No. 10-212

In the Supreme Court of the United States

MARIA HENRIETTA WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted of a misdemeanor violation of 18 U.S.C. 111(a)(1) on the basis of her physical resistance to being handcuffed by federal officers.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 602 F.3d 313.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2010. A petition for rehearing was denied on May 14, 2010 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on August 12, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of two counts of forcibly assaulting, resisting, opposing, impeding, intimidating, and interfering with

federal officers, in violation of 18 U.S.C. 111(a)(1). She was sentenced to 21 months of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed her convictions, but remanded for resentencing. Pet. App. 1a-17a.

1. Petitioner was convicted of violating 18 U.S.C. 111, which provides:

> (a) IN GENERAL.—Whoever—
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
>
> (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,
>
> shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.
>
> (b) ENHANCED PENALTY.—Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or

> inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. 111 (2006 & Supp II 2008) (reprinted at Pet. App. 25a-26a).

Before 2008, the statute prohibited the same conduct (in the same terms) and contained the same "enhanced penalty" provision, but included a different penalty structure in subsection (a). That subsection provided that, "where the acts in violation of this section constitute only simple assault, [the defendant shall] be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both." 18 U.S.C. 111(a) (Supp. II 2002). Thus, when Congress amended Section 111 in 2007 (with the amendments to take effect in January 2008), it deleted from the penalty provision in subsection (a) the phrase "in all other cases," and substituted the phrase "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." See Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2538.

2. On May 31, 2008, military police officers Harris and Putnam and Sergeant Eichmann went to petitioner's home in order to respond to a complaint lodged by a neighbor against petitioner for indecent exposure. Pet. App. 2a. When Sergeant Eichmann asked petitioner whether someone could watch her child while they discussed the complaint with her, petitioner became upset, and stated that she would not be arrested or go to jail. *Ibid.* Petitioner was very agitated and repeated several times that she would not go anywhere with the

officers. Gov't C.A. Br. 11-12. After unsuccessful attempts to calm petitioner down, Sergeant Eichmann decided to detain petitioner and ordered Officers Harris and Putman to take her into custody. *Id.* at 12-13; see Pet. App. 2a. Petitioner attempted unsuccessfully to flee. Gov't C.A. Br. 12-13. Officer Harris (the only female officer on the scene) then attempted to handcuff petitioner in a standing position. *Id.* at 13-14; see Pet. App. 2a. Petitioner stated to Officer Harris that petitioner should not be placed in handcuffs because she had previously had surgery on her wrist and suffered from fibromyalgia. Gov't C.A. Br. 17; Pet. App. 2a. Officer Harris responded that she was aware of the medical problems and was trying not to hurt petitioner. Gov't C.A. Br. 17.

When Officer Harris attempted to handcuff petitioner, petitioner started swinging her arms wildly around. Gov't C.A. Br. 14. In one of her swinging hands, petitioner held a lit cigarette. *Ibid.*; Pet. App. 2a-3a. The officers asked petitioner to put her cigarette out, but she refused. Gov't C.A. Br. 14; Pet. App. 2a. Because of the lit cigarette in petitioner's hand, Officer Harris was unable to get a grip on petitioner's arm. Gov't C.A. Br. 14, Pet. App. 2a-3a. Sergeant Eichmann then ordered Officer Harris to use force to secure petitioner. Gov't C.A. Br. 14; Pet. App. 3a. Officer Harris grabbed petitioner's wrist and shoulder in an attempt to put petitioner on the ground, but there was insufficient space to do so and both of them fell against a fence. Gov't C.A. Br. 14-15; Pet. App. 3a. Officer Harris testified that she could not get control of petitioner in part because petitioner continued to swing her arms around. Gov't C.A. Br. 15. As Officer Harris struggled with peti-

tioner, petitioner struck Officer Harris on the side of her face. *Ibid.*; Pet. App. 3a

At the direction of Sergeant Eichmann, Officer Putnam attempted to assist Officer Harris, but when he attempted to force petitioner to the ground, petitioner pulled away and struck him in the jaw. Gov't C.A. Br. 15-16; Pet. App. 3a. Officers Putnam and Harris were ultimately able to subdue and handcuff petitioner. Gov't C.A. Br. 16; Pet. App. 3a. Officer Putnam testified that he did not believe petitioner intentionally hit him; Sergeant Eichmann testified that "[i]t wasn't like she was trying to fight with us, but we weren't going to take her." Pet. App. 3a; see Gov't C.A. Br. 14-16. As Officer Harris escorted petitioner to the officers' car, petitioner screamed profanities at her neighbor, the complainant. Gov't C.A. Br. 16.

3. Petitioner was charged in an indictment with two counts of forcibly assaulting, resisting, opposing, impeding, intimidating, and interfering with a military police officer engaged in official duties, in violation of 18 U.S.C. 111(a)(1). The indictment did not refer to any physical contact between petitioner and the officers. Pet. App. 3a. The jury convicted petitioner of both counts. *Ibid.*

The presentence report prepared in connection with petitioner's sentencing characterized petitioner's offenses as class D felonies under 18 U.S.C. 111(a)(2)—which provides a statutory maximum of eight years of imprisonment—because the offenses involved physical contact with the arresting officers. Pet. App. 3a-4a. According to the Probation Office's Guidelines calculation, petitioner's advisory sentencing range was 21-27 months. *Id.* at 4a. The district court sentenced petitioner to concurrent terms of 21 months of imprison-

ment, to be followed by two years of supervised release. *Ibid.*

4. The court of appeals affirmed petitioner's convictions, but vacated her sentence, and remanded for resentencing. Pet. App. 1a-17a.

a. The court initially acknowledged that it had previously described Section 111 as creating three separate offenses: "(1) simple assault; (2) more serious assaults but not involving a dangerous weapon; and (3) assault with a dangerous weapon." Pet. App. 7a (citation omitted). The court went on, however, to reject petitioner's argument that Section 111's prohibition of "resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing] with" a federal officer, 18 U.S.C. 111 (2006 & Supp. II 2008), "requires conduct amounting to an assault." Pet. App. 6a-7a (brackets in original).

The court of appeals acknowledged that other courts of appeals had disagreed about whether every violation of the pre-2008 version of Section 111 required that a defendant have engaged in some form of assault. Pet. App. 8a. The Ninth Circuit, the court noted, had held that the earlier version of Section 111 required proof of "some form of assault" in order to sustain a conviction. *Id.* at 9a (citing *United States* v. *Chapman*, 528 F.3d 1215, 1219 (9th Cir. 2008)). In contrast, the Sixth Circuit had rejected the Ninth Circuit's reasoning in *Chapman*, concluding that the Ninth Circuit's reading "ma[de] a great deal of what § 111 does say entirely meaningless" and therefore violated the canon against construing a statute in a way that renders words superfluous. *United States* v. *Gagnon*, 553 F.3d 1021, 1026 (6th Cir.) (citing *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992)), cert. denied, 130 S. Ct. 115

(2009). The Sixth Circuit in *Gagnon* emphasized that Congress listed five prohibited actions in addition to assault (resisting, opposing, impeding, intimidating, and interfering with an officer) in the text of Section 111(a)(1), and one prohibited action in addition to assault (interfering with an officer) in Section 111(a)(2). *Ibid.* That court concluded that, when Congress added the phrase "simple assault" to the penalty provision in Section 111, it intended it as "a term of art that includes the forcible performance of any of the six proscribed actions in § 111(a) *without* the intent to cause physical contact or to commit a serious felony." *Id.* at 1027.

The court of appeals here held that, "[e]ven before the [2008] change in the statute, the Sixth Circuit rule was the better one, as it avoided rendering superfluous the other five forms of conduct proscribed by § 111(a)(1)." Pet. App. 11a. The court also concluded that the Sixth Circuit's interpretation of Section 111 was "more consonant with the dual purpose of the statute, which * * * is not simply to protect federal officers by punishing assault, but also to 'deter interference with federal law enforcement activities' and ensure the integrity of federal operations by punishing obstruction and other forms of resistance." *Ibid.* (quoting *United States* v. *Feola*, 420 U.S. 671, 678 (1975)).

In addition, the court of appeals considered the 2008 amendment to Section 111, which removed the phrase "all other cases" from the penalty provision, and instead "specif[ied] that the line between misdemeanors and felonies is drawn at physical contact or acting with the intent to commit another crime." Pet. App. 11a. The court reasoned that the amended language "also supports the conclusion that § 111(a)(1) prohibits more than

assault, simple or otherwise." *Ibid.* The court explained that Congress "explicitly dr[ew] the misdemeanor/felony line at physical contact, but it declined the opportunity to delete the other forms of conduct proscribed by the statute or to otherwise clarify that § 111(a)(1) convictions require an underlying assault." *Ibid.*

Applying its understanding that Section 111 does not require assaultive conduct, the court found "ample evidence that [petitioner] 'forcibly . . . resist[ed]' federal officers." Pet. App. 12a (brackets in original). The court relied on petitioner's admission that she "swung her arms for the specific purpose of resisting the officers' attempts to handcuff her." *Ibid.*

b. Although the court of appeals affirmed petitioner's convictions, it vacated her sentence and remanded the case to the district court for resentencing. Pet. App. 12a-17a. The court agreed with both petitioner and the United States that the district court had committed obvious error by sentencing petitioner pursuant to the felony provision of Section 111 even though "physical contact with the officers was neither charged in the indictment nor submitted to the jury." *Id.* at 13a. Had petitioner been properly sentenced under Section 111's misdemeanor provision, she would not have been subject to more than 12 months of imprisonment on each count. *Ibid.* Although the court noted that the district court could have sentenced petitioner to 21 months of imprisonment by running the sentence on the two counts of conviction consecutively, the court vacated petitioner's sentence and remanded the case for resentencing, because there was a reasonable probability that petitioner's sentence would have been different absent the error. *Id.* at 13a-15a.

ARGUMENT

Petitioner asks this Court to review whether a defendant may be convicted for a misdemeanor violation of 18 U.S.C. 111(a)(1) when the defendant is not alleged to have engaged in any assaultive conduct. Further review is not warranted, because the court of appeals' decision is interlocutory and because petitioner's claim lacks merit. In addition, although there was a division among the courts of appeals as to the proper interpretation of Section 111 as it existed before 2008, Section 111 was amended in 2008, and the decision below is the only court of appeals decision to construe the amended statute. There is no warrant for this Court to grant review to resolve a disagreement about a now-superseded statute. In any case, petitioner would not be entitled to relief even under her view of Section 111.

1. Review by this Court of the court of appeals' decision affirming petitioner's convictions and remanding for resentencing is not warranted at this time. That decision is interlocutory because petitioner has not yet been resentenced, and that interlocutory posture "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., concurring in denial of a writ of certiorari); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 & n.63 (9th ed. 2007). After the district court resentences petitioner, petitioner will be able to raise her cur-

rent claim—together with any other claims that may arise with respect to her resentencing—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

2. Even if the court of appeals' decision were not interlocutory, review would be unwarranted because the decision is correct. Several factors support the court of appeals' interpretation of Section 111(a)(1) as encompassing violations that do not involve assault. Section 111(a)(1) identifies six categories of prohibited conduct, only one of which is "assault." The other five prohibited actions involve types of behavior that are not necessarily assaultive—*i.e.*, when the defendant forcibly "resists, opposes, impedes, intimidates, or interferes with" a federal officer. 18 U.S.C. 111(a)(1). The commas between the verbs and the disjunctive "or" make clear that Congress intended each category of prohibited conduct to be separate and independent of the others. See *Horne* v. *Flores*, 129 S. Ct. 2579, 2597 (2009). And the last five types of conduct need not be sub-categories of assault. Whereas the term "assault" implies conduct that a suspect initiates against an officer, the other five terms encompass actions taken by the suspect in response to conduct initiated by the officer—actions that may or may not rise to the level of an assault.[1]

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[1] Petitioner's argument (Pet. 14-15) that the court of appeals' reading of Section 111 is inconsistent with courts' interpretation of 18 U.S.C. 113, which prohibits various forms of "assault," is incorrect. As petitioner notes (Pet. 14), Section 113 prohibits seven forms of conduct, one

In addition, one of the statutory predecessors to Section 111 made it an offense to "forcibly resist, oppose, impede, intimidate, or interfere with any [designated official] * * * while engaged in the performance of his official duties, or [to] assault him on account of the performance of his official duties." Act of May 18, 1934, ch. 299, § 2, 48 Stat. 781 (18 U.S.C. 254 (1940)). As this Court recognized, that statute was chiefly directed at non-assault crimes and clearly "outlawed more than assaults." *United States* v. *Feola*, 420 U.S. 671, 682 n.17 (1975); see *Ladner* v. *United States*, 358 U.S. 169, 176 (1958) (stating that former statute "makes it unlawful not only to assault federal officers engaged on official duty but also forcibly to resist, oppose, impede, intimidate or interfere with such officers. Clearly one may resist, oppose, or impede the officers or interfere with the performance of their duties without placing them in personal danger."). As an example of non-assaultive conduct "denounced by the statute," this Court's opinion in *Ladner* mentioned locking a door to a house to prevent officers from arresting a person inside. *Ibid.* And Congress made only a technical change when, as part of the codification of Title 18 in 1948, it placed the word "assault" at the beginning of the statutory text, ahead of the non-assault categories of prohibited conduct. *Id.* at 176 n.4 (discussing Reviser's Notes to Act of June 25, 1948, ch. 645, 62 Stat. 688, which recodified provision as

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of which is described as "simple assault" and the other six of which are described as various forms of "assault"—*e.g.*, "[a]ssault with intent to commit murder" and "[a]ssault with a dangerous weapon." 18 U.S.C. 113; Pet. App. 29a. Because Section 113 does not prohibit any conduct other than assault and simple assault, it is unlike Section 111, which prohibits assault *and* five other categories of conduct.

Section 111, and stating that "th[e] change in wording was not intended to be a substantive one"). Not surprisingly, courts have upheld convictions under Section 111(a)(1) for non-assaultive conduct. See, *e.g.*, *United States* v. *Johnson*, 462 F.2d 423, 425 (3d Cir. 1972) (upholding conviction under Section 111(a) for "willfully resisting, opposing, impeding and interfering with federal officers," despite jury's acquittal of defendant on charge of "assault" under that statute), cert. denied, 410 U.S. 937 (1973).

When Congress amended the penalty structure of Section 111 in 1994, it introduced the phrase "simple assault" to encompass misdemeanor violations; but Congress gave no indication that it thereby intended to cut back on the substantive reach of the statute. Before 1994, Section 111 punished all offenses by up to three years of imprisonment, except that offenses involving a deadly or dangerous weapon were subject to up to ten years of imprisonment. In 1994, Congress amended Section 111(a) by providing that the penalty for acts constituting "simple assault" would be imprisonment for not more than one year, and that the penalty for "all other cases" (other than those involving a deadly or dangerous weapon) would be imprisonment for up to three years. Congress did not define the term "simple assault." There is no indication, however, that Congress intended the 1994 amendment's creation of a class of Section 111 violations punishable as misdemeanors to narrow the statute's substantive reach by eliminating from the statute's scope all non-assaultive "resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing] with" a federal officer. The court below therefore properly concluded (as did the Sixth Circuit in *Gagnon*) that Section

111's penalty provision applicable to "simple assault" encompasses all of the conduct listed in Section 111(a). See also *United States* v. *Vallery*, 437 F.3d 626, 633 (7th Cir. 2006) ("We hold the simple assault provision of § 111(a) applies to all violations of § 111(a), not merely to 'assaults.'"); *United States* v. *Yates*, 304 F.3d 818, 822 (8th Cir. 2002) ("We hold that, in the context of § 111, the definition of simple assault is conduct in violation of § 111(a), which does not involve actual physical contact, a dangerous weapon, serious bodily injury, or the intent to commit murder or another serious felony."), cert. denied, 538 U.S. 909 (2003).[2]

3. Nor is there any need for this Court to grant review in order to resolve a conflict among the courts of appeals. Petitioner errs in arguing (Pet. 9-12) that the court of appeals' decision squarely conflicts with the Ninth Circuit's holding in *United States* v. *Chapman*, 528 F.3d 1215 (2008), or with the decision of any other court of appeals. Congress recently amended Section 111, and the only courts to have considered whether the current version of the statute prohibits non-assaultive

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[2] Petitioner argues (Pet. 18) that "interpreting 'simple assault' to require proof of an assault would not make [the] five forms of non-assaultive conduct [listed in subsection (a)(1)] superfluous for *all* aspects of § 111." She argues that "the non-assaultive conduct listed in 111(a) would inform * * * the 'any acts' portion of the felony offense established in § 111(b)," which penalizes as a felony the commission of any acts described in subsection (a) if a deadly or dangerous weapon is used or bodily injury occurs. But this argument ignores the fact that the non-assaultive conduct listed in Section 111(a), if committed through the use of a deadly or dangerous weapon, or if it results in bodily injury, would amount to an assault. Thus, unless Congress intended those five forms of conduct to encompass non-assaultive acts, it would not have needed to itemize them in Subsection (a).

conduct (*i.e.*, the court of appeals in this case and one district court) have agreed that it does. Pet. App. 5a-12a; *United States* v. *Perea*, No. CR 09-1034 JB, 2010 WL 2292937 (D.N.M. May 21, 2010).

a. In *Chapman*, the Ninth Circuit construed the pre-2008 version of Section 111, which punished "simple assaults" as misdemeanors and "all other cases" as felonies. In determining whether that version of the statute prohibited conduct that did not constitute assault, the court identified "two major ambiguities" in the statute: "First, [the statute] distinguishe[d] between misdemeanor and felony conduct by use of the term 'simple assault'" but did not define that term. 528 F.3d at 1218. Second, the statute "appears to prohibit six different types of actions, only one of which is 'assault,' but then it draws the line between misdemeanors and felonies solely by referencing the crime of assault." *Id.* at 1218-1219. In the view of the Ninth Circuit, construing Section 111 to prohibit non-assaultive conduct would require such conduct to be treated as a felony violation of the statute because the version of the statute before that court distinguished between "simple assaults" and "all other cases." *Id.* at 1220. Such a reading of the statute, the Ninth Circuit stated, "ineluctably leads to absurdity."[3] *Ibid.* Thus, the court concluded that the stat

[3] The Ninth Circuit's reading of Section 111 ignores the plain text of the statute's substantive prohibition. In concluding that a violation of Section 111 requires proof of an assault, the *Chapman* court reasoned that, if it accepted the argument that mere passive resistence was sufficient to support conviction under Section 111(a), the court would be forced to accept the absurd result that "[a] protester who resisted arrest by merely standing still would be guilty of a felony punishable by up to eight years imprisonment, whereas an individual who attempted to punch an arresting officer could be guilty only of a misdemeanor, so

ute's reference to acts that constitute "only simple assault" as the benchmark for the misdemeanor offense required that the statute be interpreted to "require at least some form of assault." *Id.* at 1221.[4]

Although the Ninth Circuit's construction of Section 111 in *Chapman* did conflict with the subsequent decision of the Sixth Circuit in *United States* v. *Gagnon*, 553 F.3d 1021 (2009), there is no reason for this Court to resolve that conflict because Section 111 was amended in 2008, after the conduct charged in both *Chapman* and *Gagnon*. Court Security Improvement Act of 2007 § 208(b), 121 Stat. 2538. No similar conflict has developed with respect to the amended version of the statute.

The Court Security Improvement Act amended Section 111 by striking the phrase "in all other cases" and inserting "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." Pub. L. No. 110-177, § 208(b), 121 Stat. 2538. By striking the phrase "in all other cases," the 2008 amendment alleviated some of the "ambiguit[y]" the

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long as the attempted physical contact was unsuccessful." 528 F.3d at 1220. As the court of appeals in the instant case properly concluded (Pet. App. 10a), the Ninth Circuit's reasoning (on which petitioner also relies, see Pet. 16), ignores the requirement in Section 111 that any resistance, opposition, impeding, intimidation, or interference with a federal officer be forcible.

[4] In so concluding, the *Chapman* court failed to cite its earlier decision in *United States* v. *Jim*, 865 F.2d 211 (9th Cir.), cert. denied, 493 U.S. 827 (1989), in which it found both that "Section 111 prohibits in addition to assault, resisting, impeding, intimidating, and interfering with a federal officer," and that, in originally enacting Section 111, "Congress intended to prevent interference with federal functions, not just assault on federal officers." *Id.* at 214, see *Ibid.* ("We conclude that § 111 has a broader purpose than to deter assault.").

Ninth Circuit in *Chapman* found in the previous version of Section 111. The only courts to have addressed whether a conviction under the current version of Section 111 requires proof of an underlying assault—the Fifth Circuit in this case and a district court in New Mexico in *Perea*, No. CR 09-1034 JB, 2010 WL 2292937—have concluded that it does not, and that a conviction based on the other acts listed in Section 111(a) does not require proof of an underlying assault. The Ninth Circuit has not had an opportunity to reconsider its interpretation of the statute since the recent amendment. It is true, as petitioner observes (Pet. 11), that the 2008 amendments to the statute did not explicitly resolve the issue presented here (see *Gagnon*, 553 F.3d at 1024 n.2), and it is therefore possible that a similar conflict could develop with respect to the construction of Section 111(a) as amended. But this Court should wait to see whether such a conflict does arise and, if so, to resolve the issue in a case involving the amended statutory language.

b. In addition, petitioner is incorrect in suggesting (Pet. 10-12) that the decision below conflicts with decisions of courts of appeals other than the Ninth Circuit. Other than *Chapman*, none of the decisions on which petitioner relies considered the question presented in this case, and none held that Section 111 prohibits only conduct that constitutes assault. Rather, those cases held that, in order to convict a defendant of a felony violation of the pre-2008 version of Section 111, the government had to allege in the indictment and prove at trial that the defendant engaged in assaultive conduct that involved physical contact or otherwise exceeded the bounds of the common-law understanding of simple as-

sault. See *Vallery*, 437 F.3d at 629-633 (7th Cir.); *United States* v. *Hathaway*, 318 F.3d 1001, 1006-1009 (10th Cir. 2003); *Yates*, 304 F.3d at 822-823 (8th Cir.); *United States* v. *McCulligan*, 256 F.3d 97, 101-104 (3d Cir. 2001); *United States* v. *Ramirez*, 233 F.3d 318, 320-323 (5th Cir. 2000); *United States* v. *Chestaro*, 197 F.3d 600, 604-605 (2d Cir. 1999), cert. denied, 530 U.S. 1245 (2000). In each of those cases, it was alleged that the defendant's offense conduct had included physical contact with a federal officer, had resulted in physical injury, or had involved the use or attempted use of a deadly or dangerous weapon. See *Vallery*, 437 F.3d at 628-629 (officer received minor injuries; defendant pushed officer); *Hathaway*, 318 F.3d at 1003-1004 (officer suffered bruising; defendant pushed officer in the chest and choked him with his tie); *Yates*, 304 F.3d at 820-821 (defendant attempted to drive his truck into officers' car; truck was "dangerous weapon"); *Ramirez*, 233 F.3d at 320 (defendant hurled two cups of human waste at officer, striking officer in the chest); *Chestaro*, 197 F.3d at 602-603 (officers received minor injuries; defendant swung box-cutter at officers); see also *McCulligan*, 256 F.3d at 98-99, 104 (although defendant drove his car into officers' car, court of appeals held that proof of "actual contact" was required under Section 111(a); defendant was not charged under Section 111(b), which provides an enhanced penalty for the use of a deadly or dangerous weapon).

None of those cases is inconsistent with the holding of the court of appeals in this case. On the contrary, the courts have agreed that Section 111 creates three separate offenses, one of which is a misdemeanor ("simple assault") and two of which are felonies. The focus of the

decisions of other courts of appeals (other than the Ninth Circuit in *Chapman*) has been on whether a particular defendant was properly charged with a misdemeanor or a felony violation of Section 111, not on whether conduct that does not constitute an assault in any form is covered by the statute. See Pet. App. 7a-8a (noting that, although the Fifth Circuit has interpreted Section 111 to create three separate offenses, "this court has never ruled on whether the additional conduct proscribed in § 111(a)(1) requires, at a minimum, underlying assaultive conduct").

4. Finally, further review by this Court is also unwarranted because there is no reason to believe that petitioner would prevail under the construction of Section 111(a) urged by petitioner and adopted by the Ninth Circuit in *Chapman*. Although that construction would require the government to establish that petitioner committed an assault, petitioner's conduct in this case did constitute an assault. In adopting the common law definition of assault, the *Chapman* court held that, "[t]o constitute an assault, an action must be either a willful attempt to inflict injury upon the person of another, or . . . a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." 528 F.3d at 1219-1220 (citation and internal quotation marks omitted). Petitioner resisted the officers' attempts to handcuff her by wildly flailing her arms while holding a lit cigarette, and refusing the officers' commands to put out the cigarette. Such conduct amounted to a "threat to inflict injury" upon the officers if they persisted in their attempts to handcuff her, and would cause a reasonable apprehension of immediate

bodily harm on the part of the officers. See *McCulligan*, 256 F.3d at 102-104 & n.3 (defining simple assault as the "attempt or offer to beat another, without touching him," or the "placing of another in reasonable apprehension of a battery") (citing 3 William Blackstone, *Commentaries on the Laws of England* 120 (1768) and *Ramirez*, 233 F.3d at 321-322); *United States* v. *Bayes*, 210 F.3d 64, 68 (1st Cir. 2000) (finding that assault at common law had two meanings: "an attempt to commit a battery" and "an act putting another in reasonable apprehension of bodily harm") (quoting *United States* v. *Bell*, 505 F.2d 539, 540 (7th Cir. 1974), cert. denied, 420 U.S. 964 (1975)); cf. *United States* v. *Peneaux*, 432 F.3d 882, 890 (8th Cir. 2005) (holding that a lit cigarette can be a dangerous weapon for purpose of 18 U.S.C. 113(a)(3), which prohibits assault), cert. denied, 549 U.S. 828 (2006).

Moreover, petitioner's deliberate struggles to break free from the officers as they attempted to handcuff her constituted a completed battery, which would also have qualified as an assault under the statute. *United States* v. *Lewellyn*, 481 F.3d 695, 697 (9th Cir.) (under common law, "proof of a battery will support conviction of an assault") (quoting *United States* v. *Dupree*, 544 F.2d 1050, 1052 (9th Cir. 1976)), cert. denied, 552 U.S. 864 (2007); *United States* v. *Linn*, 438 F.2d 456, 459 (10th Cir. 1971) ("[W]hen the evidence shows there has been a battery of the federal officers, this is sufficient to sustain a conviction under § 111."); cf. *United States* v. *Delis*, 558 F.3d 177, 181 (2d Cir. 2009) (holding that "completed common-law battery" falls within the definition of the term "simple assault" as used in 18 U.S.C. 113(a)(5)).

That petitioner may not have intended to cause injury to the officers is irrelevant, because, as the courts of appeals—including the Ninth Circuit—have repeatedly held, Section 111 is a general intent crime that requires no proof of intent to injure. See, *e.g.*, *United States* v. *Garcia-Camacho*, 122 F.3d 1265, 1268 (9th Cir. 1997). Even if petitioner did not intend to strike and injure the officers during her struggle to break free, she would be guilty of violating Section 111 if she intentionally resisted the officers' lawful attempts to handcuff her. See *Delis*, 558 F.3d at 184 ("As common-law battery did not require specific intent to injure, * * * conviction under § 113(a)(5) for conduct constituting common-law battery does not require any finding of specific intent to injure."); *Lewellyn*, 481 F.3d at 697 ("The *mens rea* requirement [for assault] is that the volitional act be willful or intentional; an intent to cause injury is not required.") (citing *United States* v. *Skeet*, 665 F.2d 983, 986-987 (9th Cir. 1982)). Thus, petitioner would not be entitled to relief even under her view of Section 111.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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