No. 14-866

In the Supreme Court of the United States

JAY BONANZA BRILEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was validly convicted of violating 18 U.S.C. 111(a)(1) on the basis of his physical resistance to being handcuffed and his repeated striking and kicking of the arresting officers.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 770 F.3d 267.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on October 22, 2014. The petition for a writ of certiorari was filed on January 20, 2015. 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 Eastern District of Virginia, petitioner was convicted on three counts of assaulting or interfering with a federal officer, in violation of 18 U.S.C. 111(a), and one count of disorderly conduct, in violation of 36 C.F.R. 2.34(a)(2). Pet. App. 23a-24a. He

was sentenced to 78 months of imprisonment, to be followed by three years of supervised release. *Id.* at 7a, 25a-26a. A restitution order of $62,306.10 was also imposed. *Id.* at 7a, 30a. The court of appeals affirmed. *Id.* at 1a-21a.

1. On the afternoon of January 12, 2012, while on patrol of national parkland at Daingerfield Island, plain-clothes Park Police Officers William Brancato and Robert Usher observed petitioner inside a parked vehicle. Petitioner was naked and preparing to have sexual relations with a companion. Pet. App. 3a. Officers Brancato and Usher notified Officers Corey Mace and Thomas Twiname, who were nearby and wearing visibly marked police attire. Officers Mace and Twiname approached the vehicle and ordered the men to get out; petitioner's companion complied. *Ibid.* Petitioner, however, refused repeated requests to exit the vehicle. After Officer Twiname threatened to smash the window, petitioner opened the door but stayed inside. *Id.* at 3a-4a.

Officer Twiname attempted unsuccessfully to pull petitioner from the vehicle. Pet. App. 4a. Petitioner "locked his legs under the steering column to secure himself and began honking the horn." *Ibid.* Attempting to handcuff petitioner, Officer Twiname got into the vehicle behind petitioner and wrapped his arms around petitioner's neck and shoulders; Officer Mace attempted to help by initiating a wristlock, but "to no avail." *Ibid.*

Officers Brancato and Usher joined the effort to remove petitioner from the vehicle, calling on petitioner to "stop resisting." Pet. App. 4a. As the two officers attempted to pull petitioner through the driver's side door, petitioner "tried to push Usher out of

the way and struck him in the arms, side, and lower back." *Ibid.* Petitioner also "kicked Brancato in the abdomen" multiple times. *Ibid.* Both officers were seriously injured by petitioner's attacks: Officer Usher "suffered from various lower-back problems," and Officer Brancato "suffered from impairment of his pancreas and lost his gallbladder." *Ibid.*; see *id.* at 8a ("[T]he trauma from Briley's kicks had caused Brancato's pancreatitis, which in turn had compelled the removal of his gallbladder.").

Petitioner eventually agreed to leave the vehicle, "but as soon as he stepped out, the struggle resumed." Pet. App. 4a. Petitioner moved his arms to avoid being handcuffed, and rushed at Officers Brancato and Usher, "push[ing] them backward." *Id.* at 5a; see *id.* at 4a. Officer Brancato put his arm around petitioner's shoulder, and petitioner dragged Officer Brancato until two of the other officers managed to bring petitioner to the ground. Only after petitioner was finally handcuffed did he cease resisting. *Id.* at 5a.

2. In October 2013, a grand jury in the United States District Court for the Eastern District of Virginia charged petitioner with disorderly conduct and with three violations of 18 U.S.C. 111(a). Pet. App. 23a-24a. Section 111 provides:

> (a) IN GENERAL.—Whoever—
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title [*i.e.*, a federal officer] 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 (reprinted at Pet. App. 8a-9a).

The indictment charged petitioner with "forcibly assaulting, resisting, opposing, impeding, and interfering with Officer Brancato while making physical contact" (Count 1, felony); "forcibly resisting, opposing, impeding, and interfering with Officer Usher while making physical contact" (Count 2, felony); and "forcibly resisting, opposing, impeding, and interfering with Officer Twiname" (Count 3, misdemeanor). Pet. App. 5a. Petitioner moved to dismiss Counts 2 and 3 on the ground that they failed to state an offense because neither charged "assault," which he argued is an element of all Section 111(a) crimes. *Id.* at 6a, 43a-46a. The district court denied the motion. *Id.* at 6a, 46a.

Petitioner proceeded to trial, at which the district court again rejected petitioner's proffered statutory construction. Pet. App. 6a. On Counts 2 and 3, the court instructed the jury to convict if the government proved that petitioner "forcibly did any one of the several alternative acts as charged." *Ibid.* The court also, without objection, instructed the jury on Count 1 that it only needed to find that petitioner "forcibly assaulted, resisted, opposed, impeded, *or* interfered with" Officer Brancato. *Ibid.*

The jury convicted petitioner on all counts. Pet. App. 7a. The district court sentenced him to 78 months of imprisonment, to be followed by three years of supervised release, with the sentences for the various counts to run concurrently. *Ibid.* The court also ordered petitioner to pay $62,306.10 in restitution, the "lion's share" of which went to Officer Brancato for his medical expenses. *Id.* at 7a-8a.

3. The court of appeals affirmed. Pet. App. 1a-21a. Examining the text of Section 111, the court concluded that the provision's tiered structure "proscribes five types of offenses: a misdemeanor (constituting only simple assault), two less serious felonies (involving either physical contact or felonious intent), and two more serious felonies (involving either a weapon or bodily injury)." *Id.* at 10a. Because each penalty provision "refers back to the original list of violative acts," the court concluded that each offense can be committed by doing any of the six prohibited actions against a federal official: forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with the execution of his duties. *Id.* at 10a; see *id.* at 10a-11a. The court rejected petitioner's contrary reading because it "renders a slew of verbs in § 111(a)

largely surplusage"; it frustrates congressional intent to protect officers in the execution of their duties; and it "would allow an individual to commit an array of forcible acts against federal officials performing government functions without criminal consequence." *Id.* at 12a-13a.

ARGUMENT

Petitioner renews his contention (Pet. 6-15) that assault is an element of every Section 111(a) conviction; he asserts that the district court therefore erred in denying his motion to dismiss Counts 2 and 3 and in instructing the jury on Count 1. The court of appeals correctly interpreted Section 111(a), and the narrow disagreement in the courts of appeals on this issue does not warrant further review. Moreover, the evidence in this case makes clear that petitioner's conduct would be criminal even under his preferred construction of the statute. This Court has previously denied review of this issue, and the same result is warranted here.[1]

1. a. The court of appeals correctly interpreted Section 111(a)(1) as encompassing violations that do not involve assault. The provision identifies six categories of prohibited conduct: It applies to anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes" with a federal officer engaged in official duties. By using commas between the verbs and the disjunctive "or," Congress made clear its intention that each category of prohibited conduct should be separate and independent of the others. See *Horne* v. *Flores*, 557 U.S. 433, 454 (2009).

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[1] See *Williams* v. *United States*, 131 S. Ct. 597 (2010) (No. 10-212); *Gagnon* v. *United States*, 558 U.S. 822 (2009) (No. 08-1486).

Although all six require the defendant to act "forcibly," only one constitutes assault. The other five prohibited actions involve behavior that threatens federal officers or obstructs their official activities but is not necessarily assaultive.

As the court of appeals recognized, this reading is necessary to prevent "a slew of verbs in § 111(a) [from becoming] largely surplusage." Pet. App. 12a. If assault were an element of every Section 111 violation, then Congress would have had no reason to include the five other offense-conduct verbs. Petitioner responds that "the statute's five non-assault acts would appear to be criminally prohibited by the felony clause 'where such acts involve . . . the intent to commit another felony.'" Pet. 12 (citations omitted). That reading, however, cannot be squared with the text. Each of Section 111's three punishment tiers points back to the six categories of prohibited conduct. The simple-assault clause points back to "the acts in violation of this section"; both prongs of the felony clause (physical contact or felonious intent) point back to "such acts"; and Subsection (b), the "enhanced penalty" provision, points back to "any acts described in subsection (a)." Properly interpreted, the "acts" in question consistently refer to all six offense-conduct verbs; but on petitioner's reading, the "acts" in the first clause would have a narrower sense. That is not a sensible interpretation. Pet. App. 12a ("Why would Congress repeatedly refer back to the same list of threshold acts for every designated offense, and yet covertly assign varying acts to different crimes?").

Petitioner argues (Pet. 12-14) that his reading is necessary to give meaning to "a well-defined, common law term"—namely, the words "simple assault" in the

misdemeanor clause. Pet. 12-13 (emphasis omitted). Yet as courts have recognized, Congress "used the phrase 'simple assault' as a term of art," calling on courts to read the misdemeanor clause "through the common-law lens of 'simple assault' as excluding cases involving forcible physical contact or the intent to commit a serious felony." *United States* v. *Gagnon*, 553 F.3d 1021, 1027 (6th Cir.), cert. denied, 558 U.S. 822 (2009); see Pet. App. 13a-14a. The term "simple assault" thus helps to distinguish misdemeanor violations—which lack physical contact or felonious intent—from more serious violations that "involve physical contact with the victim of that assault or the intent to commit another felony." 18 U.S.C. 111(a). The legislative history cited by petitioner (Pet. 10, 14) makes the same point. See 153 Cong. Rec. 34,620 (2007) (statement of Sen. Kyl) (explaining that the current language was intended to ratify "the 10th Circuit's decision in" *United States* v. *Hathaway*, 318 F.3d 1001, 1008-1009 (2003)); *Hathaway*, 318 F.3d at 1008 (explaining that "the definition of 'simple assault' is assault which does not involve actual physical contact, a deadly or dangerous weapon, bodily injury, or the intent to commit murder or any felony other than" certain sexual-abuse felonies).

b. The history of Section 111 confirms its application to non-assaultive conduct. The statute's predecessor made it an offense to "forcibly resist, oppose, impede, intimidate, or interfere with any" designated federal 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)). That provision, which contained the same six offense-

conduct verbs as the current version, was designed to "insur[e] the integrity of law enforcement pursuits." *United States* v. *Feola*, 420 U.S. 671, 682 (1975). And as this Court has explained, it clearly "outlawed more than assaults." *Id.* at 682 n.17; see *Ladner* v. *United States*, 358 U.S. 169, 176 (1958) (prior statute "ma[de] 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."). For instance, in *Ladner*, this Court stated that "the locking of the door of a building to prevent the entry of officers intending to arrest a person within would be an act of hindrance denounced by the statute." 358 U.S. at 176.

In 1948, Congress reordered the statute by placing the word "assaults" in front of the five other verbs. Act of June 25, 1948, ch. 645, 62 Stat. 688 ("Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes"). But "this change in wording was not intended to be a substantive one." *Ladner*, 358 U.S. at 176 n.4 (discussing Reviser's Notes). Not surprisingly, courts continued to uphold convictions for non-assaultive conduct under Section 111. See, *e.g.*, *United States* v. *Johnson*, 462 F.2d 423, 425, 429 (3d Cir. 1972) (upholding conviction for "willfully resisting, opposing, impeding and interfering with federal officers," despite jury's conclusion that defendant did not commit "assault"), cert. denied, 410 U.S. 937 (1973).

Before 1994, Section 111 had a two-tier punishment structure: It punished a defendant who forcibly committed actions described by any of the six verbs with

up to three years of imprisonment; but where "any such acts" involved a deadly or dangerous weapon, the limit was ten years. 62 Stat. 688. In 1994, Congress amended the penalty structure of Section 111 to create a third, less-severe form of the offense. It introduced the phrase "simple assault" to encompass misdemeanor violations, punishable by no more than a year in prison; "all other cases" would continue to be punishable by up to three years; and offenses involving a dangerous or deadly weapon would remain punishable by up to ten years, as would any act that "inflicts bodily injury."[2] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320101(a), 108 Stat. 2108. In so doing, however, Congress gave no indication that it intended to cut back on the statute's *substantive* reach by eliminating non-assaultive conduct from the statute's scope.

That conclusion is further buttressed by Congress's subsequent amendment of the statute. In 2008, Congress amended the second punishment tier of 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." Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2538. By striking the phrase "in all other cases," the 2008 amendment specifically limited the second tier to cases involving physical contact or felonious intent. That change underscored Congress's view that the

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[2] In the Federal Judiciary Protection Act of 2002, Congress increased the second-tier penalty ("all other cases" offenses) to eight years, and it increased the third-tier penalty ("deadly or dangerous weapon" and "bodily injury" offenses) to 20 years. Pub. L. No. 107-273, § 11008(b), 116 Stat. 1818.

first-tier misdemeanor provision encompasses non-assualtive conduct—like resisting arrest—that does not involve physical contact or felonious intent. Otherwise, such conduct would not be covered by the statute at all, "rip[ping] a big hole in the statutory scheme" and "leav[ing] those officials without protection for the carrying out of federal functions." Pet. App. 13a; see *United States* v. *Williams*, 602 F.3d 313, 317 (5th Cir.) ("The recent change in the statutory language * * * also supports the conclusion that § 111(a)(1) prohibits more than assault, simple or otherwise."), cert. denied, 131 S. Ct. 597 (2010).

Thus, for almost a century, Congress has protected federal officials in the performance of their duties by criminalizing six categories of forcibly obstructive conduct. Although over time it has altered the punishment according to the severity of the defendant's behavior—eventually settling on the current three-tier punishment structure—at no point has Congress altered the six basic categories of forcible conduct covered by the statute. Section 111(a) therefore applies to any defendant who forcibly "resists, opposes, impedes, intimidates, or interferes with" a federal officer, whether or not his conduct also constitutes assault.

2. Petitioner argues (Pet. 6) that "[a]t least seven circuits disagree on the question presented." Petitioner is incorrect. Two of the cases he cites were concerned with issues other than whether assault is an element of every Section 111(a)(1) conviction; one other case has been superseded by the 2008 amendment, and that circuit has not weighed in on the post-amendment version. The division among the remain-

ing circuits is underdeveloped and of relatively recent origin.

a. Two of the cases cited by petitioner (Pet. 6-7, 9-11) addressed a different aspect of Section 111(a). In *United States* v. *Hathaway*, 318 F.3d 1001 (10th Cir. 2003), the Tenth Circuit interpreted the pre-2008 version of Section 111(a), which created two crimes: "simple assault" misdemeanors and "all other cases" felonies. *Id.* at 1007. The question was how to distinguish between the two—a question that the court resolved by defining "simple assault" as "assault which does not involve actual physical contact, a deadly or dangerous weapon, bodily injury, or the intent to commit murder or any felony other than" certain sexual-abuse offenses. *Id.* at 1008. An offense that "involves actual physical contact" or felonious intent, by contrast, would qualify as an "all other cases" offense. *Id.* at 1008-1009.[3] Because the indictment "contained no allegation of physical contact," the court concluded that it "did not put Mr. Hathaway on fair notice that he needed to defend against the felony charge." *Id.* at 1010. The question presented here—whether assault is an element of all Section 111(a) violations—was not at issue. And in fact, the indictment in that case *did* include assault. *Id.* at 1004.

The question in *United States* v. *Vallery,* 437 F.3d 626 (7th Cir. 2006), was similar: "whether Vallery's indictment, which did not allege physical contact, charged him under § 111 with a felony or a misdemeanor." *Id.* at 629. The Seventh Circuit concluded

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[3] As explained above, Congress ultimately codified a similar distinction—between assaults that involve physical contact or the intent to commit a felony and those that do not—in its 2008 amendment of Section 111(a). See pp. 10-11, *supra*.

that, absent an allegation of physical contact, the defendant could be found guilty only of a misdemeanor. *Id.* at 634 ("[P]hysical contact was not explicitly or * * * implicitly alleged; therefore, we agree with the district court's conclusion that Vallery was not charged with, and could not be convicted of, 'all other assaults.'"). In the course of its discussion, the court did say that the "simple assault" misdemeanor clause of Section 111(a) applied to all six of the offense-conduct verbs listed, not only to assault. *Id.* at 632-633. Even assuming that the statement was not dicta, however, it would suggest that the Seventh Circuit agrees with the court below that assault is not an element of all Section 111(a) violations.

b. Petitioner is correct (Pet. 6, 8-9) that the Sixth and Ninth Circuits addressed the distinction between assault and the five other offense-conduct verbs, albeit under the pre-2008 version of the statute.

In *United States* v. *Chapman*, 528 F.3d 1215 (9th Cir. 2008), the Ninth Circuit addressed the statute's treatment of "simple assault" as a misdemeanor and "all other cases" as felonies. *Id.* at 1218-1219. In the court's view, drawing that distinction was only possible where the defendant had committed "some form of assault." *Id.* at 1221. Otherwise, if the defendant's behavior fell into one of the five other offense-conduct categories, no such distinction was textually possible. See *ibid.* ("If mere 'resistance' is sufficient for a § 111(a) conviction, we would have to find a meaningful way to distinguish between those cases of 'resistance' that would be punishable as misdemeanors and those that would be punishable as felonies."). The court explicitly considered but rejected a distinction based on the presence of physical contact: "If Con-

gress had intended to prohibit both assaultive and non-assaultive conduct and intended to distinguish between misdemeanors and felonies based solely on physical contact, it easily could have said so." *Ibid.*

Although *Chapman* did speak to the distinction between assault and the five other offense-conduct verbs, its reasoning was rendered moot by the 2008 amendment: Congress replaced the second punishment tier's "all other cases" language with language specifying that it applies "where such acts involve physical contact * * * or the intent to commit another felony." § 208(b), 121 Stat. 2538. As a result, the ambiguity that troubled the Ninth Circuit and motivated its interpretation in *Chapman* has now been eliminated. See *Williams*, 602 F.3d at 317 ("Congress addressed the ambiguity identified by the Ninth Circuit by explicitly drawing the misdemeanor/felony line at physical contact."). The Ninth Circuit has not interpreted this aspect of Section 111(a) since the 2008 amendment, and the question presumably remains open in that court.

In *United States* v. *Gagnon*, 553 F.3d 1021 (6th Cir.), cert. denied, 558 U.S. 822 (2009), the Sixth Circuit addressed a similar question under the pre-2008 version of the statute: "what is the difference between 'simple assault' and 'all other cases' under 18 U.S.C. § 111?" 553 F.3d at 1024. The court concluded that Congress used the phrase "simple assault" to "exclud[e] cases involving forcible physical contact or the intent to commit a serious felony." *Id.* at 1027. In the course of its discussion, the court rejected the defendant's argument "that § 111 requires a finding of actual common-law 'assault' to sustain any conviction under § 111." *Id.* at 1025 (footnote omitted). The

court found this reading "unsatisfactory," in large part because "it makes a great deal of what § 111 does say entirely meaningless." *Id.* at 1026. *Gagnon* is consistent with the decision below.

c. Since the 2008 amendment, two other courts of appeals have addressed the interpretation of Section 111(a). In *United States* v. *Williams*, 602 F.3d 313 (5th Cir.), cert. denied, 131 S. Ct. 597 (2010), the Fifth Circuit held that "a misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct." *Id.* at 318. That holding is also consistent with the ruling below in this case, at least as to the misdemeanor clause.

The only post-amendment decision to take a different view is *United States* v. *Davis*, 690 F.3d 127 (2d Cir. 2012), cert. denied, 133 S. Ct. 889 (2013). There, the Second Circuit concluded that "for a defendant to be guilty of the misdemeanor of resisting arrest under Section 111(a), he necessarily must have committed common law simple assault." *Id.* at 135. Only the misdemeanor provision of Section 111(a) was at issue in that case. *Id.* at 134. The court's discussion did include dicta about the felony clause, which can be read to suggest that the court believes that assault is an element of the physical-contact prong but not the felonious-intent prong. See *id.* at 136-137. But the Second Circuit took pains to note that it was "not called upon today to interpret Section 111(a)'s felony clause," *id.* at 136, and its view on that issue cannot be known until the court is confronted with a case in which the issue is squarely presented. In addition, as the Fourth Circuit observed, *Davis* is factually distinguishable from this case: "Whatever variance [*Davis*] manifests arises seemingly from facts that involved

primarily passive resistance toward all the officers involved, compared with [petitioner's] active, forcible actions against the Park Police." Pet. App. 14a; see *Davis*, 690 F.3d at 137 (Davis was only "passively resisting being handcuffed"). "Whatever daylight lies between the circuits' approaches," the Fourth Circuit concluded, "the practical distinction is not a large one." Pet. App. 14a.

In sum, only the Fourth Circuit has addressed whether the post-amendment version of Section 111(a)'s felony clause requires assault as an element of every conviction. The Second Circuit has ruled that assault is a required element only as to the misdemeanor clause, and it did so in a case that is distinguishable from this one on its facts, thus limiting the practical significance of any disagreement. This Court should accordingly wait for further consideration of this issue in the lower courts before determining whether this Court's intervention is warranted.

3. Finally, the facts of this case make it an especially bad vehicle for deciding whether assault is a required element of all Section 111(a) convictions. As petitioner recognizes, Count 1 of the indictment charged him with "forcibly *assaulting,* resisting, opposing, impeding, and interfering" with a federal officer. Pet. 5 (emphasis added); see Pet. App. 8a, 39a. And petitioner made no specific objection to the jury instructions on that count. Pet. App. 58a-59a. He could overturn that conviction, therefore, only by establishing reversible plain error—a showing that he could not make here because any instructional error was hardly "obvious." See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (explaining requirements of reversible plain error). The sentence on

Count 1 is alone sufficient to support petitioner's 78-month term of imprisonment. Pet. App. 25a (imposing 78 months on Counts 1 and 2; 12 months on Count 3; and 6 months on Count 4, all to run concurrently). And contrary to petitioner's contention (Pet. 14-15), any error on Counts 2 or 3 would not call his conviction on Count 1 into question.

In addition, on the facts of this case, petitioner's actions on all of the Section 111(a) counts indisputably involved assaultive conduct. Unlike other cases in which the defendant was found to be "passively resisting," *Davis*, 690 F.3d at 137, petitioner violently directed his attacks at the arresting officers. See Pet. App. 4a ("Briley tried to push Usher out of the way and struck him in the arms, side, and lower back."); *ibid.* ("Briley kicked Brancato in the abdomen."); *id.* at 5a ("Briley managed to drag Brancato."); *ibid.* ("Briley then rushed toward both Brancato and Usher and pushed them backward."). In light of that evidence, any rational jury would undoubtedly conclude that he was in fact guilty of assault. Indeed, in finding an error in admitting evidence in violation of Federal Rule of Evidence 404(b) to be harmless, the court of appeals concluded that "[a]n array of witnesses gave clear, compelling, and consistent accounts of [petitioner's] actions," including descriptions of "his injurious strikes against the officers" and "the continued skirmishing after he exited the vehicle." Pet. App. 20a. "It is plain," the court continued, "that the jury credited the version of the facts put forward by the Park Police and by Briley's own companion and disbelieved Briley's version of the incident, namely that he did not punch or kick anyone." *Id.* at 20a-21a. Against that

background, the claimed error in this case did not affect petitioner's substantial rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2015