No. 21-6826

IN THE SUPREME COURT OF THE UNITED STATES

TODD STANDS ALONE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was validly convicted of violating 18 U.S.C. 111(a)(1) and (b), where he refused to obey a correctional officer's order to vacate his cell, yelling at the officer and brandishing a fire extinguisher.

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-6826

TODD STANDS ALONE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 11 F.4th 532. The order of the district court (Pet. App. 12a-27a) is unreported but is available at 2020 WL 2085304.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2021. 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. The petition for a writ of certiorari was filed on December 31, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on one count of inflicting bodily injury on a federal officer, in violation of 18 U.S.C. 111(a)(1) and (b). Pet. App. 28a; see id. at 3a. The district court sentenced petitioner to time served. Id. at 29a. The court of appeals affirmed. Id. at 1a-10a.

1. Petitioner was a federal prisoner at a facility in Wisconsin. Pet. App. 2a. After an inspection of his cell resulted in the confiscation of items including a razor blade, petitioner paced back and forth inside the prison unit, threw his clothes at the door, and shouted at the officers. Ibid. The officer who had conducted the initial inspection ordered petitioner to move to the front of the unit. Ibid. Petitioner refused to comply, returned to his cell, and continued to shout. Ibid. The officer followed petitioner to his cell and advised that she would use pepper spray if petitioner continued to resist. Ibid. Petitioner grabbed a nearby fire extinguisher off the wall and lifted it to his chest, at which point the officer deployed her pepper spray, and petitioner discharged the fire extinguisher. Ibid. The fire-suppressant and pepper-spray chemicals blew toward the officer, causing her to suffer visual impairment and chemical burns. Ibid.

A grand jury in the Western District of Wisconsin charged petitioner with one count of violating 18 U.S.C. 111(a)(1) and (b). Pet. App. 2a-3a.

Section 111 provides:

> (a) IN GENERAL.--Whoever--
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title [i.e., a federal officer] 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.

18 U.S.C. 111 (reprinted at Pet. App. 33a). The indictment charged that petitioner "knowingly and forcibly resisted, intimidated, and interfered with" the correctional officer "while she was engaged in her official duties, and in doing so, inflicted bodily injury to her." Pet. App. 3a (brackets omitted). Petitioner waived his right to a jury trial. Ibid.

2. The day before trial, petitioner claimed for the first time that his indictment was defective, on the theory that assault is an essential element of every Section 111 offense. Pet. App. 3a. Petitioner disavowed that he was seeking dismissal of the indictment, but maintained that he could not face the felony or misdemeanor penalties in Section 111 because the indictment did not allege the commission of an assault. Ibid. (noting petitioner's assertion that "he could be convicted only of an infraction under 18 U.S.C. § 3559(a)(9)").

The district court observed that "the government was sand-bagged by the last minute, ex-parte disclosure of the theory of defense," and described petitioner's "eve-of-trial disclosure" as a tactic "to avoid the requirement in [Federal Rule of Criminal Procedure] 12 that legal defenses like the one raised here must be brought and resolved before trial." Pet. App. 13a-14a. But notwithstanding that "[t]he government * * * ha[d] a plausible waiver argument," the court declined to address it because "[petitioner's] legal defense fail[ed] on the merits." Id. at 14a.

The district court explained that "assault is not an implicit element of conviction under § 111(b)." Pet. App. 19a. The court observed that Section 111(a)(1) identifies "[t]he prohibited acts * * * with six verbs: 'assaults, resists, opposes, impedes, intimidates, or interferes.'" Id. at 16a (quoting 18 U.S.C.

111(a)(1)). And it accordingly reasoned that "[t]he disjunctive 'or' means that any one of these acts, if done forcibly to a specified officer, violates the statute." Ibid.

The district court also analyzed "[t]he remainder of the statute," which "sets out the penalties that apply based on the consequences of the prohibited acts." Pet. App. 16a. It noted that Section 111(a) authorizes "imprisonment of not more than a year" for a "simple assault" and "imprisonment of not more than eight years" "when the act in violation involves physical contact with the 'victim of that assault'" or "the intent to commit another felony, with no victim specified," ibid., while Section 111(b) separately authorizes "imprisonment of not more than 20 years" where the individual "either uses a deadly or dangerous weapon or inflicts bodily injury" "in the commission of the acts defined in [Section 111](a)," id. at 16a-17a. The court observed that "[n]othing in [Section 111](b) expressly requires that any 'assault' be committed." Id. at 17a. And the court emphasized that petitioner's view of the statute as invariably requiring assault would "render[] five of the six verbs in [Section 111(a)(1)] superfluous"; "undermine[] the purpose of the statute, which is to protect the physical safety of federal officers and the performance of their duties"; and "def[y] common sense" by allowing a defendant who "forcibly resist[s] a federal officer

performing her duties, [and] inflict[s] great bodily harm," to escape the statute's reach. Id. at 19a.

As the finder of fact in the bench trial, the district court found petitioner guilty of the offense, because he had "resisted [the correctional officer] by refusing to comply with her orders," "interfered with her efforts to control the unit by discharging the fire extinguisher," and "intimidated her by yelling at her, by raising the fire extinguisher in front of her, and by discharging the fire extinguisher." Pet. App. 25a. The court found that petitioner had "intended to resist, interfere, and intimidate"; that "[e]ach of the[] acts was done forcibly" and "inspired in [the officer] a fear of bodily harm or death"; and that petitioner caused "bodily injury" under Section 111(b) because the correctional officer "suffered bodily injury from the discharge of the fire extinguisher." Ibid. The court sentenced petitioner to time served. Id. at 29a.

3. The court of appeals affirmed in a published opinion. Pet. App. 1a-10a.

The court of appeals observed, as a threshold matter, that petitioner's claim -- "submitted one day before the trial commenced" -- was "a challenge to the indictment itself" and therefore "untimely" under Federal Rule of Criminal Procedure 12(b)(3), which requires such objections to be "raised by pretrial motion." Pet. App. 4a-5a. The court, however, declined to find

that petitioner had waived or forfeited the claim on the view that the district court, by deciding the merits, had "implicitly found good cause" to excuse the untimely filing. Id. at 5a.

On the merits, the court of appeals observed that a "defendant violates § 111(a)(1) by forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with a federal officer." Pet. App. 6a. The court found the "most natural way to read" the statute to be that "subsection (a)(1) contains six distinct verbs, and subsection (b) enhances the penalty when a defendant inflicts bodily injury while committing one or more of those six acts." Id. at 8a. The court stated that it "disagree[d] with" the Tenth Circuit's holding in United States v. Wolfname, 835 F.3d 1214 (2016), that assault is "'an essential element of every § 111(a)(1) offense.'" Pet. App. 7a (quoting 835 F.3d at 1218). The court stressed that Section 111(a) "lists six verbs separated by the disjunctive 'or' and adjective 'forcibly' modifying each of those acts." Ibid. "A proper reading of the text," the court explained, "militates against defining resist, oppose, impede, intimidate, and interfere merely as synonyms of 'assault.'" Id. at 7a-8a.

The court of appeals also observed, as did the district court, that petitioner's proposed construction "would render the remaining five verbs superfluous." Pet. App. 8a. The court of appeals emphasized that "'each word Congress uses is there for a reason,'" and "'if possible, every word and every provision is to

be given effect,'" ibid. (quoting Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1659 (2017), and Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012)) (brackets omitted), and considered the outcome urged by petitioner to be a "linguistic * * * absurdity," id. at 10a.

ARGUMENT

Petitioner renews his claim (Pet. 14-27) that common-law assault is a necessary element for any conviction under 18 U.S.C. 111. The court of appeals correctly applied the statute to petitioner's conduct in this case, no square conflict exists on the question presented, and any tension in the relevant decisions is narrow and does not warrant further review. Indeed, the evidence in this case makes clear that petitioner's conduct would be criminal even under his preferred construction of the statute. This Court has previously denied review of petitions for writs of certiorari raising similar issues, and the same result is warranted here. See Briley v. United States, 575 U.S. 962 (2015) (No. 14-866); Williams v. United States, 562 U.S. 1044 (2010) (No. 10-212); Gagnon v. United States, 558 U.S. 822 (2009) (No. 08-1486).

1. a. The court of appeals correctly applied Section 111 irrespective of whether petitioner's conduct would qualify as common-law assault. Section 111(a)(1) identifies six categories of prohibited conduct, covering anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes" with a

federal officer engaged in official duties. 18 U.S.C. 111(a)(1). By using commas between the verbs and the disjunctive "or," Congress made clear its intention that each category of prohibited conduct should be separate and independent of the others. See Horne v. Flores, 557 U.S. 433, 454 (2009). And although all six require the defendant to act "forcibly," only one is "assault." The other five prohibited actions involve behavior that threatens federal officers or obstructs their official activities but is not necessarily "assault."

As the court of appeals recognized, invariably requiring assault would fail "to * * * give[] effect" to "every word" in Section 111(a)(1). Pet. App. 8a (quoting Scalia 174). If "assault [were] an essential element of every § 111 offense," the "remaining five verbs [would be] superfluous." Ibid. (emphasis omitted). Contrary to petitioner's contention (Pet. 15-19) that the six prohibited acts in Section 111 "operate as a unit" that sets "an elemental floor with the misdemeanor offense * * * of 'simple assault,'" each of Section 111's three punishment tiers points back to six categories. Section 111(a)'s simple-assault clause points back to "the acts in violation of this section"; both alternatives identified in Section 111(a)'s felony clause (physical contact or felonious intent) point back to "such acts"; and, as most relevant here, Section 111(b)'s "enhanced penalty"

provision points back to "any acts described in subsection (a)." 18 U.S.C. 111 (capitalization altered).

Petitioner's narrower reading of "acts" thus does not properly account for the statute's use of the term "acts" to refer to all six offense-conduct verbs. See United States v. Briley, 770 F.3d 267, 274 (4th Cir. 2014) ("Why would Congress repeatedly refer back to the same list of threshold acts for every designated offense, and yet covertly assign varying acts to different crimes?"), cert. denied, 575 U.S. 962 (2015). And far from supporting his reading, petitioner's reference (Pet. 22-23) to Section 111's title -- "[a]ssaulting, resisting, or impeding certain officers or employees" -- cuts strongly against it. 18 U.S.C. 111 (emphasis omitted). The disjunctive list of three conduct categories -- only one of which is "assault" -- reinforces that the statute proscribes a range of conduct beyond just assault. See Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'") (citation omitted).

Petitioner argues (Pet. 20-21) that his reading is necessary to give the term "simple assault" in Section 111's misdemeanor clause "its common-law meaning." But even as to Section 111 offenses that do not involve subsection (b)'s enhanced penalty -- as petitioner's own offense here does -- petitioner mistakes the

role of the phrase "simple assault." Rather than serving as a "lesser-included offense of each felony" described in Section 111, Pet. 15, it acts "as a term of art," calling on courts to read the misdemeanor clause "through the common-law lens of 'simple assault' as excluding cases involving forcible physical contact or the intent to commit a serious felony." United States v. Gagnon, 553 F.3d 1021, 1027 (6th Cir.), cert. denied, 558 U.S. 822 (2009). The term "simple assault" thus helps to distinguish misdemeanor violations -- which lack physical contact or felonious intent -- from more serious Section 111(a) violations that "involve physical contact with the victim of that assault or the intent to commit another felony." 18 U.S.C. 111(a).

The legislative history discussing Section 111's current formulation reflects precisely that intent. The current language was intended to ratify the "explanation of what this language means" in "the 10th Circuit's decision in" United States v. Hathaway, 318 F.3d 1001, 1008-1009 (10th Cir. 2003). 153 Cong. Rec. 34,620 (2007) (statement of Sen. Kyl). And Hathaway had explained that "the definition of 'simple assault' is assault which does not involve actual physical contact, a deadly or dangerous weapon, bodily injury, or the intent to commit murder or any felony other than" certain sexual-abuse felonies. 318 F.3d at 1008.

Petitioner's position is further undermined by his own separate invocation (Pet. 21-22) of the related-statute canon and

contention that Section 111 should be interpreted alongside 18 U.S.C. 113 -- a provision that punishes "[a]ssault" "within the special maritime and territorial jurisdiction of the United States." See Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) (courts should interpret statutes that "pertain to the same subject * * * as if they were one law") (citation and internal quotation marks omitted). Section 111 identifies six categories of prohibited conduct ("forcibly assaults, resists, opposes, impedes, intimidates, or interferes"), whereas Section 113 identifies one category ("assault"). 18 U.S.C. 111 and 113. That contrast strengthens, rather than weakens, the textual indications that Congress intended to proscribe a broader range of conduct in Section 111. See Russello v. United States, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that Congress act[ed] intentionally and purposely in * * * disparate inclusion or exclusion.") (citation omitted).

b. Contrary to petitioner's claim (Pet. 23-24), the history and design of Section 111 confirm its application to non-assaultive conduct. The statute's predecessor made it an offense to "forcibly resist, oppose, impede, intimidate, or interfere with any" designated federal official "while engaged in the performance of his official duties, or [to] assault him on account of the performance of his official duties." Act of May 18, 1934, ch. 299, § 2, 48 Stat. 781 (18 U.S.C. 254 (1940)). That provision,

which contained the same six offense-conduct verbs as the current version, was designed to "insur[e] the integrity of law enforcement pursuits." United States v. Feola, 420 U.S. 671, 682 (1975). As this Court recognized, the provision clearly "outlawed more than assaults." Id. at 682 n.17; see Ladner v. United States, 358 U.S. 169, 176 (1958) (explaining that the prior statute "ma[de] it unlawful not only to assault federal officers engaged on official duty but also forcibly to resist, oppose, impede, intimidate or interfere with such officers," noting that "[c]learly one may resist, oppose, or impede the officers or interfere with the performance of their duties without placing them in personal danger"). In Ladner v. United States, for example, the Court stated that "the locking of the door of a building to prevent the entry of officers intending to arrest a person within would be an act of hindrance denounced by the statute." 358 U.S. at 176. The Court noted that in 1948, Congress reordered the statute by placing the word "assaults" in front of the five other verbs. Act of June 25, 1948, ch. 645, 62 Stat. 688 ("Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes"); see Ladner, 358 U.S. at 176 n.4. That "change in wording," however, "was not intended to be a substantive one." Ladner, 358 U.S. at 176 n.4 (discussing Reviser's Notes). And courts therefore properly continued to uphold convictions for non-assaultive conduct under Section 111. See United States v. Johnson, 462 F.2d

423, 425, 429 (3d Cir. 1972) (upholding conviction for "willfully resisting, opposing, impeding and interfering with federal officers," despite jury's conclusion that defendant did not commit "assault"), cert. denied, 410 U.S. 937 (1973).

Before 1994, Section 111 had a two-tier punishment structure: It punished a defendant who forcibly committed actions described by any of the six verbs with up to three years of imprisonment; but where "any such acts" involved a deadly or dangerous weapon, the limit was ten years. 62 Stat. 688. In 1994, Congress amended the penalty structure of Section 111 to its current tripartite structure by carving out less-severe forms of the offense into their own category. It introduced the phrase "simple assault" to encompass misdemeanor violations, punishable by no more than a year in prison; "all other cases" would continue to be punishable by up to three years; and offenses involving a dangerous or deadly weapon would remain punishable by up to ten years, as would any act that "inflicts bodily injury." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320101(a), 108 Stat. 2108; see Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, Div. C, Tit. I, § 11008(b), 116 Stat. 1818 (increasing second- and third-tier penalties). In so doing, however, Congress gave no indication that it intended to cut back on the statute's substantive reach by eliminating non-assaultive conduct from the statute's scope.

Congress's subsequent amendment of the statute in 2008 specifically limited the second tier to cases involving physical contact or felonious intent by striking the phrase "in all other cases" from Section 111(a) and inserting "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." Court Security Improvement Act of 2007 (2007 Act), Pub. L. No. 110-177, § 208(b), 121 Stat. 2538. In doing so, it necessarily understood the language of the first-tier misdemeanor provision to encompass non-assaultive conduct -- like resisting arrest -- that does not involve physical contact or felonious intent. Otherwise, such conduct would not be covered by the statute at all, "rip[ping] a big hole in the statutory scheme" and "leav[ing] those officials without protection for the carrying out of federal functions." Briley, 770 F.3d at 274; see United States v. Williams, 602 F.3d 313, 317 (5th Cir.) ("The recent change in the statutory language * * * also supports the conclusion that § 111(a)(1) prohibits more than assault, simple or otherwise."), cert. denied, 562 U.S. 1044 (2010).

Thus, for almost a century, Congress has protected federal officials in the performance of their duties by criminalizing six categories of forcibly obstructive conduct. Although over time it has altered the punishment according to the severity of the defendant's behavior -- eventually settling on the current three-tier punishment structure -- at no point has Congress altered the

six basic categories of forcible conduct covered by the statute. Section 111(a) therefore continues to apply to any defendant who forcibly "resists, opposes, impedes, intimidates, or interferes with" a federal officer, whether or not his conduct also constitutes assault. 18 U.S.C. 111; see Ladner, 358 U.S. at 176 n.4.

c. Petitioner's resort (Pet. 24-25) to the rule of lenity is misplaced. For nearly 50 years, this Court has explained that "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." United States v. Castleman, 572 U.S. 157, 172-173 (2014) (citation omitted); see Shular v. United States, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring); Huddleston v. United States, 415 U.S. 814, 830-831 (1974). This case presents no such circumstance, for the reasons explained above. And petitioner's related invocation (Pet. 25-26) of constitutional vagueness principles is similarly misplaced. See United States v. Lanier, 520 U.S. 259, 266 (1997) (characterizing the rule of lenity as the "junior version of the vagueness doctrine") (citation omitted). The Due Process Clause bars enforcement of a criminal statute on vagueness grounds only if the statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so

standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, 553 U.S. 285, 304 (2008).

Because petitioner does not challenge Section 111 on First Amendment grounds, he cannot prevail in his vagueness challenge by positing hypothetical situations involving a prisoner who "turns into a limp-noodle" or "stands rigidly still" in response to a correctional officer's directive. Pet. 26. Instead, under this Court's precedents, petitioner can succeed only by demonstrating that the statute failed to provide clear warning that his own conduct was proscribed. See Chapman v. United States, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * * so the vagueness claim must be evaluated as the statute is applied to the facts of this case."). And even if the five verbs beyond "assault" did not themselves plainly establish the statute's coverage of the conduct that those verbs describe, this Court previously observed that Section 111's predecessor provision -- which contained the same six offense-conduct verbs -- clearly "outlawed more than assaults." Feola, 420 U.S. at 682 n.17; see Ladner, 358 U.S. at 176 n.4. Petitioner accordingly had fair notice that the statute reached more broadly than the assault definition he advances.

2. Petitioner asserts (Pet. 9) that the circuits "have splintered over whether 'simple assault' is an element of each

offense in § 111." But no circuit division warrants this Court's review. In United States v. Chapman, 528 F.3d 1215 (2008), the Ninth Circuit considered the prior version of the statute that treated "simple assault" as a misdemeanor and "all other cases" as felonies. Id. at 1218 (citations omitted); see id. at 1219; United States v. Juvenile Female, 566 F.3d 943, 946 (9th Cir. 2009) (addressing pre-2008 version of Section 111 and reiterating Chapman's holding), cert. denied, 558 U.S. 1134 (2010); United States v. Rivera-Alonzo, 584 F.3d 829, 833 (9th Cir. 2009) (similar). In deeming the provision to require the defendant to have committed "some form of assault," Chapman, 528 F.3d at 1221, the court explicitly considered but rejected a distinction based on the presence of physical contact. "If Congress had intended to prohibit both assaultive and non-assaultive conduct and intended to distinguish between misdemeanors and felonies based solely on physical contact," the court stated, "it easily could have said so." Ibid. It now has. As previously discussed, in 2008, Congress replaced the second punishment tier's "all other cases" language with language specifying that it applies "where such acts involve physical contact * * * or the intent to commit another felony." 2007 Act § 208(b), 121 Stat. 2538. In so doing, it abrogated the reasoning in Chapman. See Williams, 602 F.3d at 317 ("Congress addressed the ambiguity identified by the Ninth Circuit by explicitly drawing the misdemeanor/felony line at physical

contact."). And since the 2008 amendments, the Ninth Circuit has addressed Section 111(a)'s revised language only in dicta, see Rivera-Alonzo, 584 F.3d at 833 n.2, and the question presumably remains open in that court.

Even before the 2008 amendment, the Sixth Circuit recognized that common-law assault is not invariably an element of a Section 111 offense. See Gagnon, 553 F.3d at 1024-1027. Since the 2008 amendment, four other courts of appeals have addressed the interpretation of Section 111(a). In United States v. Williams, the Fifth Circuit recognized that "a misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct," explaining that this reading "avoided rendering superfluous the other five forms of conduct [besides assault] proscribed by § 111(a)(1)." 602 F.3d at 317-318. And in United States v. Briley, the Fourth Circuit likewise rejected the contention that "assault is a required element" for either a misdemeanor or felony conviction under Section 111(a)(1). 770 F.3d at 273-274 (noting that defendant's contrary reading "renders a slew of verbs in § 111(a) largely surplusage" and "wanders too far from congressional intent"). Those decisions, like Gagnon, accord with the decision below.

And while the Second Circuit has taken a different view of offenses punishable under Section 111(a), that view does not directly conflict with the court of appeals' determination here,

which addresses an offense punishable under Section 111(b). Only the misdemeanor provision of Section 111(a) was at issue in United States v. Davis, 690 F.3d 127 (2012), cert. denied, 568 U.S. 1107 (2013), in which the Second Circuit concluded that "for a defendant to be guilty of the misdemeanor of resisting arrest under Section 111(a), he necessarily must have committed common law simple assault." Id. at 135; see id. at 134. The court's discussion includes dicta about Section 111(a)'s felony provision, suggesting that assault is an element of the physical-contact variant, but it distinguished the felonious-intent variant on the ground that "the statute's five non-assault acts would appear to be criminally prohibited by the felony clause 'where such acts involve . . . the intent to commit another felony.'" Id. at 136-137. That reasoning would equally apply to Section 111(b) offenses involving weapon use or bodily injury. In any event, the Second Circuit emphasized that it was "not called upon today to interpret" the felony provisions of even Section 111(a), id. at 136, and it did not discuss Section 111(b).

In United States v. Kendall, 876 F.3d 1264, 1270 (2017), cert. denied, 138 S. Ct. 1582 (2018), the Tenth Circuit stated that "every conviction under § 111 requires an assault," citing United States v. Wolfname, 835 F.3d 1214, 1218 (10th Cir. 2016), in which the court had viewed a published circuit decision regarding the pre-2008 statute to compel the conclusion that "assault is

necessarily an element of any § 111(a)(1) conviction," 835 F.3d at 1218, including a conviction under Section 111(a)'s felony clause, see id. at 1219. Kendall did not, however, have occasion to address whether assault is a necessary element of the enhanced offense in Section 111(b), but instead simply presumed, along with the parties, without discussion, that Wolfname applied to a Section 111(b) offense, in the course of classifying a prior conviction for purposes of the Sentencing Guidelines. See ibid.; see also Pet. C.A. Br. at 12, United States v. Kendall, No. 16-6344 (Mar. 20, 2017); Gov't C.A. Br. at 9-11, Kendall, supra (No. 16-6344). Although that largely unexplained aspect of the Tenth Circuit's decision in Kendall deviates from the court of appeals' reasoning here, "this Court reviews judgments, not opinions," Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). Because no square conflict exists on the question presented, this Court's intervention is unwarranted.

3. Even if the question presented warranted further review, this case would be an unsuitable vehicle to address it because petitioner's actions indisputably qualify as assaultive conduct under his proposed reading of Section 111(b). The court of appeals did not address this contention, but the government -- as the prevailing party below -- may support the judgment on other grounds. See Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970).

And its ability to do so here would, at a minimum, complicate further review in this Court.

Petitioner refused the correctional officer's command to move to the front of the prison unit, shouted "loudly and angrily" at her, and grabbed a fire extinguisher off the wall and lifted it to chest height. Pet. App. 21a. The officer then discharged her pepper-spray canister, and petitioner discharged the fire extinguisher "[a]t about the same time." Ibid. As the government explained below, see Gov't C.A. Br. 33-36, that conduct constitutes "simple assault" even under his proposed framework because he "threatened to inflict injury on [the correctional officer]." Pet. 27.

The district court -- as the factfinder at trial -- declined to credit petitioner's testimony that he grabbed the fire extinguisher as a shield. Pet. App. 22a-23a. Instead, the court found that petitioner "held the fire extinguisher at chest height to intimidate [the officer], as he yelled" obscenity-laden warnings not to spray him. Id. at 23a. And the court further found that petitioner did "[e]ach of these acts * * * forcibly" -- that is, "'to inspire fear of pain, bodily harm, or death.'" Id. at 25a (citation omitted). Because these findings necessarily establish that petitioner threatened to inflict injury upon the officer, they show that he committed a simple assault. See Davis, 690 F.3d at 135 (defining simple assault as, inter alia, "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") (citation omitted).

Indeed, petitioner's counsel acknowledged at trial that these findings would satisfy the elements of common-law assault. See D. Ct. Doc. 56, at 221-222 (July 1, 2019) ("agree[ing]" that "[p]icking up the fire extinguisher and holding it up, if it was done for the purpose of intimidating [the officer], * * * would constitute an assault"). Petitioner focuses on (Pet. 27) the district court's conclusion that the evidence failed to show that he "intended to spray [the officer] with the fire extinguisher;" the court instead found that petitioner "intentionally discharged the fire extinguisher in response to being pepper sprayed." Pet. App. 23a. That conclusion does not negate the court's threshold finding that petitioner's initial actions -- grabbing the fire extinguisher off the wall and lifting it to his chest as he yelled -- were done to "intimidate" the officer. Ibid. Therefore, even if petitioner did not intend to target the officer when discharging the fire extinguisher, his forcible intimidation of the officer qualifies as simple assault and subjected him to prosecution under his proposed reading of Section 111.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

APRIL 2022