No. 21-6826

IN THE
Supreme Court of the United States

TODD STANDS ALONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Todd Stands Alone has asked this Court to review whether common-law simple assault is an essential element of a conviction under 18 U.S.C. § 111. In response, the Government leads with and spends the bulk of its brief addressing the merits of that legal question, which strongly indicates that a writ of certiorari should be granted. Seven courts of appeals are divided on this issue, and the Government's restatement of one side of the conflict is no reason to leave the split unresolved.

The Government's brief offers just two non-merits arguments in opposition to accepting review, and neither withstands scrutiny. First, it attempts to wash away the circuit split, but that stain has set. The Second, Ninth, and Tenth Circuits squarely addressed the language in § 111 on which Stands Alone's conviction and the question presented rest. Those rulings remain both good law and in conflict with the position of the Fourth, Fifth, Sixth, and Seventh Circuits. In addition, on a mistaken reading of the record, the Government suggests that a decision from this Court would not affect this case's outcome because Stands Alone did, in fact, commit simple assault. A quick review of the trial transcript and district court's opinion, however, makes clear that that is not the case.

For the reasons set out in the petition and those advanced below, Stands Alone respectfully requests that the Court grant a writ of certiorari.

A. A clear conflict exists among the courts of appeals.

Seven courts of appeals have picked sides in resolving the question presented. The Second, Ninth, and Tenth Circuits hold that a defendant has not violated § 111 if he did not commit at least "simple assault"—which takes its meaning from the common law and is limited to assaultive conduct. *United States v. Wolfname*, 835 F.3d 1214 (10th Cir. 2016); *United States v. Davis*, 690 F.3d 127 (2d Cir. 2012); *United States v. Chapman*, 528 F.3d 1215 (9th Cir. 2008). Meanwhile, the Fourth, Fifth, Sixth, and Seventh Circuits hold that a defendant can violate § 111 even if he did not commit an assault. *United States v. Briley*, 770 F.3d 267 (4th Cir. 2014); *United States v. Williams*, 602 F.3d 313 (5th Cir. 2010); *United States v. Gagnon*, 553 F.3d 1021 (6th Cir. 2009); Pet. App. 1a–10a. Yet, the Government asserts that "no circuit division warrants this Court's review." Opp. 18.

The Government's efforts to fuse the circuit split come up short. It attempts to discount the decisions of the three courts of appeals that support Stands Alone's position (the Second, Ninth, and Tenth Circuits), but its arguments founder on the plain text of the statute, the cases themselves, and the appellate courts' own articulation of the state of play. Tellingly, because the circuit split is inescapable, the Government leads its opposition by defending the decision below and digging into the merits of the question presented. Opp. 8–17. Its merits position is wrong. But, more importantly, its merits position is irrelevant to whether the Court should grant certiorari to resolve the conflict.

1. a. The Government acknowledges that the Second, Ninth, and Tenth Circuits have "taken a different view of offenses punishable under Section 111(a)" (Opp. 19; *accord id.* at 18, 20–21)—which contains the key language at issue. But it resists counting those courts' rulings toward the split because the facts involved convictions under subsection (a) rather than subsection (b) of the statute. That formalism proves too much. The "acts in violation of this section," referenced in subsection (a), are *the same acts* referenced in subsection (b). 18 U.S.C. § 111(b) (liability premised on "any acts described in subsection (a)"); *see also* Pet. 15–17. Consequently, when the Second, Ninth, and Tenth Circuits held that the acts that trigger liability in subsection (a) concern only *assaultive* conduct, they necessary concluded that the acts that trigger liability in subsection (b) concern only *assaultive* conduct. *See Wolfname*, 835 F.3d at 1218; *Davis*, 690 F.3d at 136; *Chapman*, 528 F.3d at 1221.[1] And for this very reason, when addressing the conduct that § 111(b) covers, the Seventh Circuit's analysis rose and fell with its interpretation of the acts in subsection (a). Pet. App. 7a–10a.

Although the Government points to contrary dicta in the Second Circuit's ruling, it acknowledges that (of course) that dicta is not controlling. Opp. 20; *see id.*

[1] The Ninth and Tenth Circuits said as much in subsequent cases that assessed whether § 111(b) is a "crime of violence." *United States v. Kendall,* 876 F.3d 1264, 1270 (10th Cir. 2017) ("Although one can violate § 111 in a number of ways—by assaulting, resisting, opposing, impeding, intimidating, or interfering with a designated official—*every* conviction under § 111 requires an assault." (emphasis added) (citing *Wolfname*, 835 F.3d at 1218)); *United States v. Juvenile Female*, 566 F.3d 943, 947 (9th Cir. 2009) (defendant's "argument that . . . [§ 111(b)] subsumes five other non-assaultive offenses, because it also lists those who resist, oppose, impede, intimidate, or interfere with designated officers, fails" because "convictions under this statute require at least some form of assault" (quoting *Chapman*, 528 F.3d at 1221)).

at 19. And the Second Circuit's passing comment—that the five verbs other than "assault" in § 111(a) "would appear to be criminally prohibited by the felony clause 'where such acts involve . . . the intent to commit another felony'" (*Davis*, 690 F.3d at 137)—is even less persuasive than the Government suggests. The court noted only that requiring proof of common-law simple assault for purposes of § 111(a)'s misdemeanor "does not *necessarily* run afoul of the preference against" superfluity. *Id.* at 136–37 (emphasis added). But it simultaneously rejected the Fifth and Sixth Circuits' willingness to read "simple assault" as a "term of art" that encompasses non-assaultive conduct. *Id.* 137 & n.4. Thus, even the dicta to which the Government points does not support its position.

b. The Government also suggests that the question presented remains "open" in the Ninth Circuit because *Chapman* is no longer good law following the 2008 amendment to the statute. Opp. 18–19. But the Government has misread both that case and the amendment. Although the court of appeals assessed a prior version of § 111 in *Chapman*, it did so *after* the 2008 amendment had passed, and it considered the statutory change (at length) as part of its analysis. 528 F.3d at 1219–21. The Ninth Circuit determined that § 111 requires proof of assaultive conduct because the statute distinguishes between misdemeanors and felonies based on "simple assault." *Id.* at 1219–20. That did not change with the 2008 amendment. Instead, as *Chapman* recognized, that amendment affected the definition of the felony in § 111(a), but it altered neither the relevant "acts" in subsection (a) nor the "simple assault" line that demarcates misdemeanors from felonies. *Id.* at 1219. In

fact, as *Chapman* pointed out, the 2008 amendment *reinforced* its conclusion that "an assault [is] required for a § 111 conviction" because the amendment "use[s] the word 'assault' in the description of both misdemeanors *and* felonies." *Id.* at 1221 (emphasis in original). And so, the Ninth Circuit "reject[ed] the government's reading of § 111, and h[e]ld . . . that convictions under this statute require at least some form of assault." *Id.* That holding remains controlling today.

c. The Government's claim that no real circuit split exists also contradicts several courts' description of the issue. In this case, the district court identified the circuit split, and the Seventh Circuit stated that it "disagree[d]" with the Tenth Circuit's reading of § 111. Pet. App. 7a, 17a. The Second, Fourth, Fifth, and Tenth Circuits also have called attention to the split. *Briley*, 770 F.3d at 274–75; *Wolfname*, 835 F.3d at 1221 & n.3; *Davis*, 690 F.3d at 135–36; *Williams*, 602 F.3d at 316–17. Even those courts of appeals that have not yet weighed-in have acknowledged the divide. *See* Pet. 14 (citing *United States v. Taylor*, 848 F.3d 476, 493 n.6 (1st Cir. 2017); *United States v. Green*, 543 F. App'x 266, 272 n.9 (3d Cir. 2013)).

2. Faced with that unavoidable conflict, the Government spends the bulk of its brief defending the decision below and emphasizing the Fourth, Fifth, Sixth, and Seventh Circuits' view of the law. Opp. 8–17. It offers two substantive arguments why § 111 encompasses non-assaultive conduct. But it has not demonstrated that either the text or the legislative history of § 111 unquestionably supports its position.

First, the Government argues that "simple assault" operates as a "term of art" that encompasses non-assaultive conduct. Opp. 11 (quoting *Gagnon*, 553 F.3d at

1027). But that argument runs headlong into the "cardinal rule of statutory construction" that undefined terms "are to be interpreted and applied according to their common law-meanings." *Molzof v. United States*, 502 U.S. 301, 307 (1992) (first quote); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 320 (2012) (second quote). And "simple assault" has an established common-law meaning: "an act constitutes 'simple assault' only if the actor intended to or threatened to injure another." Br. of Amici at 6; *see id.* at 6–8 & n.2 (collecting sources); *see also Davis*, 690 F.3d at 136 (common-law definition of "simple assault" is "longstanding and precise"). Nowhere does the Government's merits position account for that definition. Nor does it point to anywhere in the text of § 111 that indicates Congress consciously abandoned that term's established common-law meaning. Instead, the Government cites Senator Kyl's statement for support. Opp. 11. But the Senator repeatedly described § 111 as an "assault offense" and endorsed the approach taken in *United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003)—which defined "simple assault" by reference to the common law and held that the felony in § 111(a) refers to "*any assault* that involves actual physical contact or the intent to commit murder or any other felony . . . ." 318 F.3d at 1008–09 (emphasis added); 153 Cong. Rec. 34,620 (2007); *see also* Br. of Amici at 14.

Second, the Government contends that § 111's history and purpose, defined through the discussion in two decisions from this Court, "confirm [the statute's] application to non-assaultive conduct." Opp. 12–13, 17 (citing *United States v. Feola*, 420 U.S. 671 (1975); *Ladner v. United States*, 358 U.S. 169 (1958)). But neither case

to which the Government points supports that conclusion. In *Ladner*, this Court assessed the predecessor statute to § 111 and, applying the rule of lenity, held that a single assaultive act wounding multiple officers is a single violation of the statute. 358 U.S. at 177–78. In *Feola*, this Court determined that § 111 does not require the Government to prove that the defendant knew his victim was a federal officer. 420 U.S. at 684–86. Thus, although those cases discuss the general protectionist purpose that motivated § 111's enactment, neither speaks to whether the statute's purpose demands that its plain text be read to encompass non-assaultive conduct. More importantly, both those cases pre-date the statute's reorganization in 1994, when Congress first introduced the term "simple assault" and used it to differentiate the statute's misdemeanor and felony offenses. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 320101(a), 108 Stat. 2108. Neither case sheds light, then, on how that term affects the statute's scope. And the remainder of the Government's argument, based on subsequent statutory amendments, requires it to read the tea leaves of legislative history. Opp. 14–16.

B. A decision on the merits would affect the outcome of this case.

The Government also contends that this Court should not accept review because any decision would not affect Stands Alone's conviction. It asserts that, even under his reading of § 111, the case's outcome will not change because the district court's findings "necessarily establish" that he "indisputably" committed simple assault and that trial counsel conceded as much. Opp. 21–22. But the Government has misread the record. This Court should accept review because interpreting the statute in Stands Alone's favor would require that his conviction be vacated.

1. The district court did *not* find that Stands Alone committed an assault. As the Government recites, the court found that Stands Alone "forcibl[y] intimidate[d]" an officer based on having held a fire extinguisher "at chest height . . . as he yelled" and that he "discharged the fire extinguisher in response to being pepper sprayed." Pet. App. 23a, 25a; *see* Opp. 23. But "intimidation" and "simple assault" are not inherently the same. A person can intimidate another *without* attempting or threatening to inflict injury, and an attempt or threat of injury is required to constitute assaultive conduct. *See, e.g.*, *Davis*, 690 F.3d at 135–36.

The district court recognized this. It stated at the end of trial that, although the Government had proven intimidation, the court "still entertain[ed] grave doubts about whether [the Government] can show the assault to beyond a reasonable doubt," but it believed the Government had proven its case "based on the reading of the statute that is not the *Wolfname* reading[.]"[2] The court's written opinion tracks that oral statement: the court found that the Government *had not* proven beyond a reasonable doubt that "Stands Alone intended to spray [Officer] Decker with the fire extinguisher" but concluded that that fact was "ultimately immaterial to Stands Alone's guilt" because assault is not a required element of the statute. Pet. App. 19a, 23a. In other words, the court found that the Government had *not* proven that Stands Alone attempted or threatened to injure (i.e., assaulted) the officer, but he could be liable based on the non-assaultive conduct the Government had proven.

[2] Tr. of Trial, June 20, 2019, *United States v. Stands Alone*, No. 3:18-cr-000128-jdp (W.D. Wis. July 1, 2019), ECF No. 56 [hereinafter "Trial Tr."], at 228.

2. Trial counsel did *not* concede that Stands Alone committed an assault. The Government picks out one line from the trial transcript and labels it a dispositive concession. Opp. 23. But, placing that line in context, it is clear that that is not what happened. During the defense's closing argument, the district court engaged trial counsel in a discussion over whether the Government had proven that an assault had occurred. As part of that discussion, defense counsel and the court had the following exchange, with key parts in bold and italics:

> THE COURT: Let me make one more observation for you. Then I'll pivot over to the government side. The additional observation is this, is that the assault, which doesn't require physical conduct, it does require an intent to induce fear.
>
> MR. BUGNI: Correct.
>
> THE COURT: *Picking up the fire extinguisher and holding it up, if it was done for the purpose of intimidating Officer Decker, that would constitute an assault*.
>
> MR. BUGNI: *I agree*.
>
> THE COURT: And so the fact that the extinguisher went off and the bicarbonate went all over is really neither here nor there. **He assaulted her when he raised the fire extinguisher if his intent was to make her perceive it as a threat**.
>
> MR. BUGNI: **I agree with that.** I agree with that. I don't believe—
>
> THE COURT: And that's one explanation for why he grabbed the fire extinguisher instead of turning his back or covering his face.
>
> MR. BUGNI: **It is one explanation, but I don't believe it's a beyond-a-reasonable-doubt explanation** and partly for this reason is he's holding it there and it's a standoff. It's not like I'm going to actually throw it at you. I'm going to do that. He's not that hot. But, also, what does

> he try to do with it? He tries to, like, hold it up to protect himself. So I agree the mere fact could get it to -- you wouldn't be able to find as a matter of law. You'd have to give this to a jury. But the fact that you're a fact finder, is this his intention? Decker doesn't even testify to that.
>
> THE COURT: Well, it's a good point to pivot to the government. I don't know if I believe the story about that it was an accident. It was never intended to be intimidating or no intention to harm or to threaten. I don't know if I believe that, but **I have a hard time getting to the point where, if I were called upon to make a determination that Mr. Stands Alone committed an assault, that I could find that beyond a reasonable doubt on the evidence before me. It's certainly one possible explanation for the evidence, but I've got to find it beyond a reasonable doubt.**

Trial Tr. at 221–23 (emphases added). The Government's brief cites to the italicized language and ignores the bolded language. *See* Opp. 23. Reading the discussion as a whole, though, it is plain that trial counsel agreed Stands Alone committed an assault *only* if the court concluded that Stands Alone's intent was to threaten the officer with bodily harm. Trial Tr. at 222. And the district court, in turn, confirmed that it had "a hard time getting to the point where" it could find "beyond a reasonable doubt on the evidence before [it]" that Stands Alone had committed an assault. *Id.* at 223. That doubt persisted into the court's written opinion where, as just noted, the court determined that the Government *had not* proven that Stands Alone intended to discharge the fire extinguisher—i.e., that he had not attempted or threatened to injure the officer and, therefore, had not committed a common-law assault. Pet. App. 23a; *see also* Pet. 4. Thus, if this Court were to accept review and hold that common-law assault is an essential element of § 111, then Stands Alone's conviction must be vacated.

CONCLUSION

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

Respectfully submitted.

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