No. ___

IN THE

Supreme Court of the United States

STEPHEN GUSTUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. §111 criminalizes "assaulting, resisting, or impeding certain officers or employees" of the federal government. As Judge Kelly explained below (and several other courts of appeals have noted) there is a recognized disagreement among the federal circuits over whether this is a specific-intent or general-intent offense. The distinction matters because—among other things—defendants charged with specific-intent crimes may offer a defense at trial based on diminished capacity (like mental defect or intoxication) while defendants charged with general-intent crimes may not. Petitioner here was accused of "assaulting, impeding, or interfering with" a postal service employee and precluded from offering any diminished-capacity defense on the sole ground that §111 is a general-intent crime. The question presented is:

Whether 18 U.S.C. §111 is a specific-intent or general-intent offense.

RELATED PROCEEDINGS

Proceedings directly on review:

United States v. Gustus, No. 18-2303
(8th Cir. June 14, 2019)

United States v. Gustus, No. 4:17-cr-00006-BRW-1
(E.D. Ark. June 12, 2018)

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INTRODUCTION

This petition presents a straightforward case for certiorari review. The Eighth Circuit held below that 18 U.S.C. §111 (2018) is a general-intent offense, and for that reason alone precluded petitioner Stephen Gustus from offering any defense at his trial based on his diminished mental capacity and intoxication at the time of his alleged crime. As Judge Kelly's concurrence explained, this decision resolved the Eighth Circuit's position in a deep circuit split—one that the United States has acknowledged and that has been identified by other courts of appeals as well.

As explained below, the disagreement among the circuits on this issue arises from confusion over the meaning of one of this Court's decisions, and this Court should take this opportunity to resolve that confusion. The issue is important: Among other things, the rule endorsed below and adopted by six other circuits transforms a wide variety of state-law misdemeanors—and even potentially innocent acts—into serious federal felonies. This Court should accordingly grant review to resolve the disagreement and correct a misinterpretation of its precedent that precludes legitimate defenses and makes a crime out of conduct Congress almost certainly did not intend to reach.

PETITION FOR CERTIORARI

Petitioner Stephen Gustus respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a) is published at 926 F.3d 1037. The opinion of the District

Court for the Eastern District of Arkansas is unpublished. *See* Order Granting Government's Mot. in Lim., Dist. Ct. Doc. 39 (Apr. 16, 2018); Judgment, Dist. Ct. Doc. 51 (June 12, 2018).

JURISDICTION

The court of appeals' judgment was entered June 14, 2019. The defendant's petition for rehearing en banc was denied September 9, 2019 (Pet. App. 17a). On November 25, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including January 7, 2020. On December 30, 2019, Justice Gorsuch further extended the time to January 27, 2020. No. 19A588. This Court has jurisdiction under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 111(a)(1) provides, in relevant part:

Assaulting, resisting, or impeding certain officers or employees

(a) In General.—Whoever—

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; … shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

STATEMENT OF THE CASE

I. Legal Background

1. Criminal prohibitions may be categorized as requiring the prosecution to prove either specific or general intent. "General intent is only the intention to make the bodily movement that constitutes the act that the crime requires." 21 Am. Juris. 2d *Criminal Law* §113 (2019). Thus, to satisfy a general-intent standard, "all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing." *Id.* In contrast, specific intent "describe[s] a state of mind that exists where circumstances indicate that an offender actively desired certain criminal consequences, or objectively desired a specific result to follow his act." *Id.* at §114. Accordingly, to satisfy a specific-intent standard, the government must "prove that the defendant intended to commit some further act, or intended some additional consequence, or intended to achieve some additional purpose beyond the prohibited conduct itself." *Id.* As a shorthand, general intent may be thought of as intending the underlying *action*, while specific intent may be thought of as intending a particular *result*.

As an example, consider the offense of battery, described by a hypothetical state law as "harmful or offensive touching." If the state considers a battery provision so drafted to be a general-intent crime, then intent to touch suffices: So long as harm or offense results, it does not matter whether the defendant intended any such harm or offense. On the other hand, if a state interprets such a battery provision to be a specific-intent crime, the prosecution must prove that the defendant intended not only to touch the victim, but also to cause the specific result of harm or offense.

If any element of a crime requires specific intent, then the offense as a whole can be described as a specific-intent offense. For example, if (as petitioner argues) §111 requires the specific intent to "assault" or "interfere" with someone, then it is a specific-intent crime as a whole, whether or not it requires specific intent for every element—like the intent to interfere with a *federal officer* as such. That is important in part because defendants can only present defenses related to their mental states, like diminished capacity or intoxication, when they are accused of specific-intent crimes. Petitioner here, for example, sought to defend himself against the charge of assaulting, impeding, or interfering with a mailman on the ground that he could not form the requisite criminal intent because of his serious mental instability and intoxication at the time. And, accordingly, the district court precluded that defense (and the Eighth Circuit affirmed) based *solely* on its categorization of §111 as a general-intent offense.

2. Section 111—entitled "Assaulting, resisting, or impeding certain officers or employees"—was created in 1948 as a combination of two preexisting obstruction of justice statutes. In its current form, it prescribes federal felony-level penalties for anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with [federal officers or employees] while engaged in or on account of the performance of official duties." 18 U.S.C. §111(a)(1) (2018).

In 1975, in *United States v. Feola*, 420 U.S. 671 (1975), this Court considered "whether knowledge that the intended victim is a federal officer is a requisite for the crime of conspiracy, under 18 U.S.C. §371, to commit an offense violative of 18 U.S.C. §111." *Feola*, 420

U.S. at 672–73. As this quote indicates, *Feola* was principally a case about the intent requirement for an alleged *conspiracy* to violate §111, rather than the requirements for the substantive offense under §111 itself. *See id.* at 696–97 (Stewart, J., dissenting) (noting that requirements for §111 were not briefed in *Feola*). But, relying almost exclusively on executive-branch materials from the Congressional Record, *Feola* nonetheless concluded that, in order to violate §111, a defendant need not know that their victim is a federal officer. *Id.* at 682–84 (describing a letter from Attorney General Cummings calling for legislation to create a federal forum for adjudicating "attacks on federal officers"). Instead, this Court regarded the federal-officer element of §111 as a purely jurisdictional requirement—necessary to make the offense appropriate for a federal-court trial, but not a part of what made the defendant's conduct wrongful in the first place.[1] Accordingly, *Feola* held that a drug dealer who intended to assault his buyer could be held liable for violating §111 when the buyer turned out to be an undercover federal agent. *Id.* at 684–85.

Importantly, *Feola* stressed that, in holding that the federal-officer element was "jurisdictional only," *id.* at 676–77, 676 n.9, it was not creating any "risk of unfairness to defendants" because the offense would

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[1] Based on the Cummings letter, the *Feola* Court concluded that §111's purpose was to shift adjudications of offenses against federal officers from state courts to federal courts, in part based on then-prevailing distrust of the state courts. *Id.* at 682–83. Given Congress's intent to bring all cases involving federal officers into federal court based on doubts about the *subsequent* conduct of the state tribunal, it made little sense to condition jurisdiction on the perpetrator's *prior* knowledge of the victim's status.

still reach only those who "know[] from the very outset that [their] planned course of conduct is wrongful," *id.* at 685. That was so because "the conduct proscribed by the substantive offense, here assault, is not of the type outlawed without regard to the *intent of the actor to accomplish the result that is made criminal*." *Id.* at 692 (emphasis added). This can only be a description of assault itself as a specific-intent offense: It refers explicitly to the "intent of the actor to *accomplish the result* that is made criminal" rather than the mere, general intent "to perform an act even though the actor does not desire the consequences that result," *Black's Law Dictionary* 931 (10th ed. 2014); *see also supra* p.3 (explaining act/result articulation of general/specific-intent divide).

3. In the wake of *Feola*, the courts of appeals encountered cases in which the issue was the type of intent required not for the jurisdictional federal-officer element, but for the substantive offense described by the provision as a whole. Before the case at issue here, six circuits resolved similar cases by extending *Feola*'s approach to the jurisdictional, federal-officer element to the substantive elements as well. Conversely, three circuits described §111 as a specific-intent offense. *See, e.g.*, *United States v. Kimes*, 246 F.3d 800, 808 (6th Cir. 2001) (outlining circuit disagreement). Below, the Eighth Circuit joined the majority view and definitively held that §111 is a general-intent offense.

II. Procedural History

Petitioner Stephen Gustus suffers from mental stability issues and has a history of substance abuse. Indeed, after the offense at issue here, he was initially deemed incompetent to stand trial based on a "mental

disease or defect rendering him unable to properly assist in his defense." Evaluation of Competence to Proceed, Dist. Ct. Doc. 11, at 18. The report detailed petitioner's long and substantial history of drug abuse and the effects of his "severe mental illness." *Id.* at 17. The evaluation further indicated that petitioner had been previously hospitalized for mental health issues and recommended re-hospitalizing him to address his "pattern of instability." *Id.* at 18.

These mental-health problems contributed directly to the incident at issue here. On December 21, 2016, petitioner, while severely intoxicated and wearing only a bed comforter, for some reason tried to seize a United States Postal Service truck. Pet. App. 3a. In attempting to jump into the truck, petitioner bungled into Postal Service employee Julio Gonzalez from behind. *Id.* At that point, Gonzalez physically engaged petitioner, throwing three or four punches at him before slipping and falling himself. *Id.* As Gonzalez fell, he grabbed hold of petitioner's bed comforter. *Id.* Petitioner then jumped out of the truck, kicked Gonzalez's arm away from the comforter, and fled the scene. *Id.* Gonzalez called the police, who located petitioner shortly thereafter. *Id.* Upon being confronted by a police officer, petitioner was unresponsive and simply stared up at the sky. *Id.* at 3a–4a.

Petitioner was ultimately charged under 18 U.S.C. §111 for "voluntarily and intentionally forcibly assault[ing], imped[ing] and interfer[ing] with an employee of the United States while the employee was engaged in and on account of the performance of official duties." Pet. App. 4a. Petitioner pleaded not guilty and planned to assert a defense at trial based on his mental state and voluntary intoxication at the time.

Id. That intoxication was not seriously disputed: The government's own presentence report showed that petitioner exhibited several obvious signs, including smelling of intoxicants, having blood-shot eyes, using slurred speech, and walking unstably. *Id.* at 4a n.2. The report also stated that petitioner reported drinking alcohol and tested positive for amphetamines, methamphetamines, and marijuana. *Id.*

In a pretrial motion *in limine*, the government sought to exclude petitioner's proffered jury instruction on voluntary intoxication, arguing that binding circuit precedent in *United States v. Hanson*, 618 F.2d 1261, 1265 (8th Cir. 1980), foreclosed the possibility of an intoxication defense by holding that §111 assaults are general-intent offenses. Pet. App. 4a. The district court agreed and prohibited petitioner from asserting any such defense. *Id.* at 4a–5a. Petitioner specifically objected on the ground that presentation of "evidence of intoxication or other specific mental state as it related to his specific intent to commit that crime … would be essential to his defense." Trial Tr. vol. 1, Dist. Ct. Doc. 57, at 4. But the district court overruled this objection, and not only refused to give petitioner's instruction, but affirmatively precluded petitioner from presenting any evidence tending to negate specific intent at trial. *Id.* Following a two-day proceeding, petitioner was then convicted of his first felony, and sentenced to time served and two years of supervised release. Pet. App. 5a.

On appeal to the Eighth Circuit, petitioner asserted that he should have been able to bring an intoxication defense or other defense based on his mental state because, properly read, §111 requires specific in-

tent. *Id.* at 6a. The court of appeals noted that it appeared to have conflicting precedents on this question: *Hanson* had held that §111 requires only general intent, *see* 618 F.2d at 1261, while *United States v. Manelli*, 667 F.2d 695, 696 (8th Cir. 1981), had later required specific intent for a §111 conviction. The court reconciled these precedents by asserting that *Hanson* controlled solely because it was the earlier decision. Pet. App. 7a–8a. Accordingly, the Eighth Circuit held that §111 is a general-intent provision, and affirmed because petitioner was correctly barred from asserting any defense based on his mental state or diminished capacity at trial. *Id.* at 8a.

Writing separately in concurrence, Judge Kelly noted the existence of conflicting precedent among the courts of appeals and underscored the need for further consideration of the intent standard of §111. She explained that this Court's decision in *Feola* generated significant confusion among the circuits, resulting in divergent holdings on the precise question presented here. Pet. App. 11a (Kelly, J., concurring). Citing the *Feola* Court's assertion that "[a]ll the statute requires is an intent to assault, not an intent to assault a federal officer," Judge Kelly explained that, in her view, this Court had at least left open the question of whether §111 required specific or general intent. *Id.* (citing *Feola*, 420 U.S. at 684). And after outlining the "compelling arguments" for both interpretations, Judge Kelly explained that this disagreement could be resolved only through further review. *Id.* at 12a–13a.

Petitioner sought rehearing *en banc*. The court of appeals ordered a response, and the government then argued against rehearing en banc in part because "the *majority* of circuits have determined that Section 111

is a general intent crime." Gov't C.A. Opp. to Pet. for Reh'g 7 (emphasis added). The Eighth Circuit denied rehearing on September 9, 2019, with Judge Kelly dissenting. Pet. App. 17a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are Divided Seven-To-Three On The Question Presented.

Seven circuits treat §111 as a general-intent offense,[2] while three circuits hold the opposite.[3] Judge Kelly recognized the existence of this disagreement in her opinion below. Pet. App. 12a (Kelly, J., concurring) ("[O]ther circuits also appear divided on whether §111 is a specific-intent or general-intent offense."). Meanwhile, several other courts of appeals have themselves noted that there is a split among the circuits on this precise issue. *See, e.g.*, *United States v. Kimes*, 246 F.3d 800, 808 (6th Cir. 2001) ("Four of our sister circuits … have held that the statute creates a general intent crime …. Three other circuits … seem to have reached the opposite result."); *United States v. Jim*, 865 F.2d 211, 213 (9th Cir. 1989) ("Circuits that have

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[2] *See, e.g.*, Pet. App. 7a–8a; *United States v. Brown*, 592 F. App'x 164, 166 (4th Cir. 2014) (per curiam); *United States v. Ettinger*, 344 F.3d 1149, 1160 (11th Cir. 2003); *United States v. Kimes*, 246 F.3d 800, 809 (6th Cir. 2001); *United States v. Kleinbart*, 27 F.3d 586, 592 (D.C. Cir. 1994); *United States v. Ricketts*, 146 F.3d 492, 497 (7th Cir. 1998); *United States v. Jim*, 865 F.2d 211, 215 (9th Cir. 1989).

[3] *See, e.g.*, *United States v. Simmonds*, 931 F.2d 685, 687 (10th Cir. 1991); *United States v. Taylor*, 680 F.2d 378, 381 (5th Cir. 1982); *United States v. Flood*, 586 F.2d 391, 392 (5th Cir. 1978); *United States v. Caruana*, 652 F.2d 220, 221–23 (1st Cir. 1981).

considered the issue whether §111 is a specific or general intent offense differ in their interpretation of the [*Feola*] Court's 'intent to assault' and 'criminal intent' language."). As these decisions well indicate, the courts of appeals are aware of the diverging readings of this Court's precedents with respect to this issue, and there appears to be no prospect that consensus will be reached.

Furthermore, while the government has criticized the reasoning and the depth of analysis among the circuits on the minority side, it has also expressly acknowledged the disagreement at least twice in this case alone. *See, e.g.*, Gov't C.A. Opp. to Pet. for Reh'g 6–8; Gov't C.A. Br. 18–19. Indeed, the government's merits brief in this appeal asked the Eighth Circuit to adopt the "majority" view without any criticism of the minority reasoning at all. *See* Gov't C.A. Br. 18–19 ("Of the circuits to have considered whether Section 111 criminal assault is a general intent crime, the vast majority hold that it is.").

The split among the circuits is described in greater detail below. But the persistence of this recognized disagreement is itself a reason to grant review. The courts of appeals appear to be aware that the guidance necessary to resolve their conflicting readings of this statute (and this Court's precedent in *Feola*) can come only from this Court. That situation itself recommends strongly in favor of this Court's plenary review.

1. The Sixth Circuit exemplifies the majority position, squarely holding that §111 requires only general intent. *See Kimes*, 246 F.3d at 809. Among other things, the Sixth Circuit relied for this view on the fact that Congress did not explicitly include a specific-in-

tent requirement in §111 as it had done in other assault statutes. *Id.* The court of appeals also concluded that categorizing the statute as such would better advance the congressional objectives of §111 as established by *Feola*: namely, protecting federal officers and their functions. *Id.* The court thus held that, to obtain a conviction under §111, the government need not prove any specific intent—a holding that it understood as eliminating any requirement of a "bad purpose." *Id.* at 807. That meant in turn that any defense based on mental state or diminished capacity (there, PTSD) was necessarily precluded. *Id.* at 809. And again, in reaching this decision, the Sixth Circuit explicitly noted and rejected the contrary view of some of its sister circuits. *Id.* at 808.

Notably, Judge Merritt dissented in *Kimes*, setting forth a persuasive defense of the minority view. He stressed that, at common law, assault required a bad intent—"more consciousness of wrongdoing than simply an intent to do an act." *Id.* at 811 (Merritt, J., dissenting). Accordingly, he worried that departing from the common-law view and describing §111 as a general-intent offense would tend to convert it into "a mindless strict liability crime contrary to its common law origin and the enlightened policy respecting *mens rea* followed in federal law during most of the last two centuries." *Id.* He thus "agree[d] with those Circuits which have reached the opposite result from our Court in this case," citing the same courts as the majority as having correctly adopted the specific-intent rule. *Id.*

Six other circuits have reached the same conclusion as the majority in *Kimes* and held that §111 is only a general-intent offense. Pet. App. 7a–8a; *United States v. Brown*, 592 F. App'x 164, 166 (4th Cir. 2014)

(per curiam); *United States v. Ettinger*, 344 F.3d 1149, 1160 (11th Cir. 2003); *United States v. Kleinbart*, 27 F.3d 586, 592 (D.C. Cir. 1994); *United States v. Ricketts*, 146 F.3d 492, 497 (7th Cir. 1998); *Jim*, 865 F.2d at 215.

The analysis and conclusion in each case is quite similar, as each tends to rely squarely on either passages from *Feola* removed from context and/or *Feola*'s purposivist, legislative-history driven approach. *See Ettinger*, 344 F.3d at 1154–55 (holding that §111 as a whole is a general-intent provision based on *Feola*'s phrasing that §111 requires "an intent to assault, not an intent to assault a federal officer"); *Kleinbart*, 27 F.3d at 592 (finding "conclusive" *Feola*'s language that "an actor must entertain *merely* the criminal intent to do the acts therein specified"). Notably, the Ninth Circuit's discussion in *Jim* suggests that, although the panel there believed that the *minority* has the better view of the statutory text, it nonetheless felt compelled by *Feola*'s analysis of the statutory purpose to adopt the contrary result. *See Jim*, 865 F.2d at 213–14 (holding that §111's purposes identified in *Feola* were best served by a general-intent reading despite concluding that "[w]ithout a congressional purpose analysis, §111 appears to be a specific intent crime").

2. The Tenth Circuit illustrates the opposing view in defining §111 as a specific-intent offense. In *United States v. Simmonds*, 931 F.2d 685 (10th Cir. 1991), that court considered a mental state defense to a §111 charge, and cited with approval to the district court's use of a "standard specific intent instruction" for §111. *Id.* at 689. Since then, the Tenth Circuit has adhered to its view that §111 requires specific intent, and its

model jury instruction for §111 thus requires an "intentional attempt or threat to inflict injury" on the victim. Tenth Circuit Criminal Pattern Jury Instruction §2.09, Assaulting a Federal Officer, 18 U.S.C. §111 (2018). As explained below, this is the precise intent requirement that made assault a specific-intent crime at common law. *See infra* pp.23-25.

Notably, the Tenth Circuit also recently solidified and further explained its view that assault of a federal officer requires specific intent in *United States v. Gonzales*, 931 F.3d 1219 (10th Cir. 2019). *Gonzales* interpreted a sentencing guideline that uses quite similar language to §111 to prescribe an enhanced penalty for anyone who assaults a federal officer.[4] And, reading that guideline "in the same manner as statutes," *id.* at 1221, the Tenth Circuit there held that this assault enhancement applied only if the government could prove that the defendant had the specific intent to harm or instill fear in the alleged victim. *Id.* at 1221–24. The Tenth Circuit relied heavily on the common-law conception of assault as requiring one of two specific-intent offenses: either the attempt to commit a battery, or the intentional infliction of a reasonable fear of injury. *Id.* at 1221. And because the district court in that case had "erroneously disregarded [the defendant's] subjective intent" in imposing the assault-of-a-

[4] This guideline provides for enhanced penalties "[i]f, in a manner creating a substantial risk of serious bodily injury, the defendant … knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom[.]" U.S. Sentencing Guidelines Manual §3A1.2(c) (U.S. Sentencing Comm'n 2018).

federal-officer enhancement, the court vacated the defendant's sentence, and remanded to the trial court. *Id.* at 1224.

The unambiguous holding for the defendant in *Gonzales*, combined with the parallel language of the Tenth Circuit's pattern jury instruction, confirms that petitioner here would have been entitled to put on his diminished-capacity defense had his encounter with a mailman occurred in Kansas rather than Arkansas. And that is because (and only because) the Tenth Circuit regards §111 as a specific-intent offense, while the Eighth Circuit holds that it requires only general intent for a conviction.

The Fifth Circuit similarly holds that §111 is a specific-intent offense. In *United States v. Flood*, 586 F.2d 391 (5th Cir. 1978), the court, recognizing that "by definition intent is an essential element of assault," held that an indictment correctly "set[] forth a charge of specific intent" for §111. *Id.* at 392. Indeed, the court noted that "a charge of 'intentional assault' would obviously be redundant." *Id.* The Fifth Circuit addressed §111's intent standard again in *United States v. Taylor*, 680 F.2d 378 (5th Cir. 1982), where the defendant was convicted of striking his supervisor at the U.S. Postal Service. *Id.* at 379. There, the trial court allowed Taylor to assert a defense that he could not have formed the requisite intent because he acted "on impulse, without any real intent" to hurt the victim, *id.* at 380 n.2—a defense the circuit again appeared to endorse, *see id.* at 381.[5] And, just like the

[5] Although *Taylor*'s endorsement of the specific-intent requirement is perhaps more implicit than *Flood*'s, both Judge Kelly and the other circuits who have discussed the division among the circuits have cited *Taylor* as plain evidence that the

Tenth Circuit, the Fifth Circuit has since incorporated its view that §111 is a specific-intent offense directly into its model jury instruction for §111, which requires an identical showing of an "intentional attempt or threat to inflict injury" for an assault conviction. Fifth Circuit Pattern Jury Instruction §2.07, Assaulting a Federal Officer, 18 U.S.C. §111 (2016).

Finally, the First Circuit joins the Tenth and Fifth Circuits in characterizing §111 as a specific-intent crime, and so is consistently placed on the specific-intent side of the divide by the on-point court of appeals opinions. In *United States v. Caruana*, 652 F.2d 220 (1st Cir. 1981), the court upheld the defendant's §111 conviction for intimidating federal officers after an exhaustive analysis showing that he possessed the requisite specific intent for the offense. *Id.* at 221–23. To be sure, the First Circuit's opinion does not explicitly hold that this specific intent is *required* for a §111 conviction—the court does not squarely state that a defendant cannot be convicted absent such a showing. But almost every word of this opinion would have been unnecessary in a circuit regarding §111 as a general-intent offense, demonstrating that this case has been correctly categorized by numerous authorities as one requiring specific intent for a §111 conviction. *See, e.g.*, Pet. App. 12a n.5 (Kelly, J., concurring); *Jim*, 865 F.2d at 213 n.3; *Kimes*, 246 F.3d at 808, 811.

3. As the foregoing demonstrates, there is a meaningful disagreement among the courts of appeals on the question presented that appropriately calls for this

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Fifth Circuit is on the specific-intent side of the split. *See* Pet. App. 12a n.5 (Kelly, J., concurring); *Jim*, 865 F.2d at 213 n.3; *Kimes*, 246 F.3d at 808.

Court's plenary review. As an initial matter, what is at issue here is a rule of criminal law that will dispositively bar in one circuit a defense that could likely lead to acquittal in another. It seems impossible genuinely to argue that the Tenth or Fifth Circuit would have foreclosed someone like petitioner from asserting a convincing defense to a §111 charge based on his serious mental instability and intoxication at the time. This persistent circuit disagreement thus creates the kind of unequal justice among the lower courts that this Court should address.

Second, it is evident that this longstanding circuit disagreement is ready for this Court's intervention. There are reasoned opinions on both sides of the issue, including majorities and dissents. And several judges of the courts of appeals have now identified the disagreement, which only this Court's intervention can resolve. As explained below, while the majority view here is incorrect, it is also rooted deep in a misreading of this Court's precedent—a precedent that is itself rooted in a relatively outdated, atextual approach to reading criminal statutes. This case thus presents an excellent opportunity to resolve the longstanding disagreement and adopt the correct view of the minority circuits, which hold that §111 requires specific intent as to the substantive offense.

II. The Decision Below Is Wrong.

As explained below, the view that §111 is a general-intent crime comes from a misunderstanding of this Court's decision in *Feola*. In reality, *Feola* supports only the contrary conclusion—*i.e.*, that a conviction under §111 requires a showing of specific intent. All the regular tools of statutory construction support

the same conclusion as well. Certiorari is thus warranted to set right a widespread error and conform §111's requirements to modern conceptions of statutory interpretation.

a. The split arises from confusion over this Court's opinion in *Feola*.

As noted above, this Court held in *United States v. Feola*, 420 U.S. 671 (1975), that the government need not prove specific intent as to §111's federal-officer element because that element is "jurisdictional only."[6] *Id.* at 676 & n.9. Put another way, this Court concluded that "[a]ll the statute requires is an intent to assault, not an intent to assault a federal officer," *Feola*, 420 U.S. at 684. This phrasing conveys very effectively the point *Feola* decided: namely, that a defendant can violate §111 without knowing that their victim is a federal officer. But it does not effectively answer the very different question presented here, which is unsurprising, as that question was not presented at all in *Feola* itself.

Unfortunately, this has not stopped many circuit courts from reading this language (and *Feola* more generally) onto this separate issue, and using it to mistakenly conclude that §111 as a whole requires only general intent. For example, as Judge Kelly explained below, the phrase "intent to assault" has "generated significant confusion" among the circuits when taken out of its original context and applied to the question

[6] Since *Feola*, this Court has frequently concluded that jurisdictional elements of federal crimes have lower intent requirements than their substantive counterparts. *See, e.g.*, *Torres v. Lynch*, 136 S. Ct. 1619, 1630–31 (2016); *United States v. Yermian*, 468 U.S. 63, 68–69 (1984).

presented here. *See* Pet. App. 11a; *United States* v. *Ettinger*, 344 F.3d 1149, 1154–55 (11th Cir. 2003) (holding that §111 as a whole is a general-intent provision based on *Feola*'s phrasing that §111 requires "an intent to assault, not an intent to assault a federal officer"); *United States v. Hanson*, 618 F.2d 1261, 1265 (8th Cir. 1980) (same); *see also United States v. Kleinbart*, 27 F.3d 586, 592 (D.C. Cir. 1994) (finding "conclusive" *Feola*'s language that "an actor must entertain *merely* the criminal intent to do the acts therein specified").

Moreover, *Feola*'s articulation of and heavy reliance upon §111's purpose—derived almost exclusively from legislative history—has led some circuits to adopt an answer to the general/specific intent question that they view as *contrary* to the best reading of the text. The Ninth Circuit, for example, concluded in *Jim* that, "[w]ithout a congressional purpose analysis, §111 appears to be a specific intent crime," emphasizing both the text of §111 and the common-law meaning of assault. *See* 865 F.2d at 213. Nevertheless, the court felt compelled by *Feola*'s determination that "Congress intended [§111] to protect *both* federal officers and federal functions" to hold that §111 is a general-intent crime. *Id.* at 214–15 (quoting *Feola*, 420 U.S. at 679); *see also Kimes*, 246 F.3d at 809 (quoting same language and adopting same purposivist reading of §111).

It is decidedly ironic that *Feola* should lead lower courts to conclude that §111's *substantive* elements—as opposed to its jurisdictional provisions—require only general intent. That is because, to the extent *Feola* says anything about this issue, it suggests that §111 requires specific intent for its substantive elements, not the mere general intent that the majority

of circuits have required in *Feola*'s name. Indeed, the fact that §111 would still have a specific-intent element seems central to *Feola*'s reasoning: This Court explained in *Feola* that the result there was not unfair to defendants precisely because "the conduct proscribed by the substantive offense, here assault, is *not* of the type outlawed without regard to the intent of the actor to accomplish the result that is made criminal." *Feola*, 420 U.S. at 692 (emphasis added). And this language all but holds that "the substantive offense" under §111 is not a general-intent crime. *Compare Black's Law Dictionary* 931 (10th ed. 2014) (defining general intent as "[t]he intent to perform an act *even though the actor does not desire the consequences that result*" (emphasis added)), *with Feola*, 420 U.S. at 692 ("[A]ssault[] is not … outlawed without regard to the *intent of the actor to accomplish the result* that is made criminal." (emphasis added)).

Moreover, when this Court explained five years later that "the kind of culpability required to establish the commission of an offense [must] be faced separately with respect to each material element of the crime"—in the very context of general and specific intent—it pointed to *Feola* as an example of a case requiring different levels of intent for different elements in a statute. *United States v. Bailey*, 444 U.S. 394, 405–06 (1980); *see also Staples v. United States*, 511 U.S. 600, 609 (1994); *Liparota v. United States*, 471 U.S. 419, 423 n.5 (1985). Perhaps, not withstanding the points in the next section, there are reasons that §111 should be read as a general-intent crime. But *Feola* is not one of them, and this Court could well use this case to clarify as much.

b. The correct view is that §111 is a specific-intent offense.

The foregoing demonstrates that most of the circuits are misreading *Feola* in suggesting that it requires reading §111 as a general-intent offense. But more importantly, as the Ninth Circuit's discussion in *Jim* suggests (*see supra* pp.13, 19), the far better view of the text of §111 itself—read in light of the applicable canons of construction and modern principles of statutory interpretation—is that §111 is in fact a specific-intent offense.

1. As an initial matter, the courts of appeals that hold §111 to be a general-intent offense largely fail to address the language of §111 as a whole. Typically, they hold that "the crime established in 18 U.S.C. §111(a) is a general intent crime," by narrowly discussing "whether *assaulting* a federal officer is a 'general intent crime' or a 'specific intent crime,'" and they do not even acknowledge that the text of §111 includes many more terms with a much broader sweep. *See, e.g.*, *Kimes*, 246 F.3d at 802 (emphasis added). Section 111 in fact makes it a crime to "assault[], resist[], oppose[], impede[], intimidate[], or interfere[]" with a federal officer or employee, 18 U.S.C. §111(a), and those words strongly suggest that Congress meant the substantive element of §111 to be a specific-intent crime.[7]

[7] Notably, petitioner's jury was instructed that it could convict him if he "assaulted, impeded, or interfered with Mr. Gonzalez." Jury Instructions, Dist. Ct. Doc. 45, at 6. And, in fact, the jury itself underlined the words "or" and "interfered" in the jury instructions. *See id.* Nonetheless, the generic holding that §111(a) as a whole is a general-intent offense precluded him from

This is evident from the terms themselves. Means of violating a statute like "resisting," "opposing," or "impeding" have little or no intelligible meaning without reference to the result intended by a particular course of action. For example, an actor who consistently exits stage left when the director says "exit stage right" might be described as "resisting" the director if he intends to change the play. But if he simply can't keep track of whose right is stage right, one would never describe that same act as "resisting" or "opposing" the director's instruction. In other words, we simply cannot judge whether an action constitutes "resisting" without knowing what result the actor intends to achieve. And because a violation of §111 can be committed simply by "resisting" or "impeding" a federal officer, it is, at an absolute minimum, plainly incorrect for courts to hold generically that "§111(a) is a general intent crime" as to all the means of violating it.

Indeed, even beyond their plain meaning, it is clear that these statutory terms require specific intent from their historical usage and the context of §111. These words are terms of art drawn from the common and statutory law of obstruction of justice.[8] And it has

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presenting his diminished-capacity defense—a result that is illustrative of the poor attention the lower courts have paid to the text of the statute.

[8] As Justice Stewart explained in dissent, many obstruction of justice statutes use the same terms Congress used in §111. *See Feola*, 420 U.S. at 708. Indeed, federal obstruction of justice statutes using these terms include, for example, 18 U.S.C. §2231 (2018) (imposing penalties upon one who "forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes" with one authorized to execute search warrants or make searches and seizures), 18 U.S.C. §1501 (2018) (imposing penalties upon one who "obstructs, resists, or opposes" a process server), and 18 U.S.C. §1509 (2018) (imposing penalties upon one who "willfully

been long understood that one of the essential elements of obstruction of justice is specific intent. *See, e.g.*, *Pettibone v. United States*, 148 U.S. 197, 204–07 (1893) (rejecting the "intent to commit an unlawful act, in the doing of which justice was in fact obstructed" as insufficient to satisfy the intent requirement of a federal obstruction statute and collecting cases finding "scienter is necessary" for such offenses). There is thus no disputing that at least five of the six terms in §111's list of prohibited actions describe an offense requiring specific intent.

Meanwhile, although there appears to be at least some confusion on this issue in the lower courts, *see, e.g.*, Pet. App. 13a (Kelly, J., concurring), there should be no disputing that the term "assault" likewise describes a specific-intent offense. Indeed, it is quite clear that assault was a specific-intent offense at common law, requiring either the intent to commit a battery or the intent to inspire fear in the victim; the sources are legion on this point. *See, e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.3(a)–(b) (3d. ed. 2019) (defining assault to "require[] an intent to commit a battery, i.e., an intent to cause physical injury" or an "intent to cause a reasonable apprehension of immediate bodily harm"); *Black's*, *supra*, at 137 (defining criminal assault as "[a]n attempt to commit battery, requiring the specific intent to cause physical injury"); *Black's*, *supra*, at 931 ("At common law, the specific-intent crimes [included] … assault[.]"); Rollin M. Perkins, *Non-Homicide Offenses Against the Person*,

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prevents, obstructs, impedes, or interferes" with the execution of court orders).

26 B.U. L. Rev. 119, 134–35 (1946) (noting that "a specific intent to commit a battery is essential" to criminal assault); *see also Gonzales*, 931 F.3d at 1222 & n.1 (collecting cases concluding common-law assault requires specific intent).[9]

Accordingly, this case is controlled by the "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13 (1994). Indeed, the "age-old principle … that words undefined in a statute are to be interpreted and applied according to their common-law meanings …. *has been applied to such terms as assault*." Antonin Scalia & Bryan A. Garner, *Reading Law* 320 (2012) (emphasis added). The Fifth and

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[9] Some confusion about whether common-law assault was a specific- or general-intent offense has arisen from courts importing the general-intent, common-law offense of battery into statutes that criminalize assault. Courts have done so under the theory that every completed battery necessarily includes an assault. *See, e.g.*, *United States v. Delis*, 558 F.3d 177, 181 (2d Cir. 2009) (interpreting 18 U.S.C. §113(a)(5) to incorporate the common law of battery because "battery has generally been considered to constitute the successful completion of, and therefore necessarily to include, an assault"). Yet this involves a subtle but critical error: A battery necessarily includes an assault only if it is an *intentional* battery. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.1(a) n.6 (3d. ed. 2019) ("[A]t most it can properly be said only that every *intentional* battery necessarily includes an assault." (emphasis original)). The relatively rare circumstance of unintended battery is still a crime (because battery itself is a general-intent offense), but such an unintended battery does *not* logically include an assault, precisely because the defendant does not necessarily intend to cause injury or inspire fear. It is thus decidedly backwards to infer that assault is a general-intent offense from the proposition that statutes criminalizing assault also logically criminalize all intentional batteries.

Tenth Circuits faithfully follow this canon—and correctly read the statute—when they incorporate the precise, specific-intent elements from the common-law offense of assault into their pattern instructions for §111. *See supra* pp.13-14, 16.[10] The circuits that haphazardly categorize §111 as a "general-intent crime" do not.

Quite helpfully, reading "assault" in §111 to incorporate the specific-intent requirements from its common-law definition also aligns that term with the other means of violating §111 enumerated in the statute. "[T]he commonsense canon of *noscitur a sociis* … counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Accordingly, because the other terms in the list—resist, oppose, impede, intimidate, and interfere—require specific intent by their plain meaning and their established context, assault should likewise be read to incorporate a specific-intent requirement.

2. These strong textual indications that §111 is a specific-intent offense are backed up by another well-worn rule of criminal statutory interpretation—namely, that statutes should generally be read to avoid over-punishing petty infractions or wholly innocent conduct. A long line of cases in this Court, from *Morissette v. United States* in 1952 to last Term's decision in

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[10] *See* Tenth Circuit Criminal Pattern Jury Instruction §2.09, Assaulting a Federal Officer, 18 U.S.C. §111 (2018) (requiring an "intentional [1] attempt or [2] threat to inflict injury" on the victim); Fifth Circuit Pattern Jury Instruction §2.07, Assaulting a Federal Officer, 18 U.S.C. §111 (2016) (requiring an identical showing of an "intentional [1] attempt or [2] threat to inflict injury" for an assault conviction).

Rehaif v. United States, stands for the proposition that, absent some explicit indication, such an aggressive reading of a criminal statute is almost certainly not what the legislature thought the enacted words would mean. *See, e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019); *Carter v. United States*, 530 U.S. 255, 269–70 (2000); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *Staples v. United States*, 511 U.S. 600, 614–15 (1994); *Liparota v. United States*, 471 U.S. 419, 426 (1985); *Morissette v. United States*, 342 U.S. 246, 271 (1952). Indeed, even where (unlike here) Congress has not chosen to employ a common-law term like "assault," this Court will interpret federal criminal laws to include an intent requirement sufficient to ensure that they do not criminalize otherwise innocent behavior. *See, e.g.*, *Carter*, 530 U.S. at 265, 269–70. And, similarly, this Court has recognized that harsh, felony-level penalties are unlikely to apply to conduct that—while perhaps still a violation—does not entail any bad intent. *See Staples*, 511 U.S. at 618.

Read without a specific-intent requirement, §111 breaks both these basic rules. Consider, for example, a carsick passenger on a public bus in Washington, D.C., who intentionally pushes another rider aside to avoid vomiting on them, unintentionally injuring them in the process. This well-intentioned pushing might be, at most, a simple state-law misdemeanor—perhaps the kind of general-intent battery described above. *See supra* p.3. But if the injured rider is a federal employee responding to emails on their smartphone, and §111 does not require specific intent, this is now a federal felony, punishable by up to *twenty years* in prison because bodily injury resulted. *See* 18 U.S.C. §111(b); *see also* 18 U.S.C. §111(a) (permitting up to eight

years' imprisonment in cases involving "physical contact"). This cannot be what the statute means; Congress could not have meant to attach such harsh penalties to actions involving *no* intent to cause any injury, harm, or even offense to the victim.

Indeed, behavior that is indisputably innocent could likewise violate §111 when read as a general-intent crime. Note, for example, that it is readily possible for interference with a federal employee to result unintentionally from many kinds of innocent conduct. Squeezing into a very tight parking space could box in an unmarked car, forcing an undercover federal agent to abandon an ensuing effort to respond to an amber alert. Likewise, it could be a violation to distract a federal marshal working the metal detector at a courthouse or personal security for a judge by forcibly drawing her attention to another person in distress. Zealous federal prosecutors have been known to bring charges on similarly aggressive theories. *See, e.g.*, *infra* pp.30-31. And yet the key point is not that any of these "crimes" are likely to be prosecuted, but rather that Congress's text should not be given the unlikely reading that would permit such prosecutions in the first place.

That is particularly true because this Court has explicitly recognized that reading federal criminal statutes to require only "general intent"—as some courts have erroneously done here—will sometimes transform serious felonies into what Judge Merritt called "mindless strict liability crime[s]." *Kimes*, 246 F.3d at 811 (Merritt, J., dissenting). As this Court explained in *Carter*, "some situations may call for implying a *specific intent* requirement into statutory text" precisely because "[r]eading the statute to require that

the defendant possess *general intent* with respect to the *actus reus* … would fail to protect the innocent actor." *Carter*, 530 U.S. at 269 (emphasis added). Notably, *Feola* itself was aware of just this risk, and specifically disavowed the "unfairness" of punishing under §111 those who do not "know[] from the very outset that [their] planned course of conduct is wrongful." *Feola*, 420 U.S. at 685. Accordingly, *Feola* carefully explained that, although §111 does not always require knowledge with respect to its federal-officer element, there would still be circumstances in which such knowledge would have to be shown in order to avoid punishing otherwise innocent actors. *See, e.g.*, *id.* at 685–86 (outlining situations where, absent knowledge of the officer's status, "one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent," which "the statute does require"). Eliminating *any* specific-intent requirement in §111 and treating it as a general-intent crime thus fails to follow the best teachings of this Court—including the most on-point aspects of *Feola* itself—and this Court should accordingly intervene to correct this longstanding error.

III. This Case Represents An Excellent Vehicle For Deciding An Important Question.

1. The question presented is important. Assault in general is increasingly prevalent on the federal criminal docket, as are prosecutions specifically under §111. The number of federal assault cases brought each year has been steadily increasing,[11] with a total of 11,628

[11] In 1998, 449 defendants were charged with federal assault, as compared to 784 defendants who were charged with federal assault in 2016. Pet. App. 19a–20a.

cases between 1998 and 2016. Pet. App. 19a–20a. And the number of §111 charges has likewise been increasing, with 4,713 defendants charged with assault between 1994 and 2016.[12] *Id.* Indeed, between 1998 and 2016, over one-third of federal assault defendants were charged under §111. *See id.* As explained above, the question presented affects not only the availability of diminished-capacity defenses for defendants like petitioner, but also the basic intent instruction that should be read to the jury. Accordingly, this case will have a substantial—and sometimes dispositive—impact on an offense that is regularly and increasingly prosecuted throughout the federal courts, and granting here will ensure that such prosecutions proceed under uniform standards across the federal courts.

Despite the large number of cases affected, however, it is far from certain that this Court will confront another vehicle to decide this case in the near future. Defendants who would like to present mental-impairment or diminished-capacity defenses are exceedingly unlikely to go to trial when circuit precedent unambiguously denies them the right to make either argument to the jury. Likewise, defendants in such circuits who want to argue that they did the *actus reus* but did not have the requisite, specific intent as to the result cannot present a vehicle to this Court unless they are willing to forfeit any possibility of credit for cooperation, take an utterly hopeless case to trial, and then gamble on the long odds of certiorari review. Given the recognized disagreement among the circuits on this issue—and the incorrect view in the majority thereof—this

[12] The number of defendants charged under §111 increased from 173 in 1994 to 215 in 2016. Pet. App. 19a–20a.

Court should intervene now and stop essentially forcing the bulk of §111 defendants to forfeit their only valid defenses based on erroneous circuit precedent.

2. This case is also an opportunity for this Court to continue developing its recent jurisprudence emphasizing a more classically textualist approach to interpreting criminal statutes, and pushing back on expansive readings of federal criminal laws that lead to an overly punitive approach to innocent, minor, and/or purely local conduct. *See, e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019) (rejecting reading of firearms statute that would have subjected unintentionally illegal possession to "a potential penalty of 10 years in prison"); *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (rejecting reading of "tangible object" in Sarbanes-Oxley that would have exposed "individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense," including a fish); *Bond v. United States*, 572 U.S. 844, 862 (2014) (rejecting reading of "chemical weapon" in legislation implementing international treaty ban that would have made it "a serious federal offense" to "poison[a goldfish] with a few drops of vinegar"). To be sure, *intentionally* injuring someone who turns out to be a federal officer is a serious offense. But *unintentionally* interfering with someone who just so happens to be a federal officer is at best a petty local crime, and more likely no offense at all.

This Court has recognized that unnecessarily federalizing petty, local incidents is a serious problem—it both disturbs the regular state/federal balance within the criminal law, and leads to far harsher penalties than any legislature intended. *See, e.g.*, *Bond*, 572

U.S. at 848. Indeed, the imposition of harsh federal punishments has formed the basis of many recent critiques of the criminal law's over-federalization. *See generally* Task Force on the Federalization of Criminal Law, Am. Bar Ass'n, *The Federalization of Criminal Law* (1998); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. 825 (2000); Stephen F. Smith, *Federalization's Folly*, 56 San Diego L. Rev. 31 (2019). And because those same harsh punishments typically recommend against reading offenses as "mindless strict liability crime[s]," *Kimes*, 246 F.3d at 811 (Merritt, J., dissenting), the issue in the case presents a good vehicle for the Court to reinforce its influential jurisprudence in this area.

In fact, a narrow reading of the intent requirement for the substantive offense under §111 is particularly necessary to avoid overly harsh punishment in this area precisely because *Feola* has already held that the federal-officer element appears in the statute for purely jurisdictional purposes. The states have highly analogous aggravated assault statutes punishing offenses against local officers, but almost all of them guard against an overly punitive approach by requiring knowledge of officer status in order to impose the harsher penalty. *See, e.g.*, *State v. Nozie*, 207 P.3d 1119, 1128–29 (N.M. 2009); *State v. Morey*, 427 A.2d 479, 483–84 (Me. 1981); *People v. Prante*, 493 P.2d 1083, 1085 (Colo. 1972).[13] For reasons unrelated to the substance of the offense, *Feola* forecloses that safety valve in the federal statute. But an effective safeguard

[13] We surveyed all 50 states and the District of Columbia on this issue. Forty-three jurisdictions clearly impose a knowledge requirement, four do not, and the remainder either do not have such a statute or are otherwise indeterminate.

against an excessively harsh reading of the statute remains essential, and here, *Feola* itself indicates that Congress put that safeguard in the requirement of specific intent for the substantive offense. This Court should thus grant certiorari to clarify the intent requirement of §111 and thereby avoid criminalizing relatively benign conduct as a federal felony.

3. Finally, this case is an ideal vehicle for the purely legal question presented. The holding in lower courts that petitioner could not even present his mental state and diminished capacity defenses well illustrates the stakes of this issue without tying it to any specific facts. Indeed, the district court held that Gustus's defense was foreclosed solely because §111 is a general-intent offense, and the Eighth Circuit likewise affirmed on that ground alone. Gustus's diminished capacity defense was substantial, and he would have been allowed to present it in other circuits, demonstrating that the specific/general intent issue could have meant the difference between conviction and acquittal here, as it will in other cases too. Given the long-standing and well-recognized divide among the circuits on this precisely isolated and purely legal issue, this Court should grant certiorari, and reverse.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 27, 2020

APPENDIX

Appendix A: Opinion of the Court of Appeals

United States Court of Appeals
for the Eighth Circuit

No. 18-2303

United States of America

Plaintiff - Appellee

v.

Stephen Gustus

Defendant - Appellant

Appeal from United States District Court for the Eastern District of Arkansas - Little Rock

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Submitted: January 17, 2019

Filed: June 14, 2019

Before BENTON, MELLOY, and KELLY, Circuit Judges.

MELLOY, Circuit Judge.

Following a jury trial, Defendant Stephen Gustus appeals his conviction under 18 U.S.C. § 111(a)(1) for

assaulting a United States Postal Service employee.[1] Having jurisdiction under 28 U.S.C. § 1291, we affirm in part and reverse in part.

I. Background

The following facts are presented in a light most favorable to the verdict. On December 21, 2016, a Postal Service employee named Julio Gonzalez was unexpectedly tackled from behind by a man wearing nothing but a pair of shoes and a bed comforter. The man was later identified as Gustus. Gonzalez fell to the ground, and Gustus jumped into Gonzalez's mail truck. Gonzalez got up and physically engaged Gustus in the truck, punching him three or four times before slipping and falling to the ground again. At some point after this second fall, Gonzalez grabbed hold of Gustus's comforter. Gustus jumped out of the truck and kicked Gonzalez in the arm until he released the comforter. Gustus then fled on foot. Gonzalez ran into a nearby field to keep an eye on Gustus and called 911. Gonzalez lost sight of Gustus, but a police officer was able to locate him soon thereafter.

When the officer encountered Gustus, Gustus would not respond to the officer's commands. Instead,

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[1] We note that Gustus's criminal judgment indicates he was convicted of violating 18 U.S.C. §§ 111(a)(1) and 1114. Section 111(a)(1) references § 1114 for the purpose of defining the victim of the § 111(a)(1) assault. Section 1114 itself is a homicide statute that defines the qualifying victim, in relevant part, as "any officer or employee of the United States . . . while such officer or employee is engaged in . . . official duties." 18 U.S.C. § 1114. To be clear, Gustus was convicted of assault, not homicide, and the references in his case to § 1114 are merely definitional.

he merely stared up at the sky. After several unsuccessful attempts to get Gustus to sit down with hands behind his back, the officer threatened to use pepper spray. The officer observed Gustus clench his hands into fists as if "he was getting ready to fight." The officer then sprayed a burst of pepper spray, hitting Gustus in the face. Gustus immediately sat down, and the officer placed him in handcuffs and called for medical personnel to take Gustus to a nearby healthcare facility.

Gustus was eventually charged with "voluntarily and intentionally forcibly assault[ing],imped[ing] and interfer[ing] with an employee of the United States while the employee was engaged in and on account of the performance of official duties," a violation of 18 U.S.C. § 111(a)(1). Gustus pled not guilty to the offense and prepared to present a defense that he was voluntarily intoxicated and lacked the specific intent to assault Gonzalez.[2] He proffered a jury instruction on intoxication to that effect. The government responded by filing a motion in limine, arguing that our opinion in *United States v. Hanson*, 618 F.2d 1261 (8th Cir. 1980), established that § 111(a)(1) assaults are general-intent crimes for which a voluntary-intoxication defense is unavailable. The district court granted

[2] A presentence investigation report ("PSR") prepared after trial reveals that, at the time of the offense, Gustus showed multiple signs of being intoxicated, including smelling of intoxicants, using slurred speech, and having blood-shot eyes and unstable footing. The PSR further reveals that, at the healthcare facility, Gustus admitted to drinking alcohol and tested positive for amphetamines, methamphetamines, and marijuana.

the government's motion and prohibited Gustus from presenting a voluntary-intoxication defense.

A two-day trial ensued. The government called several witnesses, including: Gonzalez; the 911 operator who fielded Gonzalez's call; the officer who apprehended Gustus; a postal inspector; medical personnel who treated Gonzalez; and Gonzalez's supervisor who visited Gonzalez at the site of the incident and took him to receive medical treatment. Gustus did not call any witnesses but moved for a judgment of acquittal. The district court denied the motion, and the jury found Gustus guilty of assaulting Gonzalez. The district court sentenced Gustus to time served followed by two years of supervised release. As part of the supervised release, the district court orally imposed the following special condition:

> He'll have to participate, of course, in a substance abuse treatment program under the guidance and supervision of the probation office. And that might include drug testing, alcohol testing, outpatient counseling, residential treatment. He can't use any alcohol during those sessions.
>
> . . .
>
> . . . . He can't use any alcohol during the program of alcohol testing and outpatient counseling. He must pay for the cost [at a rate of $10 per session, with a total cost not to exceed $40 a month based on ability to pay as determined by the probation office. If he can't afford that, the copayment will be waived].

> And he'll be required to disclose his substance abuse history to prescribing physicians and allow the probation office to verify disclosure. . . .

The district court clarified that the alcohol restriction applied while Gustus was receiving both substance abuse and mental health treatment. The final, written version of the special condition ("Special Condition 5") read as follows:

> You must participate in a substance abuse treatment program under the guidance and supervision of the probation office. The program may include drug and alcohol testing, outpatient counseling, and residential treatment. You must abstain from the use of alcohol during supervision. You must pay for the cost of treatment at the rate of $10 per session, with the total cost not to exceed $40 per month, based on ability to pay as determined by the probation office. If you are financially unable to pay for the cost of treatment, the co-pay requirement will be waived. You must disclose your substance abuse history to prescribing physicians and allow the probation office to verify disclosure.

Gustus timely filed a notice of appeal.

II. Discussion

Gustus presents three arguments on appeal: (1) the district court erred in denying him the opportunity to present a voluntary-intoxication defense; (2) there was insufficient evidence to convict him of assaulting Gonzalez; and (3) Special Condition 5 was broader

than the oral version of the condition and should be modified. We address each argument in turn. Regarding the voluntary-intoxication defense and sufficiency-of-the-evidence arguments, we review the district court's judgment de novo. *See United States v. Young*, 613 F.3d 735, 744 (8th Cir. 2010) ("[W]hen the refusal of a proffered instruction . . . denies a legal defense, the correct standard of review is de novo . . . ."); *United States v. DeFoggi*, 839 F.3d 701, 709 (8th Cir. 2016) ("We review the sufficiency of the evidence in a jury trial de novo, but examine the evidence in the light most favorable to the jury's verdict, resolving factual disputes and accepting all reasonable inferences in support of the verdict."). We review the "terms and conditions of supervised release for abuse of discretion." *United States v. Phillips*, 785 F.3d 282, 284 (8th Cir. 2015).

The district court did not err in preventing Gustus from presenting a voluntary intoxication defense. "Such a defense is. . . unavailable" to defendants being charged with violating 18 U.S.C. § 111(a)(1) because assaulting a federal employee is a general-intent crime. *Hanson*, 618 F.2d at 1265. Gustus argues that we should disregard *Hanson* because later decisions contain language to the effect that assaulting a federal employee is a specific-intent crime. *See, e.g.*, *United States v. Manelli*, 667 F.2d 695, 696 (8th Cir. 1981) ("Specific intent is an essential element of the crime of assaulting a federal officer in the performance of his duties."). He further argues that voluntary intoxication is a defense to specific-intent crimes. *See United States v. Kenyon*, 481 F.3d 1054, 1070 (8th Cir. 2007). We are bound to follow *Hanson* as it is the earliest of the conflicting opinions and "should have controlled

the subsequent panels." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (citation omitted). Consequently, we hold that Gustus was not entitled to present a voluntary-intoxication defense.

We also hold that sufficient evidence supports Gustus's conviction. Section 111(a)(1) makes it a crime to "forcibly assault[], resist[], oppose[], impede[], intimidate[], or interfere[] with [a federal employee] while engaged in or on account of the performance of official duties." 18 U.S.C. § 111(a)(1). The parties agree that the government proved all of the elements of a § 111(a)(1) violation beyond a reasonable doubt except for the mens rea element, which they agree is voluntary and intentional. *See United States v. Drapeau*, 644 F.3d 646, 652 (8th Cir. 2011). Gustus argues that because he was intoxicated, his actions could not have been voluntary or intentional. We reject this argument as indistinguishable from his argument above that the district court erred in preventing him from presenting a voluntary-intoxication defense.

Gustus also argues that portions of Gonzalez's testimony at trial were not credible, making the evidence as a whole insufficient. Gonzalez, for example, made seemingly inconsistent statements about: (1) whether he was attacked while he was getting into his mail truck or while he was getting out; and (2) whether he had his keys in his hands during the attack. The credibility of a witness is "within the province of the jury and virtually unreviewable on appeal." *United States v. Thompson*, 881 F.3d 629, 633 (8th Cir. 2018) (citation omitted). We are to "resolve any credibility issues in favor of the verdict." *United States v. Polk*, 715 F.3d 238, 247 (8th Cir. 2013) (citation omitted). We do so

here and reject Gustus's argument. His conviction was supported by sufficient, credible evidence.

Finally, we agree that Special Condition 5 is broader than the condition the district court imposed orally. However, it is not entirely clear from the sentencing transcript and other portions of the record exactly how long the district court intended the alcohol-prohibiting condition to apply or whether that issue is moot.[3] We therefore reverse the district court's judgment as to Special Condition 5 and remand for the district court to determine if the special condition is moot, and if not, to clarify the alcohol-prohibiting special condition of supervised release. *See United States v. James*, 792 F.3d 962, 973 (8th Cir. 2015).

III. Conclusion

For the reasons stated above, we affirm Gustus's conviction under 18 U.S.C. § 111(a)(1). We reverse the district court's judgment as to Special Condition 5 and remand for the district court to determine if the special condition is moot, and if not, to clarify the alcohol-prohibiting special condition of supervised release.

KELLY, Circuit Judge, concurring.

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[3] We note from the district court docket that Gustus's supervised release has been revoked for reasons unrelated to the alcohol condition. He has been sentenced to four months' imprisonment with no supervision to follow—likely making this issue moot.

I concur in the court's decision because our earliest precedent, *Hanson*, 618 F.2d 1261, appears to foreclose Gustus from presenting an intoxication defense to his § 111(a)(1) charge. I write separately because we have issued conflicting decisions on whether assault under § 111(a)(1) requires specific or general intent, and the issue is one that warrants greater attention.

As the court notes, a defendant must be charged with a specific-intent crime to merit an intoxication defense. *See Kenyon*, 481 F.3d at 1070. Specific intent is usually defined as "the intent to accomplish the precise criminal act that one is later charged with," as opposed to general intent, which is "the intent to perform an act even though the actor does not desire the consequences that result." *United States v. Robertson*, 606 F.3d 943, 954 (8th Cir. 2010) (cleaned up). Specific intent loosely equates to the Model Penal Code's culpability standard of "purposely." *See United States v. Bailey*, 444 U.S. 394, 404–05 (1980). A defendant is said to act purposely when it is the defendant's "conscious object to engage in conduct of that nature or to cause such a result." Model Penal Code § 2.02(2)(a) (Am. Law Inst. 1985); *see Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016).

Section 111(a) makes it a felony to assault a federal employee while the employee is engaged in official duties if the assault involved physical contact with the victim.[4] The statute does not specify what culpability

[4] The offense is a misdemeanor if the assault "constitute[d] only simple assault," but it becomes a felony if the assault "involve[d] physical contact with the victim" or if the defendant had

standard applies to its elements. In *United States v. Feola*, the Supreme Court addressed one element of the offense—the attendant circumstance of the victim's identity—and concluded that there is no requirement that the defendant "be aware that his victim is a federal officer." 420 U.S. 671, 684 (1975). "All the statute requires is an intent to assault, not an intent to assault a federal officer." *Id.*

Feola's use of the phrase "an intent to assault" generated significant confusion. In short succession, we issued "conflicting . . . decisions as to whether specific intent is an element of a § 111 violation." *United States v. Oakie*, 12 F.3d 1436, 1443 (8th Cir. 1993) (citing *Hanson*, 618 F.2d at 1265, and *Manelli*, 667 F.2d at 696). *Hanson* appears to hold that § 111 only requires a general intent to assault, 618 F.2d at 1265, whereas *Manelli* states that "[s]pecific intent is an essential element of the crime," 667 F.2d at 696. This conflict is particularly curious because *Hanson* and *Manelli* were issued only a year apart, both decisions cite to the Supreme Court's decision in *Feola* in support of their respective positions, and one of the judges on the *Hanson* panel authored the later *Manelli* opinion. Notably, other circuits also appear divided on

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"the intent to commit another felony." 18 U.S.C. § 111(a). Gustus's conviction was treated as a felony, and the jury specifically found that he made physical contact with Gonzalez. It should be noted, however, that Gustus's indictment did not include the allegation that he made physical contact with the victim. The failure to include in the indictment a critical element that transforms an offense from a misdemeanor to a felony is reversible error. *See Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). Gustus has not raised this argument, so the issue is not before us on direct appeal.

whether § 111 is a specific-intent or general-intent offense.[5] Nonetheless, we are bound to follow *Hanson*, the earlier opinion, which indicates that § 111 is a general intent offense.[6] *See Mader*, 654 F.3d at 800.

There are compelling arguments for treating assault under § 111 as either a general-intent or specific-intent crime.[7] On the one hand, we recognized in

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[5] Five circuits have characterized the offense as one of general intent. *United States v. Brown*, 592 F. App'x 164, 166 (4th Cir. 2014) (per curiam); *United States v. Kimes*, 246 F.3d 800, 808 (6th Cir. 2001); *United States v. Ricketts*, 146 F.3d 492, 497 (7th Cir. 1998); *United States v. Kleinbart*, 27 F.3d 586, 592 (D.C. Cir. 1994); *United States v. Jim*, 865 F.2d 211, 214–15 (9th Cir. 1989). *But see United States v. Staggs*, 553 F.2d 1073, 1076 (7th Cir. 1977) (taking opposite approach). Three circuits have treated § 111 as a specific-intent crime. *United States v. Simmonds*, 931 F.2d 685, 687 (10th Cir. 1991); *United States v. Taylor*, 680 F.2d 378, 381 (5th Cir. 1982); *United States v. Caruana*, 652 F.2d 220, 222–23 (1st Cir. 1981) (per curiam).

[6] It is debatable whether *Hanson* fully addressed the question presented here: Does § 111 require the defendant to commit the assault with specific intent? The defendants in *Hanson* conceded that assault is ordinarily a general-intent crime, but attempted to "distinguish the crime of assault from that of assault on a federal officer" by arguing that the latter offense requires specific intent. 618 F.2d at 1265. Citing *Feola*, we rejected that distinction because § 111 does not require the defendant to know the victim's identity. *Id.* Even if the court in fact adopted the concession that assault is a general-intent crime, that concession was immaterial to the outcome of the decision; the court noted, "Even were we to agree that assault were a specific intent crime, it cannot be said that [the assault was] not done purposely and knowingly." *Id.*

[7] Regardless of whether the assault element of § 111(a) requires proof of specific intent, some formulations of the offense undoubtedly would. For example, charging the offense as a felony because the defendant had the "intent to commit another felony"

United States v. Yates that Congress imported into § 111 the common-law definition of simple assault. 304 F.3d 818, 821–23 (8th Cir. 2002). Assault at common law "requires the showing of an offer or attempt by force or violence to do a corporal injury to another." *Id.* at 822 (quoting *United States v. Bear Ribs*, 562 F.2d 563, 564 (8th Cir. 1977) (per curiam)). Applying this definition, we have previously characterized common-law assault as a general-intent crime. *See United States v. Ashley*, 255 F.3d 907, 911–12 (8th Cir. 2001). This would support treating § 111 as a general-intent crime, although some of our sister circuits disagree with our reading of the common law. *See, e.g.*, *United States v. Lamott*, 831 F.3d 1153, 1156 (9th Cir. 2016) ("[C]ommon law assault is a specific intent crime . . . .").

On the other hand, we have also held that an assault under § 111 must be "willfully" committed. *United States v. Olunloyo*, 10 F.3d 578, 580–81 (8th Cir. 1993) (citing *Potter v. United States*, 691 F.2d 1275, 1280 (8th Cir. 1982)); *see also United States v. Long Soldier*, 562 F.2d 601, 606–07 (8th Cir. 1977) (discussing, prior to *Hanson*, jury instructions requiring the defendant to act willfully). When used in a criminal statute, willfully "generally means an act done with a bad purpose." *Screws v. United States*, 325 U.S. 91, 101 (1945) (quoting *United States v. Murdock*, 290 U.S. 389, 394 (1933)). We have therefore

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unquestionably requires specific intent. *See, e.g., United States v. Iron Shell*, 633 F.2d 77, 88 (8th Cir. 1980) (explaining that assault with intent to commit rape requires the specific intent to commit rape).

regularly interpreted the term as requiring specific intent. *See, e.g.*, *United States v. Boone*, 828 F.3d 705, 711 (8th Cir. 2016); *United States v. Bussey*, 942 F.2d 1241, 1250 (8th Cir. 1991). It follows from these decisions that for an assault under § 111 to be "willfully" committed, the defendant must have acted with specific intent.

Our pattern jury instructions on § 111 offenses are consistent with this latter view.[8] The model instructions advise district courts to add the terms "voluntarily and intentionally" to § 111's elements because "[t]he assault must be intentional, even though the term 'willful' is not used in the statute." 8th Cir. Model Crim. Jury Instructions § 6.18.111 & n.4 (2017); *see also United States v. Wallace*, 852 F.3d 778, 783 (8th Cir. 2017) (approving similar instruction); *United States v. Bettelyoun*, 16 F.3d 850, 853 (8th Cir. 1994) (same). To satisfy a requirement that the assault be intentional, it would appear that the government would need to prove that the defendant committed the assault willfully, that is, with specific intent. *See Screws*, 325 U.S. at 101.

Gustus's case illustrates the tension in our precedents. His indictment and jury instructions conformed to our model instructions and included the terms "voluntarily and intentionally." Those terms usually require a showing of specific intent, and we ordinarily "hold the government to the elements charged

[8] "The model jury instructions are available for use by the district courts, but they are not binding." *United States v. Sparkman*, 500 F.3d 678, 684 (8th Cir. 2007).

in its indictment." *Wallace*, 852 F.3d at 783. Yet Gustus was denied the opportunity to present an intoxication defense based on the conclusion that he was charged with a general-intent crime.

Whether § 111 is a specific-intent or general-intent crime is a difficult question to which we have given conflicting answers, but one that only the court sitting en banc can resolve. I therefore concur fully in the court's opinion.

Appendix B: Order of the Court of Appeals Denying Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2303

United States of America
Appellee

v.

Stephen Gustus
Appellant

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:17-cr-00006-BRW-1)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judge Kelley would grant the petition for rehearing *en banc* and the petition for panel rehearing.

September 09, 2019

Order Entered at the Direction of the Court:
Clerk, U.S Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix C: Bureau of Justice Statistics on Federal Assault

BUREAU OF JUSTICE STATISTICS ON FEDERAL ASSAULT AND 18 U.S.C. § 111 1994–2016

Year	Number of Defendants Charged with Federal Assault[1]	Number of Defendants Charged Under §111[2]
1994	-	173
1995	-	174
1996	-	187
1997	-	179
1998	449	198
1999	340	160
2000	396	195
2001	386	195
2002	397	200
2003	506	210
2004	676	190
2005	707	226
2006	609	206

[1] This data was downloaded from *Federal Criminal Case Processing Statistics*, Bureau of Justice Statistics, U.S. Dep't of Justice, https://www.bjs.gov/fjsrc/var.cfm?ttype=trends&agency=AOUSC&db_type=CrimCtCases&saf=IN (last visited Jan. 20, 2020). The data for this statistic begins in 1998. The years 1994–1997 were not included.

[2] This data was downloaded from *Federal Criminal Case Processing Statistics*, Bureau of Justice Statistics, U.S. Dep't of Justice, https://www.bjs.gov/fjsrc/tsec.cfm# (last visited Jan. 20, 2020).

2007	629	226
2008	661	211
2009	694	228
2010	663	218
2011	738	226
2012	750	253
2013	805	238
2014	696	198
2015	742	207
2016	784	215