No. 08-1486

In the Supreme Court of the United States

CHRISTIAN GAGNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH 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 his physical resistance to being handcuffed and his repeated attempts, while making verbal threats, to spit on officers after sticking his fingers down his throat and vomiting.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 553 F.3d 1021.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a-17a) was entered on January 29, 2009. The petition for a writ of certiorari was filed on April 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial before a magistrate judge in the United States District Court for the Eastern District of Michigan, petitioner was convicted of simple assault by forcibly resisting, impeding, and interfering

with federal agents, in violation of 18 U.S.C. 111(a)(1). He was sentenced to six months of imprisonment. The court of appeals affirmed. Pet. App. 1a-15a.

1. At the time of petitioner's crime, Section 111 provided:

> (a) IN GENERAL.—Whoever—
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [designated federal officer or employee] 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 [designated federal officer or employee] 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 in all other cases, 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. In 2008, Congress amended Section 111 by deleting from the penalty provision in subsection (a) the phrase "in all other cases," and substituted the phrase "and 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. In June 2006, petitioner, a Canadian citizen, was on a boat at a marina in St. Clair Shores, Michigan. After a security guard reported that petitioner had immigration problems, Border Patrol Agents arrived at the marina to interview petitioner. Petitioner, who had been drinking, went into the cabin of the boat to get his passport. At one point, petitioner, who had been sitting down, suddenly "jump[ed] up" which caused one agent to believe that petitioner was about to "attack and push" another agent. Two agents sought to restrain petitioner and tried to get him to sit down so they could handcuff him, but petitioner physically resisted the officers' efforts to force him to sit down. Pet. App. 2a-3a; 10/10/06 Tr. 10, 34-35 (Tr.).

After finally subduing and handcuffing petitioner, the agents took petitioner off the boat, put him in the back of their vehicle, and took him to a Border Patrol station. Enroute, petitioner, seated in the back seat, put his fingers down his throat and repeatedly vomited. He then spat at the agents while yelling obscenities at them and threatening that he was going to kill them. Pet. App. 3a; Tr. 39-42.

3. Petitioner was issued a citation for violating Section 111(a)(1). The parties entered into a stipulation by which they agreed that the case would "proceed as a petty offense constituting a Class B misdemeanor," which limited petitioner's potential punishment to imprisonment for six months and a fine of $5000 and relieved the government of the obligation to file an information, indictment, or complaint. Petitioner also consented to trial and sentencing on the misdemeanor

charge before a magistrate judge. Tr. 4-5; Stipulation to Proceed as Petty Offense; Pet. App. 3a.

After hearing testimony from Border Patrol Agents and petitioner, the magistrate judge found defendant "guilty of the offense charged." Tr. 98. The magistrate judge specifically found that "the element of forcible resistance, forcible impeding, forcible interference is satisfied in this case." *Ibid.* The district court affirmed the conviction. Pet. App. 18a-19a.

4. The court of appeals affirmed. Pet. App. 1a-15a. At the outset, the court agreed with the other courts of appeals to address the issue that, pursuant to *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), Section 111's prohibition and punishment provisions "must be treated as creating three separate crimes," which are: "(1) 'simple assault' (misdemeanor); (2) violations of § 111 that either involve a deadly or dangerous weapon or result in bodily injury (aggravated felony); or (3) 'all other cases' (felony)." Pet. App. 6a.

The court rejected petitioner's argument that any conviction under the statute for "resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing] with" a federal officer, 18 U.S.C. 111(a)(1), "requires a finding of actual common-law 'assault,'" Pet. App. 8a. The court of appeals acknowledged that the Ninth Circuit had adopted petitioner's reading of the statute in *United States* v. *Chapman*, 528 F.3d 1215 (2008). The court rejected that reading, however, because it "makes a great deal of what § 111 does say entirely meaningless" and would therefore violate the canon against construing a statute in a way that renders words superfluous. Pet. App. 10a (citing *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992)). The court noted that Congress listed five prohibited actions beyond assault in the text of Sec-

tion 111(a)(1), and one prohibited act beyond assault (interfering with an officer) in Section 111(a)(2). *Id.* at 11a. The court concluded that any ambiguity that arose when, in 1994, Congress introduced the distinction between "simple assault" and "all other cases" in Section 111's penalty provision was "no excuse to ignore what [the prohibited conduct language] plainly does say." *Ibid.*

The court also rejected what it termed a "hyper-literal" interpretation of Section 111 under which, of the six forms of conduct prohibited in Section 111(a)(1), only "assault" could qualify as a misdemeanor, whereas the other five types of conduct always come within the "all other cases" category subject to punishment as a felony. Pet. App. 11a n.5. The court regarded that interpretation, under which an assault on an officer could be a misdemeanor but passively resisting arrest would always be a felony, as "lead[ing] to absurd results" that Congress could not have intended. *Ibid.*

The court concluded that the "better reading" of Section 111 was that Congress used the phrase "simple assault," which was added when Congress amended the statute in 1994, 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." Pet. App. 12a-13a. The phrase "all other cases," by contrast, "covers the commission of these same violations plus the intent to commit a felony or resulting physical contact from forcible (and thus intentional) action." *Id.* at 13a.

Applying that interpretation to the facts of this case, the Sixth Circuit concluded petitioner violated the statute when he acted "defiantly while being detained and taken away." Pet. App. 14a. In light of its conclusions,

the court declined to resolve the government's alternative argument that petitioner's conduct of spitting his vomit at Border Patrol Agents while shouting that he would kill them would, in any event, qualify as a "simple assault." *Id.* at 14a n.7 (citing Govt. C.A. Br. 14).

ARGUMENT

Petitioner contends (Pet. i, 3-9) that the government's evidence and the district court's findings were insufficient to support his misdemeanor conviction for violating 18 U.S.C. 111(a)(1). That contention lacks merit and would not, in any event, warrant this Court's review. Although the court of appeals' construction of Section 111 does conflict with that of the Ninth Circuit in *United States* v. *Chapman*, 528 F.3d 1215 (2008), that conflict is of little continuing relevance because Congress amended Section 111 in 2008, after the conduct at issue here. The Court should wait to see whether a similar conflict will develop with respect to the amended statute and, if so, to resolve it in the context of a case involving the proper construction of the statute as amended. In any event, petitioner would not prevail even under the Ninth Circuit's approach. The evidence at trial showed that petitioner repeatedly spit vomit at the Border Patrol Agents while threatening to kill them. That conduct qualifies as a "simple assault," even assuming that it is necessary for the government to prove an assault in order to convict petitioner under Section 111. Accordingly, this Court's review of petitioner's misdemeanor conviction under a now-superseded statute is unwarranted.

1. The court of appeals characterized the question presented for its determination as "how to distinguish between cases involving 'only simple assault' from 'all

other cases.'" Pet. App. 7a. That question is of now exceedingly negligible importance in light of Congress's 2008 amendment to Section 111. In that amendment, Congress deleted the phrase "in all other cases" from the statute and thereby eliminated the statutory dichotomy the court of appeals construed. In its place, Congress inserted the phrase "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2538. In light of that change to the statutory text, the precise question addressed by the court of appeals in this case can only arise in the small number of prosecutions that might still be pending involving conduct that pre-dated the effective date of the 2008 amendment. Because the precise issue presented here has arisen only infrequently in the past, as evidenced by the extremely narrow circuit split on the issue, this Court's review of the proper construction of the now-superseded version of Section 111(a) is not warranted.

It is, of course, possible that a similar conflict could develop with respect to the construction of Section 111(a) as amended. Although the court of appeals stated that the amendments did not "directly resolve" the issue before it, the court acknowledged that "[t]he amended version of the statute is not before the Court in this case." Pet. App. 7a n.2. Thus, any commentary on the amendment and what significance it might have for construing Section 111(a) was dictum. This Court should wait to see if a conflict does arise and, if so, to resolve the issue in a case involving the new statutory language.

2. Several factors support the court of appeals' interpretation of Section 111(a)(1) to encompass violations that do not involve assault. Section 111(a)(1) identifies

six categories of prohibited conduct: assault and five non-assaultive types of behavior—*i.e.*, where the defendant forcibly "resists, opposes, impedes, intimidates, or interferes with" the federal officer. 18 U.S.C. 111(a)(1). The commas between the verbs and the disjunctive "or" suggest 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 are not necessarily sub-categories of assault. Whereas the term assault implies conduct that the suspect initiates against the officer, the other five terms can be satisfied by actions taken by the suspect in response to conduct initiated by the officer.

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); *United States* v. *Ladner*, 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 a non-assault "denounced by the statute," *Ladner* mentioned an act of 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 assault at the beginning of the statute 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 Section 111). Not surprisingly, courts upheld non-assault crime convictions under Section 111(a)(1). 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).

The alteration of Section 111's penalty structure in 1994 introduced the phrase "simple assault" to encompass misdemeanor violations, but Congress gave no indication that it 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 for offenses with a deadly or dangerous weapon, where the penalty was up to ten years. 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 "all other cases" would be subject to imprisonment up to three years. Congress did not provide a definition of "simple assault." There is no indication, however, that Congress intended the 1994 amendment's creation of a class of misdemeanor violations to narrow Section 111 by eliminating all non-assaultive "resist[ing], oppos[ing], imped-[ing], intimidat[ing], or interfer[ing] with" a federal officer from the statute's scope.

3. Further review by this Court is also unwarranted to resolve any claim of a conflict. Petitioner's reliance on a decision of the Tenth Circuit is misplaced. And there is no reason to believe that petitioner would prevail under the construction of Section 111(a) adopted by the Ninth Circuit in *Chapman*. Under *Chapman*, the government would have to establish an assault, but petitioner would not prevail under that standard because, as the Ninth Circuit has held, spitting at federal officers in an offensive manner *does* qualify as "simple assault." *United States* v. *Lewellyn*, 481 F.3d 695, 697, cert. denied, 128 S. Ct. 154 (2007).

a. Petitioner urges (Pet. 5-7) that the decision below conflicts with the Tenth Circuit's decision in *United States* v. *Hathaway*, 318 F.3d 1001 (2003). That case, however, did not involve the issue presented here. Rather, the Tenth Circuit held that the defendant's conviction for violating Section 111 was punishable only as a misdemeanor instead of a felony because the indictment and the jury instructions failed to distinguish between simple assault and felony assault. Because the indictment failed to allege all of the elements of felony assault—*i.e.*, "actual physical contact, a deadly or dangerous weapon, bodily injury, or the intent to commit murder or [another] felony," *id.* at 1008—and to provide the defendant with sufficient notice that he needed to defend against a felony charge, the defendant could not be convicted of felony assault, *id.* at 1009-1010. The court remanded with directions that the judgment be amended to reflect the defendant's conviction for a misdemeanor. *Id.* at 1010. Because the case involved what was admittedly a "simple assault," *id.* at 1004, 1010, the court did not need to resolve how Section 111(a) would apply to

conduct constituting only one of the five non-assault categories of Section 111(a).

b. Although the court of appeals acknowledged a conflict between its construction of Section 111(a) and that of the Ninth Circuit in *Chapman*, see Pet. App. 10a, it is far from clear that petitioner would prevail even under *Chapman*. As the government argued below, see Govt. C.A. Br. 13-14, petitioner's conduct of spitting his vomit at Border Patrol Agents while threatening to kill them does constitute simple assault, and thus would support petitioner's misdemeanor conviction even if assault is an essential element of every Section 111(a) violation.

In *Chapman*, the Ninth Circuit overturned a misdemeanor conviction under Section 111(a) because the defendant's "nonviolent civil disobedience did not constitute a simple assault." 528 F.3d at 1216. The court of appeals adopted the argument, advanced here by petitioner, that a defendant can be convicted of a misdemeanor under Section 111(a) only for "assaults that do not involve physical contact" and that a defendant charged with "resisting, opposing, impeding, intimidating or interfering * * * could not be convicted unless his conduct *also* amounted to an assault." *Id.* at 1219. To be convicted of a felony under the "all other cases" prong, the court concluded, also "require[s] at least some form of assault." *Id.* at 1221. The Ninth Circuit held that Chapman's misdemeanor conviction could not stand under the court's interpretation of Section 111(a) because the defendant "did not threaten or attempt to injure the officers in any way—he merely stood still, 'tensing' his body." *Id.* at 1219.

In contrast to the facts of *Chapman*, petitioner's conduct in this case *did* qualify as "simple assault" as the Ninth Circuit has construed that phrase. Far from sim-

ply "disobeying [the officer's] orders," as happened in *Chapman*, 528 F.3d at 1222, petitioner threatened to kill the Border Patrol Agents while repeatedly attempting to spit vomit at them. That conduct easily satisfies the requirements of a "simple assault" under Section 111(a). Indeed, even without the aggravating factors of the verbal threat or vomit intermingled with the spit, the Ninth Circuit has held that intentionally and offensively spitting on another person qualifies as a "simple assault" under the theory of assault as an attempted battery. *Lewellyn*, 481 F.3d at 697. See also *United States* v. *Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1974) (upholding conviction under 18 U.S.C. 111(a) based on spitting). *Lewellyn* sustained a conviction under 18 U.S.C. 113(a) for "simple assault" based on an incident in which the defendant spat in the face of another on the grounds of a Veterans Administration hospital. 481 F.3d at 696. Although the court was construing a different statute, the relevant phrase—"simple assault"—is the same as appears in Section 111(a). Indeed, in *Hathaway*, on which petitioner relies, the Tenth Circuit expressly relied on the courts' construction of "simple assault" in Section 113 to guide interpretation of Section 111(a). 318 F.3d at 1008.

The magistrate judge did not expressly rule on whether defendant's conduct constituted "assault" because it found that petitioner's conduct violated other prohibitions in Section 111(a). Tr. 98. Likewise, the Sixth Circuit declined to rule on the government's alternative argument that, if an "assault" is a necessary element of any Section 111(a) conviction, the evidence demonstrated an assault in this case. See Pet. App. 14a n.7. Nevertheless, as demonstrated above, petitioner's misdemeanor conviction would very likely be upheld even

under the Ninth Circuit standard for which he advocates. Because the prospect that petitioner would obtain any benefit from a favorable ruling by this Court on his legal contentions is remote, further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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