PETITION APPENDIX

TABLE OF APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JACQUELINE ANDERSON, *Defendant-Appellant.*	No. 20-50207 D.C. Nos. 2:19-cr-00157-CJC-1 2:19-cr-00157-CJC OPINION

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted December 8, 2021
Pasadena, California

Filed August 25, 2022

Before: William A. Fletcher, Johnnie B. Rawlinson, and John B. Owens, Circuit Judges.

Opinion by Judge Rawlinson;
Dissent by Judge W. Fletcher

SUMMARY*

Criminal Law

The panel affirmed Jacqueline Anderson's jury conviction for threatening a person assisting federal officers and employees in violation of 18 U.S.C. § 115(a)(1)(B).

Anderson threatened to kill a Protective Security Officer while he was on duty at the Long Beach Social Security Office. The PSO was an employee of a private company that had been contracted by the Federal Protective Service to "provide security services at government-owned and leased properties."

Section 115(a)(1)(B) prohibits threats against "a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under section 1114 of this title." 18 U.S.C. § 1114 prohibits killing or attempting to kill "any officer or employee of the United States or of any agency in any branch of the United States Government . . . 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."

Agreeing with the Third and Eighth Circuits, the panel held that the plain language of § 115(a)(1)(B) includes all persons described in § 1114. The panel rejected Anderson's argument that the word "official" was a "term of limitation"

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

intended to protect only those "officials" designated in § 1114. The panel held that, because, under § 1114, the PSO was assisting with official duties, Anderson's conduct violated § 115, and the district court properly denied her motion for a judgment of acquittal.

Dissenting, Judge W. Fletcher wrote that § 115(a)(1)(B) clearly did not support Anderson's conviction because the PSO was not an "official." Judge W. Fletcher wrote that the restrictive clause of § 115(a)(1)(B) indicates that the target of the threat must not only be a federal official, but must also be a federal official whose killing would be a crime under § 1114. Put differently, § 115(a)(1)(B) protects federal officials, but only the subset of federal officials whose killing would be a crime under § 1114. Judge W. Fletcher wrote that the Third and Eighth Circuit cases addressed a different question and did not support the majority's statutory reading. Judge W. Fletcher wrote that the PSO, the target of Anderson's threat, was not a federal official, but rather was a "person assisting . . . an officer or employee" of the United States; therefore, under the plain meaning of the statute, Anderson did not violate § 115(a)(1)(B).

COUNSEL

Gia Kim (argued), Deputy Federal Public Defender; Cuauhtemoc Ortega, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California, for Defendant-Appellant.

David R. Friedman (argued), Assistant United States Attorney; Bram M. Alden, Chief, Criminal Appeals Section; Tracy L. Wilkison, Acting United States Attorney; United

States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION

RAWLINSON, Circuit Judge:

We readily acknowledge that 18 U.S.C. § 115 is not a model of legislative clarity. However, that is nothing new. *See, e.g.*, *United States v. Lucero*, 989 F.3d 1088, 1096 (9th Cir. 2021) (describing the Clean Water Act as "not the most artfully drafted"); *see also In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1181 (9th Cir. 2013) (noting the "bewildering wording" of the Class Action Fairness Act) (citation and internal quotation marks omitted). We are not the first court to find the statutes and cross-references of issue here to be unclear. *See United States v. Wynn*, 827 F.3d 778, 783 (8th Cir. 2016) (describing § 115 as a "strangely-worded statute"). But the lack of clarity does not negate our obligation to ascertain the intent of Congress in enacting the statute.[1] Having done so, we conclude that the district court correctly

[1] Contrary to the dissent's insinuation, a lack of clarity does not equate to ambiguity. *See Dissenting Opinion*, p. 22. Although 18 U.S.C. § 115 could have been more clearly drafted, it is not ambiguous. *See Chowdhury v. I.N.S.*, 249 F.3d 970, 972 (9th Cir. 2001) ("We must first determine whether there is any ambiguity in the statute using traditional tools of statutory interpretation. . . .") (citation omitted). Thus, the rule of lenity is not triggered. *See Ocasio v. United States*, 578 U.S. 282, 295 n.8 (2016) ("Th[e] rule [of lenity] applies only when a criminal statute contains a grievous ambiguity or uncertainty, and only if, after seizing everything from which aid can be derived, the Court can make no more than a guess as to what Congress intended.") (citation and internal quotation marks omitted).

included a Protective Security Officer (PSO) within the persons covered under the provisions of § 115, and AFFIRM the judgment of conviction.[2]

I. Background

Defendant Jacqueline Anderson (Anderson) was convicted of violating 18 U.S.C. § 115(a)(1)(B) by threatening a person assisting federal officers and employees. Anderson threatened to kill PSO Justin Bacchus (PSO Bacchus) while he was on duty at the Long Beach Social Security Office (Social Security Office). We have jurisdiction to review Anderson's appeal under 28 U.S.C. § 1291.

A. The Incident and The Indictment

At all times relevant to this case, PSO Bacchus was an employee of a private company that has been contracted by the Federal Protective Service (FPS) to "provide security services at government-owned and leased properties." FPS is the federal agency responsible for protecting federal buildings. Given the sheer number of facilities within its jurisdiction, FPS relies on contractors to protect facilities that it does not have the capacity to cover.

[2] We are not persuaded by our colleagues' contention that the statute "is very clear [and] does not support the conviction." *Dissenting Opinion*, p. 22. Under the dissent's reading of the statute, the language is clear only if the portions of § 115 incorporating 18 U.S.C. § 1114 are ignored. Of course, such a reading flouts a cardinal rule of statutory construction—that each word in the statute be given effect. *See Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009) ("Where possible, we are required to give each word of a statute meaning. . . .") (citation omitted).

On a typical day, the Social Security Office tasks three PSOs with screening and processing the office's visitors. The first PSO is stationed outside the main entrance and is responsible for directing visitors to either the "appointment" or "general information" line. The second PSO is assigned to screen and check bags for prohibited items. The third PSO is stationed at the metal detector to ensure that no weapons are brought into the office. The three PSOs rotate through these positions throughout the day.

On the morning of December 12, 2018, PSO Bacchus was outside, screening and processing visitors to the Social Security Office. Anderson arrived at the Social Security Office just before 11:15 that morning. She approached PSO Bacchus and informed him that she had an appointment. When PSO Bacchus was unable to verify that Anderson had an appointment, he directed her to the "general information" line.

PSO Bacchus' response angered Anderson. She became aggressive, and her voice "got louder." Initially she refused to move; but eventually, went to the back of the line as directed.

Shortly thereafter, an older man approached PSO Bacchus. The man did not have an appointment either, so PSO Bacchus instructed him to go to the back of the "general information" line as well. Despite PSO Bacchus' instruction, moments later, the man was near the front of the line with Anderson. Because PSO Bacchus knew that the man "didn't go to the back of the line and make his way to the front that quickly," he decided to approach the man. However, Anderson "jumped in the conversation and told [PSO Bacchus that the man] didn't have to go anywhere." She

continued: "I don't give a f*** about you or none of these illegal Mexicans," and that she didn't "care about the rules of the Social Security Administration." She then turned to PSO Bacchus and said, "F*** you, b**** a** n****."

PSO Bacchus informed Anderson that her behavior was "becoming a problem for the other people in line" and that she "cannot be speaking like that." Anderson had become so "loud[]" and "unruly" that PSO Kraft came outside to help PSO Bacchus de-escalate the situation. Despite the PSOs' attempts at de-escalation, Anderson persisted in "[c]ursing, getting loud, and just being very, like, aggressive in her manner." Ultimately, PSO Bacchus decided that, given Anderson's behavior, he could not allow her into the building.

When PSO Bacchus informed Anderson that she would not be allowed into the Social Security Office and would have to come back the next day, Anderson became "[v]ery upset." She blocked the door to the Social Security Office and refused to leave. Rather than moving Anderson—and to avoid further escalating the situation—PSO Kraft decided to open another door to allow visitors to enter and exit. As Anderson continued to block the entrance, she told PSO Bacchus that she "would not move" and that she didn't "care about [his] job and she'll get [his] black a** fired."

When PSO Whiteside came outside to help PSOs Bacchus and Kraft diffuse the situation and spoke to Anderson, she once again "yelled" and cursed. After PSO Whiteside went back inside, Anderson continued to block the door.

Eventually, Anderson turned toward her car to leave the Social Security Office. But as she walked away, she told PSO Bacchus: "I'm going to go to my car and get my gun and blow your f***ing brains out."

Anderson's tone was "loud" and made PSO Bacchus feel "threatened," "afraid," and "like she might carry out the action." Wanting to "make sure [he] heard what was said to [him]," PSO Bacchus responded, "Excuse me?" "What did you say?" Anderson continued toward her car and replied, "You heard me."

PSO Bacchus immediately informed PSOs Kraft and Whiteside that Anderson had threatened him. PSO Bacchus "felt scared" and "feared for [his] life." He was also concerned about the "other people in line based off . . . what she said about illegal immigrants." Consequently, the PSOs decided to leave their posts and follow Anderson to her car. They planned to detain her, or at the very least, get her license plate number so they could report the threat.

Although Anderson drove away in a "[f]ast, aggressive" manner before the PSOs were able to detain her, they recorded her license plate number. They also reported the incident, and "stayed on alert" for "two or three days."

After an investigation by FPS, Anderson was charged in a single count indictment with threatening a person assisting federal officers and employees in violation of § 115(a)(1)(B). The indictment alleged that Anderson:

> knowingly threatened to assault and murder victim [PSO Bacchus], a Protective Security Officer employed by Paragon Systems,

> assisting officers and employees of the United States Social Security Administration ("SSA") in the Long Beach, California field office, with the intent to impede, intimidate, and interfere with victim [PSO Bacchus] while victim [PSO Bacchus] was engaged in, and on account of, the performance of official duties, and with the intent to retaliate against victim [PSO Bacchus] on account of the performance of official duties.

B. The Trial

During trial, PSOs Bacchus, Kraft and Whiteside all testified on behalf of the government about their interaction with Anderson. Anderson did not call any witnesses, but moved under Federal Rule of Criminal Procedure 29 (Rule 29) for judgment of acquittal on the basis that PSO Bacchus is not an "official" for the purposes of § 115(a)(1)(B). She contended that "[t]he only evidence put on during the government's case [wa]s that a threat was made toward a private security guard in the employ of Paragon Systems."

The district court declined to rule on the motion until after the jury returned its verdict. Meantime, the jury was instructed that:

> The second element the government must prove beyond a reasonable doubt is that, at the time the threat was made, Protective Security Officer Bacchus was a federal official.

> A "federal official" includes officers and employees of the United States *and any person assisting an officer or employee of the United States while such an officer or employee is engaged in the performance of official duties.* Officers and employees of the Social Security Administration and the Federal Protective Service, which is part of the Department of Homeland Security, are officers and employees of the United States. It is for you to determine if Protective Security Officer Bacchus was an officer or employee of the United States or a person . . . assisting officers or employees of the United States at the time the threat was made.

(Emphasis added).

The jury convicted Anderson of violating 18 U.S.C. § 115(a)(1)(B), and the court subsequently denied Anderson's Rule 29 motion. After being sentenced to one year of probation and a fine, Anderson filed a timely notice of appeal.

II. Discussion

Anderson challenges the district court's denial of her Rule 29 motion for judgment of acquittal. She argues on appeal that PSO Bacchus is not an "official" under 18 U.S.C. § 115(a)(1)(B). This argument presents a question of

statutory interpretation, which we decide de novo. *See United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020).[3]

Anderson was charged under § 115(a)(1)(B) which provides in pertinent part:

> Whoever . . . threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, *or an official whose killing would be a crime under section 1114 of this title, . . .* with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished. . . .

18 U.S.C. § 115(a)(1)(B) (2018) (emphasis added).

[3] The government argues that Anderson waived her claim that PSO Bacchus is not an "official" covered by 18 U.S.C. § 115(a)(1)(B) by failing to raise it in a pretrial motion as required by Federal Rule of Criminal Procedure 12(b)(3). We are unpersuaded by this argument. Even if the government is correct and Anderson was required to raise this claim before trial, the claim is not waived because the district court addressed it on the merits in a written decision. *See United States v. Scott*, 705 F.3d 410, 416 (9th Cir. 2012) ("Even where a waiver argument may be available, when a court rules on the merits of an untimely suppression motion, it implicitly concludes that there is adequate cause to grant relief from a waiver of the right to seek suppression. . . .") (citation, alteration, and internal quotation marks omitted).

In turn, § 1114 provides, in relevant part, that:

> 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 . . .

18 U.S.C. § 1114(a) (2018) (emphasis added).

In cases requiring statutory interpretation, "our starting point is the plain language of the statute." *United States v. Williams*, 659 F.3d 1223, 1225 (9th Cir. 2011). Our review of the statute's plain language involves an examination of "the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Id.* (citation omitted). Our analysis is informed by decisions from other circuit courts that have interpreted the statute, and we will not create a circuit split unnecessarily. *See Seven Arts Filmed Ent. Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1255 (9th Cir. 2013) (taking guidance from two of our sister circuits when resolving an issue of first impression); *see also Padilla-Ramirez v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017) ("declin[ing] to create a circuit split unless there is a compelling reason to do so") (citation omitted).

Although we have not previously considered the issue presented by Anderson's appeal, two of our sister circuits have held that § 115(a)(1)(B) includes all individuals covered

by 18 U.S.C. § 1114. *See United States v. Bankoff*, 613 F.3d 358, 360 (3rd Cir. 2010); *see also Wynn*, 827 F.3d at 783–85.

The Third Circuit was the first federal appellate court to resolve the question of the scope of § 115(a)(1)(B). In *Bankoff*, the defendant was convicted of threatening two Social Security Administration employees in violation of § 115(a)(1)(B). *See* 613 F.3d at 360. The first employee was a claims representative (indictment Count Three) and the second was an operations supervisor (indictment Count Two). *See id.* The district court granted the defendant's motion for judgment of acquittal on Count Three on the basis that the claims representative was not an "official" under § 115(a)(1)(B), because her responsibilities were limited to "routine and subordinate functions." *Id.* The defendant's motion for judgment of acquittal on Count Two was denied. *See id.* The district court reasoned that because an operations supervisor "had the authority to adjudicate claims on behalf of the federal government," she was an "official." *Id.* On appeal, the Third Circuit affirmed the district court's denial of the defendant's motion for judgment of acquittal on Count Two and vacated the acquittal on Count Three. *See id.* The Third Circuit reasoned that both the claims representative and the operations supervisor were "official[s]" under § 115(a)(1)(B). *Id.*

To reach this conclusion, the Third Circuit reviewed the text, context, and legislative histories[4] of §§ 115(a)(1)(B) and 1114. *See id.* at 365–72. The court began by rejecting the defendant's argument that "Congress could not have intended

[4] The court noted that because the language of § 115 was "plain," consulting legislative history was not required, but considered only as a "course marker." *Bankoff*, 613 F.3d at 371.

that § 115 apply to threats against employees 'whose killing would be a crime under' § 1114 by referring to threats against 'official[s] whose killing would be a crime under' § 1114" because the terms "official" and "employee" have different ordinary meanings. *Id.* at 365. The court reasoned that § 115 "prohibits threats against four categories of individuals—'United States officials,' 'United States judges,' 'Federal law enforcement officers,' and 'officials whose killing would be a crime under' § 1114." *Id.* at 366 (alterations omitted). Although only the first three terms are explicitly defined by the statute, the court was persuaded that "Congress intended for § 1114 itself to define th[e] [fourth] category by incorporating it by reference into § 115." *Id.* (citation omitted). Thus, the court held, the ordinary dictionary definition of "official" is not controlling. *Id.* at 366–67.

The court was not convinced by the defendant's argument that if Congress had intended to have § 115 apply to all persons listed in § 1114, it would have used language like "any *person* designated in section 1114," as it did in 18 U.S.C. § 111. *Id.* at 367 (emphasis in the original). Rather, the court concluded that Congress' use of different language to incorporate § 1114 into "different statutes that were codified nearly four decades apart—§ 111 in 1948, and § 115 in 1984" did not portend that "it used the term 'official' (as opposed to 'person') in § 115 with the intention of limiting its scope." *Id.* (footnote reference omitted).

The *Bankoff* defendant's final argument centered on the legislative history of §§ 115 and 1114. *See* 613 F.3d at 371. The defendant maintained that the legislative history of the two provisions "indicates that Congress was concerned with high policymaking, judicial and law enforcement officers, but

that . . . legislative concern did not extend to federal employees in general." *Id.* The court rejected this contention, concluding that even if "Congress was primarily concerned with protecting high-ranking policy makers," there was no indication in the legislative history that Congress did not intend to protect "mere employees" as well. *Id.* (internal quotation marks omitted).

After its thorough review of the text and legislative histories of the statutes, the Third Circuit concluded that "Congress did not use 'official' [in § 115] as a limitation on the categories of individuals protected by § 1114." *Id.* at 372.

In *Wynn*, the defendant also challenged his conviction under § 115(a)(1)(B) by arguing that the supervisor he threatened was not a federal "official." 827 F.3d at 783. The Eighth Circuit was unpersuaded, reasoning that in context, the wording of § 115(a)(1)(B) "strongly suggests" that the term "official" was defined by a cross-reference to the "universe of federal 'officials' covered by § 1114." *Id.* Citing *Bankoff*, the Eighth Circuit observed that the defendant's argument relied on an interpretation of § 115(a)(1)(B) that is contrary to the statutory history of §§ 115(a)(1)(B) and 1114. *Id.* at 783–84. Although acknowledging that § 1114 has been cross-referenced in other statutes containing words broader than "official," the Eighth Circuit was nevertheless persuaded that "there is nothing in the legislative history of these other statutes, or of the later amendments to § 115(a)(1)(B) and § 1114, that suggests Congress intended to change, or to clarify, the fundamental relationship between' § 115 and § 1114." *Id.* at 784 (citation, alteration, and internal quotation marks omitted). This "fundamental relationship" is that § 115(a)(1)(B) incorporates § 1114 in its entirety. *Id.* at 784–85.

We are similarly persuaded that the plain language of § 115 incorporates all persons described in § 1114. Section 115(a)(1)(B) criminalizes threatening to assault, kidnap or murder "a United States official, a United States judge, a Federal law enforcement officer, *or an official whose killing would be a crime under* [*section 1114*]." 18 U.S.C. § 115(a)(1)(B) (emphasis added). Congress explicitly delineated the defined categories of "United States official," "United States judge," and "Federal law enforcement officer," in § 115. *Id.* § 115(c). This phrasing "strongly suggests" that the following phrase—"official whose killing would be a crime under section 1114"—was not intended to be an undefined term. *Wynn*, 827 F.3d at 783; *see also Bankoff*, 613 F.3d at 366. Logically and linguistically speaking, the definition can only be found in the language of § 1114. *See id.*

Anderson argues that we should reject the plain reading of § 115 and instead interpret the statute using the ordinary meaning of "official." She suggests that the word "official" in § 115 is a "term of limitation" intended to protect only those "official[s]" designated in § 1114. Anderson therefore contends, that even if PSO Bacchus was assisting with official duties, he was not an "official" within the ordinary meaning of that term, or in a similar position as the "official[s]" specifically delineated in § 1114.

Our colleague in dissent parrots Anderson's argument. But this argument makes sense only if the word "official" is considered in isolation without consideration of those individuals described in § 1114. We, like the Third Circuit, find this narrow reading unpersuasive. As the Third Circuit wrote in *Bankoff*:

> [W]e think it implausible that Congress used the term "official" as a limitation on the persons enumerated in § 1114, yet declined to define that term or provide any indication as to how courts (or presumably juries) were to determine which of the enumerated "employees," "officers," "members," and "agents" listed in § 1114 also qualify as "officials."

613 F.3d at 369–70 (footnote reference omitted).

We agree with the Third and Eighth Circuits that Anderson's interpretation would require an individual to be both an "official" and an "officer," "employee" or person assisting an officer or employee with their official duties under § 1114. *Id.*; *see also Wynn*, 827 F.3d at 785. Because Congress provided no guidance on how to even begin to determine which "officers," "employees," or persons assisting those officers or employees would count as "official[s]" under § 115, Anderson and the dissent's suggested interpretation is unworkable and unfaithful to the intent of the statute.

Our colleague in dissent reasons that an individual "assisting a federal officer or employee is not himself . . . a federal officer or employee." *Dissenting Opinion*, p. 26 (internal quotation marks omitted). But this reasoning elides the actual inclusion of those assisting a federal officer or employee under the umbrella of individuals referenced in §115, whose killing would violate § 1114. Admittedly, § 1114 did not originally protect persons assisting federal officers. *See Bankoff*, 613 F.3d at 368–69 (discussing amendment history of § 1114). But the dissent does not

explain how the subsequent expansion of § 1114 transformed the term "official" in § 115 into a term of limitation, when it was not a term of limitation originally. *See Dissenting Opinion*, p. 27 (agreeing that "federal employee[s]"—a class that encompasses the individuals previously protected by § 1114—are "'official[s]' within the meaning of § 115(a)(1)(B)").

The dissent also seeks to distinguish the cases relied on by the majority, both of which interpret the same two statutes at issue in this case. *Id*. The dissent is correct that both *Bankoff* and *Wynn* involved federal employees, not persons assisting federal employees, but the *logic* of those cases does not support the dissent's proposed line-drawing. And it is telling that the dissent cites *no* case that has reached a different conclusion regarding the interplay between §§ 115 and 1114. Indeed, adoption of the dissent's reading of the statutes would create an unwarranted circuit split, a result we understandably avoid if at all possible. *See Padilla-Ramirez*, 882 F.3d at 836.

Anderson also contends that the legislative history of § 115 supports her reading that § 115 only applies to "officials" designated in § 1114. Actually, the legislative history of § 115 offers no such support. The Senate Report accompanying § 115 demonstrates, contrary to Anderson's position, that the protections afforded by § 115 were not intended to be limited to "officials." When § 115 was passed, the Senate wrote that:

> [§ 115] is a new provision designed to protect *the close relatives of* certain high level officials, such as the President, Vice-President, members of Congress, cabinet

> officers, and federal judges, as well as federal law enforcement officers . . .
>
> The Committee believes that serious crimes against family members of high level federal officials, federal judges, and federal law enforcement officers, which are committed because of their relatives' jobs are, generally speaking, proper matters of federal concern. . . .

S. Rep. No. 98-225 at 320 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3496, 1983 WL 25404 (emphasis added). This language signals that Congress' intent in passing § 115 was to afford protections to non-officials; we are therefore unpersuaded that § 115 should be read to capture only those "officials" listed in § 1114.

Anderson relies on the reference canon to argue that § 115 incorporates § 1114 as it existed in 1986, when Congress first added § 115(a)(1)(B). *See Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (explaining that, under the reference canon, "a statute that refers to another statute by . . . section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments") (citation omitted). At that time, § 1114 did not protect "person[s] assisting" federal employees and would not have protected PSOs like Bacchus. *See Bankoff*, 613 F.3d at 368 n.9.

But the reference canon does not apply when "there is some very clear indication to the contrary." *United States v. Smith*, 683 F.2d 1236, 1239 (9th Cir. 1982) (en banc) (citations omitted). And, as other circuits have concluded,

simultaneous amendment or re-enactment of both statutes "evidences a congressional intent to incorporate subsequent amendments." *United States v. Rodriguez-Rodriguez*, 863 F.2d 830, 831 (11th Cir. 1989) (per curiam). Even amendments that "appear small" can show that the interaction between two statutes "did not escape Congress's notice." *New York ex rel. N.Y. Off. of Child. & Fam. Servs. v. U.S. Dep't of Health & Hum. Servs.' Admin. for Child. & Fams.*, 556 F.3d 90, 99 (2d Cir. 2009).

Here, Congress amended both §§ 115 and 1114 when it passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104-132, §§ 723, 727, 110 Stat 1214, 1300, 1302 (1996). It is implausible that Congress simultaneously edited both statutes but missed their interaction. True, AEDPA amended § 115(a)(1)(A), not subsection (a)(1)(B), with which Anderson is charged. But subsection (B) incorporates § 1114 only through its reference to subsection (A). Given the link between these subsections, it is absurd to think that Congress intended the scope of (a)(1)(A) (covering assaults, kidnappings, murders, attempts, and conspiracies) to differ from that of (a)(1)(B) (covering threats).

AEDPA's legislative history bolsters our conclusion that Congress was aware of the cross-reference and intended § 115 to incorporate the updates to § 1114. A summary of AEDPA explained that, "[b]y expanding the coverage of 18 U.S.C. 1114 to include all federal officers and employees, [AEDPA] also expands the coverage of . . . 18 U.S.C. 115." Charles Doyle, American Law Division, 96-499 A, Antiterrorism and Effective Death Penalty Act of 1996: A Summary 38 (1996) [hereinafter Doyle, Summary]. This reading also furthers AEDPA's "larger legislative scheme,"

Rodriguez-Rodriguez, 863 F.2d at 831, "[t]o deter terrorism." 110 Stat. at 1214.[5] We therefore reject application of the reference canon in this case as incompatible with Congressional intent.

We are convinced that affording the protections of § 115 to individuals who are threatened while assisting officers or employees of the United States with their official duties is similarly a "matter[] of federal concern." S. Rep. No. 98-225, at 320.

III. Conclusion

Although we acknowledge that Congress could have more carefully drafted 18 U.S.C. § 115, we join our sister circuits in concluding that, plainly read, the statute incorporates all persons covered by 18 U.S.C. § 1114. When Anderson threatened PSO Bacchus, he was assisting the FPS in performing its official duty to protect the Social Security Office. Thus, her conduct violated 18 U.S.C. § 115, and the

[5] The events that prompted the passage of AEDPA included the deadly bombing at an Oklahoma City federal building in 1995. *See, e.g.*, Doyle, Summary, at 1 ("The Antiterrorism and Effective Death Penalty Act of 1996 is the product of legislative efforts . . . stimulated to passage in part by the traged[y] in Oklahoma City . . ."). Given this historical context, we cannot conclude that Congress intended to leave unprotected the very people who protect federal buildings: PSOs like Bacchus. *See also, e.g.*, Cara McCoy, *Slain Court Officer Remembered for Service to Las Vegas* (Jan. 11, 2010), https://lasvegassun.com/news/2010/jan/11/funeral-services-today-slain-court-officer/ (reporting on the killing of a court security officer in Las Vegas).

district court committed no error when it denied her Rule 29 motion for a judgment of acquittal.[6]

AFFIRMED.

W. FLETCHER, Circuit Judge, dissenting:

The majority writes that the statute under which Jacqueline Anderson was convicted "is not a model of legislative clarity," but concludes that the statute's "lack of clarity" does not protect Anderson from conviction. I respectfully disagree.

If the statute were truly unclear, it should not be used to convict Anderson. *Yates v. United States*, 574 U.S. 528, 547–48 (2015) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000))). However, with respect to the question before us, the statute is very clear. It does not support the conviction.

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[6] We also reject Anderson's argument that a new trial is required because the district court mistakenly instructed the jury. The jury was instructed that "federal official" includes "any person assisting an officer or employee of the United States while such an officer or employee is engaged in the performance of official duties." As discussed, the instruction was a correct statement of law. Therefore, no new trial is required. *See United States v. Renzi*, 769 F.3d 731, 755–56 (9th Cir. 2014); *see also Wynn*, 827 F.3d at 785 (rejecting a claim of instructional error).

I. Background

The factual narrative underlying Anderson's conviction is accurately recounted in the majority opinion, and I will not repeat it here.

Anderson threatened Protective Security Officer ("PSO") Justin Bacchus outside of a Social Security Administration building. PSOs assist the Federal Protective Service ("FPS"), a federal agency that protects government buildings. Because FPS does not have enough officers to cover all of the buildings for which it is responsible, it contracts with Paragon Systems, a private security firm, to provide protection at some buildings. Bacchus is an employee of Paragon Systems.

It is uncontested that Bacchus is not an employee of the federal government. *See*, *e.g.*, *Rabieh v. United States*, No. 5:19-cv-00944, 2019 WL 5788673, at *2 (N.D. Cal. Nov. 6, 2019) (noting that PSOs "are Paragon employees," that "Paragon is responsible for most of the training of PSOs," and that "Paragon provides all management, supervision, equipment, and certification for PSOs"); *Gonzagowski v. United States*, 495 F. Supp. 3d 1048, 1103 (D.N.M. Sept. 1, 2020) ("[PSOs] are independent contractors and not federal employees . . . ."); *United States v. Maestas*, No. 18-2419, 2019 WL 145578, at *1 (D.N.M. Jan. 9, 2019) (concluding that a PSO is neither a federal employee nor a federal law enforcement officer).

Anderson was convicted of threatening an "official" within the meaning of 18 U.S.C. § 115. Section 115 provides, in relevant part,

> Whoever—threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or *an official whose killing would be a crime under [18 U.S.C. § 1114],* with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).

Id. § 115(a)(1)(B) (emphasis added). Section 1114, in turn, provides,

> 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 . . . .

Id. § 1114(a) (emphasis added).

II. Analysis

The majority and I agree that the question before us is whether Bacchus was "an official whose killing would be a crime under [18 U.S.C. § 1114]." *Id.* § 115(a)(1)(B). The question is really two questions: (1) Was Bacchus "an official"? (2) Would his killing be a crime under § 1114? In order to convict Anderson, the answer to both questions must have been "yes." The answer to the first question is "no."

The Supreme Court has "stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461–62 (2002) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). "[A] literal reading of Congress' words is generally the only proper reading of those words." *United States v. Locke*, 471 U.S. 84, 93 (1985).

Section 115(a)(1)(B) criminalizes threats against "an official whose killing would be a crime under [18 U.S.C. § 1114]." It is undisputed that an "official" under § 115(a)(1)(B) refers to a federal official. The restrictive relative clause "whose killing would be a crime under [18 U.S.C. § 1114]" limits the category of federal officials to which § 115(a)(1)(B) applies. *See* The Chicago Manual of Style ¶ 6.27 (17th ed. 2017) ("A clause is said to be restrictive (or defining) if it provides information that is essential to understanding the intended meaning of the rest of the sentence. Restrictive relative clauses are usually introduced by *that* (or by *who/whom/whose*) and are never set off by commas from the rest of the sentence."); *see also*

United States v. Nishiie, 996 F.3d 1013, 1017 (9th Cir. 2021) (noting that restrictive relative clauses are "limiting"). The restrictive clause thus indicates that the target of the threat must not only be a federal official, but must also be a federal official whose killing would be a crime under § 1114. Put differently, § 115(a)(1)(B) protects federal officials, but only the subset of federal officials whose killing would be a crime under § 1114.

Section 1114 criminalizes killing an "officer," "employee," and "any person assisting such an officer or employee." A person "assisting" a federal officer or employee is not himself or herself a federal officer or employee. Rather, as § 1114 plainly states, that person is *assisting* an officer or employee. Under a reasonable reading of § 1114, Bacchus was assisting an officer or employee of the United States in providing private security to a Social Security Administration building. But under no reasonable reading was he, by virtue of providing such assistance, himself an officer or employee.

Anderson was convicted under § 115(a)(1)(B) of threatening a federal official. Bacchus, the target of Anderson's threat, was not a federal official. Rather, he was a "person assisting . . . an officer or employee" of the United States. Under the plain meaning of the statute, Anderson did not violate § 115(a)(1)(B). That should be the end of the matter.

III. Majority Opinion

My colleagues disagree. They read "official" in § 115(a)(1)(B) to include everyone protected in § 1114, not limited to the federal "officials" who are protected in § 1114.

They rely heavily on two cases to support their reading. Neither case provides support.

The first is *United States v. Bankoff*, 613 F.3d 358 (3d Cir. 2010). The question in *Bankoff* was whether an "employee" of the federal government, as that term is used in § 1114, is an "official," as that term is used in § 115(a)(1)(B). The Third Circuit answered "yes":

> In sum, we conclude that when § 115's reference to an "official whose killing would be a crime under" § 1114 is read in context, its meaning is plain; "official" is not used as a term of limitation, but as a general term that incorporates by reference all the individuals protected under § 1114, both "officer[s] and employee[s]."

Id. at 370. The second case is *United States v. Wynn*, 827 F.3d 778 (8th Cir. 2016). The question in *Wynn* was the same as in *Bankoff*: Is a federal "employee," as used in § 1114, an "official," as used in § 115(a)(1)(B)? The Eighth Circuit followed *Bankoff*. It wrote, "Though the interpretive question is not free from doubt, we agree with the Third Circuit's analysis." *Id.* at 784.

If the question presented in *Bankoff* and *Wynn* were before us, I would reach the same answer as the Third and Eighth Circuits. But those courts answered a different question. The question in *Bankoff* and *Wynn* was whether a federal "employee" is a federal "official" within the meaning of § 115(a)(1)(B).

The question before us is whether a private employee who *assists* a federal officer or employee is a federal "official" within the meaning of § 115(a)(1)(B). The answer is straightforward. Bacchus was assisting federal officers or employees. He did not, by virtue of his assistance, *become* a federal officer or employee.

Conclusion

Section 115(a)(1)(B) does not criminalize a threat against an employee of a private corporation that has contracted with the government to provide security to a government building. Perhaps such a threat should be made criminal under federal law. But that is a task for Congress, not for us.

I respectfully dissent.

APPENDIX B

United States District Court
Central District of California

UNITED STATES OF AMERICA vs. **Docket No.** CR 19-00157-CJC

Defendant Jacqueline Anderson **Social Security No.** 3 0 6 8

akas: Jacqueline Marie Anderson (Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH	DAY	YEAR
07	30	2020

In the presence of the attorney for the government, the defendant appeared in person on this date.

COUNSEL Adam Olin, DFPD; Cuauhtemoc Ortega, DFPD
(Name of Counsel)

PLEA [ ] **GUILTY,** and the court being satisfied that there is a factual basis for the plea. [ ] **NOLO CONTENDERE** [ ] **NOT GUILTY**

FINDING The jury returned a finding/verdict of [X] **GUILTY,** on the following offense(s):

Threatening a Person Assisting Federal Officers and Employees in violation of 18 U.S.C. § 115(a)(1)(B) as charged in Count 1 of the Indictment.

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that pursuant to the Sentencing Reform Act of 1984, the defendant, Jacqueline Anderson, is hereby placed on **PROBATION** on Count 1 of the Indictment for a term of **ONE (1) YEAR** under the following conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and General Order 20-04, excluding Condition 14 in Section I of that Order.

2. During the period of community supervision, the defendant shall pay the special assessment and fine in accordance with this judgment's orders pertaining to such payment.

3. The defendant shall cooperate in the collection of a DNA sample from the defendant.

4. The defendant shall apply all monies received from income tax refunds, lottery winnings, inheritance, judgments and any other financial gains to the Court-ordered financial obligation.

5. The defendant shall comply with the letter dated December 14, 2018, from the United States Social Security Administration (SSA), whereby the defendant is prohibited from entering a SSA office unless she receives a certified letter with the specific date and time of an appointment, and she may only enter the SSA office for that particular appointment. The defendant shall provide the Probation Officer with a copy of the certified letter at least 72 hours prior to entering the SSA office.

6. The defendant shall participate in mental health treatment, which may include evaluation and counseling, until discharged from the program by the treatment provider, with the approval of the Probation Officer.

7. As directed by the Probation Officer, the defendant shall pay all or part of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.

8. The defendant shall perform 80 hours of community service, as directed by the Probation Officer.

It is ordered that the defendant shall pay to the United States a special assessment of $100, which is due immediately.

It is ordered that the defendant shall pay to the United States a total fine of $7,500, which shall bear interest as provided by law.

A sum of $600 shall be paid immediately, and the balance of the fine shall be paid in monthly installments of at least $575, or 10 % of her gross monthly income, whichever is greater, during the period of probation. These payments shall begin within 30 days after the date of this judgment.

Pursuant to 18 U.S.C. § 3612(f)(3)(A), interest on the fine is waived as it is found that the defendant does not have the ability to pay interest. Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

The Court authorizes the Probation Officer to disclose the Presentence Report, and any previous mental health evaluations or reports, to the treatment provider. The treatment provider may provide information (excluding the Presentence report), to State or local social service agencies (such as the State of California, Department of Social Service), for the purpose of the client's rehabilitation.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

Bond is exonerated.

The Court advised the defendant of her right to appeal.

/ / /

/ / /

USA vs. Jacqueline Anderson Docket No.: CR 19-00157-CJC

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

July 31, 2020
Date

Cormac J. Carney, U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

July 31, 2020
Filed Date

By */s/ G. Garcia*
Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. As directed by the probation officer, the defendant must notify specific persons and organizations of specific risks posed by the defendant to those persons and organizations and must permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications;
15. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

☐ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   - Non-federal victims (individual and corporate),
   - Providers of compensation to non-federal victims,
   - The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant must maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds must be deposited into this account, which must be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, must be disclosed to the Probation Officer upon request.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. Jacqueline Anderson Docket No.: CR 19-00157-CJC

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____

Defendant Date

_____ _____

U. S. Probation Officer/Designated Witness Date

APPENDIX C

FILED

JAN 6 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JACQUELINE ANDERSON, Defendant-Appellant.	No. 20-50207 D.C. Nos. 2:19-cr-00157-CJC-1 2:19-cr-00157-CJC Central District of California, Los Angeles ORDER

Before: W. FLETCHER, RAWLINSON, and OWENS, Circuit Judges.

Judges Rawlinson and Owens voted to deny, and Judge W. Fletcher voted to grant, the Petition for Rehearing.

Judges Rawlinson and Owens voted to deny, and Judge W. Fletcher recommended granting, the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Appellant's Petition for Panel Rehearing and Rehearing En Banc, filed October 24, 2022, is DENIED.

APPENDIX D

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 7. Assault

18 U.S.C.A. § 115

§ 115. Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member

Effective: November 18, 2021
Currentness

(a)(1) Whoever--

(A) assaults, kidnaps, or murders, or attempts or conspires to kidnap or murder, or threatens to assault, kidnap or murder a member of the immediate family of a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under section 1114 of this title; or

(B) threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section,

with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).

(2) Whoever assaults, kidnaps, or murders, or attempts or conspires to kidnap or murder, or threatens to assault, kidnap, or murder, any person who formerly served as a person designated in paragraph (1), or a member of the immediate family of any person who formerly served as a person designated in paragraph (1), with intent to retaliate against such person on account of the performance of official duties during the term of service of such person, shall be punished as provided in subsection (b).

(b)(1) The punishment for an assault in violation of this section is--

(A) a fine under this title; and

(B)(i) if the assault consists of a simple assault, a term of imprisonment for not more than 1 year;

(ii) if the assault involved physical contact with the victim of that assault or the intent to commit another felony, a term of imprisonment for not more than 10 years;

(iii) if the assault resulted in bodily injury, a term of imprisonment for not more than 20 years; or

(iv) if the assault resulted in serious bodily injury (as that term is defined in section 1365 of this title, and including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) or a dangerous weapon was used during and in relation to the offense, a term of imprisonment for not more than 30 years.

(2) A kidnapping, attempted kidnapping, or conspiracy to kidnap in violation of this section shall be punished as provided in section 1201 of this title for the kidnapping or attempted kidnapping of, or a conspiracy to kidnap, a person described in section 1201(a)(5) of this title.

(3) A murder, attempted murder, or conspiracy to murder in violation of this section shall be punished as provided in sections 1111, 1113, and 1117 of this title.

(4) A threat made in violation of this section shall be punished by a fine under this title or imprisonment for a term of not more than 10 years, or both, except that imprisonment for a threatened assault shall not exceed 6 years.

(c) As used in this section, the term--

(1) "Federal law enforcement officer" means any officer, agent, or employee of the United States authorized by law or by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law;

(2) "immediate family member" of an individual means--

(A) his spouse, parent, brother or sister, child or person to whom he stands in loco parentis; or

(B) any other person living in his household and related to him by blood or marriage;

(3) "United States judge" means any judicial officer of the United States, and includes a justice of the Supreme Court and a United States magistrate judge; and

(4) "United States official" means the President, President-elect, Vice President, Vice President-elect, a Member of Congress, a member-elect of Congress, a member of the executive branch who is the head of a department listed in 5 U.S.C. 101, or the Director of the Central Intelligence Agency.

(d) This section shall not interfere with the investigative authority of the United States Secret Service, as provided under sections 3056, 871, and 879 of this title.

(e) There is extraterritorial jurisdiction over the conduct prohibited by this section.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 1008(a), Oct. 12, 1984, 98 Stat. 2140; amended Pub.L. 99-646, §§ 37(a), 60, Nov. 10, 1986, 100 Stat. 3599, 3613; Pub.L. 100-690, Title VI, § 6487(f)[b], Nov. 18, 1988, 102 Stat. 4386; Pub.L. 101-647, Title XXXV, § 3508, Nov. 29, 1990, 104 Stat. 4922; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub.L. 103-322, Title XXXIII, §§ 330016(2)(C), 330021(1), Sept. 13, 1994, 108 Stat. 2148, 2150; Pub.L. 104-132, Title VII, §§ 723(a), 727(b), Apr. 24, 1996, 110 Stat. 1300, 1302; Pub.L. 107-273, Div. B, Title IV, § 4002(b)(9), Div. C, Title I, § 11008(c), Nov. 2, 2002, 116 Stat. 1808, 1818; Pub.L. 110-177, Title II, § 208(a), Jan. 7, 2008, 121 Stat. 2538; Pub.L. 117-59, § 3(2), Nov. 18, 2021, 135 Stat. 1469.)

Notes of Decisions (40)

18 U.S.C.A. § 115, 18 USCA § 115
Current through P.L. 118-3. Some statute sections may be more current, see credits for details.

End of Document

APPENDIX E

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 51. Homicide (Refs & Annos)

18 U.S.C.A. § 1114

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

Effective: November 18, 2021
Currentness

(a) In general.--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.

(b) Extraterritorial jurisdiction.--There is extraterritorial jurisdiction over the conduct prohibited by this section.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 756; May 24, 1949, c. 139, § 24, 63 Stat. 93; Oct. 31, 1951, c. 655, § 28, 65 Stat. 721; June 27, 1952, c. 477, Title IV, § 402(c), 66 Stat. 276; Pub.L. 85-568, Title III, § 304(d), July 29, 1958, 72 Stat. 434; Pub.L. 87-518, § 10, July 2, 1962, 76 Stat. 132; Pub.L. 88-493, § 3, Aug. 27, 1964, 78 Stat. 610; Pub.L. 89-74, § 8(b), July 15, 1965, 79 Stat. 234; Pub.L. 90-449, § 2, Aug. 2, 1968, 82 Stat. 611; Pub.L. 91-375, § 6(j)(9), Aug. 12, 1970, 84 Stat. 777; Pub.L. 91-513, Title II, § 701(i)(1), Oct. 27, 1970, 84 Stat. 1282; Pub.L. 91-596, § 17(h)(1), Dec. 29, 1970, 84 Stat. 1607; Pub.L. 93-481, § 5, Oct. 26, 1974, 88 Stat. 1456; Pub.L. 94-284, § 18, May 11, 1976, 90 Stat. 514; Pub.L. 94-582, § 16, Oct. 21, 1976, 90 Stat. 2883; Pub.L. 95-87, Title VII, § 704, Aug. 3, 1977, 91 Stat. 520; Pub.L. 95-616, § 3(j)(2), Nov. 8, 1978, 92 Stat. 3112; Pub.L. 95-630, Title III, § 307, Nov. 10, 1978, 92 Stat. 3677; Pub.L. 96-296, § 26(c), July 1, 1980, 94 Stat. 819; Pub.L. 96-466, Title VII, § 704, Oct. 17, 1980, 94 Stat. 2216; Pub.L. 97-143, § 1(b), Dec. 29, 1981, 95 Stat. 1724; Pub.L. 97-259, Title I, § 128, Sept. 13, 1982, 96 Stat. 1099; Pub.L. 97-365, § 6, Oct. 25, 1982, 96 Stat. 1752; Pub.L. 97-452, § 2(b), Jan. 12, 1983, 96 Stat. 2478; Pub.L. 98-63, Title I, § 101, July 30, 1983, 97 Stat. 313; Pub.L. 98-473, Title II, § 1012, Oct. 12, 1984, 98 Stat. 2142; Pub.L. 98-557, § 17(c), Oct. 30, 1984, 98 Stat. 2868; Pub.L. 100-690, Title VII, § 7026, Nov. 18, 1988, 102 Stat. 4397; Pub.L. 101-73, Title IX, § 962(a)(6), Aug. 9, 1989, 103 Stat. 502; Pub.L. 101-647, Title XII, § 1205(h), Title XVI, § 1606, Title XXXV, § 3535, Nov. 29, 1990, 104 Stat. 4831, 4843, 4925; Pub.L. 102-54, § 13(f)(2), June 13, 1991, 105 Stat. 275; Pub.L. 102-365, § 6, Sept.

3, 1992, 106 Stat. 975; Pub.L. 103-322, Title VI, § 60007, Title XXXIII, §§ 330009(c), 330011(g), Sept. 13, 1994, 108 Stat. 1971, 2143, 2145; Pub.L. 104-132, Title VII, § 727(a), Apr. 24, 1996, 110 Stat. 1302; Pub.L. 104-294, Title VI, § 601(f)(2), Oct. 11, 1996, 110 Stat. 3499; Pub.L. 107-273, Div. B, Title IV, § 4002(c)(1), Nov. 2, 2002, 116 Stat. 1808; Pub.L. 117-59, § 3(3), Nov. 18, 2021, 135 Stat. 1469.)

Notes of Decisions (123)

18 U.S.C.A. § 1114, 18 USCA § 1114
Current through P.L. 118-3. Some statute sections may be more current, see credits for details.

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APPENDIX F

No. 20-50207

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACQUELINE ANDERSON,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CR 19-157-CJC

GOVERNMENT'S OPPOSITION TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

DESCRIPTION **PAGE(S)**

Federal Cases

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

Federal Statutes and Rules

Other Authorities

No. 20-50207

IN THE UNITED STATES COURT OF APPEALS
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DISTRICT COURT NO. CR 19-157-CJC

GOVERNMENT'S OPPOSITION TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

I

INTRODUCTION

Defendant Jacqueline Anderson threatened to murder Protective Security Officer ("PSO") Justin Bacchus while he was on duty at the Long Beach Social Security Office. After a series of escalating and aggressive confrontations, PSO Bacchus—who was protecting a federal facility, assisting federal employees, and acting pursuant to the

authority of a federal agency—informed defendant that she could not enter the building. In response, defendant told PSO Bacchus, "I'm going to go to my car and get my gun and blow your fucking brains out."

Based on this threat, a jury convicted defendant of violating 18 U.S.C. § 115(a)(1)(B). This statute prohibits threatening to murder, among other people, "an official whose killing would be a crime under [section 1114]." And 18 U.S.C. § 1114, in turn, makes it a crime to kill "any person assisting" a federal officer or employee "in the performance of [their] duties." Therefore, a divided panel of this Court concluded that defendant violated § 115(a)(1)(B) because—while PSO Bacchus is not employed by the federal government—he was assisting federal employees at the time of the threat.

Defendant now argues that this Court should grant rehearing because § 115(a)(1)(B) only prohibits threats against federal employees. But as the panel properly held, the plain language of § 115(a)(1)(B) protects all of the persons covered by § 1114. That conclusion is consistent with the text of § 115, the statutory structure, the relevant legislative history, and the decisions of the two other circuits that have addressed this question. Rehearing should be denied.

II

FACTUAL BACKGROUND

A. Defendant Threatens to Murder a Protective Security Officer at the Long Beach Social Security Office

The Federal Protective Service ("FPS") is a federal agency that is responsible for protecting federal facilities and investigating crimes that occur on federal property. (3-ER-260–64.) FPS does not have enough officers to cover all of the facilities within its jurisdiction, so the agency uses contractors "to provide security services at government-owned and leased properties." (3-ER-262.) These contractors are called Protective Security Officers, or PSOs. (*Id.*) While PSOs are employed by a private company, they provide critical support and assistance to FPS. (*See* 3-ER-262–64.) As an FPS agent explained at defendant's trial, PSOs serve as the "eyes and ears" of FPS. (3-ER-263.)

Justin Bacchus is a PSO. (2-ER-82.) In late 2018, PSO Bacchus was posted to the Long Beach Social Security Office. (2-ER-84.) This office provides a variety of federal services, including processing claims for federal benefits, answering questions about these benefits, and handling appeals of claims decisions. (3-ER-251.) PSO Bacchus's role at the Long Beach Social Security Office was screening and processing

visitors. (2-ER-84–85.) His core responsibility was to ensure the safety of the federal employees working at the office, as well as the many visitors to this federal facility. (*See* 2-ER-140–41.)

On December 12, 2018, defendant threatened to murder PSO Bacchus while he was on duty at the Long Beach Social Security Office. (2-ER-87–88.) Defendant arrived at this federal facility around 11 a.m. (2-ER-90, 103.) Upon reaching the entrance, defendant approached PSO Bacchus and told him that she had an appointment. (2-ER-101.) PSO Bacchus could not verify her appointment, so he told defendant to go to the back of the no-appointment line. (2-ER-101–02.) This made defendant angry. (2-ER-102.) "Her demeanor got more aggressive, and her voice got louder." (*Id.*) She told PSO Bacchus "that she don't understand why she has to go to the back of the line. And she doesn't want to move, and she won't move." (*Id.*) Defendant, however, eventually went to the back of the line. (2-ER-102–03.)

A few minutes later, an older man approached PSO Bacchus and asked if he could enter the facility. (2-ER-106–07.) PSO Bacchus told the man that he had to go to the back of the no-appointment line. (*Id.*) Moments later, PSO Bacchus noticed the man was standing next to

defendant near the front of the line. (2-ER-107.) PSO Bacchus approached the man because he "knew that he didn't go to the back of the line and make his way to the front that quickly." (*Id.*) PSO Bacchus had planned to speak only with the older man, but "defendant jumped in the conversation and told me he didn't have to go anywhere." (2-ER-107–08.) Defendant then launched into a tirade. She told PSO Bacchus "that, 'I don't give a fuck about you or none of these illegal Mexicans'" (2-ER-109); that "she don't care about the rules of the Social Security Administration" (*id.*); and "Fuck you, bitch-ass nigga" (2-ER-110). The volume of defendant's voice was at an "[e]ight or nine" during this interaction. (*Id.*) "[S]he was getting more upset, more louder based on her being aggravated." (2-ER-108.) Another PSO tried to intervene, but she continued "[c]ursing, getting loud, and just being very, like, aggressive in her manner." (2-ER-116.)

Given defendant's aggressive and disruptive behavior, PSO Bacchus decided that he could not allow her into the building. (2-ER-116–17.) This made defendant "[v]ery upset." (2-ER-118.) She refused to leave and started blocking the door to the facility. (*Id.*; 3-ER-192, 224.) PSO Bacchus, however, decided to let her stay in line so she could

"cool down." (2-ER-118–19.) Another PSO opened a different door to allow visitors to enter and exit the facility. (2-ER-125; 3-ER-192.)

Defendant continued to block the door for about two to three minutes. (2-ER-120.) During this time, defendant told PSO Bacchus "that she didn't want to move out the doorway, and she would not move out the doorway" (2-ER-122); that "she don't care about my job and she'll get my black ass fired" (2-ER-123); and again, "Fuck you, bitch-ass nigga" (2-ER-122). Defendant also told PSO Bacchus that she was going to call the Long Beach police and (falsely) tell them that he had "touched her" and "assaulted her." (2-ER-122–23; 3-ER-190.) When another PSO came outside and tried to defuse the situation, defendant gave him "the 'fuck you.'" (3-ER-225–26.) By this time, defendant's volume was "over a ten" and every time the officers spoke with her, "she yelled." (3-ER-225.)

Defendant eventually started to leave the facility. (2-ER-128.) However, as she was walking toward her car, defendant told PSO Bacchus: "I'm going to go to my car and get my gun and blow your fucking brains out." (2-ER-88; *see* 2-ER-128.) Defendant said these words to PSO Bacchus "loud" and "in a way that [he] felt threatened."

(2-ER-128.) PSO Bacchus responded, "Excuse me? What did you say?" (2-ER-130.) Defendant replied, "You heard me." (*Id.*) Defendant then drove away in a "[f]ast, aggressive" manner before the PSOs could detain her. (3-ER-235–36; *see* 2-ER-136.)

B. The District Court Rejects Defendant's Challenge to the Indictment

Defendant was charged in a single-count indictment with threatening a person assisting federal officers and employees, in violation of 18 U.S.C. § 115(a)(1)(B). (3-ER-409–10.) In February 2020, the district court held a two-day jury trial. The government presented overwhelming evidence of defendant's guilt, including testimony from PSO Bacchus about defendant's threat to "blow [his] fucking brains out" (2-ER-87–139); evidence that defendant lied to FPS about the events of December 12, 2018, and tried to cover up her misconduct (3-ER-278–85); and video surveillance footage of the incident (Ex. 1; 2-ER-98–99).

After the government rested, the defense moved for a judgment of acquittal under Rule 29. (3-ER-325.) According to defendant, she could not have violated § 115 because this statute only protects individuals who are direct employees of the federal government, not private contractors like PSO Bacchus. (3-ER-326.) The district court reserved

its ruling on the Rule 29 motion until after trial. (3-ER-332–33.) In the meantime, the court instructed the jury that § 115 protects "officers and employees of the United States and any person assisting an officer or employee of the United States while such an officer or employee is engaged in the performance of official duties." (3-ER-348–49.) The jury quickly returned a guilty verdict. (*See* 3-ER-400–02.)

After trial, the district court denied defendant's Rule 29 motion. (1-ER-7–17.) The question before the court was "whether § 115(a)(1)(B) protects all of the 'officers,' 'employees,' and 'persons' covered by § 1114 or, as [defendant] argues, just the 'officers' and 'employees.'" (1-ER-10.) The court determined that § 115(a)(1)(B) protects everyone covered by § 1114 and rejected defendant's claim that the "plain language" of § 115 restricts its scope to federal officers and employees. (1-ER-12.) As the court explained, § 1114 does not actually refer to any "officials"—the statute refers to "officers and employees." "If Congress had intended to limit the scope of § 115 in this manner, it could have used clear language expressing that limit." (*Id.*)

The district court also highlighted that one of the dictionary definitions of "official" is "a person authorized to act for a government,

corporation, [or] organization." (*Id.* (alteration in original).) PSO Bacchus qualified as an official under this definition because he was "plainly authorized to act on behalf of the Federal Protective Service, even though he was privately employed." (*Id.*) And this "functional approach" to defining "official" is harmonious with the fact that an individual "must be performing 'official duties' to be protected" by § 115. (1-ER-12–13.) As a result, the court concluded that PSO Bacchus "was an 'official' protected by § 115(a)(1)(B) at the time of the altercation." (1-ER-16.)

C. The Panel Affirms Defendant's Conviction in a Divided Opinion

This Court reached the same conclusion in a divided opinion. *See United States v. Anderson*, 46 F.4th 1000 (9th Cir. 2022).

At the outset, the majority noted that "two of our sister circuits have held that § 115(a)(1)(B) includes all individuals covered by 18 U.S.C. § 1114." *Id.* at 1005 (citing *United States v. Bankoff*, 613 F.3d 358, 360 (3rd Cir. 2010); *United States v. Wynn*, 827 F.3d 778, 783-85 (8th Cir. 2016)). These circuits had conducted a thorough review of "the text, context, and legislative histories of §§ 115(a)(1)(B) and 1114." *Id.* at 1005-06 (footnote omitted). After reviewing these same materials,

the majority was "similarly persuaded that the plain language of § 115 incorporates all persons described in § 1114." *Id.* at 1007.

The majority explained that this conclusion was driven by the statutory structure of § 115 and § 1114. *Id.* Section 115(a)(1)(B) makes it a crime to threaten four categories of protected individuals: (1) "a United States official"; (2) "a United States judge"; (3) "a Federal law enforcement officer"; or (4) "an official whose killing would be a crime under [section 1114]." Congress provided definitions for the first three categories of protected individuals, *see* 18 U.S.C. § 115(c), which "'strongly suggests' that the following phrase—'official whose killing would be a crime under section 1114'—was not intended to be an undefined term," *Anderson*, 46 F.4th at 1007 (quoting *Wynn*, 827 F.3d at 783). "Logically and linguistically speaking, the definition can only be found in the language of § 1114." *Id.*

The majority therefore rejected defendant's claim that "the word 'official' in § 115 is a 'term of limitation' intended to protect" only *certain persons* covered by § 1114. *Id.* This argument was "unworkable and unfaithful to the intent of the statute" because it ignored that § 1114 does not refer to any protected persons as "officials." Like the Third

Circuit, the majority found "it implausible that Congress used the term 'official' as a limitation on the persons enumerated in § 1114, yet declined to define that term or provide any indication as to how courts (or presumably juries) were to determine which of the enumerated 'employees,' 'officers,' 'members,' and 'agents' listed in § 1114 also qualify as 'officials.'" *Id.* (quoting *Bankoff*, 613 F.3d at 369-70).

The majority found further support for its interpretation in the legislative history and purpose of § 115. *Id.* at 1008-09. As it explained, the relevant legislative history "signals that Congress' intent in passing § 115 was to afford protection" to persons who are not employed by the federal government. *Id.* at 1008. And given the "historical context" of § 115's amendment by AEDPA, the majority could not "conclude that Congress intended to leave unprotected the very people who protect federal buildings: PSOs like Bacchus." *Id.* at 1009 n.5.[1] Accordingly, the majority "join[ed] our sister circuits in concluding that, plainly read, the statute incorporates all persons covered by 18 U.S.C. § 1114." *Id.* at 1009.

[1] The district court made this same observation about the CSOs who protect federal courthouses. (ER-16 n.9.)

Judge Fletcher dissented. In his view, the "statute is very clear": the term "official" refers to federal officers and employees. *Id.* at 1010-11. The dissent offered no support for this interpretation of "official," beyond a claim that it is dictated by a "literal reading" of § 115. *Id.* at 1011 (quotation marks omitted). Nevertheless, the dissent concluded that defendant did not violate § 115 because "Bacchus, the target of Anderson's threat, was not a federal official." *Id.*

Defendant subsequently petitioned for panel rehearing and rehearing en banc.

III

STANDARD FOR REHEARING

"En banc courts are the exception, not the rule." *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). Rehearing en banc "is not favored and ordinarily will not be ordered." Fed. R. App. P. 35(a). It is warranted only when necessary to "maintain uniformity" in this Court's decisions or to resolve a "question of exceptional importance." *Id.* That standard is not met when rehearing en banc would "create[] an inter-circuit split; a result at odds with Rule 35 of the Federal Rules of Appellate Procedure." *Makaeff v. Trump Univ., LLC*,

736 F.3d 1180, 1184 (9th Cir. 2013) (Wardlaw, J., concurring in the denial of rehearing en banc); *see also* Fed. R. App. P. 35(b)(1)(B).

Panel rehearing is also "unusual." *Vukmirovic v. Holder*, 640 F.3d 977, 978 (9th Cir. 2011). It is best suited to correct errors that implicate "significant individual rights" or may seriously affect numerous parties. *Albertson's, Inc. v. Comm'r*, 42 F.3d 537, 540 (9th Cir. 1994). A petition for panel rehearing is not appropriate "merely to reargue the case." *See Adamson v. Port of Bellingham*, 907 F.3d 1122, 1136 (9th Cir. 2018) (appending text of post-judgment form).

IV

ARGUMENT

A. The Panel Decision Is Correct

This Court should not grant rehearing for a simple reason—the panel decision is correct.

Defendant's primary claim is that the majority's decision "eschews fundamental principles of textualism" by failing to "apply the ordinary meaning of federal 'official.'" (Petition for Rehearing ("PFR") 9-11.) According to defendant, she provided "several dictionary definitions" that support her interpretation of § 115 so that should be the end of the

analysis. (PFR 11.) But as the district court recognized (1-ER-12), there are also dictionary definitions that support the government's interpretation. *See* Webster's Third New Int'l Dictionary 1566 (1971) (defining "official" as "a person authorized to act for a government, corporation, [or] organization"); Black's Law Dictionary (11th ed. 2019) (defining "official" as "[o]ne authorized to act for a corporation or organization, esp. in a subordinate capacity"). As a result, this is not a case in which consulting dictionaries alone can resolve the interpretive question. *Cf. Torres v. Lynch*, 578 U.S. 452, 458-59 (2016) (declining to resolve case by choosing between conflicting dictionary definitions).

Moreover, this Court has recognized that "[s]ometimes looking at dictionary definitions in isolation can lead us astray." *Cal. River Watch v. City of Vacaville*, 39 F.4th 624, 630 (9th Cir. 2022). "A legislative term's meaning may also be uncovered 'by the specific context in which that language is used, and the broader context of the statute as a whole.'" *Id.* (quoting *Yates v. United States*, 574 U.S. 528, 537 (2015)). In this case, the broader context of § 115(a)(1)(B) shows that the term "official" is not limited to federal employees. As the majority explained, "Congress explicitly delineated the defined categories of 'United States

official,' 'United States judge,' and 'Federal law enforcement officer,' in § 115." *Anderson*, 46 F.4th at 1007. "This phrasing 'strongly suggests' that the following phrase—'official whose killing would be a crime under section 1114'—was not intended to be an undefined term." *Id.* (quoting *Wynn*, 827 F.3d at 783). And "[l]ogically and linguistically speaking, the definition can only be found in the language of § 1114." *Id.*

The majority's method of interpretation is not inconsistent with the Supreme Court authority cited by defendant. (PFR 9-12.) None of these cases say that statutory interpretation merely requires courts to look at a dictionary and then call it a day. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1482 (2021) (taking "a wider look at [the] statutory structure and history" to resolve question); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020) (explaining that dictionary definitions of the word "sex" were just "a starting point" to the statutory analysis); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (relying upon dictionary definitions only to "confirm" what was "clear from the face" of the statute).

Indeed, the only decision that interpreted a similar term, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019), supports the government's position. In *Cochise*, the Supreme Court held that "a private relator" did not qualify as an "official of the United States" under the False Claims Act. *Id.* at 1514. Congress, however, did not use the term "official *of the United States*" in § 115(a)(1)(B) to cross-reference § 1114—it used the term "official." If anything, Congress's decision to use the longer term "official of the United States" in the False Claims Act suggests that the shorter term "official" in § 115(a)(1)(B) is not limited to federal employees. That conclusion is buttressed by Congress's use of "official" in other criminal statutes to refer to private persons acting on the government's behalf. *See* 18 U.S.C. § 201(a)(1) (defining "public official" to include any "person acting for or on behalf of the United States"); *Dixson v. United States*, 465 U.S. 482, 496-97 (1984) (holding that officers of a private corporation qualified as "public officials" under § 201).

At minimum, *Cochise* is simply irrelevant because the False Claims Act was enacted more than a century before § 115 and has its own unique history. Although defendant argues that Congress's use of

different language in other criminal statutes to cross-reference § 1114 is meaningful (PFR 12-13), those statutes were enacted several decades apart from § 115. *See Bankoff*, 613 F.3d at 367 & n.7. And while courts generally presume that Congress uses different words to convey different meanings, this presumption is far weaker when "the two relevant provisions were not considered or enacted together." *Gomez-Perez v. Potter*, 553 U.S. 474, 486-88 (2008).

Defendant is also incorrect that the majority disregarded the "rules of proper grammar." (PFR 13.) As she notes, the dissent concluded that "[t]he restrictive relative clause 'whose killing would be a crime under [18 U.S.C. § 1114]' limits the category of federal officials to which § 115(a)(1)(B) applies." *Anderson*, 46 F.4th at 1011 (Fletcher, J., dissenting) (second alteration in original). But defendant fails to explain how the majority's decision is inconsistent with this statement. Although the majority disagreed that § 115(a)(1)(B) is limited to "federal officials," it did agree that the clause "whose killing would be a crime under [18 U.S.C. § 1114]" limits the category of "officials"—a broad term that could refer to many private persons—who are protected by § 115.

Furthermore, the majority committed no error by recognizing that its interpretation of § 115 was consistent with congressional intent. (PFR 14.) The majority did not, as defendant suggests, rely upon the absurdity canon to reach a conclusion that was contrary to the text of § 115. Instead, it applied "the plain language of § 115" in affirming defendant's conviction. *Anderson*, 46 F.4th at 1007. And to the extent the majority acknowledged the lack of evidence that Congress intended to "leave unprotected the very people who protect federal buildings," it was explaining why the reference canon did not require *deviating* from the plain language of § 115. *Id.* at 1009 & n.5.

B. This Court Should Not Grant Rehearing to Create a Circuit Split

Defendant next argues that rehearing is warranted because the panel's decision was "informed" and "distorted" by its desire to avoid a circuit split. (PFR 14.) As a threshold matter, however, there was nothing improper about the majority considering the implications of its decision. This Court has instructed that "[a]s a general rule, we decline to create a circuit split unless there is a compelling reason to do so." *Padilla-Ramirez v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017) (quotation marks omitted).

In any event, the majority's concern with avoiding a circuit split did not "distort[] its interpretation of the statute." (PFR 14.) While the majority described the reasoning of *Bankoff* and *Wynn*, it did not defer to these decisions without conducting any analysis of its own. Instead, the majority based its holding on an independent analysis of the text, statutory structure, and relevant legislative history. *See Anderson*, 46 F.4th at 1007-09. There is no suggestion in the majority's opinion that it thought defendant's proposed interpretation was correct, but it still decided to affirm based on *Bankoff* and *Wynn*.

This Court should also reject defendant's claim that these decisions are not on point. (PFR 15-17.) While defendant "is correct that both *Bankoff* and *Wynn* involved federal employees, not persons assisting federal employees, . . . the *logic* of those cases does not support [her] proposed line-drawing." *Anderson*, 46 F.4th at 1008. Rather, both the Third and Eighth Circuits broadly held "that § 115 incorporates by reference all persons covered by § 1114." *Bankoff*, 613 F.3d at 360; *see Wynn*, 827 F.3d at 785 (concluding that Congress did not intend "to limit the cross reference to § 1114"). In addition, at least one other circuit has implicitly adopted this position. *See United States v. Martin*,

163 F.3d 1212, 1215 (10th Cir. 1998) (holding that a local police detective was protected by § 115 because he was "an individual assisting a federal officer").

By contrast, defendant (like the dissent) "cites *no* case that has reached a different conclusion regarding the interplay between §§ 115 and 1114." *Anderson*, 46 F.4th at 1008. This Court should reject defendant's invitation to use the extraordinary remedy of rehearing to "create an unwarranted circuit split." *Id.*

C. Defendant's Policy Arguments Do Not Support Rehearing

Finally, defendant raises various policy arguments about why rehearing is appropriate. (PFR 17-21.) But again, these arguments miss the mark.

Defendant first claims that the panel decision "intrudes on legislative power reserved to Congress" because it "effectively replaced 'an official' with 'any person.'" (PFR 17-18.) That claim, however, fails for the same reasons explained above. The majority did not rewrite § 115—it used traditional tools of statutory interpretation to apply the "plain language" of the statute. *Anderson*, 46 F.4th at 1007. In fact, it is defendant who seeks to rewrite the statute by reading the

term "official" as "federal official" or "federal officer or employee."

Contrary to defendant's claim, the panel decision also does not intrude on state authority or "drastically expand[] the reach of a federal criminal statute." (PFR 18-19.) Defendant does not dispute that "affording the protections of § 115 to individuals who are threatened while assisting officers or employees of the United States with their official duties is . . . a 'matter[ ] of federal concern.'" *Anderson*, 46 F.4th at 1009 (alteration in original) (quoting S. Rep. No. 98-225, at 320 (1983)). And she provides no support for her claim that protecting individuals who guard federal buildings and assist federal employees is "an area that has primarily been the province of the States." (PFR 19.)

Moreover, defendant exaggerates the reach of the majority's decision. While there are many private contractors working for the federal government, § 115 protects them "only when a threat is made in connection with (or in retaliation against) the performance of such a person's 'official duties.'" *Bankoff*, 613 F.3d at 372 n.14. Consequently, there is "no significant alteration in the federal-state balance that results from interpreting § 115 as applying to threats against them." *Id.* (cleaned up). Indeed, *Bankoff* was issued more than a decade ago,

but defendant has not identified a flood of cases involving federal contractors.

Defendant's final appeals to lenity and general principles of fairness are similarly unavailing. (PFR 20-21.) She urges that "[e]veryday people, like [her], would not read the term federal 'official' in § 115(a)(1)(B) and expect to be charged with a federal felony . . . for threatening a private security guard." (*Id.*) But as the majority explained, the rule of lenity does not apply here because § 115(a)(1)(B) is not ambiguous, even if it "could have been more clearly drafted." *Anderson*, 46 F.4th at 1001 n.1. And defendant could not have been surprised to face federal charges for threatening to murder someone who was protecting a federal facility, assisting federal employees, and acting pursuant to the authority of a federal agency. Ultimately, her prosecution, which ended in a sentence of probation, was both consistent with the law and fair.

V

CONCLUSION

Defendant's petition for panel rehearing and rehearing en banc should be denied.

DATED: December 12, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the length limits permitted by this Court's October 31, 2022 Order and Circuit Rules 32-3(2), 35-4(a), and 40-1(a), because the brief is 4,195 words in length.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016.

DATED: December 12, 2022 */s/ David R. Friedman*

DAVID R. FRIEDMAN
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UNITED STATES OF AMERICA

APPENDIX G

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes
Chapter 51. Homicide

This section has been updated. Click here for the updated version.

18 U.S.C.A. § 1114

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

Effective: [See Text Amendments] to October 10, 1996

Whoever kills or attempts to kill any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the Secret Service or of the Drug Enforcement Administration, any officer or member of the United States Capitol Police, any member of the Coast Guard, any employee of the Coast Guard assigned to perform investigative, inspection or law enforcement functions, any officer or employee of the Federal Railroad Administration assigned to perform investigative, inspection, or law enforcement functions, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands or any other commonwealth, territory, or possession of the United States, or the District of Columbia, for the control of eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any civilian official or employee of the Army Corps of Engineers assigned to perform investigations, inspections, law or regulatory enforcement functions, or field-level real estate functions, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Education, the Department of Health and Human Services, the Consumer Product Safety Commission, Interstate Commerce Commission, the Department of Commerce, or of the Department of Labor or of the Department of the Interior, or of the Department of Agriculture assigned to perform investigative, inspection, or law enforcement functions, or any officer or employee of the Federal Communications Commission performing investigative, inspection, or law enforcement functions, or any officer or employee of the Department of Veterans Affairs assigned to perform investigative or law enforcement functions, or any United States probation or pretrial services officer, or any United States magistrate, or any officer or employee of any department or agency within the Intelligence Community (as defined in section 3.4(f) of Executive Order 12333, December 8, 1981, or successor orders) not already covered under the terms of this section, any attorney, liquidator, examiner, claim agent, or other employee of the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Housing Finance Board, the Resolution Trust Corporation, the Board of Governors of the Federal Reserve System, any Federal Reserve bank, or the National Credit Union Administration, or any other officer or employee of the United States or any agency thereof designated for coverage under this section in regulations issued by the Attorney General engaged in or on account of the performance of his official duties, or any officer or employee of the United States or any agency thereof designated to collect or compromise a Federal claim in accordance with sections 3711 and 3716-3718 of title 31 or other statutory authority shall be punished, in the case of murder, as provided under section 1111,

or, in the case of manslaughter, as provided under section 1112. [1] except that any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 756; May 24, 1949, c. 139, § 24, 63 Stat. 93; Oct. 31, 1951, c. 655, § 28, 65 Stat. 721; June 27, 1952, c. 477, Title IV, § 402(c), 66 Stat. 276; July 29, 1958, Pub.L. 85-568, Title III, § 304(d), 72 Stat. 434; July 2, 1962, Pub.L. 87-518, § 10, 76 Stat. 132; Aug. 27, 1964, Pub.L. 88-493, § 3, 78 Stat. 610; July 15, 1965, Pub.L. 89-74, § 8(b), 79 Stat. 234; Aug. 2, 1968, Pub.L. 90-449, § 2, 82 Stat. 611; Aug. 12, 1970, Pub.L. 91-375, § 6(j) (9), 84 Stat. 777; Oct. 27, 1970, Pub.L. 91-513, Title II, § 701(i) (1), 84 Stat. 1282; Dec. 29, 1970, Pub.L. 91-596, § 17(h) (1), 84 Stat. 1607; Oct. 26, 1974, Pub.L. 93-481, § 5, 88 Stat. 1456; May 11, 1976, Pub.L. 94-284, § 18, 90 Stat. 514; Oct. 21, 1976, Pub.L. 94-582, § 16, 90 Stat. 2883; Aug. 3, 1977, Pub.L. 95-87, Title VII, § 704, 91 Stat. 520; Nov. 8, 1978, Pub.L. 95-616, § 3(j) (2), 92 Stat. 3112; Nov. 10, 1978, Pub.L. 95-630, Title III, § 307, 92 Stat. 3677; July 1, 1980, Pub.L. 96-296, § 26(c), 94 Stat. 819; Oct. 17, 1980, Pub.L. 96-466, Title VII, § 704, 94 Stat. 2216; Dec. 29, 1981, Pub.L. 97-143, § 1(b), 95 Stat. 1724; Sept. 13, 1982, Pub.L. 97-259, Title I, § 128, 96 Stat. 1099; Oct. 25, 1982, Pub.L. 97-365, § 6, 96 Stat. 1752; Jan. 12, 1983, Pub.L. 97-452, § 2(b), 96 Stat. 2478; July 30, 1983, Pub.L. 98-63, Title I, § 101, 97 Stat. 313.)

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 1012, 98 Stat. 2142; Oct. 30, 1984, Pub.L. 98-557, § 17(c), 98 Stat. 2868; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7026, 102 Stat. 4397; Aug. 9, 1989, Pub.L. 101-73, Title IX, § 962(a)(6), 103 Stat. 502; Nov. 29, 1990, Pub.L. 101-647, Title XII, § 1205(h), Title XVI, § 1606, Title XXXV, § 3535, 104 Stat. 4831, 4843, 4925; June 13, 1991, Pub.L. 102-54, § 13(f)(2), 105 Stat. 275; Sept. 3, 1992, Pub.L. 102-365, § 6, 106 Stat. 975; Sept. 13, 1994, Pub.L. 103-322, Title VI, § 60007, Title XXXIII, §§ 330009(c), 330011(g), 108 Stat. 1971, 2143, 2145.)

Footnotes

1 So in original. The period probably should be a comma.

18 U.S.C.A. § 1114, 18 USCA § 1114
Current through P.L. 118-3. Some statute sections may be more current, see credits for details.

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