No. 22-6109

IN THE SUPREME COURT OF THE UNITED STATES

DUSTIN WAYNE RANDALL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the special assessment required by 18 U.S.C. 3014(a) applies to each of a defendant's counts of conviction for the type of offense that it describes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12-23) is reported at 34 F.4th 867. An additional opinion of the court of appeals (Pet. App. 24-25) is not published in the Federal Reporter but is available at 2022 WL 1605506.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2022. A petition for rehearing was denied on August 26, 2022 (Pet. App. 26). The petition for a writ of certiorari was filed on November 16, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Nevada, petitioner was convicted on one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2); and one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2). Judgment 1. The district court sentenced petitioner to 96 months of imprisonment, to be followed by a life term of supervised release. Judgment 2-3. The court also ordered petitioner to pay $13,000 in restitution and imposed a $200 assessment and a separate $10,000 assessment. Judgment 7. The court of appeals affirmed. Pet. App. 12-25.

1. In 2017, Las Vegas Metropolitan Police Department detectives were investigating David Proctor, who they suspected was using Kik, an instant-messaging application, to distribute child pornography. Pet. App. 14. A search warrant executed on Proctor's Kik account revealed a June 2017 conversation between Proctor and petitioner, in which Proctor requested to join a Kik group to which petitioner belonged. Ibid. Petitioner informed Proctor that, to join the group, he needed to send child pornography. Ibid. Proctor then sent petitioner a link to Dropbox, a cloud storage provider, containing 272 videos and 34 images of child pornography. Ibid. Proctor asked whether petitioner would be willing to trade pornography in return, and petitioner responded by sending a Dropbox link, which the government asserted contained child pornography. Ibid. As their conversation continued, Proctor sent more

Dropbox links to petitioner, and petitioner sent a second link to Proctor. Id. at 14-15.

In December 2017, after detectives identified petitioner as the participant in Proctor's Kik conversation, they executed a search warrant on petitioner's home. Pet. App. 15. Petitioner waived his Miranda rights and admitted to trading child pornography on his Kik account. Ibid. In January 2018, detectives received information that petitioner's Dropbox account contained 92 videos and 24 images of child pornography. Ibid. Ultimately, between petitioner's Dropbox account and the links sent to him by Proctor, petitioner possessed 364 videos and 75 images of child pornography. Ibid.

2. A federal grand jury indicted petitioner on one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b), and one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b). Indictment 1-2. Without a plea agreement, petitioner pleaded guilty to each count. D. Ct. Doc. 124, at 16 (Jan. 15, 2020).

Under 18 U.S.C. 3013(a), "[t]he court shall assess on any person convicted of an offense against the United States" a fine. The amount of that fine depends on whether the defendant is an individual and the seriousness of the conviction. See ibid. "[I]n the case of a felony," the court must assess "the amount of $100 if the defendant is an individual." 18 U.S.C. 3013(a)(2)(A). In Rutledge v. United States, 517 U.S. 292 (1996), this Court recog-

nized that "[Section] 3013 requires a federal district court to impose a * * * special assessment for every conviction," rather than a single assessment per defendant. Id. at 301.

In 2015, Congress supplemented Section 3013 by enacting 18 U.S.C. 3014. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, Tit. I, § 101(a), 129 Stat. 228-230. Section 3014 provides that, "in addition to the assessment imposed under section 3013, the court shall assess an amount of $5,000 on any non-indigent person or entity convicted of an offense under" specified statutory provisions prohibiting sexual abuse and exploitation and human trafficking. 18 U.S.C. 3014(a). Amounts collected under Section 3014 are used to fund various programs for victims of abuse and trafficking. 18 U.S.C. 3014(c)-(e). After multiple extensions, Section 3014(a) is scheduled to sunset on December 23, 2024. See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. X, § 101, 136 Stat. 5523; Pet. 10 n.2 (citing previous extensions of the original 2019 sunset date).

In pleading guilty, petitioner expressly acknowledged that his sentence would include "a special assessment fee of $100 per count" under Section 3013, D. Ct. Doc. 124, at 10, and "an additional $5,000 special assessment per count" under Section 3014, id. at 12. In his objections to the Probation Office's presentence report, however, petitioner changed his position and argued that Section 3014 authorizes only one $5000 assessment per defendant, regardless of the number of offenses of conviction. D. Ct. Doc.

96, at 2-3 (Aug. 12, 2020). The district court overruled petitioner's objection, D. Ct. Doc. 129, at 5 (Oct. 7, 2020), and imposed a $10,000 assessment under Section 3014, id. at 38; Pet. App. 7.

3. The court of appeals affirmed. Pet. App. 12-25. As relevant here, the court held that Section 3014(a) "mandates an assessment on a per-count," rather than a "per-offender," "basis." Id. at 18. In the court's view, the meaning of the phrase "'convicted of an offense'" in Section 3013 "provides important guidance" in interpreting the same phrase in Section 3014. Id. at 19 (citation omitted). The court observed that when Congress enacted Section 3014, this Court (as well as every circuit to address the question) "ha[d] interpreted [Section] 3013's assessment on a person 'convicted of an offense' to apply separately to each count of conviction rather than to each offender." Ibid. The court of appeals reasoned that Congress's decision to establish a statutory framework in which Section 3013 and Section 3014 "work together and employ[] nearly identical language" is "all but conclusive" evidence that "Congress endorsed the long-settled interpretation of [Section] 3013's 'convicted of an offense' phrase" and intended to import that interpretation when it used the same language in Section 3014. Ibid.

The court of appeals also found support for its interpretation in the text and logic of Section 3014 standing alone. The court explained that the term "offense" means a "discrete criminal vio-

lation," Pet. App. 19 (citation omitted), and that "convicted" similarly is "normally understood [a]s an offense-specific term," ibid. (citation omitted; brackets in original). The court further reasoned that the use of the singular "an offense" suggests that "each 'offense' requires a separate assessment." Ibid. Finally, the court observed that it would be "illogical" to read the total assessment required by Section 3014 to depend "on the happenstance of whether [the defendant] was tried for [the qualifying] offenses in one or more proceedings." Id. at 20 (quoting United States v. Johnman, 948 F.3d 612, 619 (3d Cir. 2020), cert. denied, 141 S. Ct. 1047 (2021)).

The court of appeals acknowledged that the Second Circuit had reached the opposite conclusion in United States v. Haverkamp, 958 F.3d 145, 149 (2020). Pet. App. 20. But it found that court's reasoning, as well as the similar arguments advanced by the dissent, unpersuasive. Id. at 20 & n.3. Responding to the Second Circuit's argument that "'an amount' * * * means the amount is assessed one time," id. at 20 (quoting Haverkamp, 958 F.3d at 149), the court noted that such an argument "doesn't answer whether it is one time per defendant or per count," ibid.

Judge Wardlaw dissented in relevant part. Pet. App. 21-23. She endorsed the Second Circuit's conclusion that "[a]s a matter of grammar and common understanding 'an amount' on any person convicted means the amount is assessed one time." Id. at 21 (quoting Haverkamp, 958 F.3d at 149) (brackets in original). In

her view, Section 3014 is meaningfully distinct from Section 3013, which imposes "varying amounts of assessments dependent on the grade or classification of the specific offenses of which the defendant is convicted," and thus "'plainly authorizes multiple assessments where there are multiple counts of conviction.'" Id. at 22 (citation omitted).

The court of appeals denied a petition for rehearing en banc, with only Judge Wardlaw voting to grant the petition. Pet. App. 26.

ARGUMENT

Petitioner contends (Pet. 21-25) that the $5000 special assessment required by 18 U.S.C. 3014(a) should apply on a per-offender basis, rather than to each qualifying count of conviction. The court of appeals correctly rejected that contention. Petitioner also contends (Pet. 13-20) that the circuits are divided over the proper interpretation of Section 3014(a). But the shallow and recent disagreement between three courts of appeals that petitioner identifies does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that Section 3014(a) requires a district court to impose a separate, $5000 assessment for each qualifying offense of conviction. Section 3014(a) directs the court to "assess an amount of $5,000 on any non-indigent person or entity convicted of an offense under" certain statutory provisions. 18 U.S.C. 3014(a). As the court of appeals explained,

"[t]he key issue here is how to interpret 'convicted of an offense.'" Pet. App. 18. The terms "'offense'" and "'convicted'" together signify "a 'discrete criminal violation,'" and the statute's use of the singular "an" before "offense" indicates that "each 'offense' requires a separate assessment." Id. at 19 (citation omitted).

That understanding is strongly reinforced by the "settled" interpretation of the phrase "convicted of an offense" in Section 3013, which requires an assessment for each count of conviction. Pet. App. 19. The use of the same phrase in Section 3014 suggests Congress intended a similar meaning. And the interlocking character of the two provisions confirms that interpretation. Because Section 3013 requires courts to impose assessments on a per-count basis, Section 3014(a)'s requirement for the court to impose an assessment "in addition to the assessment imposed under section 3013," 18 U.S.C. 3014(a), indicates that Section 3014(a) should operate on a per-count basis, as well.

Petitioner's contrary reading is unpersuasive. His insistence (e.g., Pet. 22) that Section "3014's text refers to a singular assessment" is neither here nor there, since it sheds no light on whether the statute requires a single assessment per defendant or per count.* Petitioner's interpretation would also produce anom-

* The same is true of the post-enactment legislative history relied on by petitioner (Pet. 24-25) and Judge Wardlaw (Pet. App. 23). The statement by Representative Poe -- that the provision authorizes "an additional assessment of up to $5,000," 163 Cong. Rec. H4564 (daily ed. May 24, 2017) -- not only fails to address

alous results. If the government had filed charges against petitioner in two separate prosecutions rather than one, nothing in Section 3014's text would have precluded each district court in those separate cases from applying a $5000 assessment for the particular offense before it. Section 3014(a)'s proper application should not turn on the happenstance of charging decisions.

2. Petitioner correctly notes (Pet. 14-19) that the Second Circuit has taken the opposite position of the Third and Ninth Circuits, concluding instead that Section 3014(a) allows only one $5000 assessment in a case involving multiple qualifying counts of conviction. See United States v. Haverkamp, 958 F.3d 145, 149 (2d Cir. 2020); United States v. Johnman, 948 F.3d 612, 616 (3d Cir. 2020), cert. denied, 141 S. Ct. 1047 (2021). But that narrow disagreement did not arise until 2020, and petitioner identifies no other court of appeals that has addressed the issue. None of the other cases petitioner cites (Pet. 17 n.4, 20) affirming assessments under Section 3014(a) actually analyzed the question presented. Such a newly developed and shallow interpretive conflict would not normally warrant this Court's review, and petitioner does not point to any exceptional circumstances indicating that a different result is appropriate at this time.

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whether "an" assessment goes with each conviction or with each defendant, but also paraphrases the statute incorrectly by referring to an assessment of "up to $5,000," rather than "of $5,000."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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