No. _____

IN THE
Supreme Court of the United States

TODD STANDS ALONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 18 U.S.C. § 111, Congress set out one misdemeanor and two felony offenses. Seven courts of appeals are split over whether § 111 requires proof of common-law simple assault for each of its offenses. Three circuits hold that it does; four circuits hold that it does not. Petitioner Todd Stands Alone was convicted of violating § 111(b) based on non-assaultive conduct. This petition asks:

Is common-law simple assault an essential element of § 111(b)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Todd Stands Alone. Respondent is the United States of America. No party is a corporation.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Stands Alone submits that the following proceedings are directly related to this case:

- *United States of America v. Todd Stands Alone*, No. 3:18-cr-00128, U.S. District Court for the Western District of Wisconsin. Judgment entered June 1, 2020.
- *United States of America v. Todd Stands Alone*, No. 20-2018, U.S. Court of Appeals for the Seventh Circuit. Judgment entered August 23, 2021.
- *United States of America v. Todd Stands Alone*, No. 21A140, U.S. Supreme Court. Time in which to file a petition for a writ of certiorari extended to January 3, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Todd Stands Alone respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS AND RULINGS BELOW

The opinion of the Seventh Circuit is reported at 11 F.4th 532 (7th Cir. 2021). *See* App., *infra*, 1a–10a. The district court's opinion is not reported. App. 12a–27a.

JURISDICTION

The Seventh Circuit entered judgment on August 23, 2021. App. 11a. On November 9, 2021, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including January 3, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 111 and 1114, as they read in March 2018, provide:

§111. 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; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

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.

(b) ENHANCED PENALTY.—Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

§1114. Protection of officers and employees of the United States

Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished—

(1) in the case of murder, as provided under section 1111;

(2) in the case of manslaughter, as provided under section 1112; or

(3) in the case of attempted murder or manslaughter, as provided in section 1113.

STATEMENT OF THE CASE

A. Stands Alone was charged with resisting, intimidating, and interfering with a federal officer in the course of her duties.

On March 1, 2018, a correctional officer peered into a prison cell at FCI Oxford and saw Todd Stands Alone tattooing another inmate. App. 20a. The officer ordered both men to stay put but neither did, so the officer radioed to fellow correctional officer, Shay Decker, for assistance. *Id.* Stands Alone returned to his own cell, where he found a few officers tossing its contents, which angered him and led him to shout and pace inside the unit. *Id.* at 2a, 21a. In response, Decker ordered a unit lockdown and directed Stands Alone to stand near the front of the unit. But Stands Alone returned to his cell, instead. *Id.* at 2a.

The stand-off that happened next led to this prosecution. Decker followed Stands Alone to his cell, ordered him to stand down, and threatened to pepper spray him. *Id.* Stands Alone grabbed a fire extinguisher off the wall, raised it to chest height, and twice yelled "Don't fucking spray me." *Id.* at 2a, 21a, 23a. Decker then sprayed Stands Alone in the face with pepper spray and, "in response," Stands Alone discharged the fire extinguisher. *Id.* at 2a, 21a, 23a. The fire suppressant mixed with the pepper spray and blew back onto Decker's face, affecting her vision and causing her physical pain. *Id.* at 2a, 21a–22a.

Stands Alone was charged with violating § 111(a)(1) and (b). The indictment alleged that he "knowingly and forcibly resisted, intimidated, and interfered with [Decker] . . . while she was engaged in her official duties, and in so doing, inflicted

bodily injury to [her]." App. 2a–3a. The indictment did not use the word "assault" and did not allege any facts that, if true, would constitute an assault.

B. The district court determined that common-law simple assault was not an element of § 111(b) and found Stands Alone guilty.

The district court, which had jurisdiction under 28 U.S.C. § 3231, held a one-day bench trial and made the factual findings articulated above. Importantly, though, the court found that, while Stands Alone "intentionally discharged the fire extinguisher in response to being pepper sprayed," the Government *had not* proven beyond a reasonable doubt that he "intended to spray Decker with the fire extinguisher." App. 23a. In other words, the Government had not proven that Stands Alone committed a common-law assault, because he had not acted with intent to cause Decker bodily harm and he had not threatened Decker with bodily harm.

Nonetheless, the district court found Stands Alone guilty of violating § 111(b). In so holding, the district court squarely tackled the question presented here: whether common-law simple assault is an essential element of § 111.[1] It reasoned as follows:

As a preliminary matter, the district court read the statute to set out multiple offenses. The court described each offense as depending on proof of a series of "prohibited acts" (set out in subsections (a)(1) and (a)(2)) against a person covered under 18 U.S.C. § 1114, with "penalties that apply based on the consequences of the prohibited acts." App. 16a. The court identified four penalty "conditions": first, "when the acts in violation constitute simple assault," then a fine or prison up to one year is

[1] The court quickly dispensed with the Government's claim that Stands Alone had forfeited or waived his legal argument. App. 13a–14a.

possible (§ 111(a)); second, "when the act in violation involves physical contact with the 'victim of that assault,' referring to the assault mentioned under the first condition," then a fine or prison of up to 8 years applies (§ 111(a)); third, "when the violating act involves the intent to commit another felony, with no victim specified," the same penalty applies (§ 111(a)); and fourth, if, "in the commission of the acts defined in subsection (a), [the defendant] either uses a deadly or dangerous weapon or inflicts bodily injury," then a fine or up to 20 years' imprisonment is possible (§ 111(b)). App. 16a–17a. According to the district court, this meant that a conviction under § 111(b) required proof of three elements: that the defendant committed any of the acts listed in subsection (a)(1), that his act was committed against a person covered by § 1114 who was engaged in her official duties at the time, and that the defendant inflicted bodily injury on her. *Id.* at 17a. Read this way, the statute permits conviction without proof of an assault.

In the defense's view, the statute's offenses overlap more than that: "simple assault" is a required element of *each* offense in § 111, not just the misdemeanor. The statute defines the misdemeanor in terms of when the acts in subsection (a)(1) or (a)(2) "constitute only simple assault." 18 U.S.C. § 111(a). By cross-referencing those same acts in the two felony offenses (using the phrases "where such acts" and "acts described in subsection (a)"), Congress made "simple assault" an element of each of those offenses. And, because Congress did not define "simple assault" as it is used in § 111, the court should look to the common law to define it. Put differently, the misdemeanor offense of common-law "simple assault" is a lesser-included offense of

each of the two felonies. This means the Government must allege and prove common-law "simple assault" as part of any offense under § 111—the misdemeanor, the 8-year felony, and the 20-year felony.

The district court rejected the defense's argument. According to the court, the canon against surplusage demanded that assault *not* be an essential element of § 111(b), because requiring proof of assault would "render[] five of the six verbs in subsection (a)(1) superfluous." App. 19a. Although the court recognized that subsection (b) cross-references the "acts described in subsection (a)," it did not read that cross-reference to make "simple assault" an element of the felony. Instead, the court concluded that "[n]othing in subsection (b) expressly requires that any 'assault' be committed." *Id.* at 16a–17a.

Further, the district court believed that the defense's reading of the statute "defies common sense" because it would not further Congress's protective intentions. The court noted that requiring proof of assaultive conduct would "undermine[] the purpose of the statute," because it would mean harmful actions against officers would be lightly punished if the defendant "did not attempt or threaten physical harm to the officer." *Id.* at 19a. Specifically, the court was concerned that, "[u]nder Stands Alone's interpretation, a defendant could forcibly resist a federal officer performing her duties, inflict great bodily harm, and yet face no more than an infraction, so long as the defendant did not attempt or threaten physical harm to the officer." *Id.*

On this understanding of § 111 and its demands, Stands Alone was convicted. The court found the Government had alleged and proven a violation of § 111(b) based

on Stands Alone's non-assaultive conduct with the fire extinguisher. *Id.* at 23a–26a**.** Stands Alone was sentenced to time served. *Id.* at 29a.

C. The Seventh Circuit affirmed.

Stands Alone timely appealed to the Seventh Circuit, which had jurisdiction under 28 U.S.C. § 1291 and affirmed. The circuit court's reasoning largely mirrored that of the district court. The Seventh Circuit explained that assault could not be an essential element of every § 111 offense because, if so, five of the six verbs in subsection (a)(1) would be superfluous. App. 7a–8a. Plus, the court noted, limiting § 111 to assaultive conduct would truncate the reach of subsection (b), which operates to "enhance[] the penalty when a defendant inflicts bodily injury while committing *one or more* of those six acts." *Id.* at 8a (emphasis added). For good measure, the court shored up its conclusion with citation to the absurdity doctrine: assault cannot be an essential element of every § 111 offense because then a person could act with force against a correctional officer by resisting an order but escape prosecution—an "absurd" result. *Id.* at 9a–10a.[2]

Although the Second, Ninth, and Tenth Circuits had reached a contrary conclusion, the Seventh Circuit did not linger on the circuit split. Instead, the court simply characterized the Tenth Circuit's contrary reading of § 111 as unpersuasive and dictated by its own precedent. *Id.* at 7a. In doing so, it joined the Fourth, Fifth, and Sixth Circuits in holding that assault is *not* an essential element of every § 111 offense and affirmed Stands Alone's conviction under § 111(b). *Id.* at 8a, 10a.

[2] Like the district court, the Seventh Circuit squarely rejected the Government's argument that Stands Alone had forfeited the issue presented on appeal. App. 4a–5a.

REASONS FOR GRANTING THE PETITION

The Court should grant a writ of certiorari for at least three reasons. First and foremost: the courts of appeals are split over whether common-law simple assault is an element of every § 111 offense. A majority of the courts of appeals have weighed-in, and the factions are almost evenly divided—three circuits say Yes, four circuits say No. As a result, federal law is being applied inconsistently across the country.

Second, the Seventh Circuit's decision is incorrect. The statute's structure makes clear that "simple assault" is part of any § 111 offense. And this Court's precedents directed the Seventh Circuit to define "simple assault" by reference to the common law, which refers only to *assaultive* conduct. This meant the Seventh Circuit should have held that common-law simple assault is an element of § 111(b). Instead, the court elevated the canon against surplusage and the absurdity doctrine over all other considerations, broadening the statute beyond its plain meaning. Had the court more carefully parsed the statute's structure, looked to the common law to define "simple assault," and cross-referenced other statutory construction tools for confirmation, then it would have joined the Second, Ninth, and Tenth Circuits in their reading of § 111 and vacated Stands Alone's conviction.

Third, this case presents an ideal vehicle for addressing this significant issue. The question presented was squarely addressed below. And resolving it is important: given the breadth of § 1114 (which sets out those protected under § 111), many prosecutions under § 111 are pending and possible, and the outcome of criminal charges should not depend on geography.

I. The decision below sits at the center of a circuit split.

The question presented arises against the backdrop of an entrenched split of authority, with seven courts of appeals having voiced an opinion. The courts start from a place of common ground: all seven agree that, in light of this Court's rulings in *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), § 111 must be read to create multiple offenses (rather than one offense with multiple possible punishments) and that the Government must plead and prove each element of each offense.[3] The courts also generally agree that § 111 outlines one misdemeanor (§ 111(a)(1)) and two felonies—one felony in § 111(a)(1) that carries an 8-year penalty, and one felony in § 111(b) that carries a 20-year penalty.[4]

But that common ground ends at a fork in the road over what elements make up each offense in § 111—specifically, whether "simple assault" is one of those elements and, if so, what "simple assault" means. Reading this statute is an exercise in patience. It appears to prohibit six acts in § 111(a), but differentiates between a misdemeanor and felony by referencing only "simple assault," and it does not define "simple assault." *See, e.g.*, *United States v. Williams*, 602 F.3d 313, 316 (5th Cir. 2010); *United States v. Chapman*, 528 F.3d 1215, 1218–19 (9th Cir. 2008). As a result, the circuits have splintered over whether "simple assault" is an element of *each* offense in § 111 and whether that term encompasses *non-assaultive* conduct.

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[3] *See United States v. Briley*, 770 F.3d 267, 273 (4th Cir. 2014); *United States v. Gagnon*, 553 F.3d 1021, 1023–24 (6th Cir. 2009) (collecting cases from the Fifth and Seventh Circuits holding the same); *United States v. Chapman*, 528 F.3d 1215, 1218–19 (9th Cir. 2008) (collecting cases from the Second, Third, Fifth, Eighth, and Tenth Circuits).

[4] The Fourth Circuit counts five offenses, given the word "or" in each felony-offense clause. *See Briley*, 770 F.3d at 273.

A. The Second, Ninth, and Tenth Circuits have held that common-law simple assault is an element of every § 111 violation.

Three courts of appeals have held that common-law simple assault is an essential element of the lesser-included misdemeanor conviction, under § 111(a). They did so by looking closely at the statute's structure and relying on the common law to conclude that, no matter which of the six verbs the Government charges, it must prove the defendant committed at least "simple assault."

First, looking to *Jones* for guidance, the Second, Ninth, and Tenth Circuits identified the different offenses within § 111 and the lines of demarcation between them. They all agreed that "simple assault" separates the misdemeanor in § 111(a) from the other felony offenses. And based on that delineation, the courts reasoned, any one of the six acts listed in subsection (a)(1) must amount at least to "simple assault" to trigger a misdemeanor conviction. *See United States v. Wolfname*, 835 F.3d 1214, 1218 (10th Cir. 2016); *United States v. Davis*, 690 F.3d 127, 134–35 (2d Cir. 2012); *Chapman*, 528 F.3d at 1219–20. As the Tenth Circuit put it, "a conviction for any of these acts [in subsection (a)(1)] necessarily involves—*at a minimum*—simple assault." *Wolfname*, 835 F.3d at 1218 & n.1 (emphasis added).

Second, consistent with this Court's precedents and rules of statutory construction, these courts gave meaning to "simple assault" through reference to the common law, which confirmed that Congress intended the acts described in § 111(a)(1) to be assaultive acts. As the Second and Ninth Circuits explained, at common law, "simple assault" meant: "a crime, not involving touching, committed by either a willful attempt to inflict injury upon the person of another, or by a threat to

inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *Davis*, 690 F.3d at 135–36 (internal quotation marks omitted); *accord Chapman*, 528 F.3d at 1219–20 (drawing same definition from circuit precedent, which cited common law); *see also Wolfname*, 835 F.3d at 1218, 1220 (adopting similar definition with cross-reference to same term in § 113, but still limited to assaultive conduct).[5] With the common law informing the meaning of "simple assault," these courts confirmed that the six acts listed in § 111(a)(1) must be *assaultive* acts. *See Wolfname*, 835 F.3d at 1218; *Davis*, 690 F.3d at 135; *Chapman*, 528 F.3d at 1219–21. Pointedly, the Second Circuit rejected the suggestion that "simple assault" could operate as a "term of art" that encompassed non-assaultive conduct, as there was no indication that Congress intended to displace that term's established common-law meaning. *Davis*, 690 F.3d at 136 (citing *United States v. Turley*, 352 U.S. 407, 411 (1957)).

After concluding that assaultive conduct underpins each of the six verbs in subsection (a)(1) for purposes of the lesser-included misdemeanor, it naturally follows that common-law simple assault also is a required element of the § 111 felony offenses. After all, each felony refers back to the same six acts. *See* 18 U.S.C. § 111(a) ("and where such acts involve"); *id.* § 111(b) ("in the commission of any acts described in subsection (a)"). In two subsequent cases, the Ninth and Tenth Circuits made explicit that assault is a required element of a violation of § 111(b). *See United States*

[5] The Third and Eighth Circuits also have defined "simple assault" in § 111 through reference to the common law and § 113, although they did not squarely address the question presented here. *See United States v. Yates*, 304 F.3d 818, 822 (8th Cir. 2002); *United States v. McCulligan*, 256 F.3d 97, 102–03 (3d Cir. 2001).

v. Kendall, 876 F.3d 1264, 1270 (10th Cir. 2017) (in context of determining whether § 111(b) is a "crime of violence," explaining that "*every* conviction under § 111 requires an assault" (emphasis added)); *United States v. Juvenile Female*, 566 F.3d 943, 946–47 (9th Cir. 2009) (same).

B. The Fourth, Fifth, Sixth, and (now) Seventh Circuits have held that § 111 criminalizes non-assaultive conduct.

In contrast, four courts of appeals have held that non-assaultive conduct can trigger liability for either a misdemeanor or felony under § 111. The break in approach turns on the courts' treatment of "simple assault" within the statute's structure. The Fourth, Fifth, Sixth, and Seventh Circuits focused on the canon against surplusage, purpose of the statute, and absurdity doctrine in holding that non-assaultive conduct can trigger § 111 liability and that "simple assault" is not limited to its meaning at common law. Although all four courts reached the same result, their reasoning falls into two camps.

1. The Fifth and Sixth Circuits held that non-assaultive conduct can violate the § 111 misdemeanor provision because Congress meant "simple assault" to operate "as a term of art" that doesn't always mean "assault." These courts reasoned that requiring proof of assault could not be what Congress intended, because doing so "disregards five of the six actions Congress specifically delineated," and "[i]f Congress meant only assault it could have said only assault[.]" *United States v. Gagnon*, 553 F.3d 1021, 1026 (6th Cir. 2009); *accord Williams*, 602 F.3d at 317. Plus, they asserted, "Congress's drafting makes clear that § 111's purpose is to protect federal officers and certain employees from a broader range of harmful conduct than just common-law

assault." *Gagnon*, 553 F.3d at 1026; *accord Williams*, 602 F.3d at 317–18. Although the Sixth Circuit claimed to be accounting for the common law, it concluded that "simple assault" in § 111 operated as a "term of art" that encompassed both assaultive and non-assaultive conduct. *See Gagnon*, 553 F.3d at 1026–27. For its part, the Fifth Circuit endorsed the Sixth Circuit's rule and reasoning without further discussion of the common-law meaning of "simple assault." *See Williams*, 602 F.3d at 317–18.

2. Although the Fourth and Seventh Circuits reached the same ultimate result, their analysis was different. Rather than invent a "term of art," they concluded that the statute's misdemeanor and felony offenses could be triggered by "any one of the[] six acts" listed in (a)(1), without proof of assaultive conduct. *United States v. Briley*, 770 F.3d 267, 274–75 (4th Cir. 2014); *accord* App. 7a–8a. In addition to citing concerns about superfluity and the statute's purpose, these courts thought that requiring proof of assaultive conduct in every case would lead to absurd results—namely, that a person could "commit an array of forcible acts against federal officials performing government functions without criminal consequence." *Briley*, 770 F.3d at 274; *accord* App. 9a–10a.

C. The conflict is clear.

Seven courts of appeals have tackled the thorny question of whether § 111 criminalizes non-assaultive conduct. The Second, Ninth, and Tenth Circuits have honored Congress's choice of language and structure by holding that a defendant has not violated § 111 if he did not commit at least "simple assault"—which takes its meaning from the common law and is limited to assaultive conduct. *See Wolfname*,

835 F.3d 1214; *Davis*, 690 F.3d 127; *Chapman*, 528 F.3d 1215. Meanwhile, the Fourth, Fifth, Sixth, and Seventh Circuits have held that a defendant can violate § 111 even if he did not commit an assault, with two courts treating "simple assault" as a "term of art" that includes non-assaultive conduct and two courts emphasizing the canon against surplusage and absurdity doctrine over all other considerations. *Briley*, 770 F.3d 267; *Williams*, 602 F.3d 313; *Gagnon*, 553 F.3d 1021; App. 1a–10a.

Even those courts that have not yet addressed the question presented acknowledge the divide. The First and Third Circuits have highlighted the conflict among the courts of appeals but not yet weighed-in on the merits. *See United States v. Taylor*, 848 F.3d 476, 493 n.6 (1st Cir. 2017); *United States v. Green*, 543 F. App'x 266, 272 n.9 (3d Cir. 2013). Yet, at this point, a majority of the courts of appeals having offered an opinion and federal law is being applied inconsistently across the country. Now that seven courts have frayed the law, this Court should step in and sew up the circuit split.

II. The decision below is incorrect.

The split in authority alone provides strong reason for the Court to take this case, but it is not the only reason. As described below, the Seventh Circuit's reasoning does not withstand close scrutiny and is at odds with this Court's instruction on how best to interpret statutes. First, the court's interpretation of § 111 runs counter to the plain language and structure of the statute. Second, the court bucked the longstanding rule of statutory construction that undefined terms should be understood in light of their common law meaning. Third, reading § 111 to make common law "simple assault" an element of *each* offense in the statute is consistent

with other tools of statutory interpretation that the Seventh Circuit ignored, including the related-statutes canon, title-and-headings canon, general purpose of the statute, rule of lenity, and principles of constitutional avoidance. And fourth, because the statute requires proof of assault and the Government did not prove an assault, Stands Alone's conviction should have been vacated.

A. The statute's plain language and structure dictate that common-law "simple assault" is an element of every § 111 offense.

The Seventh Circuit ignored the structure through which Congress defined § 111's multiple offenses. It also ran afoul of the rule of statutory construction that undefined terms are presumed to take on their common-law meaning. This combination of errors led the court mistakenly to sideline "simple assault" when it should have realized that "simple assault" was an essential element of § 111(b).

1. In trying to give weight to each of the six verbs in subsection (a)(1) individually, the Seventh Circuit overlooked that those acts operate as a unit within § 111's structure. The court thought that "requiring assault as an essential element of *every* § 111 offense would render the remaining five verbs superfluous." App. 8a. But each verb has meaning; it simply takes the form of assaultive conduct. The statute sets an elemental floor with the misdemeanor offense by defining the six verbs in § 111(a)(1) in terms of "simple assault," then cross-references those acts, so defined, and draws them into each of the two felonies. This makes "simple assault" the lesser-included offense of each felony. *See, e.g.*, *United States v. Rivera-Alonzo*, 584 F.3d 829, 834 (9th Cir. 2009) ("simple assault is a lesser-included offense of both the 8-year and the 20-year felonies described in § 111").

a. The Seventh Circuit understood that "the acts" in § 111's misdemeanor must refer to the six verbs listed in (a)(1), but it mistakenly believed all six verbs could trigger a misdemeanor even if they were non-assaultive in nature. App. 7a–9a. Instead, the misdemeanor offense in § 111 rises and falls on a showing of "simple assault." Under § 111(a), a person is guilty of a misdemeanor if "*the acts in violation of this section* constitute *only simple assault*." 18 U.S.C. § 111(a) (emphases added). Put differently, a defendant's conduct triggers misdemeanor liability *provided that* it constitutes at least "simple assault"—and Congress covered its bases by making clear that it can take the form of generic assault or assaultive resistance, opposition, impediment, intimidation, or interference. *See, e.g.*, *Chapman*, 528 F.3d at 1219.

b. Again emphasizing superfluity concerns, the Seventh Circuit overlooked that Congress built § 111's felonies from the foundation of that misdemeanor. In the very same sentence, after providing that the misdemeanor occurs when "*the acts* in violation of this section constitute only simple assault," Congress referred to the same assaultive acts with: "and where *such acts* involve . . . ." 18 U.S.C. § 111(a) (emphases added). Further confirming that "the acts" and "such acts" refer only to *assaultive* acts, Congress went on to describe a § 111 victim as "the victim of *that assault*." *Id.* (emphasis added).

"Such acts" tethers the misdemeanor to the felony. As Black's Law Dictionary explains, the word "'such' represents the object as already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last

antecedent." *Such*, BLACK'S LAW DICTIONARY 1284 (5th ed. 1979)[6]; *accord* BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE 873 (4th ed. 2016) ("Such is properly used as an adjective when reference has previously been made to a category of people or things; hence *such* means "of that kind" <such a person> <such people>."); *see also* *Such*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANG. 1456 (College ed. 1962) (". . . like or similar to something mentioned or implied; specifically, *a)* being the same as what was stated before . . ."). Properly understood, the phrase "such acts" doesn't simply refer to the individual verbs listed in the statute as they might be used in some other context; rather, it refers specifically to those acts when they constitute at least "simple assault." *Cf. Briley*, 770 F.3d at 274 (agreeing that § 111 "consistently references the same set of all six alternative verbs for each penalty provision" but failing to read them in the context of "simple assault").

The whole-text and associated-words canons support this reading. The whole-text canon "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012). And the associated-words canon (*noscitur a sociis*) instructs that "[w]hen several nouns or verbs or adjectives or adverbs—any words—are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." *Id.* at 195; *accord id.* at 197 (the

[6] The most recent edition of Black's Law Dictionary offers a consistent definition. *See Such*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. Of this or that kind <she collects a variety of such things>. 2. That or those; having just been mentioned <a newly discovered Fabergé egg will be on auction next week; such egg is expected to sell for more than $500,000>.").

words need not appear in a list; "[a]n 'association' is all that is required"). Here, the first half of § 111(a) (defining the misdemeanor) and the second half of § 111(a) (defining the first felony) are "interrelated parts that make up the whole." *Id.* at 167. And the phrases "the acts" and "such acts" make clear that the misdemeanor and felony have something in common—"simple assault." *See id.* at 195; *e.g.*, *Yates v. United States*, 574 U.S. 528, 543–45 (2015) (applying *noscitur a sociis* when interpreting 18 U.S.C. § 1519 and holding that "tangible object," which appeared after "a record [or] document," did not include fish). As noted above, cementing the fact that Congress intended to criminalize *only* assaultive conduct, the same clause describes the victim of a § 111 crime as the "victim *of that assault*." 18 U.S.C. § 111(a) (emphasis added); *see Wolfname*, 835 F.3d at 1220–21 & n.3 (2008 amendment confirmed that § 111 criminalizes only assaultive conduct); *Chapman*, 528 F.3d at 1221 (Congress chose to use "the word 'assault' in the description of both misdemeanors *and* felonies").

c. The same analysis carries into the next section of the statute (§ 111(b)), which sets out a second felony—again, built off of "simple assault." In subsection (b), Congress drafted the second felony (punishable by up to 20 years) with another explicit cross-reference to the misdemeanor offense: "in the commission of *any acts described in subsection (a)* . . . ." 18 U.S.C. § 111(b) (emphasis added). "Any acts" is no different than "such acts," given that subsection (a) refers to all its "acts" in terms of "simple assault." Thus, just as in the first felony, Congress carried the threshold requirement of "simple assault" into the statute's second felony offense.

When just quoting the phrases in which "acts" appear, it is easy to lose sight of how those phrases relate to the antecedent term of "simple assault." But highlighting "the acts," "such acts," and "any acts" within the text makes clear how the statute reinforces the terms' relationship across provisions:

> §111. 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; or
>
> (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,
>
> 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.
>
> (b) ENHANCED PENALTY.—Whoever, **in the commission of any acts described in subsection (a),** uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

Overlooking that relationship, the Seventh Circuit failed to construe the statute as a whole and give effect to its interrelated subsections. Instead, by concentrating on making sure that each of the six verbs in § 111(a)(1) had individual torque, the court tried to prevent "simple assault" from being the tail that wags the dog. *See* App. 7a–8a, 10a. But "simple assault" is not the tail—it is the dog. It is the consistent and essential element across all three offenses, the lesser-included foundation on which the two felonies are built. *Rivera-Alonzo*, 584 F.3d at 833–34.

2. The Seventh Circuit compounded its error when it declined to define "simple assault" based on its common-law meaning. The statute itself leaves "simple assault" undefined, and it is a "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); *see also, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 563–64 & n.12 (2007) (construing "extortion" in 18 U.S.C. § 1951(a) in light of its common law meaning). Rather than providing a "contrary indication," Congress defined the misdemeanor offense in terms of *"only* simple assault." 18 U.S.C. § 111(a) (emphasis added). It follows, then, that the Seventh Circuit should have looked to the common law to understand whether § 111's "simple assault" reaches non-assaultive conduct. Had it done so, it would have confirmed that the misdemeanor encompasses *only* assaultive conduct. *See Davis*, 690 F.3d at 135–36 (at common law, "simple assault" reaches only a "willful attempt . . . [or] threat to inflict injury . . . [that] causes a reasonable apprehension of immediate bodily harm"). And, echoing the discussion above, the court should have concluded that the statute's structure dictates treating common-law "simple assault"—i.e., assaultive conduct—as a threshold requirement for each felony offense.

But the Seventh Circuit ignored this principle altogether. In fact, it did not even reference this Court's precedents requiring that courts give undefined terms their common-law meaning. *See* App. 6a–10a. Instead, driven by its concern over superfluity, the Seventh Circuit joined the Fourth, Fifth and Sixth Circuits in being willing to treat the misdemeanor offense as encompassing non-assaultive conduct.

See App. 8a (citing *Briley*, 770 F.3d at 274; *Williams*, 602 F.3d at 318; *Gagnon*, 553 F.3d at 1027).

B. Reading the statute to require proof of common-law simple assault is consistent with other tools of statutory interpretation.

Several other standard tools of statutory interpretation cut against how the Seventh Circuit parsed § 111. First, the related-statutes canon supports reading § 111 in light of its neighboring provision, § 113, which also criminalizes assaultive conduct. Second, the titles of the chapter and section in which § 111 appears cue that Congress was focused on assaults. Third, reading § 111 to criminalize assaultive conduct is consistent with the statute's purpose. And fourth, to the extent that it remains a toss-up between reading § 111 to criminalize only assaultive conduct, versus reading it more broadly to encompass non-assaultive acts, the rule of lenity favors the narrower option. Collectively, these tools reinforce that § 111 should be read to reach only assaultive conduct.

1. Under the related-statutes canon, statutes that cover the same topic—like §§ 111 and 113—should be construed together so as to avoid inconsistencies across them. *See* SCALIA & GARNER at 252. Section 113 of Title 18, just two doors down, criminalizes eight different forms of "assault" committed "within the special maritime and territorial jurisdiction of the United States," including a misdemeanor offense of "simple assault." 18 U.S.C. § 113(a). Both statutory provisions use the term "simple assault" and the phrase "the victim of the assault" to define the offense. *Compare id.* § 111(a), *with id.* § 113(a)(5). The consistent use of this language across statutory provisions to define a misdemeanor offense renders §§ 111 and 113 *in pari materia*

and supports construing them together. Several courts of appeals have recognized that "simple assault" in § 113 takes its meaning from the common law.[7] It follows that Congress intended the same term to have the same meaning in § 111. *See e.g.*, *Sekhar v. United States*, 570 U.S. 729, 733 (2013) ("[A]s Justice Frankfurter colorfully put it, if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (internal quotation marks omitted)); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context."). That is, both § 111 and § 113 reference *common law* "simple assault."

2. The title and heading of § 111 cue the reader to Congress's intent to criminalize assaultive conduct. "Assault" is mentioned no less than four times in § 111. Most notably, it defines the title of the chapter. *See* 18 U.S.C., ch. 7 ("Assault"). And it appears again in the title of the section. Under the title-and-headings canon, the court can look to a title or heading for guidance when parsing an ambiguous statute. *See* SCALIA & GARNER at 222–23; *see, e.g.*, *Yates*, 574 U.S. at 540 (titles and headings "supply cues" as to congressional intent); *Almenderez-Torres v. United States*, 523 U.S. 224, 234 (1998) (statutory titles and section heads are "tools available for the resolution of a doubt about the meaning of a statute"). Here, the title and heading set the theme that carries throughout the provision, with "assault" appearing

[7] *See, e.g.*, *United States v. Bayes,* 210 F.3d 64, 68–69 (1st Cir. 2000); *United States v. Ramirez*, 233 F.3d 318, 321 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Chestaro*, 197 F.3d 600, 605 (2d Cir. 1999); *United States v. Stewart,* 568 F.2d 501, 504 (6th Cir. 1978); *see also United States v. Rocha,* 598 F.3d 1144, 1148 (9th Cir. 2010) ("assault" in § 113 takes its meaning from the common law); *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982) (same).

twice more in the substantive statutory text. "Assault" not only describes the misdemeanor offense ("simple assault") but also the victim of a felony offense ("a victim of *that assault*"). 18 U.S.C. § 111(a) (emphasis added); *see also Long v. United States*, 199 F.2d 717, 719 (4th Cir. 1952) (construing "forcibly" to modify each verb in § 111(a)(1) because, *inter alia*, § 111's placement in a chapter titled "Assault" and among "other sections of the chapter relate[d] to assaults" confirmed "force is a necessary element"). The repeat references to "assault" throughout the statute, and particularly in the title and heading, reinforce that the reader should take Congress at its word: the statute requires assaultive conduct.

3. Interpreting § 111 offenses to require proof of common-law simple assault also is consistent with the statute's purpose. In *United States v. Feola*, this Court explained that, in § 111, "Congress intended to protect both federal officers and federal functions." 420 U.S. 671, 679 (1975). For that reason, this Court declined to embroider a specific intent requirement onto the statutory text, reasoning that doing so would contravene "the congressional purpose of according maximum protection to federal officers." *Id.* at 684; *see also id.* ("All the statute requires is an intent to assault, not an intent to assault a federal officer."). Of course, reading § 111 to criminalize acts of misdemeanor simple assault and felonious assaults goes far in effectuating Congress's purpose.

Plus, it's Congress's prerogative (not the role of federal courts) to enact another law if Congress decides § 111 has proven too narrow. While the Fourth, Fifth, and Seventh Circuits invoked *Feola* to support reading § 111 more broadly, nothing in

Feola supports stretching § 111 beyond its shape in the name of effectuating a policy interest. *See Davis*, 690 F.3d at 137 n.4, *with* App. 6a, 10a; *Briley*, 770 F.3d at 274; *Williams*, 602 F.3d at 317–18. Rather, "[r]espect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe." *United States v. Davis*, 588 U.S. ___, ___, 139 S. Ct. 2319, 2333 (2019).

4. Finally, to the extent that "a reasonable doubt persists" over the scope of § 111 even after considering all these tools of statutory interpretation, lenity favors construing the statute narrowly. *See* SCALIA & GARNER at 299 (internal quotation marks omitted); *see also Shabani*, 513 U.S. at 17 (rule of lenity applies "when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute"). In the course of trying to parse § 111, courts on both sides of the split recognized that the statute is ambiguous. *See, e.g.*, *Williams*, 602 F.3d at 315; *Chapman*, 528 F.3d at 1218. In a choice between interpreting § 111 broadly or limiting its reach, the rule of lenity tips the scale in favor of the latter because, "[w]hen the government means to punish, its commands must be reasonably clear." SCALIA & GARNER at 299, 301 & n.22. This Court previously has applied that rule to limit the scope of ambiguous criminal statutes. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 410–11 (2010) (applying the rule of lenity to limit the scope of the honest-services fraud statute to bribes and kickbacks); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 n.8, 406–09 (2003) (applying the rule of lenity to

prevent the Hobbs Act from reaching acts of coercion). Just as in those cases, the rule of lenity counsels in favor of reading § 111 to apply only to assaultive conduct.

C. Allowing non-assaultive conduct to trigger a conviction creates due process concerns.

The Seventh Circuit's ruling creates constitutional doubts that don't exist in the Second, Ninth, and Tenth Circuits. The Due Process Clause of the Fifth Amendment requires that every criminal law provide "ordinary people fair notice of the conduct it punishes" and that it not be "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). Neither requirement is met under the Seventh Circuit's read of the statute.

1. Nothing in the plain text of § 111 provided Stands Alone with fair notice that it reaches *non-assaultive* conduct. Indeed, the average person would not read "simple assault" and think the statute criminalizes something *other* than assault. Nor does the surrounding context mitigate the surprise. The statute doesn't offer a specialized definition of "simple assault." And it appears in a chapter titled "Assault," alongside other provisions that discuss assaults (18 U.S.C. § 113).

2. What's more, if read to reach non-assaultive conduct, then the statute provides no principled basis for determining what conduct falls within (or outside) its ambit and invites arbitrary enforcement. The Fourth and Sixth Circuits pointed to the word "forcibly" as a governor on the statute's sweep, reasoning that it carved out passive non-assaultive conduct from wrongful non-assaultive conduct, because "[f]acts of the more passive kind fall much closer to the nonforcible borderline." *Briley*, 770 F.3d at 275; *Gagnon*, 553 F.3d at 1027. But "forcibly" alone doesn't offer officers

any principled basis on which to make arrests, because "[w]hether a person has opposed the efforts of federal agents with sufficient force to [violate § 111] can . . . be a troublesome question of degree." *United States v. Cunningham*, 509 F.2d 961, 963 (D.C. Cir. 1975) (per curiam). Consider, for example, a defendant who throws herself onto the ground and turns into a limp-noodle (toddler-style) to resist arrest; or, a defendant who stands rigidly still, opposing an officer's orders to move.[8] Whether the defendant relaxes her muscles or holds them taut, she's engaged in an act of physical force while still being passive vis-à-vis the officer. How is an officer to distinguish when a defendant has exerted enough force to have engaged in wrongful conduct—when the officer subjectively decides he is unable to move her; when a second officer agrees; when either becomes frustrated? "Forcibly" leaves the law's enforcement to "personal predilections"—an officer's gut instinct or, worse, his biases. *See Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983).

D. Stands Alone's conduct did not violate § 111 because the Government did not prove he committed at least simple assault.

The Seventh Circuit should have held that Stands Alone could be liable for a violation of § 111(b), or the lesser-included offense of § 111(a)(1), *only* if he committed at least "simple assault" when he picked up the fire extinguisher. Applying the Second, Ninth, and Tenth Circuits' common-law based definition of "simple assault,"

[8] *Cf., e.g.*, *Davis*, 690 F.3d at 129–30 (after officer caught, struck, and tackled defendant, defendant "did not fight back" but, "[w]hile pinned stomach-down on the ground, . . . placed his hands under his body and was fighting and resisting against being handcuffed" (internal quotation marks omitted)); *Chapman*, 528 F.3d at 1219 ("Chapman did not threaten or attempt to injure the officers in any way—he merely stood still, 'tensing' his body saying, albeit possibly with some intensity, 'hit me again.'").

this meant the Government was required to allege and prove (in relevant part) that Stands Alone willfully attempted to inflict injury or threatened to inflict injury on Decker. *See, e.g.*, *Davis*, 690 F.3d at 135; *Chapman*, 528 F.3d at 1219–20; *United States v. Hathaway*, 318 F.3d 1001, 1008 (10th Cir. 2003).

The Government did not carry its burden here. It did not allege an assault in the indictment; instead, it asserted that Stands Alone committed a felony because he "resisted, intimidated, and interfered with" Decker and "inflicted bodily injury" on her in the course of doing so. *See* App. 3a (quoting indictment). And it did not prove an assault at trial. Importantly, the district court concluded that the Government had *not* proven beyond reasonable doubt that Stands Alone intended to spray Decker with the fire extinguisher. *Id.* at 23a. In other words, there was insufficient proof that Stands Alone had "willful[ly] attempt[ed] to inflict injury" on Decker or "threaten[ed] to inflict injury upon" her. *See, e.g.*, *Davis*, 690 F.3d at 135. Thus, Stands Alone should not have been convicted of a violation of § 111(b).

III. This case presents an ideal vehicle for deciding an important question of federal law.

This case cleanly presents the question for this Court's resolution. Whether simple assault is an essential element of § 111 was "pressed" *and* "passed upon" below. *See Verizon Communc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) ("Any issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari[.]" (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). The district court considered the issue and entered a written opinion. *See* App. 12a–27a. It was the sole question that Stands

Alone presented on appeal. *Id.* at 4a. And the Seventh Circuit reached the merits of that question when denying relief. *See id.* at 5a–10a, 15a–27a. Plus, the question presented is important for at least two reasons:

First, the likelihood of numerous future prosecutions under § 111 is palpable given the breadth of § 1114 and § 111's cross-reference to it. Section 1114 covers "*any* officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services)." 18 U.S.C. § 1114 (emphasis added). Thus, an individual might violate § 111 in an altercation with any one of the 2.1 million employees in the federal government's civilian workforce or 1.3 million active duty members of its uniformed armed forces.[9] And those figures are just for *current* employees or service members; § 111 also reaches acts against *former* employees and service members. *See* 18 U.S.C. § 111(a)(2). What's more, Congress's amendment to § 111 just weeks ago *expanded* the statute's reach to apply extraterritorially.[10] So, even a drunken bar fight in Barcelona against a former BOP correctional officer could lead to prosecution under § 111. Given the large number of situations to which § 111 might apply, the issue presented here has particular importance. Nor is this purely hypothetical. The answer to the question

[9] *See* JULIE JENNINGS & JARED C. NAGEL, CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 1 (2021), https://sgp.fas.org/crs/misc/R43590.pdf; *2020 Demographics Profile: Active Duty Members*, U.S. DEP'T OF DEF., https://tinyurl.com/y45523ev.

[10] *See* Jaime Zapata and Victor Avila Federal Officers and Employees Protection Act, Pub. L. 117-59, 135 Stat. 1468 (2021).

presented has real and immediate consequences for the dozens of individuals charged under § 111 in connection with the breach of the U.S. Capitol on January 6, 2021.[11]

Second, the split in authority means the criminal law is being applied inconsistently across the country. Conduct that violates § 111 in one circuit is not a crime in other circuits, leaving federal prosecution to geographic happenstance. If the BOP had placed Stands Alone at FCI Florence (in Colorado), instead of FCI Oxford (in Wisconsin), then he would not be submitting this petition. Instead, *Wolfname* would have dictated Stands Alone's acquittal because the Government had neither alleged nor proven assaultive conduct against Decker. The inconsistent application of federal criminal law across the country, particularly when coupled with a statute of such breadth as § 111, demands attention and correction.

[11] A search within the Department of Justice's public list of Capitol-breach cases indicates that there have been 127 cases in which prosecutors brought charges for "assaulting, resisting[,] or impeding" under § 111. *See generally Capitol Breach Cases*, U.S. DEP'T OF JUSTICE, https://tinyurl.com/27xrzd7h (last visited Dec. 30, 2021) (search within for "assaulting" identifies 128 case numbers, with one case (21-mj-638) appearing twice).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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