

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JAMAR ALONZO QUARLES,)
)
 Petitioner,)
)
 v.) No. 17-778
)
 UNITED STATES,)
)
 Respondent.)

Pages: 1 through 65

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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
22 than -- than our definition. I think that's
23 well 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 shows
14 that a majority, even of the remaining-in stat
15 -- states, retained the traditional requirement
16 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. The Court
5 has -- has declined to read a statute in a way
6 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 the time said, "far more common
16 today is the burglary statute which covers one
17 who either enters or remains in the premises.
18 This means, of course, that the requisite
19 intent to commit a crime within need only exist
20 at the time the defendant unlawfully remained
21 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 risk of violence or risk of -- is there any
16 less risk there than when he gets the idea of
17 going into the bank two weeks earlier?

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

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

22 A night watchman, a teller who forgot
23 to go out -- I don't know if that exists, but I
24 can't quite figure out -- I'm sure there is
25 some cases both ways, I would think.

1 MR. MARWELL: So --

2 JUSTICE BREYER: Anybody ever look at
3 that and --

4 MR. MARWELL: Well, so Taylor, just --
5 just to -- Taylor referred to the risk of
6 violence when somebody does an intrusion to
7 commit a crime. And I think that's -- that
8 captures this idea of -- of why we care about
9 pre-formed intent.

10 JUSTICE KAGAN: But -- but part of our
11 understanding of why burglary is a -- is a
12 risky crime is when the burglar meets somebody
13 else, the victim, the police officer, whoever.

14 And that person is not going to know
15 when the criminal formed his intent.

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

22 And Congress did not use the word
23 "trespass" in ACCA. It could have enumerated
24 trespass. I think the government's position
25 comes close to that.

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

10 JUSTICE ALITO: Is the offense we're
11 concerned with here, his third degree home
12 invasion conviction in Michigan, anything like
13 these cases that you've just described?

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

20 And the judge said, "we certainly can
21 infer that he had an intent to commit an
22 assault while he was entering." And this
23 establishes that he did commit an assault while
24 he was in the house.

25 MR. MARWELL: So the -- the facts that

1 you've recited, Justice Alito, I think would
2 not be available to a sentencing court. That
3 was a colloquy in the state court where Mr.
4 Quarles pleaded no contest. So he was not
5 asked to confirm those facts.

6 And I think that --

7 JUSTICE ALITO: Well, doesn't --
8 doesn't the judge, in order to accept a no
9 contest plea, have to establish, be satisfied
10 that there is a factual basis for the plea?

11 MR. MARWELL: I think -- well, in
12 Michigan law, no contest is -- is -- is
13 acquiescing in the imposition of punishment but
14 not confirming or denying the facts. And I
15 think under --

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

18 Under Michigan law -- this is
19 surprising to me -- a judge can accept a non --
20 a no contest plea without ascertaining that
21 there is a factual basis for the plea?

22 MR. MARWELL: Even if so, I think
23 under this Court -- the way this Court said in
24 Shepard and Mathis, the kinds of facts that are
25 available to the sentencing judge, those are

1 limited to ones where the defendant confirmed
2 the accuracy.

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

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

15 JUSTICE KAVANAUGH: Taylor didn't say
16 that the statute had to exactly correspond to
17 generic burglary. It said "substantially
18 corresponds"?

19 MR. MARWELL: That -- that's right.
20 But we think that the -- the -- the element
21 here of contemporaneous intent is what's been
22 called the most fundamental essence of
23 burglary.

24 So I think substantial -- it's hard to
25 say that it "substantially corresponds" if it's

1 missing, you know, the core element.

2 JUSTICE GINSBURG: When you gave the
3 number six, did that exclude all the states
4 with "remaining-in" statutes that had not
5 interpreted those statutes?

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

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

19 JUSTICE GINSBURG: Did that turn out
20 to be the case, states that had remaining-in
21 statutes in 1986 and then interpreted them
22 later?

23 MR. MARWELL: Well, some jurisdictions
24 have gone towards the government's view. The
25 government identifies 18 as of today. There

1 are some jurisdictions that have adopted our
2 view, and 19 jurisdictions that have not
3 adopted any remaining-in variant and have
4 stayed only defining burglary as intent at
5 entry. So --

6 JUSTICE SOTOMAYOR: Give me the count
7 again?

8 MR. MARWELL: So if the question is
9 what's the headcount today.

10 JUSTICE SOTOMAYOR: Yes.

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

17 And I think that leaves 11, that gets
18 us to 51 jurisdictions, where the government
19 implicitly says they haven't resolved the
20 question.

21 JUSTICE KAGAN: The -- the 18 states
22 that the government says have their rule, do
23 they have other burglary statutes or would we
24 be essentially removing the only burglary
25 statutes of those states?

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

4 We cited in our brief the Priddy case
5 from the Sixth Circuit. Tennessee is one of
6 the statutes. The Priddy case decided that
7 Tennessee was divisible.

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

14 And then I think it would depend on
15 how -- the divisibility --

16 JUSTICE KAVANAUGH: What --

17 MR. MARWELL: -- analysis.

18 JUSTICE KAVANAUGH: What percentage of
19 burglaries do you think are remaining in versus
20 entry burglaries?

21 MR. MARWELL: So what we -- one thing
22 we know at the time of ACCA was that the New
23 York burglary statute was very influential.
24 And the commentaries to that burglary statute,
25 which we cited in our reply brief, say

1 explicitly that entry was the common, more
2 common variant.

3 JUSTICE KAVANAUGH: Far more common,
4 right?

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

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

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

21 As of today, I think it depends on the
22 divisibility analysis. And there are a number
23 of jurisdictions of that 18, where I think it
24 would be a -- a litigated issue, and a number
25 of jurisdictions that have other burglary

1 statutes that aren't affected. So --

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

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

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

19 And often the easier course, if you
20 take the government's reading, is, well, don't
21 worry about whether intent existed at the time
22 of entry because, you know, there was a
23 commission of a misdemeanor or a crime while
24 you're -- while you're --

25 CHIEF JUSTICE ROBERTS: It has to be

1 -- it has to be very unusual that someone
2 enters a bank and only then does it occur to
3 them that that's where money is that they might
4 want to rob.

5 (Laughter.)

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

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

21 JUSTICE ALITO: What do you make of
22 Taylor's definition of -- of burglary, where
23 the Court said that the contemporary meaning of
24 burglary means at least the following -- I'm
25 sorry, contains at least the following

1 elements: An unlawful or unprivileged entry
2 into, or remaining in a building or other
3 structure with intent to commit a crime? How
4 do you read -- how can you read that consistent
5 with your interpretation?

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

17 And then you have "remaining" modified
18 by the words "with intent." And as the
19 examples --

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

21 MR. MARWELL: -- of some --

22 JUSTICE ALITO: -- remaining with
23 intent to commit a crime.

24 MR. MARWELL: Right.

25 JUSTICE ALITO: So where do we get the

1 -- the -- the point of entry there?

2 MR. MARWELL: I -- I think you get
3 it --

4 JUSTICE ALITO: I'm sorry, the time of
5 entry. Where -- where do you -- how do you
6 read into that the requirement that the -- the
7 intent has to be present at the time of entry?

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

14 JUSTICE KAVANAUGH: What do you mean
15 by --

16 MR. MARWELL: So --

17 JUSTICE KAVANAUGH: I'm sorry to
18 interrupt.

19 MR. MARWELL: I'm sorry.

20 JUSTICE KAVANAUGH: What do you mean
21 by context there? It says "or" -- "entry into
22 or remaining in."

23 MR. MARWELL: Well, I -- the -- this
24 Court in the Neal case that we cited in our
25 reply brief has said when you have a pair of

1 words, you know, disjunctive pair of words, you
2 look at one in the context of the other.

3 And --

4 JUSTICE KAVANAUGH: But there are two
5 distinct concepts, and at least I read Taylor
6 as saying these two distinct concepts are ways
7 you can fall within generic burglary.

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

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

22 MR. MARWELL: Correct. And -- and
23 Taylor acknowledged that its definition was not
24 going to be perfect or was not going to be
25 maximalist in the sense of capturing every

1 single state. It gave some examples: The
2 vending machine; California, shoplifting is
3 burglary. It said there may be some states
4 that are broader.

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

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

18 JUSTICE ALITO: I mean, what you say
19 is a -- is an argument that one might make to a
20 state legislature in defining burglary, because
21 the other definition can potentially catch some
22 of these people who have less -- less dangerous
23 characteristics -- that where their -- that
24 individual crime has less dangerous
25 characteristics, but under ACCA, the person has

1 to have three prior convictions.

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

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

14 We cited in our reply brief, you know,
15 there are certain populations that are subject
16 to multiple, you know, low-level offenses and
17 so might well get three.

18 If I could reserve?

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Tripp.

22 ORAL ARGUMENT OF ZACHARY D. TRIPP

23 ON BEHALF OF THE RESPONDENT

24 MR. TRIPP: Mr. Chief Justice, and may
25 it please the Court:

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

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

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

19 And that's also how this works in the
20 law of trespass, which I think is really
21 important here because it has the same pairing,
22 to enter land or remain on land without
23 permission. And the remaining prong for
24 trespass is a continuing trespass. It's
25 telling you that if you're on somebody's else's

1 land without their permission, it doesn't
2 matter how -- how you got there, how long
3 you've been there; you're under a continuing
4 obligation to leave.

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

13 And then I think another important
14 point about the text here, right, is --

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

21 So it's one of these things of how do
22 we read our own opinions and do we read them
23 like statutes or do we read them a little bit
24 differently, understanding what was and what
25 wasn't in the mind of the Court at that time?

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

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

20 And I think --

21 JUSTICE SOTOMAYOR: But then what do
22 we do with the common law that has informed us?
23 And I do understand that in -- in Taylor we
24 were very clear that the -- burglary had
25 evolved from the common law in -- in dramatic

1 ways, including the fact that most of the time
2 burglary was limited to dwellings, and in more
3 recent generations, it has expanded to a
4 break-in to any structure that people own.

5 But, still, your definition, your
6 reading would be Congress intended to sweep in
7 every statute that called itself burglary?

8 MR. TRIPP: It -- it --

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

15 When they previously used the word
16 "surreptitiously," they were talking about --
17 they were thinking about everybody remains
18 without permission, even if they are not there
19 surreptitiously.

20 MR. TRIPP: So I -- I -- I think there
21 is a lot packed in there. A couple responses.

22 I mean, I think what Congress was
23 trying to pick up was the typical range of
24 burglary statutes in the states.

25 JUSTICE SOTOMAYOR: So why isn't the

1 typical the majority, the ones where "entering
2 in"?

3 MR. TRIPP: So the typical, even in
4 1986, most states had remaining in burglary.
5 The 29 states had it. That's undisputed.

6 JUSTICE GORSUCH: Well --

7 MR. TRIPP: Most of them, 27 of them,
8 it was almost verbatim --

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

17 And you're asking us to not pay
18 attention to those six and use 29 rather than,
19 I think it's 23, something like that. I might
20 have my numbers not quite right, but it's
21 slightly under half.

22 And you asked us to ignore those
23 subsequent decisions because they came after
24 1986. But we usually look at statutes and --
25 and -- and say judicial, later judicial

1 decisions we're interpreting as they were
2 written at the time, retroactively, and that
3 they're not pieces of legislation that have
4 prospective effect.

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

8 So I'm sorry for interrupting, but if
9 the premise of the entire discussion is it's
10 29, I guess I need some help on --

11 MR. TRIPP: So --

12 JUSTICE GORSUCH: -- whether that's
13 the case.

14 MR. TRIPP: I think the answers sort
15 of all get to the same place, and -- and -- and
16 that I think really our position is no matter
17 how you look at this and how far you dig,
18 you're going to get to the same answer. Right?

19 So Taylor's formulation is --

20 JUSTICE GORSUCH: Well, I'm confident
21 the government wants to win this case no matter
22 what.

23 (Laughter.)

24 MR. TRIPP: No, if I -- If I could --
25 if I could just walk you through --

1 JUSTICE GORSUCH: But if you could
2 walk through 29 --

3 MR. TRIPP: Yeah.

4 JUSTICE GORSUCH: -- versus 23, why I
5 should pay attention to one number rather than
6 the other.

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

15 And so then if you were trying to
16 figure out what is it the states were doing,
17 again, I think the first place you would look
18 is their statutes. Their statutes just say
19 "remain."

20 If you look at their judicial
21 decisions in 1986, or imagine your Congress
22 drafting this statute, literally every single
23 judicial opinion that has ever -- every single
24 state that has ever resolved this timing
25 question has read "remain" to mean remain, read

1 it literally to cover the entire time that you
2 are trespassing.

3 I mean, I -- I just think that the --

4 JUSTICE GORSUCH: Maybe you could get
5 to my question at some point.

6 MR. TRIPP: Right.

7 JUSTICE GORSUCH: Which is why should
8 I ignore those later judicial decisions? I
9 guess I'm just looking for a reason why.

10 MR. TRIPP: I -- I guess, we're -- I'm
11 not trying to count -- so we're trying to put
12 -- put two -- two different figures. I'm
13 trying to -- to understand sort of two
14 different points in time.

15 One is: What was Congress thinking in
16 1986? And I think if you are just trying to
17 approach this from the perspective of a
18 legislator who is trying to understand what
19 this is in 1986, the answer is the state of the
20 law in 1986.

21 The other thing that we're looking to,
22 just in this conversation, is: What would the
23 effect of adopting Petitioner's ruling be? And
24 there we have to look to the change in the law.
25 Right? And -- and I think they -- they

1 recognize this.

2 But today the number is that there is
3 18 states that have -- that read "remain" to
4 mean remain, either in their case law or with
5 statutes that have adopted that rule, and those
6 states have a population of 130 million people.

7 We're talking about tossing out an
8 enormous number of burglary prosecutions. And
9 I really want to emphasize how much this would
10 be the tail wagging the dog.

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

14 JUSTICE GORSUCH: Just to -- just to
15 -- I'm sure the practical effects for the
16 government are terrible and you don't want my
17 sympathy, I'm sure, on any of that, but I -- I
18 guess you'd agree with me judicial decisions
19 normally operate retroactively?

20 MR. TRIPP: I agree with you that,
21 yeah, that -- that ordinarily we understand the
22 judicial opinions here to reflect the state of
23 the law as it existed at the time. I'm just
24 trying to --

25 JUSTICE GORSUCH: How -- and I guess

1 I'm just on a totally different tangent. We
2 had some conversation last term in Stitt and
3 Sims about how we approach these cases
4 generally.

5 And I guess I'm wondering whether the
6 government has given any further thought to
7 that? This approach of counting up states and
8 -- and then asking whether this statute matches
9 the platonic ideal of burglary in 1986,
10 according to, however, 50-state survey, it's
11 not very popular with lower courts, to say the
12 least, and it's not easy to do.

13 And it's -- and it -- one might also
14 ask whether it's fair to -- whether it puts
15 anybody on fair notice what -- what their
16 conduct is, if it is later dependent upon this
17 mathematical exercise.

18 MR. TRIPP: So --

19 JUSTICE GORSUCH: So has the
20 government considered about whether we should
21 consider whether the states, if they call
22 something burglary, whether that should be
23 dispositive, for example?

24 MR. TRIPP: To -- to my knowledge, we
25 haven't changed our position on -- on -- or

1 adopted any sort of new thing on that.

2 But I -- I would say I think this case
3 is honestly an opportunity to try to simplify
4 things, that what you can just say here is that
5 the Taylor formulation, it means what it says,
6 right, that -- that enter or remain, that's
7 good enough, that it doesn't matter how exactly
8 the states define these things.

9 And there's disagreement among the
10 states on all kinds of other subsidiary issues.
11 Right? What constitutes presence -- what makes
12 your presence unprivileged, whether it extends
13 to the whole building or only part of it? What
14 exactly constitutes an entry?

15 And Petitioner has given you no
16 logical stopping point.

17 And the reason is because they're
18 already way past it. Right? Taylor says that
19 the disagreement among the states about how to
20 interpret these -- these different elements, it
21 just doesn't matter. There is still burglary
22 statutes.

23 JUSTICE KAVANAUGH: Taylor says --

24 MR. TRIPP: And I think that's really
25 the heart, the heart of our submission here,

1 that this is just too far down in the weeds.

2 JUSTICE KAVANAUGH: Taylor said
3 "substantially" corresponds, not "exactly"
4 corresponds.

5 MR. TRIPP: Right. Right. And --
6 and, again, if Congress had an extremely
7 specific, you know, and especially this -- this
8 interpretation, an -- an idiosyncratic and
9 arcane and honestly pretty novel understanding
10 of remaining that reflects no dictionary
11 definition of the term, that -- that Congress
12 would have provided that --

13 JUSTICE SOTOMAYOR: I'm sorry, there's
14 --

15 MR. TRIPP: -- definition. It
16 wouldn't have just said burglary.

17 JUSTICE SOTOMAYOR: It can't be
18 idiosyncratic because a number of states have
19 accepted it. As of 1986, you had a number of
20 states who read it that way.

21 MR. TRIPP: I -- I --

22 JUSTICE SOTOMAYOR: You have the
23 common law understanding that it was entry only
24 and not remaining in.

25 You have the use of "surreptitious" as

1 a definition prior to this statute, which also
2 has a -- a sense of, that you're surreptitious,
3 that you're remaining in with the intent to do
4 something because you're hiding from being
5 found to do something.

6 So I -- I -- I'm not sure how you call
7 it idiosyncratic.

8 MR. TRIPP: So I -- I -- I -- I -- I
9 think it is idiosyncratic. Today it's still
10 very much the minority position in this timing
11 rule. As of 1986 we think the number was zero,
12 that exactly zero states had adopted the timing
13 rule Petitioner is -- is advocating.

14 And I -- I also just wanted to -- to
15 sort of take a step back and emphasize that,
16 you know, the reason Congress, as Taylor says,
17 Congress was focused on modern law enforcement
18 concerns, not "arcane distinctions" that have
19 little relevance to modern law enforcement
20 concerns. And it's harder to think of a better
21 description of this rule.

22 I mean, you imagine being at home
23 woken at -- at night from the sound of
24 footsteps downstairs. You come downstairs and
25 there's an intruder in your house who is

1 stealing your television or, worse, is like
2 intent on assaulting you.

3 I just don't think anybody would care
4 in that situation or -- or know whether the
5 intruder developed that intent three seconds
6 before or three seconds after breaking in.

7 The timing just doesn't matter. What
8 matters is there is an intruder in your house
9 who's bent on stealing your television or -- or
10 assaulting you.

11 I think the same -- another very
12 powerful illustration of this --

13 JUSTICE SOTOMAYOR: Do you think that
14 it's a different reaction if you hear someone
15 downstairs and they are in your pantry and you
16 come down and they are stuffing their face with
17 food, do you think you're going to have the
18 same reaction to that person than you had to
19 the person walking away with your TV?

20 MR. TRIPP: I -- I -- I -- I think --

21 JUSTICE SOTOMAYOR: Or somebody
22 walking out of your house, you see they are
23 empty-handed, except they have a coat on now.
24 They're clearly homeless. They're disheveled.
25 They're unclean.

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

3 MR. TRIPP: I -- I -- I think that
4 your reaction to those different situations --
5 different situations would be very different,
6 but it would -- it doesn't depend on the timing
7 rule. It depends on the underlying facts.

8 JUSTICE GORSUCH: I -- I guess --

9 MR. TRIPP: And I think the best
10 illustration of this --

11 JUSTICE GORSUCH: I guess, I'm -- I'm
12 sorry to interrupt, but -- again, but I -- I'm
13 stuck on a little something differently. I
14 would probably react badly to all of them
15 myself.

16 (Laughter.)

17 JUSTICE GORSUCH: But I guess I'm
18 wondering, though, those other crimes are bad,
19 too. Nobody is here to defend entering without
20 intent and then committing a crime with intent
21 later. No -- nobody thinks that's a good
22 thing.

23 But the question is whether it was
24 burglary. And burglary is a very specific
25 crime. And at common law it did require intent

1 --

2 MR. TRIPP: Right.

3 JUSTICE GORSUCH: -- upon entry. So
4 calling it some arcane thing that is nuanced to
5 a point where nobody cares is like asking us to
6 ignore a thousand years worth of law.

7 MR. TRIPP: So --

8 JUSTICE GORSUCH: And -- and -- and --
9 and also possibly a majority of the
10 jurisdictions in 1986. And so I -- I guess
11 that just -- perhaps there's a better argument
12 --

13 MR. TRIPP: So it's --

14 JUSTICE GORSUCH: -- than that it's
15 too arcane.

16 MR. TRIPP: Just -- just -- I want to
17 be clear. We agree with the rule that the
18 timing needs to be contemporaneous. You need
19 to have the intent while you are remaining,
20 right?

21 We also know that the whole point of
22 the remaining prong was to eliminate the common
23 law requirement that there be an entry, right?
24 That's the only thing it's doing in any of
25 these statutes is eliminating that requirement.

1 It was part and parcel of the states
2 getting rid of the requirement that there be a
3 break-in, that it be a dwelling, that it be at
4 night, that it be with the intent to commit a
5 felony. We also know that the states were not
6 only focusing on the sort of surreptitious
7 remaining type fact pattern because only a tiny
8 number of the states actually required that.
9 Most of them just said "remaining." And I
10 think --

11 JUSTICE KAVANAUGH: The law -- the
12 law -- to pick up on Justice Kagan's question
13 from earlier, the law had sufficiently changed
14 by 1986 that the author of the opinion in
15 Taylor knew enough to put "remaining in."

16 MR. TRIPP: Yeah. And -- and it's
17 undisputed that "remaining in" is -- is -- is
18 part of what Congress was trying to reach. And
19 I guess what I'm --

20 JUSTICE KAGAN: Right. But the
21 question, Mr. Tripp, is how the intent
22 requirement figures in that. There was no
23 question that they -- that Taylor says and --
24 and that the "remaining in" was by then a known
25 feature.

1 But just as you said, the "remaining
2 in" was really an attempt to close a loophole,
3 if you will, in the entry and say, look, we
4 have these cases that are coming up where the
5 person is not entering unlawfully, the -- the
6 person -- the person is only remaining
7 unlawfully. And so it was an attempt to close
8 that loophole.

9 But then the question that I think
10 Mr. Marwell is raising is whether the intent to
11 close that loophole suggests that there was
12 also a desire to really shift the historic
13 common law understanding of when the intent
14 needed to develop.

15 And he's suggesting, no, it was really
16 just an attempt to close the small loophole but
17 you shouldn't read into that some much larger
18 desire to -- to -- to shift the understanding
19 of intent and when it arises.

20 MR. TRIPP: So a couple different
21 responses to that. So, first of all, I think
22 this is actually not a very big shift because
23 this timing question doesn't come up very much.
24 There's still 11 states that have had
25 remaining-in burglary on the -- on the books

1 for decades. The timing question is never --
2 they don't have any case law on this.

3 And then as for what the states were
4 doing, as I was saying, we know that they were
5 adding the "remaining" prong to eliminate the
6 requirement that there be an entry, and we know
7 that they were doing more than just picking up
8 the guy who was staying behind and hiding in a
9 store after hours who could steal things inside
10 because they -- they weren't requiring that it
11 be surreptitious.

12 So then to figure out what is it that
13 they were trying to do, I think really in a
14 natural way to understand that is to just read
15 the text of their statutes. They say "remain."
16 This is just what it means to remain in a
17 place, that you remain as long as you stay.

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

22 And -- and so I think really -- and
23 then again to come back, Taylor focus --
24 focuses on -- it says, look, what the states
25 were trying to do here is focusing on modern

1 law enforcement concerns, right? And the
2 concern, of course, is that there's a
3 trespasser in your house or some other building
4 or other structure like that and that he's
5 intent on committing a crime.

6 And -- and again, I think it's really
7 important that in many of these cases, just
8 nobody would care when the intent was formed.
9 The problem is that there's the -- the
10 criminally-minded trespasser. A very powerful
11 illustration of this is the domestic violence
12 situation which we talk about in our brief,
13 which would be -- which would be burglary under
14 -- under Petitioner's rule, right?

15 If an ex-boyfriend goes to visit the
16 ex-girlfriend, she lets him in, and then they
17 start to argue. She says, look, you need to
18 get out of here. If at that moment he intends
19 to assault her, that's burglary under -- under
20 Petitioner's rule because he remains with
21 intent. But if he decides to assault her three
22 or four seconds later, it's not.

23 And just -- you know, from the
24 perspective of the victim who's being assaulted
25 in her own home by an unwelcome visitor, just

1 -- what does it matter?

2 JUSTICE BREYER: True, but we're --
3 we're trying to figure out something about the
4 crime in general. In general, is it more
5 likely to involve violence or not?

6 So we have situation 1, where he
7 intends to commit the crime inside the house
8 either when he breaks in or when he first
9 remains. Situation 2, he doesn't form the
10 intent to commit a crime until after he first
11 breaks in or first unlawfully remains. Okay?
12 Those are the two situations.

13 I would have always thought -- I guess
14 this is only the 50th time I've asked this
15 question, but I would have always thought, you
16 know, you could look up the cases on it and get
17 an idea, empirically. And -- and then we'd
18 have at least something to go on, even if they
19 were only appellate cases.

20 MR. TRIPP: Yeah.

21 JUSTICE BREYER: Has anyone ever done
22 that?

23 MR. TRIPP: I think honestly the --
24 the cases that are cited in these briefs do
25 that. And -- and they tell you, they -- they

1 paint a pretty powerful picture. I urge you to
2 read a lot of them. It's true some of them are
3 minor.

4 JUSTICE BREYER: I can only read so
5 many.

6 (Laughter.)

7 MR. TRIPP: Some of these are very
8 significant --

9 JUSTICE BREYER: Can I get help from
10 my law clerks?

11 (Laughter.)

12 MR. TRIPP: Many of these are -- yeah.
13 Many of these are very significant crimes. I
14 -- I want to be clear that the -- the situation
15 I was talking about, of somebody coming in and
16 then later seeing a woman inside he decides to
17 assault, the domestic violence situation I was
18 talking about, these are not hypotheticals.
19 These are the facts of Gratton out of Alabama,
20 of DeNoyer out of South Dakota, of Fontes out
21 of Ohio. That's -- that's the seeing a woman
22 after you break in. The domestic violence one,
23 Braddy versus -- out of Florida. You know --
24 and a lot of these are very, very serious
25 crimes.

1 And I think they illustrate that what
2 these people are engaged in is very erratic and
3 impulsive decision-making, right, that they've
4 -- they -- they already decided to break into
5 somebody's house, and then they make an
6 impulsive -- or -- or to be in a place where
7 they're not supposed to be and not leave, and
8 then they make a decision to -- to engage in
9 some other further conduct, I think in many
10 cases is really very, very serious.

11 It's true there is some that are much
12 more minor like -- like Gaines, the facts of
13 that. But, again, what makes that sympathetic
14 is not the timing; it's the -- it's a homeless
15 guy who's cold, right? And you could have that
16 same homeless guy, you know, in -- in Buffalo,
17 it's -- it's snowing, it's very, very cold,
18 he's walking down the street, he looks in a
19 window and he sees a coat, and so he -- he
20 breaks in, he grabs the coat, and he goes.

21 That's burglary under their rule, even
22 though it's just equally sympathetic. What --
23 what makes it sympathetic or not are the facts
24 of the underlying case, not the timing rule
25 that he's urging.

1 JUSTICE KAGAN: Mr. Tripp, I'm not
2 sure whether this is here nor there, but, you
3 know, some of the serious crimes that you just
4 mentioned, and they are extremely serious, if
5 you went out on the street and asked a hundred
6 people whether those assault cases are
7 burglary, you would get a hundred "no" answers.
8 Does that matter?

9 MR. TRIPP: I -- I think the -- the
10 place where that instinct is most powerful is
11 for the domestic violence situation, where I
12 agree that that is like -- feels intuitively
13 different. And I think this was really what
14 drove the drafters of the Model Penal Code and
15 -- and says -- there's some language in LaFave
16 to say you shouldn't have remaining-in
17 burglary, and if you do at all, it should be
18 surreptitious. And --- and I think really the
19 short answer is that the states didn't buy it.
20 The states just didn't do that. They didn't
21 limit it to remain -- to surreptitious
22 remaining. The majority of them adopted
23 remaining statutes. Even more of them have it
24 today.

25 And so I -- I think, basically, the

1 states have recognized that there's something
2 really much more fundamental here. It -- it's
3 not about the nature of the intrusion. It's
4 about the fact that there is an unwelcome
5 visitor, somebody in your home. It's about the
6 safety and security of a person in their own
7 home or in some other space like that, from an
8 unwelcome visitor who's bent on committing some
9 kind of crime.

10 And I -- and I think the fact that a
11 lot of these are actually -- I mean, a lot of
12 these are really very, very serious crimes,
13 when the --

14 JUSTICE BREYER: In --

15 MR. TRIPP: -- the timing question does
16 come up.

17 JUSTICE BREYER: Some of them are and
18 a certain amount of them aren't -- has the
19 Department ever thought -- you don't have to
20 answer this -- but has the Department ever
21 thought of recommending to Congress a change so
22 that instead of looking at the generic crime
23 where the answer is going to be sometimes yes,
24 sometimes no, there's violence, but saying look
25 and see whether the person on the individual

1 occasion submitted -- committed a violent act?
2 Have you ever thought of that? And if they say
3 no, we're not going to do that?

4 MR. TRIPP: I mean, I'm sure people
5 have thought of it, but to my knowledge, the --
6 the Department hasn't proposed any affirmative
7 legislation on this. I know there's
8 legislation that's pending on the Hill about
9 this, that -- that the Department is providing
10 technical assistance on. But -- but, beyond
11 that, I'm not sure I know.

12 JUSTICE KAVANAUGH: Can I --

13 MR. TRIPP: If I can --

14 JUSTICE KAVANAUGH: -- ask the same
15 question that I asked the other side, which is
16 in the universe of burglaries, do you have a
17 sense of how many are remaining in?

18 MR. TRIPP: I -- my sense is that it's
19 pretty rare, that -- that it's pretty few, that
20 in the, like, overwhelming number of burglary
21 cases, you're going to have evidence of an
22 unlawful entry and then that's just how you
23 prove it up and that becomes the whole case.

24 And I guess actually this gets out to
25 this idea that our reading of "remaining" makes

1 that prong more important than the entry prong.
2 And -- and I think really our response is that
3 it doesn't matter, right, that if you look at
4 the law of trespass, it has the same pairing of
5 "to enter" or "remain."

6 And I don't think anybody cares which
7 -- whether one of those is more important than
8 the other or whether many entry trespasses
9 bleed into remaining trespasses. They --
10 they're covering the waterfront of a trespass,
11 and I think it's the same here.

12 JUSTICE KAVANAUGH: And if you were to
13 lose this case, potentially all burglaries from
14 how many states would no longer be able to be
15 counted as --

16 MR. TRIPP: Yeah, it -- it would be 18
17 states and counting. So there's 18 states with
18 a population of 130 million today. There's
19 another 11 that have still -- haven't addressed
20 this issue. And assuming that the current
21 trends continue, probably more of them will
22 read "remain" to mean "remains."

23 JUSTICE KAGAN: May I ask you the --

24 MR. TRIPP: And then --

25 JUSTICE KAGAN: -- same question I

1 asked Mr. Marwell, which -- how many of those
2 states have other burglary statutes that you
3 could capture, can I say real burglary in?

4 MR. TRIPP: I prefer not the real
5 burglary, but, yeah. I think there is -- there
6 is -- there is a mix. I think ten of these
7 states have adopted this rule by statute, but I
8 don't know how much the different ones are --
9 are used relative to each other.

10 But you would still be tossing out an
11 enormous number of burglary prosecutions, you
12 know, including from -- from Michigan, Texas,
13 some very big states.

14 And then I think another critical
15 point, again, is that -- is that Petitioner's
16 given you no logical stopping point, right,
17 that this is -- it -- it cannot end here.

18 If you think that it gets at this
19 level of specificity, then why not all the
20 other disputes about, you know, what it
21 constitutes to be unprivileged, what exactly an
22 entry is, and on and on and on.

23 And I think what it really gets to is
24 that --

25 JUSTICE GORSUCH: Right. If the

1 intent to -- if the intent to enter isn't
2 critical, how about the act of what's done once
3 inside?

4 If -- if the mens rea isn't -- if
5 that's too minor to care about, and we're going
6 to just turn every former common law larceny
7 into a burglary, which is what you're asking us
8 to do in some ways, because a lot of the other
9 conduct would be larceny, it's not like it
10 would be unpunished at common law, why should
11 we care about the actus reas and so why does it
12 have to be taking things to be burglary?

13 Couldn't it maybe also conducting a
14 fraud while they're inside? California defines
15 burglary to be almost as expansive as that. So
16 perhaps that's -- that's equally consistent
17 with your argument logically.

18 MR. TRIPP: So it's -- it's equally
19 consistent with Petitioner's as well because it
20 covers any crime that's not covered. We -- we
21 agree that there has to be mens rea. Right?
22 You -- you have to -- to intend -- you have to
23 know that you're unlawfully inside the place
24 that you're on -- that you're trespassing.

25 And we know -- and we agree that you

1 need to have intent while you're doing that.
2 The -- the only dispute here is do you need to
3 have intent only at the initial second --

4 JUSTICE GORSUCH: I understand.

5 MR. TRIPP: Of the -- right? That's
6 just the timing.

7 JUSTICE GORSUCH: But if that's too
8 minor to care about, then why should we care
9 about these other things, too, that were also
10 part of common law burglary?

11 MR. TRIPP: I think part of the answer
12 is that's -- that remains, first of all, the
13 Taylor formulation and what the -- the
14 overwhelming majority of states are doing.
15 They are saying that you need to unlawfully
16 enter or remain in a building or structure with
17 intent to commit a crime. That's what these
18 statutes say.

19 I think if you flip through them
20 you'll see that many of them are --

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

25 MR. TRIPP: I -- I think it's not just

1 about it being minor and it's not just about
2 counting. It's that -- I think what the states
3 have recognized is that the core of this
4 offense are not these kind of questions from
5 the common law about did you break and did you
6 enter, it's is there a trespasser in your home
7 who is intent on committing a crime that -- if
8 there is, he's a burglar. Right? I think
9 that's -- that's really what the states are --
10 are boiling it down to. That's the --

11 JUSTICE GORSUCH: Any crime?

12 MR. TRIPP: -- modern offense. Any
13 crime. That's what Taylor says. He agrees
14 with that. Petitioner would agree that if the
15 person is breaking into a house, you know, at
16 night with the intent to commit stock fraud on
17 his phone, I mean, I don't know if that would
18 ever happen, but, yeah, that's burglary under
19 -- under either of the rules here.

20 And I -- I guess also just to -- to
21 try and take one step back in response to some
22 of the -- the -- the questions, right, if
23 you're going to have a categorical approach to
24 this statute that doesn't look to the facts of
25 the individual case, you -- you need to have a

1 broad definition of the category. Right?

2 Otherwise, if you have a very specific
3 laundry list, a long list of things that every
4 statute needs to match perfectly, all that
5 you're going to do is be knocking them out one
6 after another, after another, until there's
7 really nothing left and -- and I think would
8 really defeat the purpose of Congress in
9 including burglary among an ACCA predicate.

10 I guess maybe just one last point
11 here. I mean, the -- the statute here, this is
12 a home invasion statute. I think most people
13 would think that this is the heart of modern
14 burglary.

15 And -- and I -- I think if you told
16 the drafters in Congress, you know, imagine a
17 person who you think should fit within the
18 ACCA, it would be somebody with a track record
19 that looks an awful lot like Petitioner's.

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

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Marwell, four minutes remaining.

25

1 REBUTTAL ARGUMENT OF JEREMY C. MARWELL
2 ON BEHALF OF THE PETITIONER

3 MR. MARWELL: Thank you.

4 On the bad cases that the government,
5 the facts that the government alleges, there is
6 no dispute that those are crimes. The question
7 is are they burglary.

8 They may be trespass. They may be
9 assault. They may be punished separately. But
10 Congress used the word "burglary."

11 And I think the reason that we're here
12 is that there is some incongruity between the
13 government's account of generic burglary and
14 these cases that just don't feel like burglary.
15 And that's why the Fifth Circuit, the Seventh
16 Circuit, have held that Taylor is not clear on
17 its face, doesn't resolve the issue.

18 I think it's worth reminding that less
19 than a year before Taylor, the New York Court
20 of Appeals interpreted that state's
21 remaining-in statute the way we say. That
22 statute we know from Colorado and other -- and
23 other states was a model for other states' laws
24 and I think it helps explain what the Court may
25 have been getting at in Taylor.

1 The government focuses heavily on
2 trespass and the fact that "remaining" has a
3 continuous sense in that law. I think that's
4 the fundamental problem with their position is
5 that they are equating trespass and burglary.

6 And we need some line, we suggest it
7 should be drawn from the common law and state
8 practice, that distinguishes those two crimes.

9 On the concern about simplicity or a
10 slippery slope, I would suggest -- I would
11 submit that Taylor provides you an
12 administrable and workable rule. Looking to
13 what states did in 1986 is an objective
14 foundation. It's a point in time.

15 And there isn't actually that much
16 dispute between the parties about what state
17 law was. It's just a dispute about what
18 inferences or what conclusions to draw.

19 If you walk away from that approach, I
20 think you're left with the difficult questions
21 of what is and what isn't risky in -- in a
22 particular consequence.

23 And the -- the government, I think,
24 has -- has not asked you to revisit Taylor in
25 this case.

1 As to whether this issue is a big
2 deal, I think it is a big deal because the
3 government can just charge entry or remaining
4 and it essentially makes the long-standing
5 traditional rule of intent at entry disappear
6 in all but the very small number of cases that
7 the government identifies, such as a fleeting
8 entry or an interrupted entry.

9 And I -- we don't see any evidence in
10 Taylor that there was intent to make that big a
11 change.

12 If this does become a problem,
13 obviously the Department is well positioned to
14 ask Congress to fix it.

15 And if there are no further questions,
16 we would suggest that a call to simplicity
17 doesn't justify overlooking hundreds of years
18 under which the essence of burglary has been
19 somebody who trespasses for the purpose of
20 committing a crime.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 11:03 a.m., the case
24 was submitted.)

25

<p>1</p> <p>1 [1] 51:6 10:08 [1] 3:2 100 [1] 7:19 11 [3] 21:17 48:24 57:19 11:03 [1] 65:23 130 [2] 39:6 57:18 14 [1] 5:5 15 [4] 10:8,8,14 11:8 17-778 [1] 3:4 18 [8] 11:25 20:25 21:21 23:14,23 39:3 57:16,17 19 [1] 21:2 1971 [1] 7:14 1983 [1] 7:15 1984 [1] 9:9 1985 [1] 7:13 1986 [28] 4:15,20 5:8,20 8:12 9:5,23,25 10:10 11:3,14,23 12:7,13 20:21 35:4,24 37:21 38:16,19,20 40:9 42:19 43:11 46:10 47:14 49:19 64:13</p> <hr/> <p style="text-align: center;">2</p> <p>2 [1] 51:9 22 [4] 6:22 7:7 10:10 27:11 23 [4] 35:19 36:7 37:4 60:24 27 [1] 35:7 29 [11] 5:7,8 7:9 10:8 35:5,12,18 36:7,10 37:2 60:23</p> <hr/> <p style="text-align: center;">5</p> <p>50-state [2] 24:10 40:10 50th [1] 51:14 51 [1] 21:18</p> <hr/> <p style="text-align: center;">A</p> <p>a.m [2] 3:2 65:23 able [1] 57:14 about [39] 7:9 11:8 14:1,8 15:19 16:8 19:9 24:21 31:16 32:14 33:3,13 34:16,17 35:12 39:7 40:3,20 41:19 50:12 51:3 52:15,18 55:3,4,5 56:8 58:20 59:2,5,11 60:8,9 61:1,1,5 64:9,16,17</p>	<p>acca [12] 3:15 4:9 12:7 15:2 16:23 20:8 22:22 23:19 29:25 31:2 62:9,18 accept [2] 18:8,19 accepted [1] 42:19 accomplish [1] 14:22 according [1] 40:10 account [1] 63:13 accuracy [1] 19:2 acknowledge [1] 28:17 acknowledged [2] 8:23 28:23 acknowledgment [1] 4:9 acquiescing [1] 18:13 act [2] 56:1 59:2 action [1] 12:9 actually [6] 25:14 47:8 48:22 55:11 56:24 64:15 actus [1] 59:11 added [1] 13:25 adding [2] 20:18 49:5 addition [1] 23:9 addressed [1] 57:19 adherence [1] 6:24 administrable [1] 64:12 adopt [1] 11:2 adopted [13] 10:4 12:4 20:8,12 21:1,3,14 25:7 39:5 41:1 43:12 54:22 58:7 adopting [4] 9:8 21:15 23:13 38:23 advance [1] 14:20 advocating [1] 43:13 affected [1] 24:1 affirm [1] 62:21 affirmative [1] 56:6 after [9] 8:4 28:20 35:23 44:6 49:9 51:10 52:22 62:6,6 again [13] 7:21 10:9 21:7 23:16 28:15 37:17 42:6 45:12 49:23 50:6 53:13 58:15 60:23 against [1] 26:9 agree [8] 32:16 39:18,20 46:17 54:12 59:21,25 61:14 agrees [3] 26:10,13 61:13</p>	<p>ah [1] 14:13 alabama [1] 52:19 alaska [1] 7:12 alien [1] 31:16 aligning [1] 32:8 aligns [2] 10:22 15:1 alito [20] 5:17,19 6:4,6,11,15,19 7:10,25 9:19 17:10 18:1,7,16 25:21 26:20,22,25 27:4 29:18 all [16] 6:7,19,21 20:3 23:14 28:12 36:15 41:10 45:14 48:21 54:17 57:13 58:19 60:12 62:4 65:6 alleges [1] 63:5 almost [3] 35:8 37:11 59:15 already [4] 31:8,15 41:18 53:4 also [13] 7:24 8:3 31:19 40:13 43:1,14 46:9,21 47:5 48:12 59:13 60:9 61:20 although [1] 28:16 always [2] 51:13,15 amicus [1] 9:15 among [6] 24:3 33:8,12 41:9,19 62:9 amount [1] 55:18 an [42] 4:9 5:25 16:6 17:21,21,23 23:12 26:1 27:10 29:11,14,17,19 33:2,2 39:7 41:3,14 42:6,8,8 43:25 44:8 46:23 48:2,7,16 49:6 50:15,25 51:17 53:5 55:4,7 56:21 58:10,21 62:9,19 64:11,13 65:8 analysis [3] 9:6 22:17 23:22 another [7] 14:21 32:13 44:11 57:19 58:14 62:6,6 answer [6] 36:18 38:19 54:19 55:20,23 60:11 answers [2] 36:14 54:7 any [22] 6:21 7:4 12:8 14:11,14,15 16:19 19:7 21:3 24:2 31:9 34:4 39:17 40:6 41:1 46:24 49:2 56:6 59:20 61:11,12 65:9</p>	<p>anybody [4] 16:2 40:15 44:3 57:6 anyone [3] 4:4 10:6 51:21 anything [1] 17:12 appeals [2] 15:9 63:20 appellate [1] 51:19 applies [1] 7:16 apply [1] 22:10 approach [7] 19:4 30:9 38:17 40:3,7 61:23 64:19 arabie [1] 7:12 arcane [4] 42:9 43:18 46:4,15 are [67] 4:16 7:11,24 11:9 12:6 14:4 15:6,15,17 16:19 18:24,25 20:11 21:1 22:19 23:22 24:4 25:17 26:8 27:10 28:4,6,19 29:4 30:15,15 33:6 34:18 38:2,16 39:16 44:15,16,22 45:18 46:19 48:4 51:12,24 52:2,7,12,13,18,19,24 53:2,11,23 54:4,6 55:11,12,17 56:17 58:8,9 60:14,15,20 61:4,9,10 63:6,7 64:5 65:15 aren't [2] 24:1 55:18 argue [2] 30:7 50:17 argument [7] 3:4,7 29:19 30:22 46:11 59:17 63:1 arises [1] 48:19 as [51] 3:22 4:2,6,7,20,20 5:1,8,8 6:2 9:14 10:10 11:3,14 12:12 14:5 17:5,14,16 19:6,6 20:25 21:4,15 23:15,21 26:18 28:6 29:7,13,15 31:14,15 34:13 36:1 39:23 42:19,25 43:11,16 48:1 49:3,4,17,17 57:15 59:15,15,19 65:1,7 ascertaining [1] 18:20 ask [4] 40:14 56:14 57:23 65:14 asked [9] 9:20 11:12 18:5 35:22 51:14 54:5 56:15 58:1 64:24 asking [5] 35:17 40:8 46:5 59:7 62:21 asks [1] 12:2</p>
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