No. 23-1288

In the Supreme Court of the United States

NICHOLAS NEWMAN, PETITIONER,

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

R. REEVES ANDERSON
JAKE MURPHY
ARNOLD & PORTER KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 80202

JUSTIN GARRATT
ARNOLD & PORTER KAYE SCHOLER LLP
44th Floor
777 South Figueroa Street
Los Angeles, CA 90017-5844

ANDREW T. TUTT
Counsel of Record
ANORA WANG
MEREDITH VOLPE
CALEB THOMPSON
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

LISA CORDARA
MAX GOULD
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Statutes

Other Authorities

In the Supreme Court of the United States

No. 23-1288

NICHOLAS NEWMAN, PETITIONER,

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

The Court should grant review and set this case for argument to resolve the first question presented: whether assault on a federal officer under 18 U.S.C. § 111 can be committed without purposely or knowingly directing force at the person or property of another.

Petitioner initially asked for a certificate of appealability ("COA") on that question and for plenary review only in the alternative. Pet. i, 1. But the United States' opposition makes clear that this case warrants plenary review to resolve the § 111 question. The United States does not dispute that the issue is nationally important or that the courts of appeals are deeply divided over what exactly this statute criminalizes.

Meanwhile, the United States' position on the scope of § 111 remains (seemingly purposefully) opaque, and the current iteration submitted to this Court appears to contradict the one it has taken in the lower courts for decades. The petition set forth numerous examples of conduct that, based on that prior position, "the United States would [] agree" violate § 111 but do not constitute

crimes of violence after *Borden v. United States*, 593 U.S. 420 (2021). Pet. 18-19. Yet the United States does not address a single one of those examples. The United States now argues that § 111 carries a new and bizarre meaning, one irreconcilable with its prior position, and one never adopted by a single court of appeals. The United States' sudden about-face underscores the necessity of a definitive interpretation of the statute from the Court. The current situation is intolerable. The breadth of a statute this important should be clear. Further percolation will not resolve the conflict.

Rather than dispute the certworthiness of the § 111 question, the United States devotes virtually its entire opposition to persuading the Court to deny a COA based on petitioner's collateral attack waiver. But the Tenth Circuit did not reach or resolve that issue. The only basis for the lower court's denial of a COA was its conclusion that it is indisputable that § 111 is violated only by purposefully or knowingly directing force against another and therefore is a crime of violence that can serve as a 18 U.S.C. § 924(c) predicate. So if the Court grants review of the § 111 question (or even issues a COA on that question), its standard practice would be to remand the collateral attack question to allow the Tenth Circuit to address it in the first instance.

The Court should grant plenary review of the § 111 question and remand the rest. Alternatively, a COA should issue.

I. THE COURT SHOULD GRANT PLENARY REVIEW OF THE § 111 QUESTION AND REMAND ON THE COLLATERAL ATTACK QUESTION

A. The § 111 Question Merits the Court's Review, and This Case Is an Ideal Vehicle to Resolve It

The § 111 question satisfies all the traditional criteria for granting plenary review. It raises recurrent legal and

practical issues of broad significance; and its correct resolution is critical to the protection of the hundreds of thousands of federal officers in the country.[1] As the petition explained, the Circuits are divided over what conduct and *mens rea* are minimally necessary to violate § 111. Pet. 16-18. The United States has taken contradictory positions, debuting an entirely new position in its brief in opposition to this Court in this case. At bottom, neither the United States nor the courts of appeals know the scope of § 111. And there is no possibility that the Circuits will come to a coherent position any time soon: the statute was amended in 1994, yet the courts of appeals, and apparently the United States, still lack clarity on what conduct and level of intent it criminalizes. Further percolation of the question would be futile. Given the stakes for thousands of federal officers, this Court's review is imperative.

1. There is no dispute that the scope of § 111 is a frequently recurring, nationally important question. Hundreds of § 111 prosecutions are brought each year.[2] This statue is the primary bulwark protecting federal officers in the discharge of their duties. Congress enacted § 111 to provide "uniformly vigorous protection of federal personnel" to the "maximum" extent. *United States v. Feola*, 420 U.S. 671, 684 (1975). The correct resolution of the § 111 question is critical for federal officers and those who rely on them.

2. There is also no dispute that the courts of appeals have reached divergent conclusions on the scope of § 111

---

[1] *See* Connor Brooks, U.S. Dep't of Just., Bureau of Just. Stat., *Federal Law Enforcement Officers, 2020 – Statistical Tables* (Sept. 2022), https://bit.ly/3SZBctb.

[2] *See* U.S. Dep't of Just., Bureau of Just. Stat., *United States Code Statistics,* https://bit.ly/4fTkhm2 (in the "United States Code citation" dropdown menu, select "18:111") (showing 292 cases in 2022, 316 in 2021, and 240 in 2020).

or that only this Court's review would bring uniformity to federal law governing this important question.

There are two different and independently certworthy bases for concluding that § 111 can be violated without purposely or knowingly directing force against any person or property. First, as the United States does not dispute, if § 111 is a "general intent" crime that corresponds to a *mens rea* of recklessness then § 111(b) is not a crime of violence under § 924(c). Second, if § 111's unique prohibition on "simple assault" means it can be violated without purposely or knowingly directing physical force against the person or property of another then § 111(b) is not a crime of violence under § 924(c). The courts of appeals have reached conflicting conclusions on these issues, and both are ripe for this Court's review.

a. The question whether "general intent" assaults can be committed recklessly—and therefore § 111 can be committed recklessly—merits the Court's review. As the United States concedes, the Court left this question open in *Voisine v. United States*, 579 U.S. 686, 697-698 (2016). *See* Opp. 22 n.4. But the United States does not dispute that the courts of appeals, and the United States itself, have consistently taken the position that § 111 is a "general intent" crime, and that general intent assaults can be committed recklessly. *See* Opp. 21-22 & n.4. (conceding United States has taken that position in this Court); *see also* Pet. 22 (collecting precedent from Eighth, Ninth, Tenth, and Eleventh Circuits). The United States does not dispute that controlling Tenth Circuit precedent required the panel below to hold that because § 111 is a general intent crime it can be violated recklessly, or that its failure to do so created an "intracircuit conflict." *See* Opp. 21-22; *see also* Pet. 22-23 (citing *United States v. Zunie*, 444 F.3d 1230, 1234-35 (10th Cir. 2006)).

The question whether "general intent" corresponds to a *mens rea* of recklessness is indisputably recurrent

and nationally important. As the United States concedes, it has arisen at least twice *in this Court*, and countless times in the courts of appeals. The United States argues that § 111 is a special kind of general intent crime that does not correspond to a *mens rea* of recklessness because it includes a "unique 'forcibly' element." Opp. 22. The question whether that "unique" element "matters," Opp. 22—as the government claims—is itself important. If § 111's words make it a different kind of general intent crime from other general intent crimes, one that is more difficult for prosecutors to prove, and one that provides less protection from assault to federal officers than nearly all other federal assault crimes (as the United States does not dispute, Opp. 22), Congress should know that so it can revise the statute, and it should have the benefit of this Court explaining the supposedly talismanic meaning of that term in context.

b. The question whether "simple assault" under § 111 can be committed recklessly, or *without even committing assault*, also plainly warrants the Court's review.[3] The answer should be straightforward: as the Second Circuit has held, "simple assault" encompasses both "common-law assault" and "common-law battery," the latter of which "does not require any specific intent either to injure or touch offensively, but rather only … mere recklessness or criminal negligence." *United States v. Delis*, 558 F.3d 177, 180-83 (2d Cir. 2009). As the petition explained, and as the United States does not dispute, everywhere "simple assault" is used in the law—in the Model Penal

[3] The United States argues this issue is not fairly encompassed within the question presented, Opp. 19-20, because it goes to *actus reus* not *mens rea*. But it goes to both: an offense committable *without* "assault" is definitionally committable *without* a *mens rea* of purposefully or knowingly directing force against another—and is thereby incapable of qualifying as a crime of violence under *Borden*. *See* 593 U.S. at 429, 432.

Code, in state codes, everywhere—it can be committed by committing a reckless battery.

But before the Court can even reach the question, it would first need to conclude that § 111's version of "simple assault" requires assault at all—a question of nationwide significance that has divided the courts of appeals and to which the United States seemingly cannot provide a straight answer. To the extent the United States takes a position in this case, it appears diametrically opposite the one it has repeatedly taken in prosecutions arising from the events at the U.S. Capitol building on January 6, 2021. *See, e.g.*, *United States v. Warnagiris*, 699 F. Supp. 3d 31, 49 (D.D.C. 2023); *United States v. Cua*, 657 F. Supp. 3d 106, 112-13 (D.D.C. 2023).

The courts of appeals are divided over whether "simple assault" can be committed without committing an assault at all (*i.e.*, without intentionally or knowingly directing force against another). Four courts of appeals have interpreted the phrase "simple assault" in § 111 to criminalize "resisting" "impeding," "intimidating," or "interfering with" a federal officer without any intent to touch them—*i.e.*, conduct not directing force against anyone or anything. *See United States v. Gagnon*, 553 F.3d 1021, 1027 (6th Cir. 2009); *see also United States v. Stands Alone*, 11 F.4th 532, 535 (7th Cir. 2021); *United States v. Briley*, 770 F.3d 267, 274-75 (4th Cir. 2014); *United States v. Williams*, 602 F.3d 313, 317-18 (5th Cir. 2010). Three have held otherwise. *See United States v. Wolfname*, 835 F.3d 1214, 1218-19, 1221 n.3 (10th Cir. 2016); *United States v. Davis,* 690 F.3d 127, 135-36 (2d Cir. 2012); *United States v. Chapman*, 528 F.3d 1215, 1219-21 (9th Cir. 2008).

The United States tries to deny the existence of the split—a split *it created*—by arguing that "[a]ll of [the] verbs" in the statute (assault, resist, impede, intimidate, and interfere with) "describe conduct directed at another person," and that the cases are "uniformly consistent with

that view." Opp. 20-21. Both arguments are wrong. First, as anyone who has tripped over a dog or a small child can confirm, a person (or animal) can "interfere with" or "impede" someone without purposely directing force against them. Second, the cases cited involved conduct *not* purposely or knowingly directed against a federal officer—otherwise they would have been traditional assault cases and the courts never would have had occasion to consider whether § 111 can be committed without assault.

In *United States v. Williams*, for example, the only question was whether the defendant's act of swinging her arms "for the specific purpose of resisting the officers' attempts to handcuff her" was enough to violate the statute (it was). 602 F.3d at 318. Had the evidence showed that the defendant swung her arms "*at* [the] officers," as the United States claims, Opp. 21 (emphasis added), *Williams* would have been an assault case. Likewise, in *United States v. Gagnon*, the question was whether the defendant violated § 111 by causing the *officers* to use force against him to handcuff him (he did). 553 F.3d at 1022, 1027-28; *see id.* at n.7 (declining to decide whether defendant directed force at officers by making himself vomit and spitting at them from back of police car).[4]

Using the United States' position in those cases, petitioner set forth a list of examples of criminal conduct that resists, impedes, intimidates, or interferes, but does not involve the knowing use of force against another. *See* Pet. 18-19. The United States offered no response

[4] The other two cases were challenges to allegedly defective indictments that charged solely *non*-assaultive conduct (*e.g.*, resistance, intimidation, interference), which the defendants argued reached conduct not directed at the officer. *See Stands Alone*, 11 F.4th at 533 (challenge to indictment that charged resistance, intimidation, and interference, but not assault); *Briley*, 770 F.3d at 272 (same).

whatsoever to that list, and certainly did not dispute its correctness. *Warnagiris*, 699 F. Supp. 3d at 49 (adopting United States' position; explaining: "For instance, a rioter may forcefully slam a door to prevent an officer from entering a building that the officer is responsible for securing. That rioter has forcibly impeded or interfered with an officer by intentionally exercising force *capable* of causing bodily injury—slamming a door—though he may not have necessarily committed an 'assault.'").

The United States does not dispute that if four courts of appeals do, in fact, hold that § 111 can be violated without knowingly directing force against another, it creates a circuit split on a question that warrants this Court's review. They do, *see id.* at 46 & n.6 (collecting cases), and the Court should grant review.

B. The Court Can and Should Remand the Collateral Attack Question

The enforceability of the collateral attack waiver is an issue for remand, not one that would prevent the Court from resolving the § 111 question. Though petitioner has meritorious arguments and will ultimately win on this issue, the Court need not reach it now.

The collateral attack question was not passed upon below and therefore is a question for remand.[5] As the United States has consistently maintained in arguments before this Court, "the existence of a potential alternative ground … not addressed by the court of appeals, is not a barrier to [this Court's] review." U.S. Cert. Reply Brief at 3, *United States v. Bean*, 537 U.S. 71 (2002) (No. 01-704). Indeed, the Court "routinely grants certiorari to resolve important questions that controlled the lower court's

[5] The Tenth Circuit did not reach the collateral attack question on the ground that it was "immaterial" in light of the panel's conclusion that "reasonable jurists could not disagree" on the § 111 question. Pet. App. 4a.

decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason." Cert. Reply Brief at 2, *Kisor v. Wilkie*, 588 U.S. 558 (2019) (No. 18-15).

Nonetheless, reasonable jurists could debate whether petitioner's collateral attack waiver is enforceable. This Court has never upheld the constitutionality of collateral attack waivers in plea agreements (a point the United States does not dispute). *See* Opp. 9-11. And the Fourth Circuit has held that such waivers are unenforceable where they would prevent a habeas petitioner from bringing a cognizable actual innocence claim. *See* Opp. 9-15. There is no basis to deny petitioner a COA on this issue.

The United States principally argues that petitioner is not actually innocent of his § 924(c) conviction because the United States used its dismissed 18 U.S.C. § 2114(a) charge as a predicate. Opp. 12-15. Neither the district court nor the Court of Appeals passed upon that argument. Pet. App. 8a, 29a. And the dismissed § 2114(a) charge cannot serve as a § 924(c) predicate for numerous reasons—the clearest is that the record does not support it because petitioner had no intent to rob the undercover agent (a necessary element of the crime). *See* Plea Agreement at 2-4, ECF No. 57 (parties' agreed facts showing no intent to rob); Plea Colloquy Tr. at 18-19, ECF No. 73; Sentencing Hr'g Tr. at 36, ECF No. 70 (similarly showing absence of intent to rob). This Court has also never held that a § 924(c) conviction can be sustained without conviction of the predicate. *See United States v. Hill*, 971 F.2d 1461, 1470-87 (10th Cir. 1992) (en banc) (Moore, J., dissenting) (explaining why § 924(c) requires conviction of predicate offense).

The Court should remand the collateral attack question to the Tenth Circuit, as it typically would in this

procedural posture. If it does reach the question, a COA should issue on this question.

II. ALTERNATIVELY, A COA SHOULD ISSUE

If the Court decides against plenary review of the § 111 question, it should issue a COA. The standard for issuance of a COA is modest and permissive: a COA should issue if "reasonable jurists could debate whether (or, for that matter, agree that) the [habeas] petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 475 (2000) (internal quotation marks omitted); *see also Autry v. Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., in chambers).

To petitioner's knowledge, the Court has no established voting rule for COA applications directed to the Court on petitions for writs of certiorari. But the appropriate rule would be to issue a COA if any justice believes that a COA should issue. Justice Rehnquist articulated that view in his separate opinion in *Davis v. Jacobs*, writing that "this Court itself, may issue a [COA]" if "any Member of this Court believes [a question] to be deserving of a [COA]." 454 U.S. 911, 918 (1981) (Rehnquist, J., dissenting from denial of certiorari); *see also id.* at 912-14 (Stevens, J., opinion respecting denial of certiorari) (agreeing); *id.* at 913-14 ("Because we have that authority, it is part of our responsibility in processing these petitions to determine whether they have arguable merit notwithstanding the failure of a district or circuit judge to [issue a COA].").

Petitioner has raised substantial questions about the lawfulness of his § 924(c) conviction that are plainly debatable. Congress intended for litigants like petitioner to have the opportunity to appeal in cases like this one that raise important debatable questions. If the Court does not

grant plenary review of the § 111 question, it should issue a COA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

R. REEVES ANDERSON
JAKE MURPHY
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 80202

JUSTIN GARRATT
ARNOLD & PORTER
KAYE SCHOLER LLP
44th Floor
777 South Figueroa Street
Los Angeles, CA 90017-5844

ANDREW T. TUTT
Counsel of Record
ANORA WANG
MEREDITH VOLPE
CALEB THOMPSON
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

LISA CORDARA
MAX GOULD
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

AUGUST 2024