No. 19-939

IN THE

Supreme Court of the United States

STEPHEN GUSTUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY

The government opposes certiorari on the theory that the only question presented in this case is whether "voluntary intoxication is a defense" for an alleged "violation of 18 U.S.C. 111(a)(1)." BIO (I). This allows the government to deny that this case implicates the disagreement that numerous federal judges have identified over whether Section 111 is a specific-intent or general-intent offense. *See* Pet. 10-17. The government represents that so narrowing the question presented is appropriate because no question broader than the viability of a voluntary-intoxication defense was "pressed or passed upon below." BIO 14 (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). And absent this strategic gambit, the government's opposition falls apart, because it cannot deny that numerous judges in multiple circuits have recognized and debated the general vs. specific intent issue that divides them, and that this case is a perfectly good vehicle for resolving the disagreement on this difficult and important question of federal criminal law.

It is therefore a fatal problem for the government's opposition that its arguments for a narrower question presented are both incorrect and unfair. Below, the *government* moved in limine to suppress any argument about intoxication on the *sole* ground that Section 111 is a general-intent offense, and it convinced both lower courts with that argument alone. *See* Mot. In Limine, Dist. Ct. Doc. 36, at 2; Pet.App. 4a-5a, 7a-8a. It is thus the *government* that belatedly seeks to inject other theories on which the availability of various mental-state defenses can be divorced from the question of Section 111(a)(1)'s intent requirement. Meanwhile, defendant specifically preserved his

objection to the grant of the motion in limine in the trial court on the ground that "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 (emphasis added). The only reason petitioner did not make this trial about his broadly diminished mental capacity "as it related to his specific intent" to commit assault under Section 111(a)(1) is that it was entirely clear that the government had successfully moved to suppress such evidence below.

Correctly understood, this case plainly presents the question whether Section 111(a)(1) is a specific-intent or general-intent offense. And while the government (tellingly) chooses the merits as its primary ground of opposition, *see* BIO 5-9, it does not even *contest* that assault was a specific-intent offense at common law, *see* Pet. 23-24, nor deny that viewing Section 111(a)(1) as a general-intent offense can make federal felonies out of either innocent conduct, *see* Pet. 25-26, or the most minor misdemeanors, *see id.* at 26-27. Solid textual analysis (of which the opposition contains none) demonstrates that Congress almost certainly understood Section 111 as a specific-intent crime, *see* Pet. 21-22—a point the courts of appeals have themselves recognized while (mistakenly) viewing themselves as bound to a different outcome by this Court's 35-year-old, purposivist decision in *United States v. Feola*, 420 U.S. 671 (1975). *See United States v. Jim*, 865 F.2d 211, 214-15 (9th Cir. 1989). This Court should disabuse the lower courts of the misconception that *Feola* transmuted Section 111 into a general-intent offense by granting certiorari and reversing the decision below. If the government wants to

then raise its never-before-discussed arguments about voluntary intoxication, it can do so at the new trial petitioner deserves.

ARGUMENT

The government's opposition presents three arguments: (1) that the Eighth Circuit was correct and Section 111 is a general-intent offense; (2) that there is no circuit disagreement about the availability of diminished-capacity defenses to Section 111; and (3) that no question broader than the availability of a voluntary-intoxication defense was presented below. We address them in reverse.

I. The Government's Own Theory Below Has Ensured That This Case Fully Presents The Question Whether Section 111 Requires Specific Or General Intent.

The government suggests that this case is a poor vehicle for the question presented because the "court of appeals determined only that petitioner 'was not entitled to present a voluntary-intoxication defense' and did not address whether petitioner might be entitled to present some other form of diminished-capacity defense, such as one based on his asserted 'mental health problems.'" BIO 13 (quoting Pet.App. 7a-8a) (internal citations omitted). The government further argues that there may be grounds for distinguishing between voluntary intoxication and other diminished-capacity defenses, and goes so far as to fault petitioner for failing to press such a theory below. BIO 13-14. This argument is incorrect and unfair.

As an initial matter, the question whether Section 111 is a specific-intent offense is squarely presented here because that was the sole theory actually decided

below. It is true that the immediate consequence of the Eighth Circuit's decision related to Gustus's voluntary-intoxication defense—a defense that was not as narrow as the government represents. *See infra* p.4-6. But that hardly matters: The Eighth Circuit recognized that the issue was whether Gustus could present evidence of intoxication to prove that he "lacked the specific intent to assault Gonzalez," Pet.App. 4a, and it held that he could not for the sole reason that Section 111(a)(1) "is a general-intent crime," *id.* at 7a. The government does not even try to dispute that this holding—that Section 111(a)(1) is only a general-intent offense—was necessary to the decision below. The question raised in the petition is thus fully presented here.

Moreover—and contrary to the government's suggestion (at BIO 13)—the court of appeals itself recognized and rejected Gustus's argument that he did not have the specific intent required for the crime. *See* Pet.App. 8a. In particular, Gustus had separately argued that the government had failed to prove "the mens rea element" for his offense. *Id.* The Eighth Circuit chose to conceptualize this argument as "indistinguishable from his argument above that the district court erred in preventing him from presenting a voluntary-intoxication defense." *Id.* But that conceptualization only proves petitioner's point: The Eighth Circuit decided this case on the premise that the question whether a voluntary-intoxication defense was permitted was entirely a question of what "mens rea element" the statute imposes. Put another way, Gustus plainly argued that the statute requires specific intent and the Eighth Circuit plainly held otherwise, and the

government presents no reason why that holding should be ignored for present purposes.

The foregoing suffices to demonstrate that the question whether specific intent is required for a Section 111(a)(1) conviction was *both* pressed *and* passed upon in the court of appeals. But the district court record makes it even more clear that Gustus articulated the question much more broadly than the government suggests. The transcript speaks for itself.

> MS. LYBRAND [counsel for Gustus]: Your Honor, I understand that the Court has granted the Government's motion in limine and *ruled that this crime that Mr. Gustus is charged with is not a specific intent crime* …
>
> The defense would maintain that it is a specific intent crime …. As a result of that, the defendant should be allowed to present and would present *evidence of intoxication or other specific mental state as it related to his specific intent to commit that crime*. It would be essential to his defense. So I would maintain the objection to the Court granting the Government's motion on that issue.
>
> THE COURT: Your objection is noted. It's overruled, and your exception is saved.

Trial Tr. vol. 1, Dist. Ct. Doc. 57, at 3-4 (emphasis added). Simply put, it was clear to all involved what had happened: The government had sought to exclude evidence of intoxication on the theory that Section 111 required only general intent, the district court had agreed, and Gustus had recognized (correctly) that this prevented him from making any kind of presentation about "mental state as it related to his specific

intent to commit that crime"—a presentation that was "essential to his defense." *Id.* at 4. It is on that precise error—described entirely in terms of the statute's intent requirement—that Gustus now petitions for certiorari.

Finally, it would be enormously unfair to allow the government to escape a ruling from this Court on the question whether Section 111(a)(1) requires specific intent based on the argument that Gustus has failed to raise other theories on which evidence of diminished mental capacity might be admissible. *See* BIO 13-14. The government sought and obtained a ruling that Section 111(a)(1) is a general-intent crime by making this the *sole* theory of its motion in limine below. *See* Mot. In Limine, Dist. Ct. Doc. 36, at 2. In so doing, it openly acknowledged that *this very holding* was the subject of a circuit disagreement, and asked the Eighth Circuit to join what it described as the "majority" view. *See* Pet. 11 (quoting multiple government briefs). The government then got just the binding precedent it asked for, and while that rule unquestionably governs the presentation of a voluntary-intoxication defense and other theories of diminished capacity, it also plainly dictates the mental state required for a conviction. Having asked that another circuit formally adopt the (mis)conception that *Feola* makes Section 111(a)(1) a general-intent offense, the government is in no position to deny that this case is an appropriate vehicle for reviewing that very determination.

II. There Is A Well-Recognized Circuit Conflict On The Question Presented.

Once the government's effort to unduly narrow the question presented is rejected, its arguments against

the existence of a circuit disagreement are easily rejected too. In particular, the government does not even attempt to address the many opinions in which the courts of appeals have recognized their conflicting views on whether Section 111(a)(1) requires general or specific intent. *See* Pet. 10 (noting Pet.App. 12a; *United States v. Kimes*, 246 F.3d 800, 808 (6th Cir. 2001); and *Jim*, 865 F.2d at 213). Indeed, the government itself acknowledged below that there is a disagreement on this question, and affirmatively asked the Eighth Circuit to adopt the "majority" view. *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 government should not now be heard to dispute the existence of the disagreement it identified below.

Moreover, while the government errs in denying that other circuits would have come to different conclusions in this case, it is also worth noting that it does not dispute that there are well-reasoned opinions on both sides. That includes Judge Kelly's concurrence below and Judge Merritt's dissent in *Kimes*, along with the Tenth Circuit's helpful and contrary recent decision in *United States v. Gonzales*, 931 F.3d 1219 (10th Cir. 2019). *See infra* p.8 (discussing *Gonzales*). It is thus undisputed that—at the very least—the conflicting views among federal judges on the question presented have ripened the issue for this Court's certiorari review.

Meanwhile, the government fares no better in disputing whether the Tenth Circuit would have sided with petitioner here. It was almost 30 years ago that the Tenth Circuit endorsed a "standard specific intent instruction" for Section 111. *United States v.*

Simmonds, 931 F.2d 685, 689 (10th Cir. 1991). The government identifies no contrary precedent since, pointing only to a 1975 decision that concerned only the allegations required for a Section 111 indictment. *See* BIO 11. The government does not dispute that the Tenth Circuit's current pattern jury instruction mirrors the specific-intent formulation of the common law. *See* Pet. 13-14 (explaining common-law formulation); BIO 12-13 (acknowledging requirement in both Tenth and Fifth Circuit pattern instruction). The government is thus starting from behind, even if it could offer a meaningful distinction of *Gonzales*.

But, perhaps most importantly, the government cannot distinguish *Gonzales*. In that case, the Tenth Circuit addressed the question of specific vs. general intent in the context of the parallel provision of the Sentencing Guidelines. *Gonzales*, 931 F.3d at 1220-21. And relying heavily on the common-law understanding of assault, it held that Guidelines Section 3A1.2(c)(1) requires specific intent. *Id.* at 1221-22. The government says in response that this guideline's "text is substantially different," BIO 12, but it does not attempt to explain *how* it is different, much less *why* any textual differences would matter—particularly to the common-law question that the Tenth Circuit resolved in favor of petitioner's argument and that this Court has consistently emphasized. *See, e.g.*, *United States v. Shabani*, 513 U.S. 10, 13-14 (1994). Put another way, the government provides no reasonable basis on which a panel of the Tenth Circuit could read its decision in *Gonzales* and then go on to hold that Section 111(a)(1) does not require the specific intent that is required for the parallel guidelines enhancement.

This Court can thus safely conclude that no such basis exists.

Relatedly, the government errs in rejecting the import of the Tenth and Fifth Circuit pattern jury instructions on the grounds that the Eighth Circuit has the same instruction. *See* BIO 12-13. As Judge Kelly explained below, those pattern instructions clearly "are consistent with [the] view" that "the defendant must have acted with specific intent." Pet.App. 14a. The Eighth Circuit's position on this issue was unusually muddied by its conflicting precedent; the positions of the Fifth and Tenth Circuits are not. *See* Pet.App. 7a-8a (holding that court was bound to adopt "the earliest of the conflicting opinions" it had adopted on the question). And, relatedly, the Eighth Circuit did not address the import of its pattern instructions only because it viewed itself as bound by its earliest precedent on point. *See id.*; *compare id.* at 14a-15a (Kelly, J., concurring). In short, there is every reason to believe that circuits describing Section 111 as a specific-intent offense and imposing pattern instructions in line with the common law's specific-intent requirement would adhere to the view that a Section 111 conviction requires specific intent. *Contra* BIO 11-13.

There is thus a split that demands resolution here—one that has developed the arguments on both sides of the question and led to conflicting requirements in different jurisdictions. This Court should not delay resolution of this conflict any longer.

III. The Decision Below Is Incorrect.

Given that conflict, this case should be granted without regard to which side is right—a point the government perhaps implicitly acknowledges by trying to

jump to the merits first. *See* BIO 4-9. It is nonetheless clear that the majority view on this question is wrong, and is an unfortunate byproduct of certain dicta in *Feola* that only this Court can now correct. The government's merits arguments are remarkably weak, and this perhaps explains why the government is so loath to see this Court review the very holding it invited below.

Most critically, while the government acknowledges that Section 111 is silent about specific vs. general intent, BIO 6, it has no way to dispute that the common law speaks loud and clear. In fact, the petition flagged the expert observation, from no less an authority than Justice Scalia, that 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: The Interpretation of Legal Texts* 320 (2012) (emphasis added). The government is silent in response: It has absolutely no explanation for how it can (1) acknowledge the statute's lack of a definition and then (2) leave the common-law definition undisputed without (3) conceding that Section 111(a)(1)'s intent requirement must incorporate the common law's requirement of specific intent.

To be sure, the government's lack of persuasive textual arguments is not surprising. Even as it concluded that it was bound by *Feola* to hold otherwise, the Ninth Circuit observed that a specific-intent requirement is the better textual view. *See* Pet. 13 (quoting *Jim*, 865 F.2d at 213-14). Yet this *is* a particularly good reason to grant review—where the courts of appeals feel bound by this Court's precedents to adopt a

view they themselves believe contrary to the best reading of the text, this Court has a responsibility to set the record straight.

Meanwhile, when it comes to *Feola*, the very best the government can do is contest whether it "all but holds that 'the substantive offense' under §111 is not a general-intent crime." BIO 7 (quoting Pet. 20). But this is not what the government needs to prove: It is *petitioner's point* that *Feola*'s dicta on a different statutory requirement should not be read to control the outcome here. All petitioner asks is that Section 111 be read according to its text and the longstanding common-law definition of assault, and not distorted by *Feola*'s outdated purposivist analysis. So unless *Feola* does control (which the government seems to deny), it is petitioner who will ultimately prevail.

In any event, petitioner has the better reading of *Feola* as well. When *Feola* says that Section 111 still requires "the intent of the actor to accomplish the *result* that is made criminal," 420 U.S. at 692 (emphasis added), it is clearly using the language of specific intent. *See* Pet. 3-4 (explaining the well-worn distinction between intending the *action* and the *result*). The government's contrary argument assumes its own conclusion—it reads *Feola* as having held that general intent suffices because Section 111 will still have "a requirement of *mens rea* as to each of its elements," when the whole point is that *Feola* can only be comfortable making this observation because it assumes that the substantive assault element requires specific intent. *See* Pet. 18-20; *contra* BIO 8. Ultimately, this Court can read and interpret *Feola* for itself. All petitioner asks is that the Court do so by granting certiorari and releasing the lower courts from a misreading

of *Feola* that has required them to go against the best view of the text.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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