Supreme Court of the United States

MARIA HENRIETTA WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 111 of Title 18 of the United States Code imposes criminal liability upon anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" a federal officer in the performance of his or her duties under three sets of conditions, with increasingly severe penalties for each: (1) "where the acts . . . constitute only simple assault;" (2) "where such acts involve physical contact with the victim of that assault or the intent to commit another felony;" and (3) where, "in the commission of any [such] acts," the person "uses a deadly or dangerous weapon . . . or inflicts bodily injury . . . ." The question presented by this petition is:

Whether the Fifth Circuit erred in holding—in acknowledged conflict with the Ninth Circuit, and in conflict with decisions of other federal courts of appeals—that a defendant may be convicted of "simple assault" under § 111(a) even when the government has neither pleaded nor proved that the defendant engaged in assaultive conduct?

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The Fifth Circuit's decision is reported at 602 F.3d 313 and reprinted in the Appendix ("App.") at App. 1–17a. The district court's oral rulings denying Mrs. Williams's motions for acquittal at the close of the government's case and at the close of evidence are reprinted at App. 19–21a.

JURISDICTION

The Fifth Circuit issued its decision on March 23, 2010, App. 1a, and denied a timely petition for rehearing en banc on May 14, 2010, App. 23–24a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 111 of Title 28 of the U.S. Code provides in pertinent part:

> **§ 111. Assaulting, resisting, or impeding certain officers or employees**
>
> **(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.

STATEMENT

This petition raises the straightforward question of whether a defendant may be convicted of "simple assault" under 18 U.S.C. § 111(a) in the absence of proof that she committed an assault according to the common-law definition of the term.

Section 111 imposes criminal liability upon anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" federal officers in the performance of their duties under three sets of conditions, with an increasingly severe range of punishments corresponding to each. First, "acts in violation of this section constitut[ing] only simple assault" are punishable by imprisonment of less than a year. Second, "such acts involv[ing] physical contact with the victim of that assault or the intent to commit another felony" are punishable by imprisonment up to 8 years. Finally, "commission of any such acts . . . us[ing] a deadly or dangerous weapon or inflict[ing] bodily injury" carries the possibility of up to 20 years' imprisonment.

For many years, the courts of appeals held that the phrase "simple assault" in § 111(a) carries its common-law meaning—namely, attempted or threatened battery. Based on this reasoning, the Ninth Circuit held in 2008 that the prosecution of misdemeanor simple assault under § 111(a) requires the government to plead and prove all of the elements of common-law assault, including assaultive intent.

In this case, however, the Fifth Circuit affirmed the conviction of Maria Henrietta Williams on two counts of simple assault even though the government did not (and could not) prove that Mrs. Williams

intended to strike the federal officers who arrested her. Following the reasoning of a 2009 decision of the Sixth Circuit, the court held that "simple assault" should actually be interpreted as a statutory term of art, so that the relevant inquiry is whether a defendant "forcibly" engaged in the types of conduct listed in § 111(a), not whether an assault occurred. In ruling that a misdemeanor conviction under § 111(a) does not require underlying assaultive conduct, the Fifth Circuit acknowledged that its reasoning conflicted with that of the Ninth Circuit. Moreover, the Fifth Circuit's decision conflicts with the majority view among federal circuits holding that the reference to "simple assault" in § 111(a) must carry the common-law meaning of those words.

The Fifth Circuit's decision conflicts with that of other courts of appeals and, as detailed below, contradicts the plain meaning of the statutory text. As a result, Mrs. Williams faces imprisonment for having committed a "simple assault" against federal officers despite never having committed any underlying assaultive conduct. The petitioner therefore respectfully submits that the Court should grant the writ of certiorari to resolve the conflict among the federal courts of appeals concerning the proper interpretation of 18 U.S.C. § 111(a) and to vacate Mrs. Williams's conviction.

I. Factual Background

Maria Henrietta Williams is a wife and mother who resided with her husband—a U.S. Army Specialist presently serving in Iraq—and their five year-old son in military housing near Fort Bliss in El Paso, Texas. On May 31, 2008, three military police officers responded to a complaint made against Mrs.

Williams by one of her neighbors relating to an argument between the two. App., *infra*, 2a. When the three officers—Private Brianna Harris, Private First Class Andrew Putman, and Sergeant Michael Eichmann—arrived at Mrs. Williams's home, they found her sitting outside under the carport with her husband and child. *Id.*

Sgt. Eichmann asked Mrs. Williams whether someone could watch her child while she accompanied the police to the station for questioning. *Id.* While Sgt. Eichmann went inside the house with Spc. Williams to notify his chain of command, Pvt. Harris and Pfc. Putman remained outside with Mrs. Williams. *Id.* Upset, Mrs. Williams told the police that she would not be arrested and would not go with them to the station. *Id.* Mrs. Williams tried to walk past both officers. When they stood in her way, she turned to go through a side door in the carport area, only to be blocked by Sgt. Eichmann, who had returned from inside the house. Sgt. Eichmann then ordered the other police to detain Mrs. Williams. *Id.* at 3a.

Mrs. Williams informed the police that that she should not be handcuffed because of medical issues, including past wrist surgery and ongoing fibromyalgia—a condition that causes Mrs. Williams extreme pain when touched and for which she had only recently been diagnosed after suffering years of chronic pain. *Id.* at 2a. The police nevertheless attempted to detain and handcuff Mrs. Williams.

When Pvt. Harris first tried to make an arrest, Mrs. Williams swung her arms away to avoid the handcuffs. *Id.* Sgt. Eichmann then ordered the other police to detain Mrs. Williams by force.

Pvt. Harris grabbed Mrs. Williams by the wrist and shoulder and pushed her onto the backyard fence. *Id.* Mrs. Williams and Pvt. Harris fell through the fence, and in the process, the back of Mrs. Williams's hand caught Pvt. Harris in the nose. *Id.* Pfc. Putnam then forced Mrs. Williams to the ground but, while he was forcing her down, Mrs. Williams's left elbow hit him in the face. *Id.* Pfc. Putnam finally managed to restrain and handcuff Mrs. Williams, who was then taken to the station and transferred to FBI custody. *Id.* Although she had moved her arms to avoid being handcuffed by the police, Mrs. Williams did not intend to strike them. *See id.*

II. The District Court Proceedings

A grand jury indicted Mrs. Williams on two counts of violating 18 U.S.C. § 111(a)(1). The indictment did not allege any physical contact between Mrs. Williams and the police who arrested her. App. at 3a. In other words, she was charged with a "simple assault" misdemeanor under § 111(a).

At trial, the defense showed that Mrs. Williams did not intend to hit or injure any of the officers and that the contact was an accidental result of her efforts to avoid handcuffs. *Id.* Pfc. Putman agreed, testifying that Mrs. Williams did not hit either officer intentionally, but was only trying to avoid being handcuffed. *Id.* As Sgt. Eichmann explained, "[i]t wasn't like she was trying to fight with us, but we weren't going to take her." *Id.*

When the government rested, and again at the close of the evidence, Mrs. Williams moved for a judgment of acquittal, arguing that the prosecution failed to meet its burden of proof. The court denied both motions, and the jury found Mrs. Williams

guilty on both counts. *Id.* The court sentenced Mrs. Williams to 21 months of imprisonment on each count, with the sentences to run concurrently. *Id.* at 4a.

III. Decision of the Fifth Circuit

Mrs. Williams appealed both her conviction and sentence. Citing Fifth Circuit cases holding that "simple assault . . . embrace[s] the common law meaning of the term," *see United States v. Ramirez*, 233 F.3d 318, 321 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625, 629-31 (2002), Mrs. Williams argued that a conviction for simple assault under § 111(a) requires the government to plead and prove some form of assaultive conduct—which the government failed to do—and that mere "forcible resistance" was not enough to satisfy the elements of § 111(a).

The Fifth Circuit rejected Mrs. Williams's argument. The court acknowledged that it previously had "held that simple assault is a misdemeanor offense under § 111(a) and defined simple assault as an attempted or threatened battery." App. at 7a (citing *United States v. Hazlewood*, 526 F.3d 862, 865 (5th Cir. 2008); *Ramirez*, 233 F.3d at 321-22); *United States v. Vallery*, 437 F.3d 626, 631 (7th Cir. 2006)). Notwithstanding these earlier decisions, the court stated that it had never resolved whether a conviction under § 111(a)(1) necessarily requires, "at a minimum, underlying assaultive conduct." App. at 7–8a.

The Fifth Circuit recognized that "[s]everal circuits have split on this question." *Id.* at 8a. On the one hand, the Ninth Circuit's decision in *United*

States v. Chapman held that a "simple assault" misdemeanor necessarily included assaultive conduct as a required element. *Id.* at 8–9a (citing *United States v. Chapman*, 528 F.3d 1215, 1221 (9th Cir. 2008)). On the other, the Sixth Circuit held that the phrase "simple assault" as it appears in § 111(a) is merely a "term of art," which must be read to include "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 10a (quoting *United States v. Gagnon*, 553 F.3d 1021, 1027 (6th Cir. 2009) (emphasis in original)).

The Fifth Circuit decided to follow the reasoning of the Sixth Circuit in *Gagnon*, holding that "a misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct." App. 11–12a. Having adopted that rule, the court found that there was ample evidence that Mrs. Williams "forcibly resisted" the officers, even if she had not assaulted them. *Id.* at 12a. While the Fifth Circuit affirmed Mrs. Williams conviction, it vacated her sentence and remanded for resentencing. *Id.* at 16a. The court held that the district court erred in sentencing Mrs. Williams to 21 months of imprisonment because her misdemeanor "simple assault" conviction could carry a maximum penalty of only one year. *Id.* at 14a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are Divided As To Whether A Defendant May Be Convicted Of "Simple Assault" Under § 111(a) When The Government Has Neither Pleaded Nor Proved That An Assault Had Occurred.

As the Fifth Circuit acknowledged in affirming Mrs. Williams's conviction, "[s]everal circuits have split on th[e] question" presented by this case. App. 8a. Along with the Sixth Circuit, the Fifth Circuit now holds that "a misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct." *Id.* at 12a; *see also Gagnon*, 553 F.3d at 1026-28 (reaching the same conclusion).[1] These decisions conflict with the Ninth Circuit's holding in *Chapman* that "convictions under this statute require at least some form of assault." 528 F.3d at 1221.

The Fifth and Sixth Circuit decisions also conflict with other courts of appeals concerning the meaning of the phrase "simple assault" in § 111(a). The majority of circuits hold that "simple assault" in

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[1] Last term, the Court denied a petition for certiorari in *Gagnon*. *See Gagnon v. United States*, 130 S. Ct. 115 (2009). But the facts of that case did not squarely present the question at issue here. There, the defendant intentionally vomited on a federal officer—plainly an assaultive act, even if not necessarily a "simple" one. *See Gagnon*, 553 F.3d at 1021-22; *see also People v. Cheatum*, No. 255261, 2005 WL 1652221, at *2-3 (Mich. App. 2005) (upholding conviction for assault where a prison employee intentionally spit on a corrections officer). In this case, by contrast, there is no dispute that Mrs. Williams's conduct did not qualify as an assault under the common law.

§ 111(a) means common-law assault—in essence, attempted or threatened battery. *See, e.g.*, *United States v. Chestaro*, 197 F.3d 600, 605 (2d Cir. 1999) ("Because Congress was silent as to the meaning of 'simple assault' . . . , it may safely be assumed . . . that Congress intended . . . to incorporate the common-law definition"); *accord Chapman*, 528 F.3d at 1219; *Vallery*, 437 F.3d at 631-33; *United States v. Hathaway*, 318 F.3d 1001, 1007-08 (10th Cir. 2003); *United States v. Yates*, 304 F.3d 818, 821-22 (8th Cir. 2002); *United States v. McCulligan*, 256 F.3d 97, 102-04 (10th Cir. 2001).

In fact, before the Sixth Circuit's decision in *Gagnon*, the courts of appeals were essentially unanimous in holding that "simple assault" for purposes of § 111(a) meant assault as defined by reference to the common law. Even the Fifth Circuit had agreed with this view. *See Ramirez*, 233 F.3d at 321-22 ("'[S]imple assault' [has] its common law meaning under 18 U.S.C. § 111 . . . ."); *accord Hazlewood*, 526 F.3d at 864-66.

The Fifth and Sixth Circuits have now, however, parted company with the other circuits by holding that "'simple assault' [is] 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." *Gagnon*, 553 F.3d at 1027; *see also* App. 10a (same). This departure from precedent was necessary to reach the conclusion that "simple assault" misdemeanors can be proven even in the absence of any underlying assaultive conduct. After all, if a "simple assault" for purposes of § 111(a) requires attempted or threatened battery—as a majority of

the circuits had held—then one could hardly be convicted of "simple assault" where no acts constituting attempted or threatened battery are alleged in the indictment or proven at trial. *See Chapman*, 528 F.3d at 1219 (explaining that the prevailing interpretation of § 111 "leaves no room for a conviction that does not involve at least some form of assault"). The Fifth Circuit's decision in this case thus exacerbates what is now a clearly-defined split of authority among the federal courts of appeals about the proper interpretation of "simple assault" in § 111(a).

Recent amendments to § 111 did not resolve the circuit split but instead addressed a different ambiguity in the statute. Prior to amendment, § 111(a) set out three separate offenses depending on the nature of the acts in violation of the section: "simple assault" (lowest tier); "us[ing] a deadly or dangerous weapon . . . or inflict[ing] bodily injury" (highest tier); and "all other cases" (middle tier). *See* 18 U.S.C. § 111 (2006). The 2008 amendments simply provided a more descriptive definition of the middle tier category, replacing the words "all other cases" with "acts involv[ing] physical contact with the victim of th[e] assault or the intent to commit another felony." Act of Jan. 7, 2008, Pub. L. No. 110-177, Title II, § 208(b), 121 Stat. 2538.

Notably, the courts of appeals had already interpreted "all other cases," as it appeared in § 111(a), to include what the amended language now specifies, albeit with subtle variations across the circuits. The Second and Fifth Circuits, for example, construed "all other cases" to mean "assault that does involve contact but does not result in bodily

injury or involve a weapon," *Chestaro*, 197 F.3d at 606; *Ramirez*, 233 F.3d at 321-22, while the Eighth and Tenth Circuit Circuits interpreted it to mean "any assault that involves actual physical contact or the intent to commit murder or any felony other than those referred to in § 113(a)(2) but does not involve a deadly or dangerous weapon or bodily injury," *Hathaway*, 318 F.3d at 1008-09; *Yates*, 304 F.3d at 823. The 2008 amendment resolved this ambiguity by adopting the Eight and Tenth Circuit's approach. *See Chapman*, 528 F.3d at 1219-20.

The amendments did not, however, alter the language of the "simple assault" misdemeanor for which Mrs. Williams was convicted. Nor did they resolve whether one can be convicted of simple assault without being charged with any assaultive conduct. Even the Sixth Circuit, in setting forth the interpretation that the Fifth Circuit adopted in this case, conceded that "Congress's amendment does little to clarify the primary question in this appeal: whether § 111 is limited only to assaults or includes all the actions spelled out in § 111(a)." *Gagnon*, 553 F.3d at 1025 n.4; *see also id.* at 1024 n.2 ("[T]he amendments do not directly resolve the ambiguity at issue here."). As such, the circuit split raised by this petition was not resolved by the 2008 amendments and still requires resolution by this Court.

II. The Fifth Circuit's Decision Contravenes The Plain Meaning Of The Statute And Misapplies Well-Settled Canons of Statutory Construction.

The Fifth and Sixth Circuits created this split of authority by ignoring the plain meaning of § 111's text and by misapplying—or failing to apply—well-recognized principles of statutory construction.

Because § 111 does not provide its own definition of "simple assault," the plain meaning of those words should be the beginning and end of this case. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning."). As Congress chose to use a term that has an "accumulated settled meaning under . . . the common law" and did not otherwise define the term, the courts must infer that Congress meant "to incorporate the established [common-law] meaning of the[ ] term[ ]." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)); *see also, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 564 (2007) (holding that the term "extortion" as used in the Hobbs Act incorporates its common-law meaning).

Courts have done just that, with the circuits reaching widespread agreement that "simple assault," as it appears in § 111(a), must incorporate the common-law definition of assault. *See Chestaro*, 197 F.3d at 605; *Chapman*, 528 F.3d at 1219; *Vallery*, 437 F.3d at 631-33; *Hathaway*, 318 F.3d at 1007-08; *Yates*, 304 F.3d at 821-22; *McCulligan*, 256 F.3d at 102-04; *United States v. Campbell*, 259 F.3d

293, 296 & n.3 (4th Cir. 2001); *cf. United States v. Passaro,* 577 F.3d 207, 217-18 (4th Cir. 2009) ("[C]ourts have uniformly recognized that various federal statutes criminalizing 'assault' incorporate the long-established common law definition of that term."). Until Mrs. Williams's appeal, the Fifth Circuit was no different. It had also followed this approach. See *Ramirez*, 233 F.3d at 321-22.

The Fifth Circuit now holds, however, that "simple assault" under § 111(a) is actually a "term-of-art" that carries a meaning that is wholly inconsistent with the common-law definition that Congress intended. In so holding, the court expands the scope of the "simple assault" misdemeanor well beyond conduct that constituted assault under the common law. While this interpretation allows the Fifth Circuit to affirm Mrs. Williams's conviction, it bears the fundamental flaw of obscuring what was one of the clearest provisions of the statute: only a "simple assault" that does not involve physical contact constitutes a misdemeanor violation of § 111.

The Fifth Circuit's decision to redefine "simple assault" as a "term of art" is also inconsistent with the well-established meaning of simple assault as it appears in other criminal statutes. Section 113 of Title 18, for instance, prohibits seven different types of "assault" committed within the maritime or territorial jurisdiction of the United States, including "simple assault." *See* 18 U.S.C. § 113(a). Because the term is not defined explicitly within the statute but is defined by its contrast with the other six types of assault listed in § 113—"assault with intent to commit murder," "assault with intent to commit [other felonies]," "assault with a dangerous weapon,"

"assault by striking, beating, or wounding," "assault resulting in serious bodily injury," and "assault resulting in substantial bodily injury [to minors under 16]"—it is well-settled that "simple assault" in § 113 "embrace[s] the common law meaning of that term." *United States v. Stewart*, 568 F.2d 501, 504 (6th Cir. 1978); *see also United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000); *United States v. Delis*, 558 F.3d 177, 180 (2d Cir. 2009); *United States v. Estrada-Fernandez*, 150 F.3d 491, 494 n.1 (5th Cir. 1998); *United State v. Rocha*, 598 F.3d 1144, 1148-49 (9th Cir. 2010); *United States v. Juvenile Male*, 930 F.2d 727, 728 (9th Cir. 1991).

Indeed, numerous circuits have reached this very conclusion. *See Chestaro*, 197 F.3d at 605 ("Because Congress was silent as to the meaning of 'simple assault' . . . , it may safely be assumed . . . that Congress intended to adopt the term as used in § 113, which in turn has been construed, appropriately in our view, to incorporate the common-law definition."); *Hathaway*, 318 F.3d 1008 ("'[S]imple assault' in § 111 should be defined by reference both to the common law meaning of assault and to the meaning of 'simple assault' as Congress used that phrase in § 113.'"); *McCulligan*, 256 F.3d at 104 ("The similar language of [§ 113] . . . lends support to the conclusion that 'simple assault' equates with traditional common-law assault."). The Fifth Circuit's refusal to ascribe to § 111's "simple assault" the well recognized common-law definition employed in § 113 is yet another departure from sound principles of statutory construction and the weight of authority among the circuits.

Furthermore, in holding that one may be convicted of "simple assault" despite not having committed an assault, the Fifth Circuit offers a construction of § 111 that is unconstitutionally vague and that may lead to absurd results. Under the Fifth Circuit's view, a "simple assault" misdemeanor under § 111(a) encompasses any act in which one "forcibly . . . resists, opposes, impedes, intimidates, or interferes with" any federal officers in the performance of their duties. App. 10a. Such a conclusion necessarily would require citizens, law enforcement, and courts to know what it means, for example, to forcibly impede or forcibly intimidate a federal officer. But these terms are hopelessly vague. The Fifth Circuit's interpretation provides no limiting guidance and thus renders § 111 unworkable and unconstitutionally vague.

Similarly, the Fifth Circuit's construction of § 111 generates absurd results that cannot plausibly be ascribed to the intent of Congress. As the Ninth Circuit explained in *Chapman*, a defendant who intended maliciously but unsuccessfully to punch an arresting officer would be guilty under § 111(a) of misdemeanor "simple assault." At the same time, however, a defendant who made incidental contact with an officer while merely flinching from handcuffs would be guilty under § 111(a) of a felony for making "physical contact" with the victim of that assault. *See Chapman*, 528 F.3d at 1220-21; *Vallery*, 437 F.3d at 633 (same). Indeed, it seems Mrs. Williams was only spared being convicted of a felony, along with a potential sentence of up to eight years for each count, merely because the government neglected to plead physical contact in the indictment. App. 13a.

The only reasonable interpretation of § 111(a), and the interpretation that still prevails in the majority of circuits, avoids the risk of confusion and the prospect of absurd results by construing "simple assault" to carry its common-law meaning. Under this view, as applied by the Ninth Circuit in *Chapman*, the government must plead and prove the elements of assault in order to obtain a conviction for "simple assault" under § 111. This approach provides a concrete and well recognizable rule indicating which conduct is proscribed and which is not, and it also increases the likelihood that only the most morally blameworthy conduct is subject to the felony-level punishments set out in the statute.

Finally, if the term "simple assault" is so ambiguous as to represent merely a term of art that is divorced from its common-law meaning, then the rule of lenity would require interpreting the term in favor of Mrs. Williams. In cases of ambiguous criminal statutes, "the tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 128 S. Ct. 2020, 2025 (2008); *United States v. Bass*, 404 U.S. 336, 347-349 (1971). The common-law definition of "simple assault" must therefore prevail because its stricter requirements for prosecution are always "more defendant-friendly" than the Fifth and Sixth Circuit's minority interpretation. *Santos*, 128 S. Ct. at 2025.

Although it disregarded these principles of statutory construction, the Fifth Circuit purported to apply two other principles—the presumption against superfluity and inferences from legislative silence—to conclude that "'simple assault' is a 'term of art that includes the forcible performance of any of the

six proscribed actions in § 111(a).'" App. at 10a (quoting *Gagnon*, 553 F.3d at 1027). But the Fifth Circuit's analysis is flawed on both grounds.

First, the Fifth Circuit erred in reasoning that requiring proof of assaultive conduct to convict a defendant of the "simple assault" misdemeanor would "render meaningless" the five forms of non-assaultive conduct in subsection (a)(1)—"resists, opposes, impedes, intimidates, or interferes." App. 10a. The court's approach is wrong because interpreting "simple assault" to require proof of an assault would not make those five forms of non-assaultive conduct superfluous for *all* aspects of § 111—that is, *for the statute as a whole.* Statutory phrases, after all, must not be "construe[d] in isolation," but rather read in the context of the "statute[] as a whole." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)). The five forms of non-assaultive conduct listed in § 111(a) would inform, for example, the "any acts" portion of the felony offense established in § 111(b). Under this interpretation, the non-assaultive "intimidate" in § 111(a) is an "act" which would, under § 111(b), constitute a felony when coupled with (b)'s "use[ ] of a deadly or dangerous weapon." The Fifth Circuit was incorrect, therefore, to assume that it needed to deprive "simple assault" of its established meaning in order to give effect to each of the terms in § 111.

Second, the Fifth Circuit improperly inferred Congress's approval of a term-of-art interpretation of "simple assault" where no such approval existed. In 2008, Congress amended § 111(a) to clarify an unrelated ambiguity regarding the distinction

between misdemeanors and felonies. *Compare* 18 U.S.C. § 111(a) (2008) (striking out "all other cases" from the pre-2008 statute and replacing it with more specific language) *with* 18 U.S.C. § 111(a) (2002). Because Congress did not alter the definition of "simple assault" at the same time, the Fifth Circuit somehow inferred from this silence Congress's approval of a term-of-art interpretation which "supports the conclusion that § 111(a)(1) prohibits more than assault, simple or otherwise." *See* App. at 11a.

As this Court has held, however, such a non-barking dog of legislative inaction "lacks persuasive significance." *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)); *see also Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.").

Moreover, the real reason Congress did not clarify the definition of "simple assault" in 2008 was that it was unaware of the term's ambiguity. Although the Fifth Circuit asserts that the 2008 amendment "addressed the ambiguity identified by the Ninth Circuit [in *Chapman*], App. at 11a, the Ninth Circuit had not even identified that ambiguity or issued its decision in *Chapman* until *after* the 2008 amendment. And as the legislative history shows, Senator Kyl noted that the 2008 revisions to § 111(a) "clarifi[ed] an *assault offense* that was created by Congress in 1994" and were designed to "correct [the] legislative sin" of the vague phrase "all other cases" in the pre-2008 version. 153 Cong. Rec. S15789-01

(2007) (statement of Senator Kyl) (emphasis added). Nothing in the legislative record remotely suggests that Congress was aware of the ambiguity in construing "simple assault" when it drafted the 2008 revisions. Congress simply avoided the "simple assault" term in § 111(a); nothing can be inferred from its inaction.

Accordingly, the Fifth Circuit's analysis rests on a flawed application of principles of statutory construction, and ignores the only reasonable interpretation of the statute. As a result, the court incorrectly affirmed Mrs. Williams's conviction for "simple assault" in the absence of proof that an assault had occurred.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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