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IN THE SUPREME COURT OF THE UNITED STATES

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JAMAR ALONZO QUARLES, )

Petitioner, )

v. ) No. 17-778

UNITED STATES, )

Respondent. )

- - - - -

Washington, D.C.

Wednesday, April 24, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

JEREMY C. MARWELL, Washington, D.C.;

on behalf of the Petitioner.

ZACHARY D. TRIPP, Assistant to the Solicitor General,

Department of Justice, Washington, D.C.;

on behalf of the Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-778, Quarles versus United States.

Mr. Marwell.

ORAL ARGUMENT OF JEREMY C. MARWELL  
ON BEHALF OF THE PETITIONER

MR. MARWELL: Mr. Chief Justice, and may it please the Court:

For centuries, the essence of burglary has been punishing those who trespass for the purpose of committing a crime. That was the rule at common law. It remained the majority view at the time of ACCA and Taylor. For two main reasons, the Court should confirm that generic burglary retains that traditional requirement of contemporaneous intent, intent at the time of the initial trespass.

First, the sources that matter under Taylor show that "remaining in" was understood as a modest expansion of the traditional offense to cover those who entered lawfully, but then overstay their welcome to commit a crime.

1           But the government reads Taylor's use  
2           of that one word, "remaining in", as a sharp  
3           break from that tradition. Under that view,  
4           "remaining" would cover anyone who enters  
5           unlawfully, regardless of whether they had that  
6           burglarious intent at the time of entry as long  
7           as the intent was formed later. And nothing in  
8           Taylor or the sources that existed at the time  
9           of ACCA suggest an intention or acknowledgment  
10          of making such a dramatic change.

11           JUSTICE GINSBURG: Well, something --  
12          something in Taylor tugs the other way; that  
13          is, Taylor said that there would be few  
14          statutes that were broader than the generic,  
15          and even in, what, 1986, there were more than a  
16          few statutes that are like the statute before  
17          us.

18           MR. MARWELL: Yes, Justice Ginsburg.  
19          The government claims there were six statutes  
20          as of -- or six states as of 1986 that had  
21          defined remaining-in burglary more broadly than  
22          -- than our definition. I think that's well  
23          below the threshold. And, in fact, Taylor  
24          contemplated that there would be a few. It  
25          gave the example of California, in which

1 shoplifting qualified as burglary.

2 JUSTICE GINSBURG: I thought --

3 MR. MARWELL: So --

4 JUSTICE GINSBURG: -- it was higher?

5 I thought it was somewhere between nine and 14?

6 MR. MARWELL: Well, the -- the  
7 government claims six statutes. There were 29  
8 statutes as of -- 29 jurisdictions as of 1986  
9 that had remaining-in variants, but I think  
10 when you -- when you look at how the states had  
11 interpreted those and -- and in some cases, at  
12 the plain language of the statutes, I think the  
13 best reading of where those states were -- it  
14 shows that a majority, even of the remaining-in  
15 stat -- states, retained the traditional  
16 requirement of contemporaneous --

17 JUSTICE ALITO: Well --

18 MR. MARWELL: -- intent.

19 JUSTICE ALITO: -- if we look at the  
20 statutes in existence in 1986, and we count  
21 only those in which there is a judicial opinion  
22 interpreting the statute on the remaining-in  
23 question, and not those which contain dicta in  
24 cases involving -- where the -- where there was  
25 an intent at the time of entry, what is the

1 breakdown?

2 MR. MARWELL: Well, as you know, we --  
3 we think you should not only look --

4 JUSTICE ALITO: I know.

5 MR. MARWELL: -- at the remaining --

6 JUSTICE ALITO: You think we should  
7 look more broadly. You want us to count all  
8 the statutes in which there is no remaining-in  
9 burglary to start out with.

10 MR. MARWELL: Correct --

11 JUSTICE ALITO: Okay.

12 MR. MARWELL: -- be -- because Taylor  
13 refers -- Taylor instructs to look at how a  
14 majority of states define burglary, and --

15 JUSTICE ALITO: Well, we know that  
16 Taylor -- that Taylor's definition of burglary  
17 includes "remaining in," does it not?

18 MR. MARWELL: Correct. And --

19 JUSTICE ALITO: All right. So then  
20 why would we look at the -- the statutes that  
21 don't have any remaining-in element at all?

22 MR. MARWELL: Because the 22  
23 jurisdictions that had just entry burglary show  
24 a widespread adherence to that traditional  
25 rule, that you needed intent at the time of

1 entry. And the government's rule, the  
2 government's interpretation of the Taylor test  
3 takes that away because they say, if you enter  
4 unlawfully without any intent at the time and  
5 you form intent later, that's burglary. And  
6 that's not consistent. That's much broader  
7 than the 22 entry states.

8 But I think -- if -- if I can respond  
9 to the question about just looking at the 29.

10 JUSTICE ALITO: Right.

11 MR. MARWELL: There are states like  
12 Alaska, which has the Arabie decision from  
13 1985; New York, which has the Licata decision  
14 from 1971; Connecticut, which has the Belton  
15 decision from 1983, where the court said that  
16 "remaining in" applies to a lawful entry  
17 followed by a subsequent formation of intent.

18 And I take the point that may not be  
19 100 percent on point with the question, but we  
20 think it forecloses the government's reading,  
21 again, because they -- that preserves the  
22 requirement of intent at initial unlawful  
23 entry.

24 There are also some statutes, Justice  
25 Alito, where the plain language of the statute,



1 we think, supports our view. Maine had a  
2 statutory sentencing provision that said you  
3 can be punished not only for burglary but also  
4 for the offense that you commit after entering  
5 or remaining. Maine had that entry or  
6 remaining statute.

7 JUSTICE KAGAN: And I guess what  
8 strikes me, Mr. Marwell, is that the  
9 distinction just wasn't -- you know, it wasn't  
10 really present at that time, that -- that --  
11 that now we can look and see how there really  
12 is a split on this question, but in 1986, there  
13 were so few cases or -- or statutes that  
14 clearly made the distinction and put a state on  
15 one side or the other of it.

16 And if that's the case, if the  
17 distinction wasn't salient, why would we assume  
18 that Congress meant to incorporate it into the  
19 burglary element?

20 MR. MARWELL: Well, I -- I think the  
21 Court typically interprets statutes to assume  
22 some degree of continuity with what had come  
23 before, and here Taylor acknowledged the common  
24 law rule. And we have a number of authorities  
25 that suggest that this contemporaneous intent

1 requirement was -- was the essential thing that  
2 differentiated burglary from trespass.

3 JUSTICE SOTOMAYOR: What do you do  
4 with the "surreptitiously" definition that was  
5 in existence before 1986? How does that inform  
6 our analysis?

7 MR. MARWELL: So the Court said in  
8 Taylor that it -- it was adopting a definition  
9 that was very close to the 1984 statute, which  
10 had the surreptitious. I think surreptitious  
11 helps us. It certainly indicates that  
12 remaining was not a continuous state in the  
13 sense that the government says it was.

14 And I think "surreptitiously," as our  
15 amicus explains, has a connotation of doing  
16 something for a -- for -- for a fraudulent  
17 reason or staying -- staying past your welcome  
18 for the purpose of committing a crime.

19 JUSTICE SOTOMAYOR: Justice Alito  
20 asked you what the lineup was of states that  
21 read it your way and the states that read it  
22 the government's way. You mentioned at least  
23 three or four that predated 1986 that read it  
24 your way.

25 At 1986, how many states had opined in

1 the government -- in the government's way?

2 MR. MARWELL: The government has five  
3 where there were judicial decisions in Texas,  
4 which adopted a slightly different statutory  
5 language that made clear that it was covering  
6 anyone who was present in and then committed.

7 I think -- in our blue brief we -- we  
8 cited 15 jurisdictions, 15 of the 29, but I  
9 think, again, if -- if we look at the entry  
10 states, that gets us 22 as of 1986. And then  
11 we get over the -- the hurdle of Taylor --

12 JUSTICE SOTOMAYOR: Well that's --

13 MR. MARWELL: -- which is --

14 JUSTICE SOTOMAYOR: -- 15 is a -- is a  
15 third of -- not quite a third, a little less  
16 than a third, of the states. Isn't that enough  
17 to say that that's what Congress had in mind?  
18 If Taylor says only a few would be excluded by  
19 its definition, that's a lot more than a few.

20 MR. MARWELL: Well, we -- Taylor says  
21 you're trying to craft a generic burglary  
22 definition that aligns with how most states  
23 viewed it, viewed burglary, at the time. And  
24 we think most states viewed burglary in -- in  
25 our way.

1           And so the government has a different  
2 reading. If you adopt our rule, that it -- it  
3 will exclude six jurisdictions as of 1986. And  
4 I think that's below the threshold that the  
5 Court has -- has declined to read a statute in  
6 a way that might exclude ten jurisdictions.

7           JUSTICE SOTOMAYOR: So I'm sorry, what  
8 was the 15 you were talking about?

9           MR. MARWELL: Fifteen are  
10 jurisdictions that read "remaining" in our way.

11           JUSTICE SOTOMAYOR: Oh, I'm sorry, I  
12 -- that's not the question I asked.

13           MR. MARWELL: Oh, I'm sorry.

14           JUSTICE SOTOMAYOR: As of 1986, how  
15 many jurisdictions read it the government's  
16 way?

17           MR. MARWELL: Six.

18           JUSTICE SOTOMAYOR: Six.

19           MR. MARWELL: Five -- five using  
20 intermediate, mostly intermediate state court  
21 decisions, and one was Texas.

22           JUSTICE SOTOMAYOR: What has -- how --  
23 how large has that number grown since 1986?

24           MR. MARWELL: So the government cites  
25 18 jurisdictions today. But we think this

1 Court's decision in Castleman and Stokeling  
2 looks -- when it asks the question of how many  
3 jurisdictions would be excluded, is looking to  
4 the time that Congress adopted the statute.

5 And I think that makes sense.  
6 Otherwise you are interpreting the word  
7 "burglary" in ACCA in 1986 to expand  
8 potentially in the future without any further  
9 congressional action.

10 And that's why I think in Stokeling  
11 and Castleman the Court said we're looking to  
12 how many jurisdictions would be excluded as of  
13 1986.

14 JUSTICE KAVANAUGH: The -- the LaFave  
15 treatise at -- at the time said, "far more  
16 common today is the burglary statute which  
17 covers one who either enters or remains in the  
18 premises. This means, of course, that the  
19 requisite intent to commit a crime within need  
20 only exist at the time the defendant unlawfully  
21 remained within."

22 So how do you respond to that --

23 MR. MARWELL: So the --

24 JUSTICE KAVANAUGH: -- contemporaneous  
25 evaluation of the law?

1           MR. MARWELL: So I think that language  
2 could -- could support our rule or the  
3 government's rule, potentially, but if you look  
4 at the rest of what LaFave said, LaFave --

5           JUSTICE KAVANAUGH: Well, let's just  
6 stick with that --

7           MR. MARWELL: Okay.

8           JUSTICE KAVANAUGH: -- sentence. How  
9 could it -- it said the intent "need only exist  
10 at the time the defendant unlawfully remained  
11 within."

12           MR. MARWELL: And -- and we think that  
13 "remaining within" refers to that point where  
14 somebody overstays their welcome. And I think  
15 you can see that by how LaFave discussed the  
16 other remaining-in statutes.

17           They said -- the LaFave treatise said,  
18 for instance, it gave one example of what the  
19 remaining statutes were intended to do and it's  
20 the classic bank customer who comes into the  
21 bank while the bank is open and then stays on  
22 to steal the bank's money.

23           That, I think, is the -- is the  
24 classic example of what states were trying to  
25 get at when they added the words "remaining."

1           But LaFave then talked about the Texas  
2 statute and said Texas has a different --  
3 different words in its statute and it says, if  
4 you are present in and you commit a crime, then  
5 that's -- that -- that counts as burglary in  
6 Texas.

7           And LaFave said that's -- that was  
8 intended to fix potential concerns about proof  
9 that would exist in the remaining  
10 jurisdictions.

11           JUSTICE BREYER: Is there any reason  
12 to think that the person who stays in the bank,  
13 and then, ah, what a nice idea, I'll help  
14 myself to some money, is any the less violent  
15 or at risk of violence or risk of -- is there  
16 any less risk there than when he gets the idea  
17 of going into the bank two weeks earlier?

18           MR. MARWELL: Yes. I think the -- the  
19 -- the existence of pre-formed intent, so  
20 somebody who comes to the bank with the advance  
21 plan to commit another crime shows that they  
22 will be more resolute in their desire to  
23 accomplish that crime.

24           It may result in them bringing a  
25 weapon because they know they're going to do

1 that. And I think it aligns with this -- with  
2 the fact that ACCA is governing career  
3 criminals, trying to select people who have  
4 that profit motive to do multiple crimes.

5           And you look at the fact patterns of  
6 the cases that are really the point of  
7 disagreement between us and the government, you  
8 know, Gaines from the New York Court of  
9 Appeals, a homeless person who breaks into a  
10 warehouse to get out of the cold, while he's in  
11 there decides to grab a jacket and is caught  
12 coming out, or the case of young people who  
13 break into a house not -- not intending to  
14 steal something -- this is the JNS case from  
15 Oregon -- take something while they're in there  
16 and caught on the way out.

17           JUSTICE BREYER: There are --

18           JUSTICE KAGAN: Part of --

19           JUSTICE BREYER: -- no -- no people  
20 who think, well, I want to rob this bank, I'm a  
21 little worried about the noise if I break in,  
22 or I guess, I want to rob this bank, he thinks  
23 it when he's inside.

24           A night watchman, a teller who forgot  
25 to go out -- I don't know if that exists, but I



1 can't quite figure out -- I'm sure there is  
2 some cases both ways, I would think.

3 MR. MARWELL: So --

4 JUSTICE BREYER: Anybody ever look at  
5 that and --

6 MR. MARWELL: Well, so Taylor, just --  
7 just to -- Taylor referred to the risk of  
8 violence when somebody does an intrusion to  
9 commit a crime. And I think that's -- that  
10 captures this idea of --

11 JUSTICE BREYER: Right.

12 MR. MARWELL: -- of why we care about  
13 pre-formed intent.

14 JUSTICE KAGAN: But -- but part of our  
15 understanding of why burglary is a -- is a  
16 risky crime is when the burglar meets somebody  
17 else, the victim, the police officer, whoever.

18 And that person is not going to know  
19 when the criminal formed his intent.

20 MR. MARWELL: That -- that's correct.  
21 But two -- two points, Justice Kagan: One,  
22 it's -- the government's position comes very  
23 close to saying that any time you are present  
24 somewhere where you're not supposed to be,  
25 there's that risk of a violent confrontation.

1           And Congress did not use the word  
2 "trespass" in ACCA. It could have enumerated  
3 trespass. I think the government's position  
4 comes close to that.

5           And then, second, I -- I do think  
6 there is, you know, a distinction from the --  
7 from the victim or the property owner's  
8 perspective of somebody who comes having  
9 pre-formed the intent to do something else as  
10 opposed to the innocent rationales of somebody  
11 who's trespassing for -- by assumption for --  
12 for doing something other than committing a  
13 crime.

14           JUSTICE ALITO: Is the offense we're  
15 concerned with here, his third degree home  
16 invasion conviction in Michigan, anything like  
17 these cases that you've just described?

18           In that case, as I understand it, he  
19 assaulted his girlfriend and then -- and this  
20 is what the judge said as the factual basis for  
21 his no contest plea -- "The victim reported  
22 that Mr. Quarles broke in through a screen  
23 window and assaulted her while in the house."

24           And the judge said, "We certainly can  
25 infer that he had an intent to commit an

1 assault while he was entering." And this  
2 establishes that he did commit an assault while  
3 he was in the house.

4 MR. MARWELL: So the -- the facts that  
5 you've recited, Justice Alito, I think would  
6 not be available to a sentencing court. That  
7 was a colloquy in the state court where Mr.  
8 Quarles pleaded no contest. So he was not  
9 asked to confirm those facts.

10 And I think that --

11 JUSTICE ALITO: Well, doesn't --  
12 doesn't the judge, in order to accept a no  
13 contest plea, have to establish, be satisfied  
14 that there is a factual basis for the plea?

15 MR. MARWELL: I think -- well, in  
16 Michigan law, no contest is -- is -- is  
17 acquiescing in the imposition of punishment but  
18 not confirming or denying the facts. And I  
19 think under --

20 JUSTICE ALITO: So the judge doesn't  
21 have to be satisfied -- we'll check it out.

22 Under Michigan law -- this is  
23 surprising to me -- a judge can accept a non --  
24 a no contest plea without ascertaining that  
25 there is a factual basis for the plea?

1           MR. MARWELL: Even if so, I think  
2 under this Court -- the way this Court said in  
3 Shepard and Mathis, the kinds of facts that are  
4 available to the sentencing judge, those are  
5 limited to ones where the defendant confirmed  
6 the accuracy.

7           But I think under, under the Court's  
8 categorical approach, what matters is the text  
9 of the Michigan statute, which is very broad.  
10 It's as broad as that Texas statute because it  
11 says any time you're present in and you -- and  
12 you commit.

13           And if there's a concern about whether  
14 the question presented is presented, the  
15 government didn't raise that in its brief in  
16 opposition. And the Sixth Circuit very clearly  
17 engaged with the question of what "remaining  
18 in" means.

19           JUSTICE KAVANAUGH: Taylor didn't say  
20 that the statute had to exactly correspond to  
21 generic burglary. It said "substantially  
22 corresponds"?

23           MR. MARWELL: That -- that's right.  
24 But we think that the -- the -- the -- the  
25 element here of contemporaneous intent is

1 what's been called the most fundamental essence  
2 of burglary.

3 So I think substantial -- it's hard to  
4 say that it substantially corresponds if it's  
5 missing, you know, the core element.

6 JUSTICE GINSBURG: When you gave the  
7 number six, did that exclude all the states  
8 with remaining-in statutes that had not  
9 interpreted those statutes?

10 MR. MARWELL: That's correct. Well,  
11 the -- the number six, I think, was how many  
12 states at the time of ACCA had -- had clearly  
13 adopted the government's reading. And the  
14 government says -- identifies only six.

15 We think the other jurisdictions are  
16 most fairly read to have adopted our rule,  
17 especially when viewed in light of the  
18 background interpretive principles, that you're  
19 going to assume a degree of continuity and  
20 you're going to not assume that the states had  
21 completely reconfigured the offense of burglary  
22 just by adding a word "remaining."

23 JUSTICE GINSBURG: Did that turn out  
24 to be the case, states that had remaining-in  
25 statutes in 1986 and then interpreted them

1 later?

2 MR. MARWELL: Well, some jurisdictions  
3 have gone towards the government's view. The  
4 government identifies 18 as of today. There  
5 are some jurisdictions that have adopted our  
6 view, and 19 jurisdictions that have not  
7 adopted any remaining-in variant and have  
8 stayed only defining burglary as intent at  
9 entry. So --

10 JUSTICE SOTOMAYOR: Give me the count  
11 again?

12 MR. MARWELL: So if the question is  
13 what's the headcount today?

14 JUSTICE SOTOMAYOR: Yes.

15 MR. MARWELL: Nineteen states retain  
16 the intent at entry, so entry only. Three  
17 states have remaining statutes and they have  
18 adopted our rule. Eighteen states, the  
19 government has identified today as adopting  
20 their rule.

21 And I think that leaves 11, that gets  
22 us to 51 jurisdictions, where the government  
23 implicitly says they haven't resolved the  
24 question.

25 JUSTICE KAGAN: The -- the 18 states

1 that the government says have their rule, do  
2 they have other burglary statutes or would we  
3 be essentially removing the only burglary  
4 statutes of those states?

5 MR. MARWELL: So it -- it -- focused  
6 on today's laws, that's going to depend on how  
7 the states have treated the statutes.

8 We cited in our brief the Priddy case  
9 from the Sixth Circuit. Tennessee is one of  
10 the statutes. The Priddy case decided that  
11 Tennessee was divisible.

12 Michigan has two other burglary  
13 statutes in separate sections with separate  
14 punishments that apply to breaking and entry,  
15 including of a dwelling. They don't have the  
16 remaining-in issue. So that would remain  
17 regardless of what you decided here.

18 And then I think it would depend on  
19 how -- the divisibility --

20 JUSTICE KAVANAUGH: What --

21 MR. MARWELL: -- analysis.

22 JUSTICE KAVANAUGH: What percentage of  
23 burglaries do you think are remaining-in versus  
24 entry burglaries?

25 MR. MARWELL: So what we -- one thing

1 we know at the time of ACCA was that the New  
2 York burglary statute was very influential.  
3 And the commentaries to that burglary statute,  
4 which we cited in our reply brief, say  
5 explicitly that entry was the common, more  
6 common variant.

7 JUSTICE KAVANAUGH: Far more common,  
8 right?

9 MR. MARWELL: Yeah. Yeah. And I  
10 think that -- that shows why the states would  
11 not have completely reframed their burglary  
12 statutes through the unacknowledged and  
13 unexplained addition of two words, "remaining  
14 in."

15 JUSTICE KAVANAUGH: But it shows --  
16 and this is an effect of Taylor, but the  
17 effects of adopting your position would be to  
18 knock out all burglaries from potentially 18 or  
19 more states as predicates?

20 MR. MARWELL: So I don't -- so, again,  
21 I think the -- the relevant question is how  
22 many would have been knocked out at the time  
23 Congress enacted ACCA, since that, I think, is  
24 the fairest reading of Castleman and Stokeling.

25 As of today, I think it depends on the



1 divisibility analysis. And there are a number  
2 of jurisdictions of that 18 where I think it  
3 would be a -- a litigated issue, and a number  
4 of jurisdictions that have other burglary  
5 statutes that aren't affected. So --

6 JUSTICE KAGAN: Is -- is there any way  
7 to tell, maybe there's not, among remaining-in  
8 burglaries, what proportion of them are people  
9 who formed their intent later versus formed  
10 their intent at the moment of decision to  
11 remain?

12 MR. MARWELL: I'm not aware of a  
13 statistic on that front. I -- I would say that  
14 it -- the benefit of doing the 50-state survey  
15 gives you a sense of where that issue has been  
16 material.

17 And you see it in the cases cited in  
18 our brief, where you either have somebody who,  
19 you know, was lawfully present, went into the  
20 bank or into the store, or you have a situation  
21 where the authorization to enter was disputed.  
22 And so the prosecution will charge both.

23 And often the easier course, if you  
24 take the government's reading, is, well, don't  
25 worry about whether intent existed at the time

1 of entry because, you know, there was a  
2 commission of a misdemeanor or a crime while  
3 you're -- while you're --

4 CHIEF JUSTICE ROBERTS: It has to be  
5 -- it has to be very unusual that someone  
6 enters a bank and only then does it occur to  
7 them that that's where money is that they might  
8 want to rob.

9 (Laughter.)

10 MR. MARWELL: Well, I -- I think the  
11 reason that the states adopted these  
12 remaining-in variants is because you're right  
13 in the sense what they were trying to get at  
14 was the person who came to the bank with that  
15 plan and they were going to avoid having to  
16 break in because they could enter lawfully.  
17 And there was a sense that that person is a  
18 burglar, just like the one who actually breaks  
19 and enters.

20 But I think that supports our view  
21 because those are captured under both -- both  
22 sides' tests because that -- that person has  
23 the intent at the time he -- his presence in  
24 the -- in the bank becomes unlawful.

25 JUSTICE ALITO: What do you make of

1 Taylor's definition of -- of burglary, where  
2 the Court said that the contemporary meaning of  
3 burglary means at least the following, and --  
4 I'm sorry, contains at least the following  
5 elements: An unlawful or unprivileged entry  
6 into, or remaining in a building or other  
7 structure with intent to commit a crime? How  
8 do you read -- how can you read that consistent  
9 with your interpretation?

10 MR. MARWELL: I think the way the  
11 Eighth and Fifth Circuits and Seventh Circuits  
12 have which is that, you are, A, defining  
13 burglary, coming at it at against the  
14 background of a common law rule that everyone  
15 agrees, the government and us, had this  
16 contemporaneous intent requirement. And you're  
17 pairing "remaining" with "entry." And everyone  
18 agrees entry is a point in time. So you have  
19 the contextual -- your -- you inform the  
20 meaning of "remaining" by context.

21 And then you have "remaining" modified  
22 by the words "with intent." And as the  
23 examples --

24 JUSTICE ALITO: Yes, it's remaining --

25 MR. MARWELL: -- of some --

1 JUSTICE ALITO: -- remaining with  
2 intent to commit a crime.

3 MR. MARWELL: Right.

4 JUSTICE ALITO: So where do we get the  
5 -- the -- the point of entry there?

6 MR. MARWELL: I -- I think you get  
7 it --

8 JUSTICE ALITO: I'm sorry, the time of  
9 entry. Where -- where do you -- how do you  
10 read into that the requirement that the -- the  
11 intent has to be present at the time of entry?

12 MR. MARWELL: Because you're reading  
13 "remaining" in the context of entry. And --  
14 and you are trying to define an offense of  
15 burglary at a time where 22 states  
16 unquestionably said you have to have intent at  
17 entry.

18 JUSTICE KAVANAUGH: What do you mean  
19 by --

20 MR. MARWELL: So --

21 JUSTICE KAVANAUGH: I'm sorry to  
22 interrupt.

23 MR. MARWELL: I'm sorry.

24 JUSTICE KAVANAUGH: What do you mean  
25 by context there? It says "or" -- entry into

1 "or" remaining in.

2 MR. MARWELL: Well, I -- the -- this  
3 Court in the Neal case that we cited in our  
4 reply brief has said when you have a pair of  
5 words, you know, disjunctive pair of words, you  
6 look at one in the context of the other.

7 And --

8 JUSTICE KAVANAUGH: But there are two  
9 distinct concepts, and at least I read Taylor  
10 as saying these two distinct concepts are ways  
11 you can fall within generic burglary.

12 MR. MARWELL: But they're two distinct  
13 concepts engaged in the effort of defining what  
14 burglary was in most states at that time. And  
15 I think if you read "remaining" in the  
16 continuous way that the government says, it all  
17 but eliminates the intent-at-entry requirement.  
18 I don't think that is what Taylor would have  
19 done explicitly. And, again, that's because --

20 JUSTICE KAVANAUGH: Although there  
21 were some states, you acknowledge, that  
22 supported the government's position at that  
23 time and that are cited in LaFave, which is  
24 cited right after this sentence in Taylor, is  
25 the LaFave treatise. I --

1           MR. MARWELL: Correct. And -- and  
2 Taylor acknowledged that its definition was not  
3 going to be perfect or was not going to be  
4 maximalist in the sense of capturing every  
5 single state. It gave some examples: The  
6 vending machine; California, shoplifting is  
7 burglary. It said there may be some states  
8 that are broader.

9           But just to get back, the government's  
10 definition puts entry completely out of focus,  
11 as the Fifth Circuit says, and it makes entry  
12 the small minority view because every unlawful  
13 entry followed by formation of intent is  
14 burglary under their view. And I just think  
15 Taylor did not give an indication of -- of  
16 changing, diverting that far.

17           If -- if you read Taylor as creating  
18 simply an empty -- empty vessel to be filled in  
19 as states decided, you know, whether they would  
20 expand their burglary statute, I don't --  
21 that's an odd way to read a criminal statute.

22           JUSTICE ALITO: I mean, what you say  
23 is a -- is an argument that one might make to a  
24 state legislature in defining burglary, because  
25 the other definition can potentially catch some

1 of these people who have less -- less dangerous  
2 characteristics -- that where their -- that  
3 individual crime has less dangerous  
4 characteristics, but under ACCA, the person has  
5 to have three prior convictions.

6 And here your client has two prior  
7 convictions for assault with a deadly weapon,  
8 so this is just the third. So this is not a  
9 case where this definition is -- is imposing a  
10 severe punishment on somebody who, you might  
11 argue, is less blameworthy; isn't that right?

12 MR. MARWELL: Well, I think under --  
13 under the Court's categorical approach, the --  
14 the -- the question is the statutes, not the --  
15 not the conduct. And I don't think that the --  
16 just needing three necessarily speaks to what  
17 the three needs.

18 We cited in our reply brief, you know,  
19 there are certain populations that are subject  
20 to multiple, you know, low-level offenses and  
21 so might well get three.

22 If I could reserve?

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Tripp.

1                   ORAL ARGUMENT OF ZACHARY D. TRIPP  
2                   ON BEHALF OF THE RESPONDENT

3                   MR. TRIPP: Mr. Chief Justice, and may  
4 it please the Court:

5                   Petitioner's conviction here is a  
6 burglary conviction for purposes of ACCA. And  
7 if I could just make three or four points why  
8 that's right and try to simplify things a bit  
9 in response to the questioning.

10                  So, first, I think you can really just  
11 begin and end with the text here. The statute  
12 says burglary. This Court has already held  
13 that that means any statute with these basic  
14 elements which include remaining with intent  
15 and -- and that's true regardless of the exact  
16 definition or label.

17                  And -- and this is just what it means  
18 to remain in a place. You remain there as long  
19 as you stay. That's what this Court already  
20 held in Cores, the case about the alien crewman  
21 who remained in the United States unlawfully  
22 because he was still here.

23                  And that's also how this works in the  
24 law of trespass, which I think is really  
25 important here because it has the same pairing,



1 to enter land or remain on land without  
2 permission. And the "remaining" prong for  
3 trespass is a continuing trespass. It's  
4 telling you that if you're on somebody's else's  
5 land without their permission, it doesn't  
6 matter how -- how you got there, how long  
7 you've been there; you're under a continuing  
8 obligation to leave.

9 And I think the -- the right way to  
10 understand the -- the -- the Taylor formulation  
11 and -- and really what's happening in these  
12 state laws is -- is aligning their burglary law  
13 with trespass. So that there's a trespasser in  
14 your house or some other building or other  
15 structure like that, and they have the intent  
16 to commit the crime, that's what burglary is.

17 And then I think another important  
18 point about the text here, right, is --

19 JUSTICE KAGAN: Mr. Tripp, the -- the  
20 formulation that Taylor used, and I agree it  
21 tends to support your position, but, I mean,  
22 nobody could think that the person who was  
23 writing the Taylor opinion had this issue in  
24 mind at that point.

25 So it's one of these things of how do

1 we read our own opinions and do we read them  
2 like statutes or do we read them a little bit  
3 differently, understanding what was and what  
4 wasn't in the mind of the Court at that time?

5 MR. TRIPP: Right. And -- and I think  
6 an -- an important part is the next piece that  
7 I was about to get to where it says that --  
8 that -- the statutes just need to have these  
9 basic elements and that it doesn't matter how  
10 exactly they are defined and labeled.

11 And so I think what it tells you is  
12 that when there's variation among the states,  
13 right -- Congress was trying to cast a broad  
14 net. It was trying to pick up burglary  
15 statutes, the typical range of variation. And  
16 so when there's variation among the states  
17 about how do you define the "remaining" prong  
18 in their burglary statute and how long does it  
19 last, how does it interact with the "intent"  
20 prong in their burglary statute, it's still a  
21 burglary statute. It -- it doesn't matter for  
22 purposes of Taylor. It's just too far down in  
23 the weeds.

24 And I think --

25 JUSTICE SOTOMAYOR: But then what do

1 we do with the common law that has informed us?  
2 And I do understand that in -- in Taylor we  
3 were very clear that the -- burglary had  
4 evolved from the common law in -- in dramatic  
5 ways, including the fact that most of the time  
6 burglary was limited to dwellings, and in more  
7 recent generations, it has expanded to a  
8 break-in to any structure that people own.

9 But, still, your definition, your  
10 reading would be Congress intended to sweep in  
11 every statute that called itself burglary?

12 MR. TRIPP: It -- it --

13 JUSTICE SOTOMAYOR: Basically that's  
14 you're -- you're -- what you're saying. They  
15 weren't looking at the common law. They  
16 weren't looking at the majority of states,  
17 which were -- who defined it as just "entering  
18 in."

19 When they previously used the word  
20 "surreptitiously," they were talking about --  
21 they were thinking about everybody who remains  
22 without permission, even if they're not there  
23 surreptitiously.

24 MR. TRIPP: So I -- I -- I think there  
25 is a lot packed in there. A -- a couple

1 responses.

2 I mean, I think what Congress was  
3 trying to pick up was the typical range of  
4 burglary statutes in the states. And --

5 JUSTICE SOTOMAYOR: So why isn't the  
6 typical the majority, the ones where "entering  
7 in"?

8 MR. TRIPP: So the typical, even in  
9 1986, most states had remaining-in burglary.  
10 The 29 states had it. That's undisputed.

11 JUSTICE GORSUCH: Well --

12 MR. TRIPP: Most of them, 27 of them,  
13 it was almost verbatim --

14 JUSTICE GORSUCH: If -- if I might on  
15 that, just to interrupt, I'm sorry, but just --  
16 just to get the playing field right, we have  
17 the 29, but then we have, I believe, about six  
18 where we have subsequent judicial decisions  
19 indicating that it required intent upon entry,  
20 some of which were later overturned by  
21 legislatures or whatever.

22 And you're asking us to not pay  
23 attention to those six and use 29 rather than,  
24 I think it's 23, something like that. I might  
25 have my numbers not quite right, but it's

1 slightly under half.

2 And you asked us to ignore those  
3 subsequent decisions because they came after  
4 1986. But we usually look at statutes and --  
5 and -- and say judicial, later judicial  
6 decisions we're interpreting as they were  
7 written at the time, retroactively, and that  
8 they're not pieces of legislation that have  
9 prospective effects.

10 So I'm not sure why we would ignore  
11 those six or whatever number of cases it would  
12 be and take us down to 23 rather than 29.

13 So I'm sorry for interrupting, but if  
14 the premise of the entire discussion is it's  
15 29, I guess I need some help on --

16 MR. TRIPP: So --

17 JUSTICE GORSUCH: -- whether that's  
18 the case.

19 MR. TRIPP: -- I think the answers  
20 sort of all get to the same place, and -- and  
21 -- and that I think really our position is no  
22 matter how you look at this and how far you  
23 dig, you're going to get to the same answer.  
24 Right?

25 So Taylor's formulation is --

1 JUSTICE GORSUCH: Well, I'm confident  
2 the government wants to win this case no matter  
3 what.

4 (Laughter.)

5 MR. TRIPP: No, if I -- If I could --  
6 if I could just walk you through --

7 JUSTICE GORSUCH: But if you could  
8 walk through 29 --

9 MR. TRIPP: Yeah.

10 JUSTICE GORSUCH: -- versus 23, and  
11 why I should pay attention to one number rather  
12 than the other.

13 MR. TRIPP: So -- so just -- the  
14 Taylor formulation is enter or remain.  
15 Twenty-nine states had remaining-in burglary,  
16 and the overwhelming majority of them were  
17 almost verbatim that formulation, just enter or  
18 remain, right, that's what they were saying.  
19 This is just what it means to remain in a  
20 place. Right?

21 And so then if you were trying to  
22 figure out what is it the states were doing,  
23 again, I think the first place you would look  
24 is their statutes. Their statutes just say  
25 "remain."

1           If you look at their judicial  
2 decisions in 1986, or imagine your Congress  
3 drafting this statute, literally every single  
4 judicial opinion that has ever -- every single  
5 state that has ever resolved this timing  
6 question has read "remain" to mean remain, to  
7 -- to -- read it literally to cover the entire  
8 time that you are trespassing.

9           I mean, I -- I just think that the --  
10           JUSTICE GORSUCH: Maybe you could get  
11 to my question at some point.

12           MR. TRIPP: Right, and --

13           JUSTICE GORSUCH: Which is why should  
14 I ignore those later judicial decisions? I  
15 guess I'm just looking for a reason why.

16           MR. TRIPP: I -- I guess, we're -- I'm  
17 not trying to count -- so we're trying to put  
18 -- put two -- two different figures. I'm  
19 trying to -- to understand sort of two  
20 different points in time.

21           One is: What was Congress thinking in  
22 1986? And I think if you're just trying to  
23 approach this from the perspective of a  
24 legislator who is trying to understand what  
25 this is in 1986, the answer is the state of the

1 law in 1986.

2 The other thing that we're looking to,  
3 just in this conversation, is: What would the  
4 effect of adopting Petitioner's ruling be? And  
5 there we have to look to the change in the law.  
6 Right? And -- and I think they -- they  
7 recognize this.

8 But today the number is that there is  
9 18 states that have -- that read "remain" to --  
10 to mean remain, either in their case law or  
11 with statutes that have adopted that rule, and  
12 those states have a population of 130 million  
13 people.

14 We're talking about tossing out an  
15 enormous number of burglary prosecutions. And  
16 I really want to emphasize how much this would  
17 be the tail wagging the dog.

18 And in -- in response to Justice  
19 Kavanaugh's question, I mean, this is very  
20 clearly, I think if you look at these cases --

21 JUSTICE GORSUCH: You -- you -- just  
22 -- just to -- I'm sure the practical effects  
23 for the government are terrible and you don't  
24 want my sympathy, I'm sure, on any of that, but  
25 I -- I guess you'd agree with me judicial



1 decisions normally operate retroactively?

2 MR. TRIPP: I agree with you that,  
3 yeah, that -- that ordinarily we understand the  
4 judicial opinions here to -- to reflect the  
5 state of the law as it existed at the time.

6 I'm just trying to --

7 JUSTICE GORSUCH: How -- and I guess  
8 I'm just on a totally different tangent. We  
9 had some conversation last term in Stitt and  
10 Sims about how we approach these cases  
11 generally.

12 And I guess I'm wondering whether the  
13 government's given any further thought to that?  
14 This approach of counting up states and -- and  
15 then asking whether this statute matches the  
16 platonic ideal of burglary in 1986, according  
17 to, however, 50-state survey, it's not very  
18 popular with lower courts, to say the least,  
19 and it's not easy to do.

20 And it's -- and it -- one might also  
21 ask whether it's fair to -- whether it puts  
22 anybody on fair notice what -- what their  
23 conduct is, if it is later dependent upon this  
24 mathematical exercise.

25 MR. TRIPP: So --

1                   JUSTICE GORSUCH: Has the government  
2 considered about whether we should consider  
3 whether the states, if they call some things  
4 burglary, whether that should be dispositive,  
5 for example?

6                   MR. TRIPP: To -- to my knowledge, we  
7 haven't changed our position on -- on -- or  
8 adopted any sort of new thing on that.

9                   But I -- I would say I think this case  
10 is honestly an opportunity to try to simplify  
11 things, that what you can just say here is that  
12 the Taylor formulation, it means what it says,  
13 right, that -- that enter or remain, that's  
14 good enough, that it doesn't matter how exactly  
15 the states define these things.

16                   And there's disagreement among the  
17 states on all kinds of other subsidiary issues.  
18 Right? What constitutes -- what makes your  
19 presence unprivileged, whether it extends to  
20 the whole building or only part of it? What  
21 exactly constitutes an entry?

22                   And Petitioner has given you no  
23 logical stopping point.

24                   And the reason is because they're  
25 already way past it. Right? Taylor says that

1 the -- the disagreement among the states about  
2 how to interpret these -- these different  
3 elements, it just doesn't matter. There is  
4 still burglary statutes.

5 JUSTICE KAVANAUGH: Taylor says --

6 MR. TRIPP: And I think that's really  
7 the heart, the heart of our submission here,  
8 that this is just too far down in the weeds.

9 JUSTICE KAVANAUGH: Taylor said  
10 "substantially" corresponds, not "exactly"  
11 corresponds.

12 MR. TRIPP: Right. Right. And --  
13 and, again, if Congress had an extremely  
14 specific, you know, and especially this -- this  
15 interpretation, an -- an idiosyncratic and  
16 arcane and honestly pretty novel understanding  
17 of remaining that reflects no dictionary  
18 definition of the term, that -- that Congress  
19 would have provided that --

20 JUSTICE SOTOMAYOR: I'm sorry, there's  
21 --

22 MR. TRIPP: -- definition. It  
23 wouldn't have just said burglary.

24 JUSTICE SOTOMAYOR: It can't be  
25 idiosyncratic because a number of states have

1 accepted it. As of 1986, you had a number of  
2 states who read it that way.

3 MR. TRIPP: I -- I --

4 JUSTICE SOTOMAYOR: You have the  
5 common law understanding that it was entry only  
6 and not remaining in.

7 You have the use of "surreptitious" as  
8 a definition prior to this statute, which also  
9 has a -- a sense of, that you're surreptitious,  
10 that you're remaining in with the intent to do  
11 something because you're hiding from being  
12 found to do something.

13 So I -- I -- I'm not sure how you call  
14 it idiosyncratic.

15 MR. TRIPP: So I -- I -- I -- I -- I  
16 think it is idiosyncratic. Today it's still  
17 very much the minority position in this timing  
18 rule. As of 1986 we think the number was zero,  
19 that exactly zero states had adopted the timing  
20 rule Petitioner is -- is advocating.

21 And I -- I also just wanted to -- to  
22 sort of take a step back and emphasize that,  
23 you know, the reason Congress, as Taylor says,  
24 Congress was focused on modern law enforcement  
25 concerns, not "arcane distinctions" that have

1 little relevance to modern law enforcement  
2 concerns. And it's harder to think of a better  
3 description of this rule.

4 I mean, you imagine being at home  
5 woken at -- at night from the sound of  
6 footsteps downstairs. You come downstairs and  
7 there's an intruder in your house who's is  
8 stealing your television or, worse, is like  
9 intent on assaulting you.

10 I just don't think anybody would care  
11 in that situation or -- or know whether the  
12 intruder developed that intent three seconds  
13 before or three seconds after breaking in.

14 The timing just doesn't matter. What  
15 matters is there is an intruder in your house  
16 who's bent on stealing your television or -- or  
17 assaulting you.

18 I think the same -- another very  
19 powerful illustration of this --

20 JUSTICE SOTOMAYOR: Do you think that  
21 it's a different reaction if you hear someone  
22 downstairs and they are in your pantry and you  
23 come down and they are stuffing their face with  
24 food, do you think you're going to have the  
25 same reaction to that person than you had to

1 the person walking away with your TV?

2 MR. TRIPP: I -- I -- I -- I think --

3 JUSTICE SOTOMAYOR: Or somebody  
4 walking out of your house, you see they're  
5 empty-handed, except they have a coat on now.  
6 They're clearly homeless. They're disheveled.  
7 They're unclean.

8 Do you think your reaction's going to  
9 be the same to the person stealing your TV?

10 MR. TRIPP: I -- I -- I think that  
11 your reaction to those different situations --  
12 those different situations would be very  
13 different, but it would -- it doesn't depend on  
14 the timing rule. It depends on the underlying  
15 facts.

16 JUSTICE GORSUCH: I -- I guess --

17 MR. TRIPP: And I think the best  
18 illustration of this --

19 JUSTICE GORSUCH: I guess, I'm -- I'm  
20 sorry to interrupt, but -- again, but I -- I'm  
21 stuck on a little something differently. I  
22 would probably react badly to all of them  
23 myself.

24 (Laughter.)

25 JUSTICE GORSUCH: But I guess I'm

1 wondering, though, those other crimes are bad,  
2 too. Nobody is here to defend entering without  
3 intent and then committing a crime with intent  
4 later. No -- nobody thinks that's a good  
5 thing.

6 But the question is whether it was  
7 burglary. And burglary is a very specific  
8 crime. And at common law it did require intent  
9 --

10 MR. TRIPP: Right.

11 JUSTICE GORSUCH: -- upon entry. So  
12 calling it some arcane thing that is nuanced to  
13 a point where nobody cares is like asking us to  
14 ignore a thousand years worth of law.

15 MR. TRIPP: So --

16 JUSTICE GORSUCH: And -- and -- and --  
17 and also possibly a majority of the  
18 jurisdictions in 1986. And so I -- I guess  
19 that just -- perhaps there's a better argument  
20 --

21 MR. TRIPP: So it's --

22 JUSTICE GORSUCH: -- than that it's  
23 too arcane.

24 MR. TRIPP: Just -- just -- I want to  
25 be clear. We agree with the rule that the

1 timing needs to be contemporaneous. You need  
2 to have the intent while you are remaining,  
3 right?

4 We also know that the whole point of  
5 the "remaining" prong was to eliminate the  
6 common law requirement that there be an entry,  
7 right? That's the only thing it's doing in any  
8 of these statutes is eliminating that  
9 requirement.

10 It was part and parcel of the states  
11 getting rid of the requirement that there be a  
12 break-in, that it be a dwelling, that it be at  
13 night, that it be with the intent to commit a  
14 felony. We also know that the states were not  
15 only focusing on the sort of surreptitious  
16 remaining type fact pattern because only a tiny  
17 number of the states actually required that.  
18 Most of them just said "remaining." And I  
19 think --

20 JUSTICE KAVANAUGH: The law -- the  
21 law -- to pick up on Justice Kagan's question  
22 from earlier, the law had sufficiently changed  
23 by 1986 that the author of the opinion in  
24 Taylor knew enough to put "remaining in."

25 MR. TRIPP: Yeah. And -- and it's



1 undisputed that "remaining in" is -- is -- is  
2 part of what Congress was trying to reach. And  
3 I guess what I'm --

4 JUSTICE KAGAN: Right. But the  
5 question, Mr. Tripp, is how the intent  
6 requirement figures in that. There was no  
7 question that they -- that Taylor says and --  
8 and that the "remaining in" was by then a known  
9 feature.

10 But just as you said, the "remaining  
11 in" was really an attempt to close a loophole,  
12 if you will, in the entry and say, look, we  
13 have these cases that are coming up where the  
14 person is not entering unlawfully, the -- the  
15 person -- the person is only remaining  
16 unlawfully. And so it was an attempt to close  
17 that loophole.

18 But then the question that I think  
19 Mr. Marwell is raising is whether the intent to  
20 close that loophole suggests that there was  
21 also a desire to really shift the historic  
22 common law understanding of when the intent  
23 needed to develop.

24 And he's suggesting, no, it was really  
25 just an attempt to close the small loophole but

1 you shouldn't read into that some much larger  
2 desire to -- to -- to shift the understanding  
3 of intent and when it arises.

4 MR. TRIPP: So a couple different  
5 responses to that. So, first of all, I think  
6 this is actually not a very big shift because  
7 this timing question doesn't come up very much.  
8 There's still 11 states that have had  
9 remaining-in burglary on the -- on the books  
10 for decades. The timing question is never --  
11 they don't have any case law on this.

12 And then as for what the states were  
13 doing, as I was saying, we know that they were  
14 adding the "remaining" prong to eliminate the  
15 requirement that there be an entry, and we know  
16 that they were doing more than just picking up  
17 the guy who was staying behind and hiding in a  
18 store after hours who could steal things inside  
19 because they -- they weren't requiring that it  
20 be surreptitious.

21 So then to figure out what is it that  
22 they were trying to do, I think really in a  
23 natural way to understand that is to just read  
24 the text of their statutes. They say "remain."  
25 This is just what it means to remain in a

1 place, that you remain as long as you stay.

2 If you want to dig deeper and look at  
3 the case law in the time in 1986, the case law  
4 was unanimous on this timing question in favor  
5 of reading that to just mean what it says.

6 And -- and so I think really -- and  
7 then again to come back, Taylor focus --  
8 focuses on -- it says, look, what the states  
9 were trying to do here is focusing on modern  
10 law enforcement concerns, right? And the  
11 concern, of course, is that there's a  
12 trespasser in your house or some other building  
13 or other structure like that and that he's  
14 intent on committing a crime.

15 And -- and again, I think it's really  
16 important that in many of these cases, just  
17 nobody would care when the intent was formed.  
18 The problem is that there's the -- the  
19 criminally-minded trespasser. A very powerful  
20 illustration of this is the domestic violence  
21 situation which we talk about in our brief,  
22 which would be -- which would be burglary under  
23 -- under Petitioner's rule, right?

24 If an ex-boyfriend goes to visit the  
25 ex-girlfriend, she lets him in, and then they

1 start to argue. She says, look, you need to  
2 get out of here. If at that moment he intends  
3 to assault her, that's burglary under -- under  
4 Petitioner's rule because he remains with  
5 intent. But if he decides to assault her three  
6 or four seconds later, it's not?

7 And just -- you know, from the  
8 perspective of the victim who's being assaulted  
9 in her own home by an unwelcome visitor, just  
10 -- what does it matter?

11 JUSTICE BREYER: True, but we're --  
12 we're trying to figure out something about the  
13 crime in general. In general, is it more  
14 likely to involve violence or not?

15 So we have situation 1, where he  
16 intends to commit the crime inside the house  
17 either when he breaks in or when he first  
18 remains. Situation 2, he doesn't form the  
19 intent to commit a crime until after he first  
20 breaks in or first unlawfully remains. Okay?  
21 Those are the two situations.

22 I would have always thought -- I guess  
23 this is only the 50th time I've asked this  
24 question, but I would have always thought, you  
25 know, you could look up the cases on it and get

1 an idea, empirically. And -- and then we'd  
2 have at least something to go on, even if they  
3 were only appellate cases.

4 MR. TRIPP: Yeah.

5 JUSTICE BREYER: Has anyone ever done  
6 that?

7 MR. TRIPP: I think honestly the --  
8 the cases that are cited in these briefs do  
9 that. And -- and they tell you, they -- they  
10 paint a pretty powerful picture. I urge you to  
11 read a lot of them. It's true some of them are  
12 minor.

13 JUSTICE BREYER: I can only read so  
14 many.

15 (Laughter.)

16 MR. TRIPP: Some of these are very  
17 significant --

18 JUSTICE BREYER: Can I get help from  
19 my law clerks?

20 (Laughter.)

21 MR. TRIPP: Many of these are -- yeah.  
22 Many of these are very significant crimes. I  
23 -- I want to be clear that the -- the situation  
24 I was talking about, of somebody coming in and  
25 then later seeing a woman inside he decides to

1 assault, the domestic violence situation I was  
2 talking about, these are not hypotheticals.  
3 These are the facts of Gratton out of Alabama,  
4 of DeNoyer out of South Dakota, of Fontes out  
5 of Ohio. That's -- that's the seeing a woman  
6 after you break in. The domestic violence one,  
7 Braddy versus -- out of Florida. You know --  
8 and a lot of these are very, very serious  
9 crimes.

10 And I think they illustrate that what  
11 these people are engaged in is very erratic and  
12 impulsive decision-making, right, that they've  
13 -- they -- they already decided to break into  
14 somebody's house, and then they make an  
15 impulsive -- or -- or to be in a place where  
16 they're not supposed to be and not leave, and  
17 then they make a decision to -- to engage in  
18 some other further conduct, I think in many  
19 cases is really very, very serious.

20 It's true there is some that are much  
21 more minor like -- like Gaines, the facts of  
22 that. But, again, what makes that sympathetic  
23 is not the timing; it's the -- it's a homeless  
24 guy who's cold, right? And you could have that  
25 same homeless guy, you know, in -- in Buffalo,

1 it's -- it's snowing, it's very, very cold,  
2 he's walking down the street, he looks in a  
3 window and he sees a coat, and so he -- he  
4 breaks in, he grabs the coat, and he goes.

5 That's burglary under their rule, even  
6 though it's just equally sympathetic. What --  
7 what makes it sympathetic or not are the facts  
8 of the underlying case, not the timing rule  
9 that he's urging.

10 JUSTICE KAGAN: Mr. Tripp, I'm not  
11 sure whether this is here nor there, but, you  
12 know, some of the serious crimes that you just  
13 mentioned, and they are extremely serious, if  
14 you went out on the street and asked a hundred  
15 people whether those assault cases are  
16 burglary, you would get a hundred "no" answers.  
17 Does that matter?

18 MR. TRIPP: I -- I think the -- the  
19 place where that instinct is most powerful is  
20 for the domestic violence situation, where I  
21 agree that that is like -- feels intuitively  
22 different. And I think this was really what  
23 drove the drafters of the Model Penal Code and  
24 -- and says -- there's some language in LaFave  
25 to say you shouldn't have remaining-in

1 burglary, and if you do at all, it should be  
2 surreptitious. And --- and I think really the  
3 short answer is that the states didn't buy it.  
4 The states just didn't do that. They didn't  
5 limit it to remain -- to surreptitious  
6 remaining. The majority of them adopted  
7 remaining statutes. Even more of them have it  
8 today.

9           And so I -- I think, basically, the  
10 states have recognized that there's something  
11 really much more fundamental here. It -- it's  
12 not about the nature of the intrusion. It's  
13 about the fact that there is an unwelcome  
14 visitor, somebody in your home. It's about the  
15 safety and security of a person in their own  
16 home or in some other space like that, from an  
17 unwelcome visitor who's bent on committing some  
18 kind of crime.

19           And I -- and I think the fact that a  
20 lot of these are actually -- I mean, a lot of  
21 these are really very, very serious crimes,  
22 when the --

23           JUSTICE BREYER: In --

24           MR. TRIPP: -- the timing question does  
25 come up.



1 JUSTICE BREYER: Some of them are and  
2 a certain amount of them aren't. Has the  
3 Department ever thought -- you don't have to  
4 answer this -- but has the Department ever  
5 thought of recommending to Congress a change so  
6 that instead of looking at the generic crime  
7 where the answer is going to be sometimes yes,  
8 sometimes no, there's violence, but saying look  
9 and see whether the person on the individual  
10 occasion submitted -- committed a violent act?  
11 Have you ever thought of that? And if they say  
12 no, we're not going to do that?

13 MR. TRIPP: I mean, I'm sure people  
14 have thought of it, but to my knowledge, the --  
15 the Department hasn't proposed any affirmative  
16 legislation on this. I know there's  
17 legislation that's pending on the Hill about  
18 this, that -- that the Department is providing  
19 technical assistance on. But -- but, beyond  
20 that, I'm not sure I know.

21 JUSTICE KAVANAUGH: Can I --

22 MR. TRIPP: If I can --

23 JUSTICE KAVANAUGH: -- ask the same  
24 question that I asked the other side, which is  
25 in the universe of burglaries, do you have a

1 sense of how many are remaining in?

2 MR. TRIPP: I -- my sense is that it's  
3 pretty rare, that -- that it's pretty few, that  
4 in the, like, overwhelming number of burglary  
5 cases, you're going to have evidence of an  
6 unlawful entry and then that's just how you  
7 prove it up and that becomes the whole case.

8 And I guess actually this gets out to  
9 this idea that our reading of "remaining" makes  
10 that prong more important than the "entry"  
11 prong. And -- and I think really our response  
12 is that it doesn't matter, right, that if you  
13 look at the law of trespass, it has the same  
14 pairing of "to enter" or "remain."

15 And I don't think anybody cares which  
16 -- whether one of those is more important than  
17 the other or whether many entry trespasses  
18 bleed into remaining trespasses. They --  
19 they're covering the waterfront of a trespass,  
20 and I think it's the same here.

21 JUSTICE KAVANAUGH: And if you were to  
22 lose this case, potentially all burglaries from  
23 how many states would no longer be able to be  
24 counted as --

25 MR. TRIPP: Yeah, it -- it would be 18

1 states and counting. So there's 18 states with  
2 a population of 130 million today. There's  
3 another 11 that have still -- haven't addressed  
4 this issue. And assuming that the current  
5 trends continue, probably more of them will  
6 read "remain" to mean "remains."

7 JUSTICE KAGAN: May I ask you the --

8 MR. TRIPP: And then --

9 JUSTICE KAGAN: -- same question I  
10 asked Mr. Marwell, which -- how many of those  
11 states have other burglary statutes that you  
12 could capture, can I say real burglary in?

13 MR. TRIPP: I prefer not the real  
14 burglary, but, yeah. I think there is -- there  
15 is -- there is a mix. I think ten of these  
16 states have adopted this rule by statute, but I  
17 don't know how much the different ones are --  
18 are used relative to each other.

19 But you would still be tossing out an  
20 enormous number of burglary prosecutions, you  
21 know, including from -- from Michigan, Texas,  
22 some very big states.

23 And then I think another critical  
24 point, again, is that -- is that Petitioner's  
25 given you no logical stopping point, right,

1 that this is -- it -- it cannot end here.

2 If you think that it gets at this  
3 level of specificity, then why not all the  
4 other disputes about, you know, what it  
5 constitutes to be unprivileged, what exactly an  
6 entry is, and on and on and on.

7 And I think what it really gets to is  
8 that --

9 JUSTICE GORSUCH: Right. If the  
10 intent to -- if the intent to enter isn't  
11 critical, how about the act of what's done once  
12 inside?

13 If -- if the mens rea isn't -- if  
14 that's too minor to care about, and we're going  
15 to just turn every former common law larceny  
16 into a burglary, which is what you're asking us  
17 to do in some ways, because a lot of the other  
18 conduct would be larceny, it's not like it  
19 would be unpunished at common law, why should  
20 we care about the actus reas and so why does it  
21 have to be taking things to be burglary?

22 Couldn't it maybe also conducting a  
23 fraud while they're inside? California defines  
24 burglary to be almost as expansive as that. So  
25 perhaps that's -- that's equally consistent

1 with your argument logically.

2 MR. TRIPP: So it's -- it's equally  
3 consistent with Petitioner's as well because it  
4 covers any crime that's not covered. We -- we  
5 agree that there has to be mens rea. Right?  
6 You -- you have to -- to intend -- you have to  
7 know that you're unlawfully inside the place  
8 that you're on -- that you're trespassing.

9 And we know -- and we agree that you  
10 need to have intent while you're doing that.  
11 The -- the only dispute here is do you need to  
12 have intent only at the initial second --

13 JUSTICE GORSUCH: I understand.

14 MR. TRIPP: Of the -- right? That's  
15 just the timing.

16 JUSTICE GORSUCH: But if that's too  
17 minor to care about, then why should we care  
18 about these other things, too, that were also  
19 part of common law burglary?

20 MR. TRIPP: I think part of the answer  
21 is that's -- that remains, first of all, the  
22 Taylor formulation and what the -- the  
23 overwhelming majority of states are doing.  
24 They are saying that you need to unlawfully  
25 enter or remain in a building or structure with

1 intent to commit a crime. That's what these  
2 statutes say.

3 I think if you flip through them  
4 you'll see that many of them are --

5 JUSTICE GORSUCH: So it isn't that  
6 it's too minor. It comes back to counting  
7 again. And then we're just back down to 29  
8 versus 23 and we have to decide.

9 MR. TRIPP: I -- I think it's not just  
10 about it being minor and it's not just about  
11 counting. It's that -- I think what the states  
12 have recognized is that the core of this  
13 offense are not these kind of questions from  
14 the common law about did you break and did you  
15 enter, it's is there a trespasser in your home  
16 who is intent on committing a crime? That --  
17 if there is, he's a burglar. Right? I think  
18 that's -- that's really what the states are --  
19 are boiling it down to. That's the --

20 JUSTICE GORSUCH: Any crime?

21 MR. TRIPP: -- modern offense. Any  
22 crime. That's what Taylor says. He agrees  
23 with that. Petitioner would agree that if the  
24 person is breaking into a house, you know, at  
25 night with the intent to commit stock fraud on

1 his phone, I mean, I don't know if that would  
2 ever happen, but, yeah, that's burglary under  
3 -- under either of the rules here.

4 And I -- I guess also just to -- to  
5 try and take one step back in response to some  
6 of the -- the -- the questions, right, if  
7 you're going to have a categorical approach to  
8 this statute that doesn't look to the facts of  
9 the individual case, you -- you need to have a  
10 broad definition of the category. Right?

11 Otherwise, if you have a very specific  
12 laundry list, a long list of things that every  
13 statute needs to match perfectly, all that  
14 you're going to do is be knocking them out one  
15 after another, after another, until there's  
16 really nothing left and -- and I think would  
17 really defeat the purpose of Congress in  
18 including burglary among an ACCA predicate.

19 I guess maybe just one last point  
20 here. I mean, the -- the statute here, this is  
21 a home invasion statute. I think most people  
22 would think that this is the heart of modern  
23 burglary.

24 And -- and I -- I -- I think if you  
25 told the drafters in Congress, you know,

1     imagine a person who you think should fit  
2     within the ACCA, it would be somebody with a  
3     track record that looks an awful lot like  
4     Petitioner's.

5             So if there's no further questions,  
6     we're asking the Court to affirm.

7             CHIEF JUSTICE ROBERTS: Thank you,  
8     counsel.

9             Mr. Marwell, four minutes remaining.

10            REBUTTAL ARGUMENT OF JEREMY C. MARWELL

11                    ON BEHALF OF THE PETITIONER

12            MR. MARWELL: Thank you.

13                    On the bad cases that the government,  
14     the facts that the government alleges, there's  
15     no dispute that those are crimes. The question  
16     is: Are they burglary?

17                    They may be trespass. They may be  
18     assault. They may be punished separately. But  
19     Congress used the word "burglary."

20                    And I think the reason that we're here  
21     is that there is some incongruity between the  
22     government's account of generic burglary and  
23     these cases that just don't feel like burglary.  
24     And that's why the Fifth Circuit, the Seventh  
25     Circuit, have held that Taylor is not clear on



1 its face, doesn't resolve the issue.

2 I think it's worth reminding that less  
3 than a year before Taylor, the New York Court  
4 of Appeals interpreted that state's  
5 remaining-in statute the way we say. That  
6 statute we know from Colorado and other -- and  
7 other states was a model for other states' laws  
8 and I think it helps explain what the Court may  
9 have been getting at in Taylor.

10 The government focuses heavily on  
11 trespass and the fact that "remaining" has a  
12 continuous sense in that law. I think that's  
13 the fundamental problem with their position is  
14 that they're equating trespass and burglary.

15 And we need some line, we suggest it  
16 should be drawn from the common law and state  
17 practice, that -- that distinguishes those two  
18 crimes.

19 On the concern about simplicity or a  
20 slippery slope, I would suggest -- I would  
21 submit that Taylor provides you an  
22 administrable and workable rule. Looking to  
23 what states did in 1986 is an objective  
24 foundation. It's a point in time.

25 And there isn't actually that much

1 dispute between the parties about what state  
2 law was. It's just a dispute about what  
3 inferences or what conclusions to draw.

4 If you walk away from that approach, I  
5 think you're left with the difficult questions  
6 of what is and what isn't risky in -- in a  
7 particular consequence.

8 And the -- the government, I think,  
9 has -- has not asked you to revisit Taylor in  
10 this case.

11 As to whether this issue is a big  
12 deal, I think it is a big deal because the  
13 government can just charge entry or remaining  
14 and it essentially makes the long-standing  
15 traditional rule of intent at entry disappear  
16 in all but the very small number of cases that  
17 the government identifies, such as a fleeting  
18 entry or an interrupted entry.

19 And I -- we don't see any evidence in  
20 Taylor that there was intent to make that big a  
21 change.

22 If this does become a problem,  
23 obviously the Department is well positioned to  
24 ask Congress to fix it.

25 And if there are no further questions,

1 we would suggest that a call to simplicity  
2 doesn't justify overlooking hundreds of years  
3 under which the essence of burglary has been  
4 somebody who trespasses for the purpose of  
5 committing a crime.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel. The case is submitted.

8 (Whereupon, at 11:03 a.m., the case  
9 was submitted.)

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