8 U.S.C. 1101(a)(43) (defining "aggravated felony"). *Taylor*, however, is not necessarily controlling on the BIA because the BIA is entitled to deference on its interpretation of an immigration statute, as long as it is reasonable, see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425

2. *Judicial interpretations of state criminal statutes are often functionally equivalent to the explicit divisions in statutes this Court has used to illustrate the application of the modified categorical approach*

This Court has on several occasions illustrated the modified categorical approach using a state statute that explicitly enumerates two or more ways a particular element of the state crime can be satisfied, where some (but not all) of those enumerated possibilities will qualify as the generic crime. But it has never held that the modified categorical approach is limited to crimes whose elements are explicitly defined in that manner. Indeed, judicial interpretations of state criminal statutes often produce results that are the functional equivalent of such explicitly divisible statutes. Accordingly, the modified categorical approach should apply to any offense where some (but not all) of the violations result in convictions for the generic crime.[4]

a. This Court's decisions clearly permit the use of a modified categorical approach in the context of explicitly divisible statutes, *i.e.*, statutes that textually offer alternative ways to violate the provision, some of which constitute a violent felony and some of which do not. See *Johnson*, 130 S. Ct. at 1273 (noting that the Court's decisions "permit[]" the use of a modified categorical approach when a defendant has been convicted under a

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(1999), and therefore may select a *Taylor*-like approach or a more flexible approach to analysis of prior convictions.

[4] Although for convenience this brief refers to previous convictions for "state" crimes under "state" statutes, the ACCA in fact reaches more broadly. See 18 U.S.C. 924(e)(1) (referring to "previous convictions by any court referred to in [18 U.S.C.] 922(g)(1)); 18 U.S.C. 924(e)(2)(B) (referring to "any crime punishable by imprisonment for a term exceeding one year," as qualified by 18 U.S.C. 921(a)(20)).

law that "contains statutory phrases that cover several generic crimes * * * to determine which statutory phrase was the basis for the conviction"); accord *Nijhawan* v. *Holder*, 557 U.S. 29, 41 (2009). Some courts have referred to such statutes as "divisible," but for clarity, this brief refers to such statutes as "explicitly divisible" because the divisions are made explicit in the statute.

This Court has not addressed how the modified categorical approach applies to crimes that are neither categorically a generic crime nor can be narrowed to a generic crime by identifying a specific textual provision of an explicitly divisible statute. Despite suggestions to the contrary in petitioner's brief (at 24-26) and some lower court opinions (*e.g.*, *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915, 949-951 (9th Cir. 2011) (en banc) (Berzon, J., concurring in the judgment)), neither *Nijhawan* nor *Johnson* limited the application of the modified categorical approach to convictions under explicitly divisible statutes.

Nijhawan described the list of record materials approved by *Shepard* as "developed * * * for * * * [the] purpose * * * of determining which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction." *Nijhawan*, 557 U.S. at 41. That accurately describes the circumstances in *Shepard*, inasmuch as the Massachusetts statutes in *Shepard* were explicitly divisible, but that says nothing about the other circumstances in which *Shepard* records would properly be consulted.

In *Johnson*, the government argued that a Florida battery statute, Fla. Stat. Ann. § 784.03(1)(a) (West 2007), was categorically a "violent felony" under 18

U.S.C. 924(e)(2)(B)(i) because it "ha[d] as an element the use * * * of physical force against the person of another," *ibid.* This Court rejected that argument, holding that "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 130 S. Ct. at 1271. The Court noted that "[w]hen the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the 'modified categorical approach' * * * permits a court to determine which statutory phrase was the basis for the conviction" by consulting judicially noticeable documents. *Id.* at 1273 (citation omitted). As in *Nijhawan*, that statement accurately reflected the Court's actual applications of the modified categorical approach. And it was a particularly apt observation in the context of the statute at issue in *Johnson*, which was explicitly divisible into some battery offenses that involved violent force and some that did not. See *id.* at 1269.

In short, "the Court's discussions of the modified categorical approach [have been] illustrative rather than prescriptive on" the question of the circumstances in which the modified categorical approach can properly be applied. *Aguila-Montes*, 655 F.3d at 931.

b. In several situations, a state crime without explicit divisions will be defined too broadly to qualify categorically as a violent felony, yet the modified categorical approach should still be applied in light of state judicial decisions. This brief refers to such statutes as "judicially divisible." As discussed below, no functional difference exists between an explicitly divisible statute and a judicially divisible statute.

First, some state common law crimes are too broad to qualify as a violent felony categorically, but judicial decisions make clear that the common law crime encompasses a variety of offenses, some of which would be a violent felony. Such common law crimes are functionally indistinguishable from a statute that expressly codifies the same elements.

For example, Massachusetts's simple assault and battery statute provides only that "[w]hoever commits an assault or an assault and battery upon another shall be punished [as provided]." Mass. Ann. Laws ch. 265, § 13A(a) (LexisNexis 2010). By common law judicial definition, "the statute encompasses three types of battery: (1) harmful battery; (2) offensive battery; and (3) reckless battery." *United States* v. *Holloway*, 630 F.3d 252, 257 (1st Cir. 2011) (citing *Commonwealth* v. *Boyd*, 897 N.E.2d 71, 76 (Mass. App. Ct. 2008), review denied, 901 N.E.2d 137 (Mass. 2009)). The First Circuit has held that a conviction for Massachusetts simple assault and battery is not categorically a violent felony because that crime "encompasses a category of offenses which are no more than offensive touchings." *Id.* at 260. But a conviction for which the *Shepard* records show, under the modified categorical approach, that the offense was of the "harmful battery" variety does qualify as a violent felony. See *id.* at 257 (discussing *United States* v. *Mangos*, 134 F.3d 460, 464 (1st Cir. 1998)); *id.* at 263 (remanding to allow the government to introduce *Shepard* records).

Second, even when not formally prescribing the elements of common law crimes, state courts (and federal courts for that matter) interpret the legislature's work. A judicial interpretation of a criminal statute that is not explicitly divisible will often clarify the elements of a

criminal offense in a way that is functionally indistinguishable from a legislatively drawn explicitly divisible statute. See *United States* v. *Gomez*, 690 F.3d 194, 207-208 (4th Cir. 2012) (Niemeyer, J., dissenting) (giving examples of cases in which "state[] courts have construed the [State's] statutes to include both conduct that qualifies as violent so as to qualify as a predicate offense and conduct that is nonviolent that does not qualify as a predicate offense").

Lower courts have repeatedly encountered such a situation in the wake of this Court's holding in *Chambers* v. *United States*, 555 U.S. 122 (2009), that the Illinois crime of failure to report for penal confinement is not a violent felony. The Illinois statute "place[d] together in a single numbered statutory section several different" "separately describe[d] * * * behaviors" ranging from prison escape, to failure to report for confinement, to failure to abide by the terms of home confinement. *Id.* at 126 (citing 720 Ill. Comp. Stat. § 5/31-6(a) (West Supp. 2008)). The Court held that "a failure to report * * * is a separate crime, different from escape," *ibid.*, and analyzed it accordingly. In applying *Chambers*, lower courts have found that "under the federal escape statute and broadly worded statutes in many States, failures to return are not separately listed but are nonetheless encompassed in the conduct prohibited" according to judicial interpretation of the statutes. *United States* v. *Parks*, 620 F.3d 911, 913 (8th Cir. 2010) (citing 18 U.S.C. 751(a)), cert. denied, 132 S. Ct. 125 (2011). Recognizing, in light of state judicial decisions, that such broadly worded statutes embrace several of the offenses explicitly enumerated in the Illinois statute at issue in *Chambers*, courts have applied a modified categorical approach to determine whether a

previous conviction under a broadly worded escape statute is properly treated as a failure to report controlled by *Chambers* or instead as a different form of escape that must be independently analyzed.[5]

Lower courts have also confronted a similar situation in classifying under the ACCA previous convictions for state-law counterparts to 18 U.S.C. 924(c). Generally speaking, such provisions make it an aggravated crime to use or possess certain weapons in connection with the commission of a specified type of predicate offense. Because commission of the aggravated crime necessarily implies guilt of the predicate offense, the aggravated crime will be a violent felony if the predicate offense is. But because state law often refers to the predicate offenses as a broad class—*e.g.*, "any felony defined by Illinois law," *United States* v. *Fife*, 624 F.3d 441, 444 (7th Cir. 2010) (quoting 720 Ill. Comp. Stat. § 5/33A-2), cert. denied, 131 S. Ct. 1536 (2011), or simply "a felony," *United States* v. *Gibbs*, 656 F.3d 180, 187 (3d Cir. 2011) (quoting Del. Code Ann. tit. 11, § 1449), cert. denied, 132 S. Ct. 1125 (2012)—such state statutes are too broad to qualify categorically as violent felonies, yet they are not explicitly divisible. Lower courts have sensibly interpreted those statutes judicially to refer to all qualifying predicate offenses; consequently "[t]here is no need that each potential felony be explicitly listed and separately enumerated as a subsection, because the practical effect is the same." *Fife*, 624 F.3d at 446.

Third, a court may also infer an offense element that is seemingly lacking from the express text of the state

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[5] See, *e.g.*, *United States* v. *Koufos*, 666 F.3d 1243, 1253 (10th Cir. 2011), cert. denied, 132 S. Ct. 2787 (2012); *Parks*, 620 F.3d at 913-916; but see *United States* v. *Hart*, 578 F.3d 674, 680-681 (7th Cir. 2009) (refusing to apply modified categorical approach to 18 U.S.C. 751(a)).

statute, relying on extratextual sources such as common law traditions or a presumption against strict liability criminal offenses. Functionally, such interpretations announce no more than what the legislature might otherwise have stated explicitly. See, *e.g.*, *Higgins* v. *Holder*, 677 F.3d 97, 105-107 (2d Cir. 2012) (per curiam) (citing *State* v. *Cavallo*, 513 A.2d 646, 649 (Conn. 1986)) (relying on a judicially implied *mens rea* element to conclude that a conviction for Connecticut's tampering with a witness law was "categorically 'an offense relating to obstruction of justice' under 8 U.S.C. § 1101(a)(43)").

As discussed below, pp. 35-39, *infra*, California Penal Code § 459 similarly must be read in light of judicial interpretations. The literal text of that burglary statute covers all entries of the enumerated places, saying nothing about whether the entry must be unlawful (in the generic-burglary sense or otherwise). Yet California jurisprudence makes clear that California burglary requires an entry that is in one sense unlawful because it "invades a possessory right in a building," "by a person who has no right to be in the building." *People* v. *Gauze*, 542 P.2d 1365, 1367 (Cal. 1975). As a result, California burglary embraces not only offenses that would have satisfied generic burglary's requirement of unlawfulness of entry, but also entries that exceed the implied consent to enter premises open to the public for lawful purposes (such as entering a store with the intent to shoplift). *Id.* at 1366-1367; cf. *Taylor*, 495 U.S. at 591.

3. No sound justification supports limiting the modified categorical approach to convictions under explicitly divisible statutes

Whether a previous conviction was entered under an explicitly divisible state statute or under a judicially divisible one, the ACCA's purpose, sentencing princi-

ples, and practical considerations support application of the same modified categorical approach.

a. The purpose of the ACCA is unrelated to whether a previous conviction was entered under an explicitly divisible state statute or under a judicially divisible one. "[T]he [ACCA] focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Begay* v. *United States*, 553 U.S. 137, 146 (2008) (citing *Taylor*, 495 U.S. at 587-588). "In order to determine which offenders fall into this category, the Act looks to past crimes" when those "prior crimes reveal a degree of callousness toward risk" and show "that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Ibid.*

Experience has confirmed that the modified categorical approach is essential to effectuate *Taylor*'s elements-focused approach. State burglary offenses, for example, often may be drawn more broadly than generic burglary. See Wayne R. LaFave, *Criminal Law* § 21.1(a), at 1072 n.27 (5th ed. 2010) (*LaFave*) (showing that some state burglary statutes are broader as to element of unlawfulness of entry); *id.* § 21.1(b), at 1073 n.38 ("Just what constitutes an entry * * * sometimes is disputed."); *id.* § 21.1(c), at 1076 n.76 (showing that many state burglary statutes are broader as to place burgled). Without the modified categorical approach, convictions under many burglary statutes, despite reflecting the very sort of violent criminal history that Congress was concerned about in the ACCA, would nonetheless never qualify as violent felonies.

The ACCA's purpose has nothing to do with the structure of a statute, or whether the text of the statute is phrased in the disjunctive, or whether judicial deci-

sions illuminate what offenses fall under a particular state criminal provision. In turn, the applicability of the modified categorical approach should not depend on those considerations.[6] Artificially limiting the use of the modified categorical approach would be underinclusive and lead to unwarranted sentencing disparities among similarly situated offenders. "[A] person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to" define burglary in an explicitly divisible statute. *Taylor*, 495 U.S. at 590-591. Such results would be contrary to Congress's purpose in the ACCA and its predecessor of ensuring "that the same type of conduct is punishable on the Federal level in all cases." S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983); see *Taylor*, 495 U.S. at 581-590 (tracing the ACCA's legislative history). And those disparities

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[6] See *Aguila-Montes*, 655 F.3d at 927 (Bybee, J.) ("The only conceptual difference between [an explicitly divisible] statute and [any other] statute is that the former creates an *explicitly* finite list of possible means of commission, while the latter creates as *implied* list of every means of commission that otherwise fits the definition of a given crime."); *United States* v. *Woods*, 576 F.3d 400, 415 (7th Cir. 2009) (Easterbrook, C.J., dissenting) ("[Consider a] statute provid[ing] that 'any person who enters a building with an intent to commit a felony therein' commits burglary. There's nothing 'divisible' about that law[.] * * * [Yet] the sentencing judge may look at the charging papers or guilty-plea colloquy to see whether the person was convicted of entering a house rather than a barn."); *Li* v. *Ashcroft*, 389 F.3d 892, 899 (9th Cir. 2004) (Kozinski, J., concurring) ("[S]uppose the generic crime requires that the defendant have used a gun, while the crime of conviction can be committed with any kind of weapon. The government may then use the indictment and other documents in the record to prove that, because the jury convicted the defendant, it must have done so by finding that he used a gun.").

would be particularly arbitrary because they would arise from an aspect of state law—how much of it is captured in statutory text as compared to judicial interpretations—that has no relevance to or effect on the State's own prosecutions.

For example, a prior conviction for "statutory rape" merits an enhancement under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). *Id.* § 2L1.2, comment. (n.1(b)(iii)); see *United States* v. *Lopez-DeLeon*, 513 F.3d 472, 473-474 (5th Cir.), cert. denied, 553 U.S. 1099 (2008). "Statutory rape" in that context has been interpreted generically to mean engaging in a sexual act with a person under the age of consent, and some courts have held the age of consent for generic statutory rape to be 16. See, *e.g.*, *id.* at 474-475. But some state statutory rape statutes, such as California Penal Code § 261.5(a), set the age of consent at 18, thus sweeping more broadly than that definition of generic statutory rape. No sound basis exists for refusing to apply the modified categorical approach to identify convictions for which the victim's age qualified the offense not only under state law but under the operative generic definition as well. See *Lopez-DeLeon*, 513 F.3d at 475-476 (applying modified categorical approach to a conviction under California Penal Code § 261.5(c) and finding it qualified as generic statutory rape because *Shepard* records established the victim was under age 14).

b. Nor is there a distinction in principle between explicit divisibility in the legislatively adopted text of the statute and judicial divisibility that arises from an interpretation of statutory text. State judicial decisions are as much a part of state law as state statutes. See *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967) ("[S]tate law as announced by the highest court of the

State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law."). In keeping with that general principle, this Court in *James* v. *United States*, 550 U.S. 192 (2007), relied on state judicial decisions clarifying and narrowing the scope of the Florida law of criminal attempt. *Id.* at 202 ("[W]hile the statutory language [of Florida attempt law] is broad, the Florida Supreme Court has considerably narrowed its application in the context of attempted burglary."). That approach should be consistently applied throughout the ACCA.

Some courts have suggested that applying the modified categorical approach in the absence of an explicitly divisible statute would impermissibly entail examining the factual circumstances of a previous conviction. See, *e.g.*, *Gomez*, 690 F.3d at 200 ("[I]f the district court were to apply the modified categorical approach to an indivisible statute, it would be required to look at the manner in which the defendant committed the crime (i.e., the specific factual circumstances of the crime) in direct contravention of Supreme Court dictates."). But *Shepard*'s constraints and the objective of the modified categorical approach to identify the necessary basis for the conviction resolve any concern about a later sentencing court confronting disputes over the circumstances of previous convictions. Indeed, on the logic of *Gomez* and similar decisions, the modified categorical approach would *never* be permissible—not even when applied to an explicitly divisible statute—because the very essence of that approach is to examine "whether the [conviction] had 'necessarily' rested *on the fact* identifying the [offense] as generic." *Shepard*, 544 U.S. at 21 (emphasis

added) (quoting *Taylor*, 495 U.S. at 602); accord *Aguila-Montes*, 655 F.3d at 935 ("a modified categorical approach * * * considers to some degree the factual basis for the defendant's conviction—as determined by looking at the limited universe of *Shepard* documents"). As discussed immediately below, a court applying the modified categorical approach engages in substantially the same exercise whether or not the statute of conviction is explicitly divisible.

c. In the practical application of a generic-crime provision of the ACCA, nothing—aside from the sources of law that must be consulted—distinguishes applying the modified categorical approach to an explicitly divisible statute and applying it to a judicially divisible statute. Either way, a court must (1) determine the elements of the crime defined by the state statute, (2) establish how those elements correspond to the elements of the generic crime, (3) identify which elements of the state crime are coextensive with or narrower than the corresponding element of the generic crime (because those elements are categorically satisfied without reference to *Shepard* records), and (4) identify which elements of the state crime are broader than the corresponding element of the generic crime (because those broad elements can be narrowed only by examining *Shepard* records under the modified categorical approach).

The *Shepard* records are then used to decide whether "a jury was *actually required* to find all the elements of [a] generic [offense]," *Taylor*, 495 U.S. at 602 (emphasis added), or whether "a plea of guilty to [an offense] defined by a nongeneric statute *necessarily admitted* elements of the generic offense," *Shepard*, 544 U.S. at 26 (emphasis added). See *Gomez*, 690 F.3d at 208 (Niemeyer, J., dissenting); *Aguila-Montes*, 655 F.3d at 937

(explaining that the modified categorical approach "asks what facts the conviction 'necessarily rested' on * * * as revealed in the relevant *Shepard* documents, and whether these facts satisfy the elements of the generic offense"). In that analysis, a sentencing court may need to consult various sources of state law to decide whether that generic element was indeed "necessarily" or "actually" the basis for the defendant's previous conviction. But *which* source of law it consults for that confirmation—an explicitly divisible state statute or a judicial interpretation or some combination—makes no practical difference.

That analysis protects defendants' rights against judicial fact-finding in two ways. First, *Shepard* sharply limits the universe of records to which a sentencing court may resort. See 544 U.S. at 26. In some cases, the government will be unable to make the required showing. See *Johnson*, 130 S. Ct. at 1273 (noting that the "absence of records will often frustrate application of the modified categorical approach"); *Shepard*, 544 U.S. at 17-19 (discussing limited records available in that case). And sometimes the *Shepard* records are insufficiently specific about the basis for conviction, in which case the prior conviction is not counted. Second, *Taylor* and *Shepard* demand that a previous conviction will qualify as a violent felony only if those limited records show that the jury in the prior case was "actually required to find," *Taylor*, 495 U.S. at 602, or the defendant "necessarily admitted," *Shepard*, 544 U.S. at 26, the elements of the generic crime. Together, those confine the modified categorical approach to the narrow circumstances in which the government's showing satisfies "*Taylor*'s demand for certainty when identifying a generic offense," *id.* at 21. Indeed, petitioner himself

concedes that such "[e]lement-based factual allegations contained in *Shepard* documents can be deemed reliable because the defendant has every incentive to contest or disprove them: in their absence, he cannot be convicted at all." Pet. Br. 34.

4. Petitioner's constitutional and practical concerns have no force when the modified categorical approach is properly defined and applied based on* Shepard*-approved records

Petitioner raises constitutional (Pet. Br. 29-33) and practical (*id.* at 33-37) concerns with applying the modified categorical approach when the state "offense of which [a defendant] was convicted is missing altogether [a] generic element," *id.* at 7. See also Amicus Br. 22-33. Those concerns are associated with "evidentiary enquiries into the factual basis for the earlier conviction" that the categorical approach seeks to avoid. *Shepard*, 544 U.S. at 20. This contention misconceives the modified categorical approach. If the crime of which a defendant was previously convicted is "missing altogether" an element corresponding to an element of the generic crime, then the defendant cannot have "necessarily admitted" the generic element, because it had no relevance to the previous conviction; any extraneous indication in the *Shepard* records that the defendant's actual conduct might have established the "missing" generic element would be outside the proper scope of the sentencing court's inquiry. For example, the offense of failure to report for penal confinement is not categorically a violent felony, see *Chambers*, *supra*, and would not become one under the modified categorical approach even if the defendant had stated in his plea colloquy that he was committing a burglary at the time he had been ordered to report for confinement, because that fact would not

be necessary to his conviction. But petitioner's concerns are not implicated here with respect to a burglary conviction under California Penal Code § 459, see pp. 35-39, *infra,* and they should never be implicated in a proper application of the modified categorical approach under the ACCA.

a. Petitioner and his amici suggest (Pet. Br. 29-33, Amicus Br. 22-28) that analyzing petitioner's burglary conviction under the modified categorical approach would raise serious constitutional concerns under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Apprendi* holds that the Sixth Amendment requires any fact "[o]ther than the fact of a prior conviction" to be submitted to a jury and proved beyond a reasonable doubt (or admitted by the defendant) when it increases the penalty for a crime beyond the otherwise-applicable maximum term of imprisonment. *Id.* at 490. In general, the use of prior convictions to increase the maximum penalty for a crime—as the ACCA does with respect to violations of 18 U.S.C. 922(g)(1)—is valid under *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). *Almendarez-Torres* holds that the fact of a prior conviction used to increase the defendant's sentence above the otherwise-applicable maximum term of imprisonment may be found by the sentencing judge by a preponderance of the evidence and need not be alleged in the indictment or proved to a jury beyond a reasonable doubt. *Id.* at 239-247.[7]

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[7] Petitioner argued below (see J.A. 71a-72a) and in the second question presented in his petition for a writ of certiorari (Pet. 23-26) that *Almendarez-Torres* should be overruled. But this Court granted certiorari limited to the first question presented in the petition. And the Court has repeatedly affirmed that the Sixth Amendment rule announced in *Apprendi* applies only to penalty-enhancing facts

Petitioner and his amici nonetheless contend (Pet. Br. 29-33, Amicus Br. 23-28) that the courts below exceeded the bounds of *Almendarez-Torres* in their examination of *Shepard* records relating to petitioner's burglary conviction. Their argument rests on the premise that the lower courts here used those records to examine "surplus allegations in a charging document" (Pet. Br. 31) or "a fact that is not an element of the [state] offense" (Amicus Br. 25). A plurality in *Shepard* voiced similar concerns as a basis for limiting the universe of documents an ACCA sentencing court may consider. See 544 U.S. at 24-26 (suggesting that allowing a "sentencing judge considering the ACCA enhancement" to "make a disputed finding of fact" would raise constitutional concerns). And in the context of another federal offense that depends on prior convictions, 18 U.S.C. 922(g)(9), this Court has suggested (without elaboration) that facts extraneous to the elements of a prior offense could not simply be drawn from records of the prior conviction but instead would need to be proved to a jury beyond a reasonable doubt or admitted by the defendant in the federal proceeding. See *United States* v. *Hayes*, 555 U.S. 415, 426 (2009).

But those concerns are not implicated here. Determining the nature of a prior conviction involves only an assessment of what "a jury was actually required to find," *Taylor*, 495 U.S. at 602, or the defendant "necessarily admitted" in pleading guilty, *Shepard*, 544 U.S. at 26. Examining *Shepard* records for that purpose is not fact-finding under *Apprendi*. Rather, it is a legal inquiry into what those records reveal about the basis for

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"other than the fact of a prior conviction." *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2348 (2012); see, *e.g.*, *James*, 550 U.S. at 214 n.8.

the conviction. See, *e.g.*, *United States* v. *Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) (Breyer, C.J.) (explaining that a court applying the modified categorical approach looks to state-court records "*not* because the court may properly be interested * * * in the violent or non-violent nature of that particular conduct," but because that information "may indicate that * * * the generically violent crime ('building'), rather than the generically non-violent crime ('vehicle') was at issue" at trial or in a guilty plea).

As for the Sixth Amendment in particular, when the modified categorical approach is used to decide whether "a jury was actually required to find all the elements of [a] generic [offense]," *Taylor*, 495 U.S. at 602, the defendant has already enjoyed his Sixth Amendment right to a jury determination of those elements. And when *Shepard*-approved documents establish that "a [prior] plea of guilty to [an offense] defined by a nongeneric statute necessarily admitted elements of the generic offense," *Shepard*, 544 U.S. at 26, the defendant has waived his right to a jury determination of those facts. The modified categorical approach—limited to *Shepard*-approved records, partly because of the *Shepard* plurality's constitutional concerns—is therefore consistent with the whole of this Court's Sixth Amendment jurisprudence.

b. For similar reasons, petitioner is mistaken in his concern that the ACCA would permit an enhanced sentence on the basis of "factual assertions whose reliability is deeply suspect" and which "the defendant had no incentive to contest," Pet. Br. 33. Because the modified categorical approach takes into account only matters actually found by a jury or necessarily admitted by the defendant—and thus excludes conduct extraneous to the

previous conviction, such as surplusage in charging instruments and superfluous admissions made during a plea colloquy—no significant worry arises that a defendant pleading guilty will let pass misstatements about the very acts offered to establish his criminality. "Rel[iance] on a narrow and defined range of [*Shepard*-approved records] ensures that the defendant will have understood and had an opportunity to contest all facts which are necessary to his [previous] conviction." *Aguila-Montes*, 655 F.3d at 938. A guilty plea entails a waiver of important constitutional protections against the erroneous deprivation of liberty, undertaken with the advice of counsel, awareness of the consequences, and a colloquy with the court. Against that backdrop, a defendant's admissions necessary to establishing his guilt furnish a reliable means for ascertaining the basis for his conviction.

Petitioner contests this principle when a defendant can claim he had "no practical reason or incentive to contest" a particular issue because his guilt did not depend on which factual variant of the offense he committed. Pet. Br. 34. Perhaps a defendant convicted under a state burglary statute that punishes equally entries into buildings and automobiles has, in some sense, a reduced incentive to contest whether the place he entered was a building or an automobile, because the outcome of the state proceeding will be the same. But that theoretical concern could arise under any application of the modified categorical approach, even under explicitly divisible statutes, and nothing suggests that it has proven problematic in practice. *Taylor* and *Shepard* appropriately rejected such speculative concerns in favor of relying on matters that the jury was actually required to find or the defendant necessarily admitted

in pleading guilty to the state crime, as revealed by *Shepard*-approved records of the previous conviction.

B. Some Convictions Under California Penal Code § 459 Are For Generic Burglary

Contrary to petitioner's contention, California burglary is not "missing altogether," Pet. Br. 7, an element of generic burglary. Despite differing in the breadth of each element, California burglary and generic burglary both cover entries, of a particular wrongful kind, into particular places, with the intent to commit particular crimes. Accordingly, some but not all convictions under California Penal Code § 459 are for generic burglary. The modified categorical approach can therefore be used to identify convictions under Section 459 that are violent felonies.

1. A conviction under California Penal Code § 459 requires an entry, into one of an enumerated list of places, that invades a possessory right in that place, with the intent to commit theft or another felony

The statute under which petitioner was convicted in 1978 provides in relevant part:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, * * * house car, * * * inhabited camper, * * * vehicle * * * when the doors of such vehicle are locked, aircraft * * * , mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459 (effective Jan. 1, 1978); see *McNeill* v. *United States*, 131 S. Ct. 2218, 2222 (2011) ("[W]hen determining whether a defendant was convict-

ed of a 'violent felony,' we have turned to the version of state law that the defendant was actually convicted of violating."). The text of the statute thus requires for conviction at least the elements of entry, of a particular place, with an intent to commit a particular crime.

Section 459 "does not explicitly require that a burglar's entry be 'unlawful,'" but "the Supreme Court of California has long held that unlawful entry is an element of burglary." *United States* v. *Painter*, 400 F.3d 1111, 1114 n.4 (8th Cir.) (citing *People* v. *Montoya*, 874 P.2d 903, 911 (Cal. 1994)), cert. denied, 546 U.S. 1035 (2005); accord *Aguila-Montes*, 655 F.3d at 941-944 (opinion of Bybee, J.). The leading California decision on the subject is *Gauze*, which confronted the question, "Can a person burglarize his own home?" 542 P.2d at 1365. The Supreme Court of California acknowledged that Section 459

> is susceptible of two rational interpretations. On the one hand, it could be argued that the Legislature deliberately revoked the common law rule that burglary requires entry into the building of another. On the other hand, the Legislature may have impliedly incorporated the common law requirement by failing to enumerate one's own home as a possible object of burglary.

Id. at 1366 (footnote omitted). Tracing the statute's history, the Supreme Court of California concluded that Section 459 "preserve[s] the spirit of the common law" by retaining the "concept that burglary law is designed to protect a possessory right in property, rather than broadly to preserve any place from all crime." *Ibid.*

Gauze acknowledged that California's "codification of the burglary law" included "elimination of the requirement of a 'breaking,'" which "mean[s] that trespassory

entry [i]s no longer a necessary element of burglary" and therefore "a person could be convicted of burglary of a store even though he entered during regular business hours." 542 P.2d at 1366-1367 (citing *People* v. *Barry*, 29 P. 1026 (Cal. 1892)). But *Gauze* cautioned:

> *Barry* and its progeny should not be read, however, to hold that a defendant's right to enter the premises is irrelevant. * * * [T]he underlying principle of the *Barry* case is that a person has an implied invitation to enter a store during business hours for legal purposes only. The cases have preserved the common law principle that in order for burglary to occur, [t]he entry must be *without consent*.

Id. at 1367 (internal quotation marks and citation omitted). Accordingly, "burglary remains an entry which invades a possessory right in a building. And it still must be committed by a person who has no right to be in the building." *Ibid.* A defendant therefore "cannot be guilty of burglarizing his own home." *Ibid.*[8]

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[8] California cases have sometimes referred to the requirement of an invasion of a possessory right as an aspect of the entry element, rather than a distinct element. See, *e.g.*, *People* v. *Waidla*, 996 P.2d 46, 65 (Cal.) ("Lack of consent was material to burglary because it was material to the element of entry."), cert. denied, 531 U.S. 1018 (2000). For clarity of exposition, this brief discusses invasion of a possessory right separately from the element of entry to distinguish the former from the unrelated issue of what physical acts involving tools or appendages constitute "entry." See, *e.g.*, *Magness* v. *Superior Court*, 278 P.3d 259, 260 (Cal. 2012) ("[U]sing a remote control to open a garage door does not constitute an entry into the residence."); Cal. Crim. Jury Instructions No. 1700 note, at 1235 (2012). But the analysis would be essentially the same if one described Section 459 as requiring (1) an entry invading a possessory interest (2) into one of an enumerated list of places, (3) with intent to commit a theft or felony, and correspondingly described generic burglary as requiring

The element of invasion of a possessory right can, obviously, be established by a classic breaking and entering, or other generically "unlawful" entry, such as one procured by fraud or threat of force, see 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(a), at 465 & nn.12-14 (1986) (*LaFave & Scott*). But California burglary's element of invasion of a possessory right is broader than generic burglary's element of unlawfulness in that the former also "permits a burglary conviction * * * so long as the person enters with the intent to commit a felony and does not have an unconditional possessory right to enter," such as a would-be shoplifter who enters a store during normal business hours. *Aguila-Montes*, 655 F.3d at 944 (opinion of Bybee, J.); accord *Barry*, *supra*; *People* v. *Pendleton*, 599 P.2d 649, 656 (Cal. 1979) ("The law after *Gauze* is that one may be convicted of burglary even if he enters with consent, provided he does not have an unconditional possessory right to enter."); *People* v. *Frye*, 959 P.2d 183, 213 (Cal. 1998) (quoting *Pendleton*), cert. denied, 526 U.S. 1023 (1999), overruled on other grounds, *People* v. *Doolin*, 198 P.3d 11 (Cal.), cert. denied, 130 S. Ct. 168 (2009).

At the same time, Section 459's requirement of an invasion of a possessory right imposes real limits. A defendant "cannot be guilty of burglarizing his own home," even if he enters "for a felonious purpose," because he "invade[s] no possessory right of habitation." *Gauze*, 542 P.2d at 1367. Likewise, a defendant is not guilty of burglary if he is invited into the building by someone who has knowledge of his intended criminality—a situation sometimes referred to as "informed consent"—

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(1) an unlawful or unprivileged entry (2) into a building or structure, (3) with intent to commit a crime.

because that conduct does not invade the invitor's possessory right. *People* v. *Superior Court* (*Granillo*), 253 Cal. Rptr. 316, 320-321 (Cal. Ct. App. 1988) (holding that defendant's entry into undercover police officer's apartment, at officer's invitation to sell stolen property, was not burglary). See generally *People* v. *Salemme*, 3 Cal. Rptr. 2d 398, 400 (Cal. Ct. App. 1992) ("[A] person who enters a structure enumerated in Penal Code section 459 with the intent to commit any felony is guilty of burglary except when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent.").

California's conception of what makes an entry "unlawful" is therefore broader than the generic conception of "unlawful" entry, in that the California definition ranks as unlawful some entries into places open to the public, but Section 459 is assuredly not "missing altogether [a] generic element," Pet. Br. 7. "[I]t is not so much that California law *lacks* the requirement of unlawful or unprivileged entry; it simply contains a nuanced definition of 'unlawful or unprivileged' different from the common law definition." *Aguila-Montes*, 655 F.3d at 942 (opinion of Bybee, J.).[9]

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[9] Several other States, through judicial interpretations similar to California's, have defined burglary in a manner that appears to parallel California's approach. See *State* v. *Bull*, 276 P. 528 (Idaho 1929); *State* v. *Baker*, 161 N.W.2d 864 (Neb. 1968), cert. denied, 394 U.S. 949 (1969); *Hernandez* v. *State*, 50 P.3d 1100, 1113 (Nev. 2002) (per curiam), cert. denied, 537 U.S. 1197 (2003); *Clark* v. *Commonwealth*, 472 S.E.2d 663, 665 (Va. Ct. App. 1996) (citing *Davis* v. *Commonwealth*, 110 S.E. 356, 357 (Va. 1922)). Rejecting the government's position here would therefore raise the peculiar prospect that the ACCA would not recognize as "burglary" convictions in several States that (1) can be shown through *Shepard* records to be for

2. Two elements of California Penal Code § 459 categorically correspond to the elements of generic burglary, while two elements are broader, calling for application of the modified categorical approach

a. Two elements of California burglary categorically satisfy the corresponding element of generic burglary. First, Section 459 requires, and generic burglary is satisfied by, an entry. In that respect, California burglary is narrower than generic burglary, because generic burglary can also be committed by "remaining in" the place of the burglary, *Taylor*, 495 U.S. at 599.

Second, both Section 459 and generic burglary require for conviction that the defendant enter with the intent to commit a crime. In that respect too, Section 459 is narrower than generic burglary because it requires "intent to commit grand or petit larceny or any felony," Cal. Penal Code § 459, while for generic burglary, "an intent to commit any offense will do," *Taylor*, 495 U.S. at 598 (quoting 2 *LaFave & Scott* § 8.13(e), at 474).

b. The enumerated list of places that can be burglarized under California law is—as in several States, see 2 *LaFave & Scott* § 8.13(c), at 471 & nn.84-85—broader than the list of places that qualify under the ACCA, which "makes burglary a violent felony only if committed in a building or enclosed space * * *, not in a boat or motor vehicle," *Shepard*, 544 U.S. at 15-16. *Taylor* expressly states that the modified categorical approach can be used to narrow such a broad list of places using appropriate records of a defendant's conviction. 495 U.S. at 602 ("[I]n a State whose burglary statutes include entry of an automobile as well as a building, if the

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generic burglary, (2) are labeled "burglary" by the State of conviction, and (3) entailed conduct that constitutes generic burglary.

indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement."); see *Shepard*, 544 U.S. at 17.

c. The dispute in this case turns on the existence and scope of Section 459's requirement corresponding to generic burglary's requirement that the entry be "unlawful or unprivileged." As discussed above, Section 459 has such an element, although it is broader than the corresponding element of generic burglary.

i. Petitioner contends that the "offense of which [he] was convicted is missing altogether the generic element of unlawful or unprivileged entry into, or remaining in, a building." Pet. Br. 7; accord Amicus Br. 13 ("Whereas generic federal burglary requires that the defendant's entry be 'unlawful or unprivileged,' that element is entirely missing from California's burglary statute."). Petitioner offers no sound support for that claim.

Petitioner cites in support two federal appellate cases. Pet. Br. 37-38 (citing *United States* v. *Huizar*, 688 F.3d 1193 (10th Cir. 2012); *United States* v. *Gonzalez-Terrazas*, 529 F.3d 293 (5th Cir. 2008)). But those cases failed to recognize that, as judicially interpreted, Section 459 contains an element of unlawfulness that embraces a wider range of entries than generic burglary but still excludes entries into buildings in which the defendant has a possessory right. Petitioner and his amici also offer passing citations to California cases holding that "[a] defendant may be convicted of burglary under California law without any showing that his entry was unlawful" in the generic sense. Amicus Br. 13 (citing *Salemme*, 3 Cal. Rptr. 2d at 401); accord Pet. Br. 37-38

(citing *Frye*, *supra*; *People* v. *Deptula*, 373 P.2d 430, 431-432 (Cal. 1962)). That is true but irrelevant. It is equally true, to take *Shepard* as an example, that "a defendant *may* be convicted of burglary under [Massachusetts] law without any showing that his entry was [of a building or structure rather than a boat or motor vehicle]." But *Taylor* and *Shepard* make clear that the modified categorical approach can be used to separate convictions for offenses that actually are the generic crime from those that are not.

ii. As discussed above, pp. 35-39, *supra*, a Section 459 conviction requires conduct that "invades a possessory right" in the burgled property. Setting aside its greater breadth, that aspect of California law substantially corresponds to generic burglary's element of unlawfulness, as evident in three related ways. First, both elements descend from modern relaxation of the common law's insistence that only an entry effected by a breaking could be burglary. As the criminal law treatise this Court relied on in *Taylor*, 495 U.S. at 598, explained, "at least *some* of what was encompassed within the common law 'breaking' element is reflected [in modern burglary statutes] by other terms describing what kind of entry is necessary * * * [such as] 'unlawfully,' * * * 'unauthorized,' by 'trespass,' 'without authority,' 'without consent,' or 'without privilege.'" 2 *LaFave & Scott* § 8.13(a), at 466 (footnotes omitted). Likewise, *Gauze* explains that California "preserved the common law principle that in order for burglary to occur, [t]he entry must be *without consent*." 542 P.2d at 1367 (internal quotation marks and citation omitted).

Second, both elements perform the function of narrowing the class of all entries to the subset that implicate modern penological justifications for burglary

(which are quite removed from common-law burglary's justification of "protecting helpless citizens from the brigands who roam in the night," 2 *LaFave & Scott* § 8.13(g), at 476). See *id.* at 476-478 (critiquing the justifications for modern burglary law and expressing a favorable view of the Model Penal Code's approach of condemning "entry without privilege"); *Gauze*, 452 P.2d at 1366 (explaining that in Section 459 "the Legislature has preserved the concept [from the common law] that burglary law is designed to protect a possessory right in property, rather than broadly to preserve any place from crime").

Third, both elements are conceived principally as a way to exclude particular offense conduct from the criminal provision's reach. In the case of Section 459, it is to reject the possibility of burglarizing one's own property or in cases of informed consent. See, *e.g.*, *Salemme*, 3 Cal. Rptr. at 400. In the case of generic burglary, it is to eliminate a larger range of less serious conduct. See 2 *LaFave & Scott* § 8.13(a), at 467 & n.30 (noting that under Model Penal Code § 221.1 cmt., at 69 (1980), the situations particularly excluded are "a servant enters his employer's house as he is normally privileged to do, intending on the occasion to steal some silver; a shoplifter enters a department store during business hours to steal from the counters; a litigant enters the courthouse with the intent to commit perjury; a fireman called on to put out a fire resolves, as he breaks down the door of the burning house, to misappropriate some of the householder's belongings").

iii. *Taylor* itself supports the view that Section 459's requirement of the invasion of a possessory interest corresponds to generic burglary's requirement of unlawfulness, but is broader than generic burglary's. *Taylor*

noted that "modern statutes 'generally require that the entry be unprivileged'" and accordingly limited generic burglary to an entry that was "unlawful or unprivileged." 495 U.S. at 598 (quoting 2 *LaFave & Scott* § 8.13(a), at 466).[10] *Taylor* specifically identified California Penal Code § 459 as "defin[ing] 'burglary' so broadly as to include shoplifting," and the Court said it would be an "odd result[]" to treat such an offense categorically as "burglary" under the ACCA, *id.* at 591, implying that the Court did not intend its definition of generic burglary to embrace all offenses under Section 459, but equally suggesting that a modified categorical analysis would be appropriate.

iv. The concurrence in *Aguila-Montes* suggested that invasion of a possessory interest "is *not* an element of burglary" and therefore cannot be taken into account under the modified categorical approach. 655 F.3d at 974 (Berzon, J., concurring in the judgment) (quoting *People* v. *Sherow*, 128 Cal. Rptr. 3d 255, 260 (Cal. Ct. App. 2011)). Judge Berzon's analysis is unsound.

Sherow concludes that consent of the property occupant in an "informed consent" scenario is an affirmative defense to burglary. 128 Cal. Rptr. 3d at 259-260 (quoting *People* v. *Felix*, 28 Cal. Rptr. 2d 860, 867 (Cal. Ct. App. 1994)). In *Sherow* itself, the defendant sold stolen goods to a pawnshop, and the State "charged him with

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[10] Both the government and the defendant in *Taylor* urged definitions of generic burglary that did not include unlawfulness of entry, as such, as an element of the generic offense. See *Taylor*, 495 U.S. at 596 (defendant's proposal); U.S. Br. at 6, 8, *Taylor*, *supra* (No. 88-7194) (relying on the definition of "burglary" in the ACCA's predecessor, "entering or remaining surreptitiously within a building that is the property of another with intent to [commit a crime]," 18 U.S.C. App. 1202(c)(9), at 107 (Supp. II 1984) (repealed 1986)).

burglarizing the pawnshop by entering it with the intent to sell stolen property"; the theory of his defense was that the pawnshop's manager "knew that [he] was selling stolen [goods] and consented to him coming into the pawnshop for that purpose." *Id.* at 259. Under *Sherow*, the defendant must put consent at issue and bears the burden of proof, *id.* at 260-261, but that burden consists only of raising a reasonable doubt as to consent, *id.* at 261-264. For several reasons, *Sherow* and *Felix* do not undermine the conclusion that the modified categorical approach can be applied to identify an offense under Section 459 as generic burglary.

First, the intermediate appellate decisions in *Sherow* and *Felix* appear to misread controlling cases from the Supreme Court of California by treating consent as a defense, rather than treating invasion of a possessory right as an element. *Gauze*, for example, affirmatively describes invasion of a possessory interest as a component of the offense, not as a defense. 542 P.2d at 1367 ("A burglary remains an entry which invades a possessory right in a building."). *People* v. *Waidla*, 996 P.2d 46 (Cal.), cert. denied, 531 U.S. 1018 (2000), is even clearer:

> Lack of consent was also disputed * * *. As a fact going to an element of burglary * * *, it was put into dispute by [the defendant's] plea of not guilty, and remained in dispute until it was resolved * * *. * * * [I]t had to be proved by the People, and proved beyond a reasonable doubt.

Id. at 65 (citation omitted); accord *Fortes* v. *Sacramento Mun. Court Dist.*, 170 Cal. Rptr. 292, 297 (Cal. Ct. App. 1980).

Second, even if *Sherow* were correct, the prosecution would still bear the burden of showing that the defendant lacked an unconditional possessory right in the place

burgled, despite having no burden to disprove the existence of informed consent on the part of whoever did hold that possessory right.

Third, in this case, petitioner's previous conviction rests on a guilty plea and the *Shepard* records show that the proceeding treated the issue of possessory right as if it were an element, by alleging the unlawfulness of petitioner's entry in the charging document and offering a factual basis for it in the plea colloquy. Whatever status an issue of consent would have had at trial, and however that would affect later application of the modified categorical approach, when the issue of possessory right was actually treated as an element in the previous proceeding, no purpose is served by refusing to likewise treat it as an element in applying the modified categorical approach now.

C. The *Shepard* Records In Petitioner's Case Establish That His Conviction Was For Generic Burglary

For the reasons discussed above, p. 40, *supra*, the entry and intent elements of petitioner's offense categorically establish the corresponding elements of generic burglary.[11] The place of petitioner's burglary was narrowed under the modified categorical approach from the list of places in Section 459 to the particular place of a

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[11] Because the intent element under Section 459 is narrower than the intent element for generic burglary, and thus a conviction under Section 459 categorically establishes that element, it is immaterial that, as petitioner pointed out below (Sent. Tr. 28; Pet. C.A. Br. 46), the plea colloquy for petitioner's burglary conviction did not expressly address petitioner's intent to commit a theft or felony in connection with breaking into the grocery store. And in any event, the criminal information to which petitioner pleaded guilty charged him with entry "with the intent to commit theft." J.A. 16a.

building, which satisfies the generic definition of burglary.[12]

As for the nature of the entry, the criminal information to which petitioner pleaded guilty charged him with "wilfully, *unlawfully* and feloniously enter[ing] a building * * * with the intent to commit theft therein." J.A. 15a (emphasis added). "Unlawfully" is best understood as an allegation that the entry invaded a possessory right held by someone other than the defendant. Some courts have understood a guilty plea to a charging instrument including such allegations to further establish unlawfulness in the particular sense in which *Taylor* defined generic burglary. See, *e.g.*, *United States* v. *Rodriguez-Rodriguez*, 393 F.3d 849, 857-858 (9th Cir.), cert. denied, 544 U.S. 1041 (2005); *United States* v. *Torres-Gonzalez*, 1 Fed. Appx. 834, 836-837 (10th Cir.) (unpublished), cert. denied, 534 U.S. 936 (2001). Those decisions are incorrect because, absent some reason to believe otherwise, a California prosecutor would most naturally be expected to use "unlawfully" in a criminal information for a violation of Section 459 to describe an entry that invades a possessory right in a broad sense, rather than in the narrower sense in which this Court used the term "unlawful" in enunciating the elements of generic burglary in *Taylor*. Thus, the government agrees with courts that have concluded that, absent

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[12] Petitioner argued below (see J.A. 73a) and in the third question presented in his petition for a writ of certiorari (Pet. 21-24) that the district court engaged in impermissible factfinding in relying on the place of the burglary as "CentroMart," a "grocery store," J.A. 16a, 25a, to identify the place of the burglary as a building, rather than (say) a tent. The district court's determination in that regard is not before this Court because the Court granted certiorari limited to the first question presented in the petition.

other *Shepard* records, a conviction under Section 459 for which the charging instrument simply alleged an unlawful entry of a building is *not* generic burglary, even applying the modified categorical approach. See, *e.g.*, *Aguila-Montes*, 655 F.3d at 945-946 (opinion of Bybee, J.) ("[Q]uite simply, the word 'unlawfully' in [the defendant's] indictment tells us nothing about whether his entry was 'unlawful or unprivileged' in the generic sense."); *Huizar*, 688 F.3d at 1196-1197 (rejecting Sentencing Guidelines enhancement on that ground).

But the *Shepard* records in this case also include a guilty plea colloquy in which a factual basis was offered for petitioner's offense:[13]

> THE COURT: Is there a factual basis for the entry of the plea of guilty, Mr. Tauman [petitioner's counsel]?
>
> MR. TAUMAN: There is a factual basis.
>
> THE COURT: Do you concur in that, Mr. DeSilva [the prosecutor]?
>
> MR. DE SILVA: Yes, Your Honor.

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[13] In taking a guilty plea in California, "[t]he court shall * * * cause an inquiry to be made of the defendant to satisfy itself * * * that there is a factual basis for the plea." Cal. Penal Code § 1192.5 (West Supp. 1978). Trial courts are not, however, obliged "to question the defendant personally about each element in the charged offense." *People* v. *Holmes*, 84 P.3d 366, 371 (Cal. 2004). "A reference to a complaint containing a factual basis for each essential element of the crime will be sufficient * * * to establish the factual basis for the plea." *Ibid.*; see generally *In re Chavez*, 68 P.3d 347, 350 (Cal. 2003) "(A guilty plea admits every element of the charged offense."). In light of the presumption of regularity that attends guilty plea proceedings, see *Parke* v. *Raley*, 506 U.S. 20, 29-30 (1992), federal courts can presume compliance with the factual basis requirement of petitioner's plea here.

> THE COURT: In substance, what does this involve?
>
> MR. DE SILVA: This involves the breaking and entering of a grocery store.
>
> THE COURT: On North California Street?
>
> MR. DE SILVA: Yes, Your Honor.
>
> THE COURT: All right. The Court will accept a plea of guilty to a violation of Section 459 of the Penal Code.

J.A. 25a.[14] Petitioner's burglary offense therefore satisfied California burglary's requirement of the invasion of a possessory right in a particular manner ("breaking") that establishes generic burglary's element of unlawfulness. See *Taylor*, 495 U.S. at 592-593 (explaining that common law "breaking" is part of the "core * * * of the contemporary usage of ['burglary']"). In particular, the admission that petitioner entered by "breaking," J.A. 25a, was "necessarily" part of the factual basis on which the trial court accepted petitioner's plea. Without that admission, petitioner's supposed crime would have merely "involve[d] the * * * entering of a grocery store," which is not burglary under Section 459. Accord-

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[14] Under Ninth Circuit law that petitioner does not directly challenge (see Pet. Br. 39 n.16), and which in any event lies beyond the scope of the question presented, a court applying the modified categorical approach may rely on a prosecutor's statement as to the factual basis for a guilty plea when that statement is offered on the record in the defendant's presence and the defendant does not object to it. See *United States* v. *Hernandez-Hernandez*, 431 F.3d 1212, 1219 (2005). Other circuits have taken a similar approach. See, *e.g.*, *United States* v. *Mahone*, 662 F.3d 651, 656 (3d Cir. 2011); *United States* v. *Taylor*, 659 F.3d 339, 347-348 (4th Cir. 2011), cert. denied, 132 S. Ct. 1817 (2012).

ingly, the district court properly invoked and applied the modified categorical approach to classify petitioner's offense as generic burglary and thus a violent felony.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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