No. 18-6789

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IN THE SUPREME COURT OF THE UNITED STATES

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DELROY MCLEAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether an immigration judge is a "United States judge" for purposes of 18 U.S.C. 115(a)(1)(B)'s prohibition against threatening to assault, kidnap, or murder such an official with intent to impede, intimidate, or interfere with the official while engaged in the performance of official duties.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 891 F.3d 1308.

## JURISDICTION

The judgment of the court of appeals was entered on June 8, 2018. The petition for a writ of certiorari was filed on August 31, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of

threatening to assault a United States judge with intent to impede, intimidate, or interfere with the judge while engaged in the performance of official duties, in violation of 18 U.S.C. 115(a)(1)(B). Judgment 1. He was sentenced to 41 months of imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 1-5.

1. Petitioner, a Jamaican citizen, came to the United States in 1989 and was granted lawful permanent resident status. Gov't C.A. Br. 4. In 2008, petitioner was convicted in Georgia state court of second-degree criminal damage to property for smashing the windshield and passenger window of a car with a tire iron. Presentence Investigation Report (PSR) ¶ 35. Petitioner served five years in prison. Ibid. After serving his prison sentence, he was taken into immigration custody at the Stewart Detention Facility (SDC) in Lumpkin, Georgia, to await deportation. Gov't C.A. Br. 5; PSR ¶ 3.

An immigration judge, Saundra Arrington-Dempsey, determined that petitioner's conviction for second-degree criminal damage to property was an aggravated felony, which rendered him ineligible for release from immigration custody on bond. See 10/4/16 Trial Tr. (Tr.) 3, 32-33, 35-36, 50. Petitioner, however, continued to request additional bond hearings. Tr. 35-36. On June 30, 2016, SDC guards brought petitioner to Judge Arrington-Dempsey's courtroom for his third bond hearing. Tr. 34-35, 108-109. Because

petitioner was being housed in a restrictive unit, guards transported him in hand restraints and leg irons and used a wheelchair to bring him into the small courtroom at SDC. Tr. 109. At the hearing, Judge Arrington-Dempsey denied petitioner's request for bond, based on both her prior ruling that petitioner had an aggravated felony conviction and the fact that petitioner was by then under a final order of removal, which independently rendered him ineligible for release on bond. Tr. 36-37.

As the proceedings concluded, petitioner tried to get out of his chair and began screaming profanities and threats at Judge Arrington-Dempsey, who was seated about 15 to 20 feet away. Tr. 37-39. Judge Arrington-Dempsey activated the courtroom's audio recording device, which captured petitioner's tirade. Tr. 39; see Gov't Trial Ex. 1 (audio recording). Petitioner threatened to "fuck [her] up," "bash [her] fucking head in," and "kill [her] if he could ever find [her]." Tr. 39, 123. He also threatened "to have his father and family come in from Jamaica to kill" her. Tr. 39. Judge Arrington-Dempsey "began to shake" in fear when petitioner repeatedly threatened to kill her. Tr. 39-40. After the hearing, Judge Arrington-Dempsey and the court security officers contacted the local police. Tr. 41-42.

Later that day, petitioner saw an SDC nurse and continued to threaten harm to Judge Arrington-Dempsey and her family. Tr. 141-143. Petitioner told the nurse "something like, 'I bet by 3:00'

* * * 'I'll have [the judge's] husband's address, I'll find out who her husband is, and I'm going to send him a letter and let him know that if you wish to see your wife you better tell her to learn to respect me.'" Tr. 143.

2. A grand jury in the Middle District of Georgia returned an indictment charging petitioner with "threaten[ing] to assault Judge Sandra Arrington-Dempsey, an Immigration Judge at [SDC] in Lumpkin, Georgia, with the intent to impede, intimidate, and interfere with Judge Arrington-Dempsey while she was engaged in the performance of her official duties," in violation of 18 U.S.C. 115(a)(1). Indictment 1. Petitioner proceeded to trial and, at the close of trial, he moved for judgment of acquittal on the grounds that Judge Arrington-Dempsey was not an Article III judge and therefore was not a "United States judge" for purposes of Section 115(a)(1)(B). See Gov't C.A. Br. 11. The court denied the motion, and the jury convicted petitioner. Ibid.; Pet. App. 3. The district court sentenced petitioner to 41 months of imprisonment and no term of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1-5. As relevant here, the court rejected petitioner's argument -- which "present[ed] an issue of first impression for [the court] (and, as far as [it could] tell, for the country)," id. at 3 -- that his threats against Judge Arrington-Dempsey fell outside the prohibition in 18 U.S.C. 115(a)(1)(B) against threatening to

assault a "United States judge" because she was an immigration judge. Id. at 3-4.

The court of appeals first explained that petitioner's proposed limitation to Article III judges was inconsistent with the definition of "United States Judge" in Section 115(c)(3). Pet. App. 3. Under that definition, "'United States judge' means any judicial officer of the United States, and includes a justice of the Supreme Court and a United States magistrate judge." Ibid. (quoting 18 U.S.C. 115(c)(3)). The court noted that a United States magistrate judge is an "Article I federal judge," so the definition makes clear that "the terms 'United States judge' and 'judicial officer of the United States' are not limited to federal judges with life tenure (i.e., Article III judges)." Ibid.

The court of appeals also rejected petitioner's argument that Judge Arrington-Dempsey did not qualify as a "United States judge" for purposes of Section 115(a)(1)(B) because she was appointed to office and supervised by the Attorney General. Pet. App. 3. The court noted that Black's Law Dictionary defines the term "judicial officer" to include a "hearing officer." Id. at 4 (quoting Black's Law Dictionary 1257 (10th ed. 2014)). The court also noted that the statutory definition's use of the word "includes" indicates that the specific examples of judicial officers in the definition -- a Justice of this Court and a magistrate judge -- are not exhaustive. Ibid. The court also observed that immigration judges

"hear[] evidence and arguments, make[] findings of fact, issue[] rulings on matters of law, and render[] decisions which are appealable." Ibid. Finally, the court noted that other courts of appeals "have characterized an immigration judge as a judicial officer" for various other purposes. Ibid. (citing examples).

ARGUMENT

Petitioner lists 12 questions presented (Pet. 1-2)[1] but the only one developed in the petition (Pet. 10) is whether an immigration judge is a "United States judge" for purposes of 18 U.S.C. 115(a)(1)(B). That question does not warrant this Court's review. The court of appeals correctly determined that an immigration judge qualifies as a "United States judge" for the limited purposes of Section 115(a)(1)(B), that determination does not conflict with any decision of this Court or any other court of appeals, and it has no practical significance in this case or any other. Accordingly, the petition should be denied.

1. a. Section 115(a)(1)(B) prohibits "threaten[ing] to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under" Section 1114 of Title 18, if the threats are made "with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer

[1] The petition is not paginated. This brief treats the first page after the cover page as page 1.

while engaged in the performance of official duties." 18 U.S.C. 115(a)(1)(B). The statute defines "United States judge" as follows: "As used in this section, the term * * * 'United States judges' means any judicial officer of the United States, and includes a justice of the Supreme Court and a United States magistrate judge." 18 U.S.C. 115(c)(3).

The court of appeals correctly determined that, in this context, the term "judicial officer" is broad enough to include immigration judges, who are executive officials that perform adjudicative functions. Pet. App. 5 (quoting 18 U.S.C. 115(c)(3)). In particular, immigration judges are attorneys appointed by the Attorney General to serve as "administrative judge[s] within the Executive Office for Immigration Review" in the Department of Justice. 8 U.S.C. 1101(b)(4). Immigration judges preside over hearings in which they are authorized to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses," to "issue subpoenas for the attendance of witnesses and presentation of evidence," and "to sanction" litigants for "contempt." 8 U.S.C. 1229a(b)(1); see 8 C.F.R. 1003.10(b). At the conclusion of such hearings, immigration judges make findings of fact and conclusions of law, see, e.g., 8 U.S.C. 1229a(c)(1)(A), and their decisions can be reviewed on appeal, see, e.g., 8 U.S.C. 1252(a)(1); 8 C.F.R. 1003.1(b). Immigration judges thus function as "hearing officer[s]" for immigration

proceedings. Pet. App. 4 (quoting the definition of "judicial officer" in Black's Law Dictionary, supra).

As the court of appeals also correctly observed, the text of Section 115(c)(3) indicates that the term "judicial officer" should not be limited to Article III judges in this particular context. Pet. App. 4. The court explained that Section 115(c)(3)'s use of the word "includes" to identify two examples of a "judicial officer" demonstrates that the list of examples is "not exhaustive." Pet. App. 4 (citing Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941)). One of those examples, "a United States magistrate judge," 18 U.S.C. 115(c)(3), is not an Article III judge. See 28 U.S.C. 631 et seq. (appointment and powers of magistrate judges). The definition also states that the term "'United States judge'" includes "any judicial officer," 18 U.S.C. 115(c)(3) (emphasis added), and "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" Ali v. Federal Bureau of Prisons, 552 U.S. 214, 219 (2008) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)). The term "any judicial officer" as used in this particular context is therefore broad enough to include executive officials who perform adjudicative functions, such as immigration judges.

Finally, the court of appeals correctly observed that numerous judicial decisions refer to immigration judges as

judicial officers. Pet. App. 4; see, e.g., Samirah v. Holder, 627 F.3d 652, 658 (7th Cir. 2010) ("[A]n immigration judge is a judicial officer[.]"); Jorgji v. Mukasey, 514 F.3d 53, 59 (1st Cir. 2008) ("An immigration judge, like all judicial officers, possesses broad but not unfettered discretion over the conduct of evidentiary proceedings."); Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006) ("[A]s a judicial officer, an immigration judge has a responsibility to function as a neutral, impartial arbiter and must be careful to refrain from assuming the role of advocate for either party."); Wang v. Attorney Gen., 423 F.3d 260, 261 (3d Cir. 2005) ("We have stressed previously that as judicial officers, immigration judges have a responsibility to function as neutral and impartial arbiters.") (brackets, citation, and internal quotation marks omitted); cf. Reno v. Flores, 507 U.S. 292, 308 (1993) (describing an immigration judge as a "quasi-judicial officer").[2]

b. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Indeed,

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[2] Petitioner also suggests that Section 115 "protect[s] members of the official['s] family and not the official" herself. Pet. 1 (capitalization omitted). That contention, however, conflates Section 115(a)(1)(A), which protects an official's family, and Section 115(a)(1)(B), which protects the official herself. Petitioner was charged and convicted of violating Section 115(a)(1)(B) based on his threats against Judge Arrington-Dempsey, not her family. Indictment 1. And in any event, the evidence at trial showed that petitioner also threatened Judge Arrington-Dempsey's husband. See Gov't C.A. Br. 7.

the court itself observed that the decision "presents an issue of first impression for us (and, as far as we can tell, for the country)." Pet. App. 3.

Petitioner errs in suggesting (Pet. 10) that the decision below conflicts with the Ninth Circuit's decision in Lopez-Telles v. INS, 564 F.2d 1302 (1977) (per curiam). In that case, the Ninth Circuit affirmed an immigration judge's determination that the judge lacked the authority to "terminate deportation proceedings for 'humanitarian reasons.'" Id. at 1303. The court explained that the relevant statutes and regulations did not confer on immigration judges a freestanding power to terminate proceedings for humanitarian reasons, see id. at 1304, and that immigration judges could not, as the alien argued, exercise "the 'inherent' powers of the [federal] judiciary," ibid.

The Ninth Circuit's decision Lopez-Telles did not address the terms "United States judge" or "judicial officer" as used in 18 U.S.C. 115(a)(1)(B) and (c)(3). Indeed, Lopez-Telles predates the 1984 enactment of 18 U.S.C. 115. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1008(a), 98 Stat. 2140. Nor does the Ninth Circuit's observation that immigration judges are "distinct" from "those judges ordinarily deemed the federal judiciary," Lopez-Telles, 564 F.2d at 1304, suggest that the Ninth Circuit would reach a different result in a future case involving Section 115 than the result the Eleventh

Circuit reached in this case. By using the phrase "any judicial officer" and the example of a magistrate judge, Congress clearly indicated in Section 115(c)(3) that it intended the statute to sweep beyond Article III judges.

c. In any event, certiorari is unwarranted for the further reason that the question whether an immigration judge qualifies as a "United States judge" for purposes of Section 115 is of no practical significance. Even if an immigration judge is not a "United States judge," threats against an immigration judge would be independently encompassed by other language in the statute. In particular, Section 115(a)(1)(B) prohibits threatening "an official whose killing would be a crime under" section 1114 of title 18. 18 U.S.C. 115(a)(1)(B). Section 1114, in turn, prohibits killing "any officer or employee of the United States * * * while such officer or employee is engaged in or on account of the performance of official duties." 18 U.S.C. 1114. An immigration judge is plainly an "officer or employee of the United States," and petitioner threatened Judge Arrington-Dempsey while she was engaged in the performance of her official duties. See Gov't C.A. Br. 26-28 (arguing, in the alternative, that Judge Arrington-Dempsey is an "official whose killing would be a crime under section 1114") (citation omitted); see also United States v. Bankoff, 613 F.3d 358, 369 (3d Cir.) ("Congress used 'official' in § 115 as a general term to incorporate by reference all the

'officers,' 'employees,' 'members,' and 'agents' of the federal departments and agencies listed in § 1114."), cert. denied, 562 U.S. 1086 (2010). And the jury in this case was instructed to determine whether the defendant threatened "a judge or official." D. Ct. Doc. 47, at 6 (Oct. 5, 2016) (emphasis added).

2. Petitioner lists numerous other questions presented (Pet. 1-2) that do not concern 18 U.S.C. 115. Petitioner does not develop any of those questions in the petition, and they were neither pressed nor passed on below.[3] This Court's usual practice is to "refrain from addressing issues not raised in the [c]ourt of [a]ppeals," EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986) (per curiam), and petitioner identifies no reason to depart from that practice here. See United States v. Williams, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'") (citation omitted).

[3] Petitioner identifies one challenge to the district court's calculation of his advisory Sentencing Guidelines range. Pet. 2 (question 12). Although petitioner objected to some aspects of his Guidelines calculation in the lower courts, see Sentencing Tr. 47-48; Pet. C.A. Br. 31-47, he did not raise his current objection to the six-level enhancement under Section 3A1.2(a) and (b) of the Guidelines, which applies when the victim is a government officer or employee and the conviction was motivated by the officer's status.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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