No. 21-6826

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

BRIEF FOR PROFESSORS STEPHEN SMITH, HADAR AVIRAM, JOHN BURKOFF, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Molzof v. United States,
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Morissette v. United States,
342 U.S. 246 (1952) 5, 6

Neder v. United States,
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Norton v. State,
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Peasley v. Puget Sound Tug & Barge Co.,
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Sekhar v. United States,
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State v. Lightsey,
20 S.E. 975 (S.C. 1895) 6

United States v. Briley,
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United States v. Chapman,
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United States v. Dupree,
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United States v. Gagnon,
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United States v. Gauvin,
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United States v. Harris,
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United States v. Ramirez,
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United States v. Turley,
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United States v. Vallery,
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United States v. Wells,
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United States v. Wolfname,
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United States v. Yates,
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Other Authorities

153 Cong. Rec. 34,620 (2007) 14

6 Am. Jur. 2d *Assault and Battery* § 1
(2022) 9

Assault, *Black's Law Dictionary* (11th
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3 William Blackstone, *Commentaries*
(1844) 7, 8

Edward Hyde East, *A Treatise of the
Pleas of the Crown* (1806) 8

William B. Eskridge, Jr., *The New
Textualism and Normative Canons*,
113 Colum. L. Rev. 531 (2013) 5, 14

Felix Frankfurter, *Some Reflections on
the Reading of Statutes*, 47 Colum.
L. Rev. 527 (1947) 3, 5

John Goldberg & Benjamin Zipursky,
The Oxford Introductions to U.S.
Law: Torts (2010) 7

William Hawkins, *A Treatise of the*
Pleas of the Crown (8th ed. 1824) 8

Impede, Oxford English Dictionary,
https://www.oed.com/view/Entry/921
92 (last visited Feb. 9, 2022) 16

Interfere, Oxford English Dictionary,
https://www.oed.com/view/Entry/977
61 (last visited Feb. 9, 2022) 16

Giles Jacob, *The Law-Dictionary* (1797) 8

Anita S. Krishnakumar & Victoria F.
Nourse, *The Canon Wars*, 97 Tex. L.
Rev. 163 (2018) 15

Wayne R. LaFave, *Substantive*
Criminal Law § 16.1(a) (3d ed. 2021) 6, 9

Nancy J. Moore*, Intent and Consent in*
the Tort of Battery: Confusion and
Controversy, 61 Am. U. L. Rev. 1585
(2012) 7

Oppose, Oxford English Dictionary,
https://www.oed.com/view/Entry/131
979 (last visited Feb. 9, 2022) 16

Rollin M. Perkins & Ronald N. Boyce,
Criminal Law (3d ed. 1982).....................................6

Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983) 15

Resist, Oxford English Dictionary, https://www.oed.com/view/Entry/163658 (last visited Feb. 9, 2022) 15

Resisting Arrest, *Black's Law Dictionary* (11th ed. 2019)................................... 16

Restatement (First) of Torts § 21 (1934) 9

Restatement (Second) of Torts § 21 (1965) 9

Antonin Scalia, *Common-Law Courts in a Civil-Law System*, The Tanner Lectures on Hum. Values (1995), https://tannerlectures.utah.edu/_resources/documents/a-to-z/s/scalia97.pdf.. 4, 5

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)...................................3, 5, 14, 15

David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921 (1992)..................................5

George E. Woodbine, *The Origins of the Action of Trespass*, 34 Yale L.J. 343 (1925) 7

INTERESTS OF AMICI CURIAE

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The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF ARGUMENT

It is a fundamental axiom of statutory interpretation that when an Act of Congress employs a well-understood common-law term without specially defining it, the term maintains its common-law meaning. This canon is not only consistent with principles of ordinary usage—indeed, the whole point of using *any* word is to invoke that word's accumulated meaning—but it respects precedent and promotes uniformity in the law, ensuring that words are used in consistent ways throughout the law except when the legislature clearly intends to do otherwise. Here, 18 U.S.C. § 111 uses the term "simple assault" without defining it. Accordingly, because "simple assault" has a well-established common-law meaning, that common-law definition is presumed to apply to the term in the statute. And nothing overcomes that presumption here.

Yet courts of appeals have split over whether the term "simple assault" in § 111 bears its common-law

meaning, with some courts ignoring the common-law definition altogether. And, those courts that decline to give the term its common-law meaning often invoke the rule against superfluities in doing so. But the general desire to avoid superfluous language is not an inexorable command, and here it should give way to the far heavier weight of an established common-law term. This Court's review is needed to clarify the meaning of § 111, and to reaffirm the importance of reading undefined statutory terms to carry their common-law meanings.

ARGUMENT

I. When Congress uses a term that has acquired a well-established common-law meaning, it is presumed to adopt that meaning.

Statutes that incorporate a common-law term without defining it "are to be interpreted and applied according to their common law-meanings." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320-21 (2012). As Justice Frankfurter memorably put it: When transplanting a term from the common law, the statute "brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). That approach respects the common-law term's "long pedigree in the law." *Molzof v. United States*, 502 U.S. 301, 306 (1992). Indeed, this canon of imputed common-law meaning is a "cardinal rule of statutory construction." *Id.* at 307.

The Court has applied this rule broadly to the interpretation of statutes covering many different subjects. *See, e.g.*, *Beck v. Prupis*, 529 U.S. 494, 501-02 (2000) (civil conspiracy statute); *Molzof*, 502 U.S. at 307 (Federal Tort Claims Act). And the Court has been explicit that this precept applies to federal criminal laws: "[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *United States v. Turley*, 352 U.S. 407, 411 (1957). So, for example, the Court has understood the word "extortion" in a criminal statute to "mirror the common-law definition," despite the statute's application of extortion to new factual situations. *Evans v. United States*, 504 U.S. 255, 264 (1992) (construing "extortion" in the Hobbs Act); *see also Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 (2003) (construing the "obtaining" requirement of extortion under the Hobbs Act); *Sekhar v. United States*, 570 U.S. 729, 736-37 (2013) (same). Similarly, applying "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses," the Court refused to "infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes." *Neder v. United States*, 527 U.S. 1, 23 (1999).

This "settled principle of statutory construction" promotes consistency and continuity in the law. *United States v. Shabani*, 513 U.S. 10, 13 (1994). The common law develops as judges apply (or distinguish) legal reasoning from prior cases to new facts. Antonin Scalia, *Common-Law Courts in a Civil-Law System*, The Tanner Lectures on Hum. Values 79-85 (1995),

https://tannerlectures.utah.edu/_resources/documents/a-to-z/s/scalia97.pdf. The process of developing common law through judicial application of legal principles to a variety of facts "has proven to be a good method of developing the law in many fields—and perhaps the very best method." *Id.* at 87-88. Over time, the common law comes to reflect workable, predictable, and widely applicable rules. Thus, when Congress "borrows terms of art," "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word" and should not be understood to make any unintended and unannounced departures from the common law. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

In short, the canon of imputed common-law meaning is a "stabilizing canon[]." William B. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 Colum. L. Rev. 531, 555 (2013); Scalia, *Reading Law*, *supra*, at xvi. It ensures that the "accumulated … legal tradition and meaning of centuries of practice" are carried over and available to courts applying well-defined terms to new circumstances. *Morissette*, 342 U.S. at 263. The canon reflects the principle that, in Justice Frankfurter's words, "continuity with the past is not only a necessity but even a duty." Frankfurter, *supra*, at 535.

As a canon that promotes continuity, the canon of imputed common-law meaning is "more likely to implement than to frustrate legislative purpose." David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 941 (1992). Because "all legislation occurs against a background of customs and understandings of the way things are done,"

by electing to enact a statute using a term with a well-established meaning, Congress is reasonably presumed to adopt that definition. *Id.* at 942. Rather than abandoning accumulated judicial investments in refining and applying terms of legal art, courts should read statutes as reflecting a legislature's "satisfaction with widely accepted definitions, not as a departure from them." *Morissette*, 342 U.S. at 263.

II. The well-established common-law definition of "simple assault" uniformly required an attempt or threat to inflict injury on another.

Congress used the term "simple assault" in § 111 without specially defining it. For the reasons just stated, that makes it especially appropriate to look to the common-law. And, indeed, that term has a well-established common-law meaning: an act constitutes "simple assault" only if the actor intended to or threatened to injure another. *See, e.g.*, Rollin M. Perkins & Ronald N. Boyce, Criminal Law 159 (3d ed. 1982) ("In the early law," assault meant "an attempt to commit a battery" or "an intentional act wrongfully placing another in apprehension of receiving an immediate battery."). This definition is "longstanding and precise." *United States v. Davis*, 690 F.3d 127, 136 (2d Cir. 2012).[2]

[2] "Simple assault" means "assault," as distinct from "assault and battery." *See* Wayne R. LaFave, Substantive Criminal Law § 16.1(a) (3d ed. 2021). Assault, unlike battery, does not require injury or touching. *Id.*; *see also State v. Lightsey*, 20 S.E. 975, 975 (S.C. 1895) ("A simple assault is an attempt to do bodily harm,

Both the crime and the tort of assault were designed to protect against a "breach of the king's peace" and to help secure an individual's right to be free from trespass to their person. George E. Woodbine, *The Origins of the Action of Trespass*, 34 Yale L.J. 343, 359 (1925); *see also* Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 Am. U. L. Rev. 1585, 1606 (2012) (common law writ of trespass included assault and was aimed at breaches of the King's peace). Courts recognized the need to ensure that citizens "feel secure" and may "live in society without being put in fear of personal harm." *Beach v. Hancock*, 27 N.H. 223, 229 (1853). "A credible threat of bodily harm undermines the sense of physical security even if no touching occurs or was going to occur." John Goldberg & Benjamin Zipursky, The Oxford Introductions to U.S. Law: Torts 219 (2010). Thus, the "core of an assault claim" is "having been *intentionally* placed by the defendant" at a perceived risk of physical harm. *Id.* (emphasis added).

To that end, numerous early and seminal common-law treatises were clear that an attempt or threat to inflict injury was an essential element of a claim for assault. For instance, Blackstone defined assault as "*an attempt or offer to beat another* … as if one lifts up his cane, or his fist, in a threatening

but fails,—falls short of doing the harm, touching the body, doing the battery." (internal quotation marks omitted)); *Norton v. State*, 14 Tex. 387, 393 (1855) ("A simple assault is an attempt or offer to beat another without touching him." (citing 3 William Blackstone, *Commentaries* *120)).

manner at another."[3] Other treatises also required that an assault include an attempt or threat to use force or violence against another. Hawkins' *A Treatise of the Pleas of the Crown*—first published in 1716, and one of the most influential law books of the 18th Century—likewise described assault as "*an attempt, or offer, with force and violence, to do a corporal hurt to another*; as by striking at him with, or without, a weapon; or presenting a gun at him, at such a distance to which the gun will carry."[4] East's *Treatise of the Pleas of the Crown* said the same: An assault was "*any attempt or offer with force and violence to do a corporal hurt to another*, whether from malice or wantonness; as by striking at him, or even by holding up one's fist at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability of using actual violence against his person; as by pointing a weapon at him within the reach of it."[5]

Early legal dictionaries likewise understood assault to include an attempt or threat of injury. One dictionary from 1797 defined assault as "*an attempt or offer, with force and violence, to do a corporal hurt to another*; as by striking at him, with or without a weapon." Giles Jacob, *The Law-Dictionary* 80 (1797).

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[3] 3 William Blackstone, *Commentaries* *120 (1844) (emphasis added).

[4] William Hawkins, *A Treatise of the Pleas of the Crown* 110 (8th ed. 1824) (emphasis added).

[5] Edward Hyde East, *A Treatise of the Pleas of the Crown* 406 (1806).

Modern treatises confirm that, under the common law, assault continues to require intent or threat to injure. The LaFave treatise on criminal law defines "assault" as "attempted battery or intentional frightening." LaFave, *supra*, note 2. Similarly, the Restatement of Torts provides that an actor commits assault if he "intend[s] to cause a harmful or offensive contact" with another and if he in fact puts the other in apprehension of that contact—but that the actor does not commit assault if he acts negligently or recklessly. Restatement (Second) of Torts § 21 (1965); *accord* Restatement (First) of Torts § 21 (1934) (requiring that "the actor *intends* to inflict a harmful or offensive contact" upon another; explaining that negligent or reckless conduct does not amount to assault (emphasis added)).

Modern legal dictionaries similarly define simple assault as "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery," or "[a]n attempt to commit battery, requiring the specific intent to cause physical injury." *Black's Law Dictionary* (11th ed. 2019); *see also* 6 Am. Jur. 2d *Assault and Battery* § 1 (2022) ("An assault is a demonstration of an unlawful intent by one person to inflict immediate injury or offensive contact on the person of another then present.").

Likewise, courts around the country have recognized that "common-law assault consisted of either attempted battery or the deliberate infliction upon

another of a reasonable fear of physical injury." *United States v. Delis*, 558 F.3d 177, 180 (2d Cir. 2009); *see also United States v. Yates*, 304 F.3d 818, 822 (8th Cir. 2002) ("The common law offense of simple assault … requires the showing of an offer or attempt by force or violence to do a corporal injury to another." (ellipsis in original) (internal quotation marks omitted)); *Brundage v. United States*, 365 F.2d 616, 619 (10th Cir. 1966) (common-law meaning of "assault" is "attempt … coupled with the present ability to commit a violent injury upon the person of another"); *Carter v. Commonwealth*, 606 S.E.2d 839, 841 (Va. 2005) (common-law assault occurs when there is "an attempt or offer committed with an intent to inflict bodily harm coupled with the present ability to inflict such harm," or conduct "intended to place the victim in fear of bodily harm" that creates a "well-founded fear in the victim"); *Peasley v. Puget Sound Tug & Barge Co.*, 125 P.2d 681, 690 (Wash. 1942) (common-law assault is attempt to inflict injury on another, accompanied with "apparent present ability to give effect to the attempt if not prevented" (internal quotation marks omitted)).[6]

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[6] *See also United States v. McCulligan*, 256 F.3d 97, 102 (3d Cir. 2001) ("[A]t common law, … 'assault' was defined as the attempt or offer to beat another, without touching him, or the placing of another in reasonable apprehension of a battery" (internal quotation marks and citations omitted)); *United States v. Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999) ("At common law, an assault was either a battery, an attempted battery, or an act that puts another in reasonable apprehension of receiving immediate bodily harm."); *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (At common law, assault meant "attempt to commit a

Consistent with the requirement that a defendant guilty of assault must attempt a battery or threaten injury, actions like "[p]ointing a gun at [the victim] and threatening to kill him clearly" are assaultive. *United States v. Harris*, 10 F.4th 1005, 1012 (10th Cir. 2021); *see id.* (defining "simple assault as either 'an attempted battery' or 'placing another in reasonable apprehension of a battery'"). Similarly, a defendant who "swerved his car in a manner placing the officers in reasonable apprehension of battery" committed assault. *United States v. Gauvin*, 173 F.3d 798, 802 (10th Cir. 1999).

On the other hand, if a defendant does not threaten or attempt to injure the victim, the defendant's acts are not assaultive. For example, a defendant has not committed assault if he engaged in a struggle with an arresting officer but did not "attempt[] or threaten[] to injure" the officer. *United States v. Wolfname*, 835 F.3d 1214, 1222 (10th Cir. 2016) (footnote omitted). Similarly, a defendant who merely "tensed up" and "took a rigid stance," but did not "threaten or attempt to injure the officers in any way," has not committed assault. *United States v. Chapman*, 528 F.3d 1215, 1217, 1219 (9th Cir. 2008); *see also Davis*, 690 F.3d at 137 (defendant who resisted handcuffing but did not attempt to inflict injury or threaten to inflict injury on officers is not guilty of assault). That analysis is consistent with the historical rationale of assault as protection against fear of

battery" or "an act which put another in reasonable apprehension of immediate bodily harm.").

injury, not merely protection against resistance, frustration, or obstinance.

Because the term “simple assault” is undefined in § 111 but has a well-established common-law meaning, the presumption is that the term as employed in the statute carries its common-law definition.

III. Nothing in § 111 overcomes the presumption that the term “simple assault” carries its common-law meaning.

There is no indication in the statute that Congress sought to depart from the common-law definition of “simple assault” when using the phrase in § 111. The phrase is not defined in the statute, or indeed in any provision of the U.S. Code. This is the classic case of a statute importing a common-law term—with, therefore, all of its “soil.” *Supra* 3.

Furthermore, Congress’s decision to leave the term “simple assault” untouched, when amending § 111 in 2008, indicates that Congress meant to adopt the then-prevailing understanding of the term. *See Davis*, 690 F.3d at 136 (“One would think that Congress, in amending the statute, would have corrected such a broad misreading had one existed.”). And, at that time, every court of appeals that interpreted the phrase “simple assault” had looked to the common-law definition. *See, e.g.*, *McCulligan*, 256 F.3d at 104 (“simple assault” in § 111 “equates with traditional

common-law assault").[7] Yet Congress amended the statute without in any way modifying that understanding. Before the amendment, § 111(a) described a misdemeanor as "acts in violation of this section [that] constitute only simple assault" and a felony as "all other cases." The 2008 amendment left the misdemeanor classification untouched, but changed the description of a felony under § 111(a) to "acts involv[ing] physical contact with the victim of that assault or the intent to commit another felony." Congress is presumed to have been aware that courts were interpreting "simple assault" by reference to the common law, and its decision to adhere to that language in the face of a widespread and consistent understanding is strong evidence that Congress intended the phrase to retain that common-law meaning. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (quoting *Lorillard v. Pons*, 434 U.S. 575, 580

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[7] *See also United States v. Vallery*, 437 F.3d 626, 631-32 (7th Cir. 2006) (applying common law definition of "simple assault" to phrase in § 111); *United States v. Hathaway*, 318 F.3d 1001, 1008 (10th Cir. 2003) ("'[S]imple assault' in § 111 should be defined by reference … to the common law meaning of assault …."); *Yates*, 304 F.3d at 821-22 (invoking "the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms"); *United States v. Fallen*, 256 F.3d 1082, 1088 (11th Cir. 2001) (common law definition of "simple assault" applies to § 111); *United States v. Ramirez*, 233 F.3d 318, 321-22 (5th Cir. 2000) ("simple assault" in § 111 has its common law meaning); *United States v. Chestaro*, 197 F.3d 600, 605 (2d Cir. 1999) (Congress intended to incorporate the common-law definition of "simple assault" by using that phrase in § 111).

(1978))); *see also United States v. Wells*, 519 U.S. 482, 495, (1997) ("we presume that Congress expects its statutes to be read in conformity with this Court's precedents").

Not only did Congress continue to use the phrase "simple assault" in § 111 when courts of appeals were interpreting that phrase to have its common-law meaning; the legislative history of the 2008 amendment also indicates an express desire to codify that interpretation. In commenting on the amendment, Senator Kyl explained that it "codif[ied] … the 10th Circuit's decision in United States v. Hathaway." 153 Cong. Rec. 34,620 (2007); *see id.* (describing § 111 as an "assault offense"); *see also Wolfname*, 835 F.3d at 1220 (2008 amendment "effectively codified" the holding of *Hathaway*). *Hathaway*, in turn, explained that "simple assault" in § 111 is defined by reference to the common-law meaning of assault. *See Hathaway*, 318 F.3d at 1008; *see also Wolfname*, 835 F.3d at 1220 ("[U]nder *Hathaway*, assault is an element of any § 111(a)(1) offense.").

In the decision below, the Seventh Circuit rejected the conclusion that "simple assault" in § 111 has its common-law meaning because, according to the court, that understanding would render the verbs besides "assault" in § 111(a)(1)—"resists, opposes, impedes, intimidates, or interferes"—superfluous, thereby violating the rule against surplusage. Pet. App. 8. But the rule against surplusage is not "always [] dispositive." Scalia, *Reading Law*, *supra*, at 176. After all, "[s]ometimes drafters *do* repeat themselves." *Id.*; *see also id.* at 177 (describing the "belt-and-suspenders approach" as "common"); Eskridge, *supra*, at 573

(congressional staff "purposely use redundant terms"); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 812 (1983) (statutes "may contain redundant language"). Indeed, congressional drafters admit they "sometimes deliberately err on the side of redundancy in order to 'capture the universe,' ensure coverage of key items, or satisfy particular legislators, constituents, or lobbyists who 'want[] to see that word' included." Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 Tex. L. Rev. 163, 187 (2018). It is therefore entirely appropriate to "prefer ordinary meaning to an unusual meaning that will avoid surplusage." Scalia, *Reading Law*, *supra*, at 176.

Here, "simple assault" has a well-established common-law meaning, and no established contrary meaning. *See supra* 6-12. It is thus preferable to interpret "simple assault" in § 111 to be consistent with that common-law definition, rather than to understand the phrase as a "term of art" with a meaning unique to that statute. *Cf. United States v. Gagnon*, 553 F.3d 1021, 1027 (6th Cir. 2009). Moreover, when it is clear that Congress decided to "string[] out synonyms and near-synonyms," it is particularly "appropriate[]" to "discount[]" the surplusage canon. Scalia, *Reading Law*, *supra*, at 179. That is the case here, where the definitions of the verbs in § 111(a)(1) overlap.[8] Applying the common-law definition of "simple

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[8] *See, e.g.*, *Resist*, *Oxford English Dictionary,* https://www.oed.com/view/Entry/163658 (last visited Feb. 9, 2022) (defining "resist" as to "act in *opposition* to, *oppose*," "to

assault" thus recognizes that Congress adopted a belt-and-suspenders approach to make clear exactly what kind of conduct it was interested in punishing—assaultive conduct that reflects disobedience or obstruction of a federal official. Applying that definition does not render the statute ineffective or result in absurd consequences.

Given the well-established common-law meaning of "simple assault," the absence of an established alternative meaning, and Congress's continued use of the term in the face of judicial decisions employing the common-law definition, the best reading of "simple assault" in § 111 is that it carries its common-law meaning, notwithstanding any claimed surplusage.

IV. A circuit split has developed regarding whether the common-law definition of "simple assault" applies to § 111.

The courts of appeals are divided regarding how to interpret § 111, with some circuits adhering to the

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impede," and to "hinder"); *Oppose*, *Oxford English Dictionary*, https://www.oed.com/view/Entry/131979 (last visited Feb. 9, 2022) (defining "oppose" as "to *resist* or obstruct"); *Impede*, *Oxford English Dictionary,* https://www.oed.com/view/Entry/92192 (last visited Feb. 9, 2022) (defining "impede" as "to obstruct" and "to hinder"); *Interfere, Oxford English Dictionary,* https://www.oed.com/view/Entry/97761 (last visited Feb. 9, 2022) (defining "interfere" as "to collide or clash, so as to hamper or hinder each other," and to "come into … *opposition*"); *see also Resisting arrest*, *Black's Law Dictionary*, *supra* (defining "resisting arrest" as "obstructing or *opposing* a police officer who is making an arrest"); *Intimidation*, *Black's Law Dictionary*, *supra* (stating that intimidation includes cases in which the "liberty of others to do as they please is *interfered* with").

canon of imputed common-law meaning, and others ignoring it altogether.

The Second, Ninth, and Tenth Circuits have concluded that "simple assault" in § 111 is a reference to the common-law term, thereby making common-law assault necessary for a conviction under § 111. *See Wolfname*, 835 F.3d at 1218-19 (common-law assault is element of § 111(a)(1) conviction); *Davis*, 690 F.3d at 135 ("'[S]imple assault' retains its common law definition in the context of the current version of Section 111(a)."); *Chapman*, 528 F.3d at 1221 ("[C]onvictions under [§ 111(a)] require at least some form of assault."). In reaching that conclusion, the Second Circuit expressly relied on the canon of imputed common-law meaning. *Davis*, 690 F.3d at 136. After describing that canon, the court explained its application to § 111, where Congress "chose to use the specific phrase 'simple assault,' which "has a longstanding and precise meaning under the common law" but no "contrary meaning in the vernacular, the U.S. Code or anywhere else." *Id.*

Conversely, the Fourth, Fifth, Sixth, and Seventh Circuits have concluded that an individual can be convicted under § 111 even if he did not commit common-law assault. The Sixth Circuit, analyzing the pre-2008 version of the statute (but in a decision issued after the statute was amended), expressly considered—and then rejected—the argument that "simple assault" in § 111 carries its common-law meaning. According to the Sixth Circuit, applying the common-law definition would "disregard[] five of the six actions Congress specifically delineated." *Gagnon*, 553 F.3d at 1025-26. The Sixth Circuit then redefined

"simple assault" for purposes of § 111. The court concluded that "simple assault" in § 111 does not have its common-law meaning, and indeed that the phrase is a "term of art" that encompasses *all* of the verbs in § 111(a)—assaulting, resisting, opposing, impeding, intimidating, or interfering. *Id.* at 1027. Under that reading, a defendant could be convicted under § 111 even if his actions did not meet the common-law definition of simple assault.

The Fifth Circuit followed the Sixth Circuit's approach of redefining "simple assault." *United States v. Williams*, 602 F.3d 313, 317 (5th Cir. 2010). The Fifth Circuit did not even engage with the common-law definition of "simple assault," much less acknowledge the canon of imputed common-law meaning.

The Fourth Circuit, and the Seventh Circuit in the decision below, likewise concluded that reading the acts in § 111(a) to have an assaultive element would render some of the words in the provision extraneous. *See* Pet. App. 8; *United States v. Briley*, 770 F.3d 267, 274 (4th Cir. 2014). These courts thus concluded that assault is not a required element of a conviction under § 111. Again, those courts of appeals did not analyze the common-law definition of "simple assault" or discuss the canon of imputed common-law meaning.

This Court's review is thus necessary not only to clarify the proper reading of § 111, but also to reaffirm the important principle that a statute is presumed to adopt a term's common-law meaning when it uses that term without defining it.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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