No. 22-7286

IN THE SUPREME COURT OF
THE UNITED STATES

VONTEAK ALEXANDER, REAL PARTY IN INTEREST, PETITIONER

v.

JANE DOE, RESPONDENT.

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

BRIEF FOR RESPONDENT JANE DOE IN OPPOSITION

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QUESTION PRESENTED

May a court reform an accepted, valid, federal plea agreement containing a mutual mistake of law to circumvent the mistake to the defendant's prejudice?

PARTIES TO THE PROCEEDING

Petitioner Vonteak Alexander was the Respondent and a Real Party in Interest
in the Ninth Circuit Court of Appeals.

Respondent Jane Doe was the petitioner in the Ninth Circuit Court of Appeals.

The government was the Respondent and a Real Party in Interest in the Ninth Circuit Court of Appeals.

The federal district court for the District of Nevada was a nominal Real Party of Interest in the Ninth Circuit Court of Appeals.

RELATED PROCEEDINGS

United States v. Vonteak Alexander, Case No. 2:17-cr-00072-RFB (D. Nev.).

In re: Jane Doe, 57 F.4th 667 (9th Cir. 2023).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 57 F.4th 667.

JURISDICTION

The amended judgment of the court of appeals was entered on January 18, 2023. Petitioner filed a petition for a writ of certiorari on April 12, 2023. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). On June 15, 2023, the Court requested a response from respondent Jane Doe.

STATUTORY PROVISIONS INVOLVED

1. The Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(a)(6), provides in relevant part:

A crime victim has the following rights:
....
(6) The right to full and timely restitution as provided in law.

2. 18 U.S.C. § 3663(a) provides in relevant part:

(1)(A) The court, when sentencing a defendant convicted of an offense under this title, . . . may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense . . . .
(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

3. 18 U.S.C. § 2259(a) provides in relevant part:

In General.—
Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under [Chapter 110].

STATEMENT OF THE CASE

This case arises out of petitioner's sex trafficking of Jane Doe, who was twelve years old at the time of his crimes. Mand. App. at 142.[1] Jane Doe is a survivor of abduction, sexual exploitation, and human trafficking at petitioner's hands, suffering extreme physical and emotional damages. *Id.* at 142–43. In his plea agreement, petitioner promised to pay Jane Doe full restitution for his crimes. Pet. App. 59a-60a. The district court, however, reluctantly concluded that it lacked authority to award restitution. Pet. App. 50a-51a. After Jane Doe sought review of

[1] Jane Doe filed a mandamus petition in the Ninth Circuit, with an accompanying appendix (cited herein as "Mand. App.").

that conclusion, the Ninth Circuit held that the district court possessed authority to award restitution. Pet. App. 1a-9a. The Circuit remanded to the district court for further proceedings to determine the amount of restitution petitioner should pay. Pet. App. 9a.

Petitioner now petitions for a writ of certiorari from this Court to review the interlocutory decision below. He seeks review of an issue he did not present below and which was not reached below: Whether the courts of appeals may "reform" a plea agreement to avoid mutual mistake of law. That issue is not presented by the facts of this case. No mutual mistake of law exists and no "reformation" of the plea agreement is involved. The Court should deny the petition.

PROCEEDINGS BELOW

I. Petitioner Sexually Traffics Jane Doe and Is Arrested and Charged for Sex Trafficking.

The relevant facts include petitioner's sex trafficking of Jane Doe.[2] Specifically, beginning on the night of March 28, 2016, petitioner abducted twelve-year-old Jane Doe, threw her in his car, assaulted her, and drugged her until she fell asleep. Mand. App. 143.

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[2] Regardless of whether etitioner plead to the facts recounted in this section, these facts were nevertheless relevant for the district court's restitution determination because petitioner's plea agreement explicitly allowed the district court to consider "*dismissed counts*" and "*uncharged conduct*" involving petitioner. Pet. App. 59a (emphasis added). The facts recounted here are detailed in Jane Doe's restitution requests which are a part of the record in this case. These facts are also recounted in the Government's Post Hearing Supplement to Petitioner Vonteak Alexander's Motion to Suppress Evidence, Docket # 156. Jane Doe submitted her requests directly to the District Court at sentencing, and the District Court discussed her restitution request at length. *See* Mand. Appx. at 51–116.

Petitioner first kept Jane Doe in Los Angeles for several days. *Id.* He sent her to the "track" to sell sex for one night, instructing her to charge $50 for oral sex and at least $80 for sex. *Id.* Jane Doe was forced to have sex with two adult men that night, and she brought back petitioner approximately $200. *Id.*

Petitioner then drove Jane Doe to Las Vegas, Nevada. For several weeks, he forced her to work nearly every day for an average of thirteen hours. *Id.* Jane Doe made approximately $500 to $1000 per night for commercial sex acts she was forced to perform in cars and hotels. *Id.* Petitioner himself also forced Jane Doe to have sex with him nearly every night. *Id.* On April 16, 2016, Jane Doe approached security at the Orleans Hotel and Casino in Las Vegas and told them she was a missing juvenile who was being sex trafficked. *Id.* Petitioner was subsequently arrested. *See id.* at 1–5.

On February 28, 2017, the government indicted petitioner on five counts, including sex trafficking of Jane Doe. The counts were: Conspiracy to Commit Sex Trafficking in violation of 18 U.S.C. § 1694(c); Sex Trafficking in violation of 18 U.S.C. §§ 1591(a)(1), (a)(2), (b)(2) and (c); Conspiracy to Transport for Prostitution or Other Criminal Sexual Activity in violation of 18 U.S.C. § 1594(c); Transportation for Prostitution or Other Criminal, Sexual Activity in violation of 18 U.S.C. § 2423(a); and Coercion and Enticement in violation of 18 U.S.C. § 2422(b). *See id.*

II. Petitioner Enters into a Binding Plea Agreement Stipulating to Mandatory Restitution for Jane Doe, Including Restitution for Losses from Dismissed Counts and Uncharged Conduct.

Following plea discussions between the government and petitioner, on May 15, 2019, the government filed a new, two-count Criminal Information. Instead of

sex trafficking charges, the Information substituted lesser charges of Interstate Travel in Aid of Unlawful Activity in violation of 18 U.S.C. § 1952(a)(3)(A). Mand. App. at 6–11. The petitioner waived his right to an indictment on these new charges and pleaded guilty pursuant to a detailed—and binding—plea agreement. While the new charges did not specifically allege sex trafficking by petitioner, petitioner agreed that he would make restitution to Jane Doe for all harms he had inflicted on her, including the harms stemming from the sex trafficking alleged in the dismissed counts. In his agreement, petitioner "acknowledge[d] that the conduct to which he is entering a plea gives rise to *mandatory restitution* to the victim(s)" under 18 U.S.C. § 2259. *Id.* at 10 (emphasis added). To assess such restitution, petitioner stipulated that "the Court may consider losses derived from the counts of conviction *as well as losses caused from dismissed counts and uncharged conduct* in which the [petitioner] has been involved." Pet. App. 59a (emphasis added).

During the May 15, 2019, plea hearing, the government specifically stated on the record (before the district court and petitioner) that petitioner would pay full restitution for all harms petitioner had inflicted on Jane Doe:

> The plea agreement advises the defendant and the defendant acknowledges that the conduct to which he is entering a plea gives rise to *mandatory restitution* to the victim under Title 18, United States Code, Section 2259, and *the defendant agrees to pay the victim the full amount of victim's losses* as defined in Title 18, United States Code, Section 2259(b)(3).

Pet. App. 79a (emphasis added). Petitioner agreed to these terms through counsel, and the district court ultimately accepted the plea, thereby making the plea binding on the Court and all parties. Pet. App. 85a-87a.

III. Jane Doe Requests Restitution.

Unsurprisingly, Jane Doe has suffered extreme physical, emotional, and mental harm resulting from petitioner's crimes against her. *See* Mand. App. 142. She was repeatedly sexually abused by petitioner and the multiple adult men with whom petitioner forced her to have commercial sex. *See id.* Jane Doe's life was changed forever because of petitioner's crimes against her. *See id.* Jane Doe feared and still fears for her life and the lives of her family. *Id.*

Following petitioner's guilty plea—and his specific promise to pay Jane Doe restitution for the "full amount" of her losses—Jane Doe (through legal counsel) filed multiple timely and substantiated requests for restitution with the district court.

A. Sentencing Hearing

On December 21, 2020, before petitioner's scheduled sentencing hearing, Jane Doe's counsel filed with the district court a timely Victim's Statement Regarding Sentencing and Restitution. Mand. App. 41. Jane Doe requested that court impose a meaningful sentence on petitioner, including a restitution order in the amount of $15,000 for petitioner's ill-gotten gains (the value of her commercial sex services to petitioner) under the Trafficking Victims' Protection Act, 18 U.S.C. § 1593(b)(3). Mand. App. 41–50.

Several months later, during the May 4, 2021, sentencing hearing,[3] Jane Doe's counsel stated on the record that petitioner "recognized that the plea would include mandatory restitution" and requested $15,000 as outlined in Jane Doe's

[3] The sentencing hearing was delayed due to petitioner's requests continuances and COVID-19 court closures.

initial filing. Mand. App. 68. In light of the restitution provision in the binding plea agreement, the district court prepared to order restitution, stating: "The Court will impose the mandatory restitution of $5,000 as well as the additional restitution based upon the calculations submitted by the victim's attorney of $15,000 of restitution. The Court finds those calculations to be appropriate and uncontested at this time." Mand. App. 102.

Following the court's statement, however, petitioner contested the amount of restitution requested—but not the court's authority to order restitution. Mand. App. 102. In response, the court questioned what grounds petitioner could possibly have for contesting the amount requested, stating: "I think the restitution is consistent with the offense conduct and my findings. So in looking at the calculations, that's actually—potentially they could have requested more. They didn't." Mand. App. 103. In reply, petitioner argued that insufficient evidence existed to establish that petitioner's "conduct occurred for that period of time and at that frequency to establish a $15,000 restitution amount"—though petitioner agreed, through legal counsel, that "$5,000 is mandatory if this Court finds that my client [i.e., petitioner] is not indigent." Mand. App. 103–04.

The court allowed petitioner to request a separate restitution hearing to determine the amount of restitution to be awarded, concluding by stating: "I do think that the [earlier] evidentiary hearing [on other issues] provided a basis for the Court making a finding as to the nature and extent of the conduct that would support the request of the victim in this case." Mand. App. 105.

Notably, during this initial sentencing hearing, the Court imposed a lenient sentence of 96 months' imprisonment, exactly in line with the "binding plea

agreement"—in other words, petitioner received his benefit of the agreed-upon sentence in exchange for his promise to pay restitution (among other provisions in the binding plea agreement). The district court specifically stated it was imposing a lenient sentence:

> Mr. Alexander, you should understand that I'm giving you a sentence that's lower than what the maximum is, although this was a very serious offense, given the considerations I've already made in this case and the fact that you weren't subject to the mandatory minimum and you weren't subject to a higher sentence or potentially a mandatory minimum sentence. There are other individuals with this similar offense conduct who are sentenced to a much higher sentence. So, you are already receiving from the Court's perspective consideration for the conduct, but also for other aspects of the conduct that would potentially and did result in the Court not seeking to upwardly depart beyond what was in the binding plea agreement. So, I think that the sentence that is imposed is appropriate on this—in this case given the seriousness of the offense conduct.

Mand. App. 115.

B. First Restitution Hearing

The district court set a separate restitution hearing for August 5, 2021.[4] On the evening before the hearing, petitioner filed a brief arguing that Jane Doe was only entitled to restitution under 18 U.S.C. § 2259, as specified in petitioner's plea agreement—not 18 U.S.C. § 1593, as argued in Jane Doe's initial filing. At the restitution hearing, the district court ultimately agreed with petitioner, repeatedly stating that Section "2259 is the statute that applies" in calculating Jane Doe's losses for restitution purposes. Mand. App. 125–26. The Court subsequently ordered Jane Doe's counsel to submit calculations based upon "the Court's ruling saying

[4] Once again, the restitution hearing was delayed due to petitioner's requests for continuances.

that [§] 2259 is the applicable statute" and set a second restitution hearing to decide the amount of restitution to be ordered under § 2259. Mand. App. 126.

In accordance with the district court's order to calculate losses using 18 U.S.C. § 2259, Jane Doe filed a supplemental restitution request with the district court, calculating restitution under 18 U.S.C. § 2259, as well as 18 U.S.C. §§ 1593 and 3663A(a)(3). Mand. App. 137. Upon reviewing 18 U.S.C. § 2259, Jane Doe realized the losses she was entitled to recover under 18 U.S.C. § 2259 were far greater than the losses she previously calculated under 18 U.S.C. § 1593. Therefore, Jane Doe's supplemental restitution request recounted the various losses she was permitted to recover under 18 U.S.C. § 2259, including lost income in the form of lost future earning and past lost wages, future medical expenses relating to psychiatric and psychological care, attorney fees and costs, and necessary transportation and relocation costs. Mand. App. 137–59.[5] Based on detailed expert reports cited in Jane Doe's request for restitution, including reports from a forensic traumatologist and an economist calculating lost income earning capacity, Jane Doe requested $1,466,482.82. *See* Mand. App. 158.

C. Second Restitution Hearing

During the second restitution hearing on February 17, 2022,[6] petitioner presented a new argument. For the first time in the twenty-two months since petitioner entered his guilty plea, petitioner claimed that the district court lacked

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[5] The supplemental request was timely, as a victim can bring to the Court's attention any losses suffered (or projected to be suffered) before the restitution award is entered. *See* 18 U.S.C. § 3664(d)(5).

[6] The restitution hearing was again delayed due to petitioner's requests for continuances.

authority to award any restitution because petitioner did not admit to conduct covered under 18 U.S.C. § 2259. Mand. App. 185–97.

In response, the district court noted that restitution was "mandatory" under petitioner's binding plea agreement and that petitioner was permitted to "admit the facts for the purposes of the restitution without admitting to them for the purpose of conviction in this case." Mand. App. 185. The court further noted that petitioner had entered into a binding contract and questioned whether petitioner should be able "to essentially renounce aspects of the contract when he received the benefit of the binding plea agreement from this Court." Mand. App. 187. Instead of awarding no restitution, the court asked petitioner to present an agreeable restitution number. Following a recess during which petitioner conferred with his counsel, petitioner proposed that the court order him to pay $1,000 in restitution. Mand. App. 199. Rejecting that position, the court replied: "I don't find that to be a reasonable amount . . . . Because $1,000 in this case is nominal ....." Mand. App. 19. The Court ultimately stated it would take the matter under advisement and issue a subsequent ruling. Mand. App. 212.

IV. The District Court Ultimately and Reluctantly Denies Jane Doe Any Restitution.

Three months later, the district court issued its final, two-page restitution order. Pet. App. 50a-51a. Over the course of three years in the multiple hearings described above, all parties (i.e., petitioner, the government, and Jane Doe) and the district court had operated under the premise that the district court possessed the authority to enforce the restitution stipulation in a binding plea agreement—an agreement which petitioner knowingly and willingly entered and which the district

court had accepted and used in imposing a (lenient) prison sentence. Yet, in its final order on May 10, 2022, the district court denied Jane Doe *any* restitution—"despite the egregious conduct admitted by [petitioner] in this case." Pet. App. 50a. In its order denying restitution, the district court held that, as a matter of law, it did not possess statutory authority to order restitution under 18 U.S.C. § 2259 because petitioner did not plead guilty to a sex offense under Chapter 110. Pet. App. 51a. The district court also held that petitioner's consent to mandatory restitution under 18 U.S.C. § 2259 did not give it authority to award the agreed upon restitution. Pet. App. 51a. Specifically, the Court stated it was "not persuaded that it can order restitution simply because [petitioner] agreed in his agreement that Section 2259 could provide a basis for restitution. The Court must still find that the statute authorizes an award of restitution." Pet. App. 51a. The Court concluded: "A consent to application [of restitution] does not itself expand the Court's legal authority under the statute." Pet. App. 51a.

V. The Ninth Circuit Reverses the District Court's Decision.

Jane Doe then filed a timely petition for review of the district court's denial of restitution, as specifically authorized by the CVRA. 18 U.S.C. § 3771(d)(3). In her petition, Jane Doe argued that the district court possessed authority to award restitution under 18 U.S.C. § 3663(a)(3), which empowers a court to "order restitution in any criminal case to the extent agreed to by the parties in a plea agreement." Mand. Pet. 16. The government agreed. Gov't Resp. 10-11 ("the district court had the authority under 18 U.S.C. § 3663(a)(3) ...to order restitution in that full amount").

In response to the argument of Jane Doe and the government, petitioner argued that Jane Doe had "waived" her right to seek restitution under § 3663(a)(3), because of her purported failure to sufficiently rely on the statute below. Resp. in Opposition to Mand. Pet. at 15-20. Petitioner also argued that the district court was not empowered to award restitution under other statutes. *Id.* at 21-40.

Following oral argument, the Ninth Circuit granted Jane Doe's petition and reversed the district court. Pet. App. 1a-9a. The Ninth Circuit began by noting that it had before it a single legal issue: Whether the district court erred in concluding that it lacked statutory authority to order restitution. Pet. App. 5a. On that sole issue, the Circuit reversed the district court. The Circuit explained that "[i]n enacting 18 U.S.C. § 3663(a)(3), Congress expressly granted district courts authority to order restitution whenever a defendant has agreed in a plea agreement to pay restitution. Defendant did so. Therefore, pursuant to the plain meaning of the statutory text and consistent with binding precedent, the district court had statutory authority to order restitution." Pet. 8a.[7]

The Ninth Circuit explained that the statutory text, § 3663(a)(3), provides that "[t]he court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3). The Circuit explained that "Congressional intent is clear. If a defendant has agreed to pay restitution in a plea agreement, then the plain meaning of the statutory text grants the district court statutory authority to order the agreed-upon restitution." Pet. App. 5a.

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[7] The Circuit also rejected petitioner's argument that Jane Doe had somehow "waived" her right to rely on the statutory command found in § 3663(a)(3). Pet. App. 6a.

The Circuit also noted that this "straightforward reading" was supported by numerous Circuit decisions. Pet. App. 6a. (citing *United States v. Soderling*, 970 F.2d 529, 534 n.9 (9th Cir. 1992); *United States v. McAninch*, 994 F.2d 1380, 1384 n.4 (9th Cir. 1993); *United States v. Maturin*, 488 F.3d 657, 661 (5th Cir. 2007); *United States v. Blake*, 81 F.3d 498, 507 (4th Cir. 1996); *United States v. Guthrie*, 64 F.3d 1510, 1514 (10th Cir. 1995); *United States v. Silkowski*, 32 F.3d 682, 688–89 (2d Cir. 1994)).

The Ninth Circuit then noted that this interpretation of § 3663(a)(3) potentially benefits not only the government and victims but also defendants. The Circuit explained that "[t]he statute allows defendants to plead guilty to crimes that carry less severe penalties overall but that do not, by themselves, authorize restitution." Pet. App. 6a. The Circuit noted that in this case, for example, petitioner initially faced sex-trafficking charges that carried mandatory minimum sentences far greater than the 96-month sentence that he received though his plea agreement. Thus, "without § 3663(a)(3)'s allowance of restitution in *any* plea deal, victims such as Jane Doe might object to plea deals to lesser charges, complicating a defendant's attempt to avoid more serious charges and longer terms of imprisonment. Section 3663(a)(3) thus gives the government, victims, and defendants flexibility to reach a just result for all involved." Pet. App. 6a.

The Ninth Circuit then turned to the question of construing petitioner's plea agreement. The Circuit began by reiterating the operative paragraph requiring the defendant to make "mandatory" restitution to the victim:

> The Defendant acknowledges that the conduct to which he is entering a plea is gives [sic] rise to mandatory restitution to the victim(s). See 18 U.S.C. § 2259. The Defendant agrees that for the purpose of assessing such restitution, the Court may consider losses derived from the counts of conviction as well as losses caused from dismissed counts and uncharged conduct in which the Defendant has been involved. The Defendant agrees to pay the victim(s) the "full amount of the victim's losses" as defined in 18 U.S.C. § 2259(b)(3).

Pet. App. 7a.

The Circuit began "with the most natural reading of the paragraph." Pet. App. 7a. The Circuit explained that the "operative sentence—the agreement to pay—is the final sentence: [Petitioner] agreed to pay Jane Doe the six categories of loss defined in § 2259(b)(3)." The Circuit noted that the "preceding sentence describes the conduct that the court may consider in determining loss: 'losses derived from the counts of conviction as well as losses caused from dismissed counts and uncharged conduct in which [petitioner] has been involved.'" Pet. App. 7a. Thus, "[p]utting it all together, [petitioner] agreed to pay Jane Doe the six categories of loss described in § 2259, and the court could consider all of [petitioner's] conduct in calculating loss." Pet. App. 7a.

The Circuit further explained that the "final two sentences of the restitution provision thus appear to authorize the district court to order restitution resulting not only from the counts of conviction but also from the dismissed counts and uncharged conduct." Pet. App. 7a. These sentences made this case unlike other cases in which a defendant "did not specifically agree to pay restitution for [specific] counts in exchange for the government's promise to drop those charges." Pet. App. 7a (*contrasting United States v. Phillips*, 174 F.3d 1074, 1077 (9th Cir. 1999)). In sum, the petitioner's plea agreement "specified that restitution would encompass

the dismissed counts and uncharged conduct, and his plea agreement obligated the government to dismiss the original indictment in exchange for his consent to the plea deal." Pet. App. 7a.

The Ninth Circuit continued, however, to explore the meaning of the first sentence of the restitution provision. The Circuit acknowledged that, when "viewed in isolation," the sentence was "not a model of clarity." Pet. App. 7a. The Circuit explained that in that sentence, petitioner "acknowledge[d]" that his conduct gave rise to "mandatory restitution," and the sentence ended with a citation to 18 U.S.C. § 2259. But § 2259 itself mandates restitution only for crimes defined in Chapter 110 of Title 18. Neither the crimes of conviction nor the originally charged crimes in the indictment fell within Chapter 110, so the purpose of the first sentence was "not entirely clear." Pet. App. 7a.

Against that backdrop, the Circuit noted that "[f]or the restitution paragraph to have any meaning, then, it must mean more than simply that [petitioner's] convictions trigger § 2259. To the extent that [petitioner] advances an interpretation that necessarily renders the restitution paragraph void on its face, we reject that interpretation." Pet. App. 7a (*citing United States v. Medina-Carrasco*, 815 F.3d 457, 462 (9th Cir. 2015) (rejecting interpretation of plea agreement that would make a provision meaningless); *United States v. Schuman*, 127 F.3d 815, 817 (9th Cir. 1997) (per curiam) (same); *United States v. Michlin*, 34 F.3d 896, 901 (9th Cir. 1994) (same)). The Circuit concluded that, "[r]ead in conjunction with the later sentences," the plea agreement's first sentence "simply acknowledge[es] [petitioner's] obligation to pay restitution." Pet. App. 7a.

The Circuit agreed that it was "possible to read the restitution paragraph "in a more constrained manner." Pet. App. 7a. Specifically, the Circuit noted that "one could interpret the passage as an agreement to pay restitution only to the extent that the district court later determined that [petitioner's] conduct resulted in the commission of a crime encompassed by § 2259, that is, a crime defined in Chapter 110." Pet. App. 7a. But the problem with that interpretation was that it would "contradict[] other parts of the plea agreement." Pet. App. 8a. For example, the first sentence, read in its entirety, did not suggest that, if the district court later found (as it did here), that petitioner did not commit any crime under Chapter 110, then "he would not have to pay *any* restitution. The first sentence states only that '[t]he [petitioner] *acknowledges* that the conduct to which he is entering a plea is gives [sic] rise to mandatory restitution.'" Pet. App. 8a (emphasis in original.) Thus, the Circuit concluded, the first sentence, "read in its entirety," suggested that petitioner knew that he would "have to pay restitution; only the amount [was] at issue." Pet. App. 8a. The Circuiit also noted that a more constrained interpretation would "contradict[] the second sentence, which provides that the court may consider losses from all conduct when 'assessing such restitution,' including the counts of conviction and the dismissed counts. Because neither the counts of conviction nor the dismissed counts fall within Chapter 110, it makes little sense to interpret 'such restitution' as encompassing only the conduct that could have been charged under Chapter 110." Pet. App. 8a.

While the more constrained interpretation seemed highly dubious, the Circuit agreed that "[t]hese competing interpretations show that the restitution provision is ambiguous." Pet. App. 8a. Accordingly, the Circuit stated that the "next step" was to

"look to the facts of the case to determine what the parties reasonably understood to be the terms of the agreement." Pet. App. 8a (citing *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000)).

In taking that next step, the Circuit held that "the record plainly reflects that the parties all understood that [petitioner] had agreed to pay restitution, limited to the categories of loss described in § 2259(b)(3)." Pet. App. 8a. The Circuit explained that until petitioner's new lawyer appeared on the scene, "the record contains no suggestion whatsoever that anyone thought that [petitioner] could escape paying restitution altogether because of a lack of statutory authority, if the court later held that [petitioner] had not committed an offense triggering the mandatory restitution provision in § 2259." Pet. App. 8a.

Reviewing the record in the case, the Circuit observed that during the plea colloquy, the prosecutor summarized the plea agreement as stating that petitioner agreed "to pay the victim the full amount of victim's losses as defined in 18 U.S.C. § 2259(b)(3)." Pet. App. 8a. Petitioner and his lawyer at the time agreed with the prosecutor's summary. Pet. App. 8a.

Later, during sentencing, petitioner's lawyer objected substantively on the "sole ground" that the evidence supporting the restitution amount was insufficient. Pet. App. 8a. Before the first restitution hearing, petitioner objected "only" to Jane Doe's calculation method, which used the criteria particular to § 1593. Indeed, the Circuit noted, petitioner "expressly asked the court to use 'a restitution calculation consistent with 18 U.S.C. §§ 2259(c)(2) or 3663A(b)(2).'" Pet. App. 8a. During the first restitution hearing, petitioner's counsel "argued that § 2259 supplies the right formula for the amount that [petitioner] would have to pay, 'which is a separate

analysis than the analysis' under § 1593." During the second restitution hearing, petitioner specifically requested that "the district court 'impose restitution' of a lower amount." Pet. App. 8a.

Thus, the Circuit summed up, "[a]ll of that conduct is consistent with our interpretation of the restitution provision; none of the conduct is consistent with the more limited interpretation of the restitution provision. Everyone who negotiated the plea agreement understood that [petitioner] agreed to pay restitution to Jane Doe." Pet. App. 8a. To be sure, petitioner "objected to the sufficiency of the evidence supporting particular amounts requested, and he insisted that restitution be limited to the categories found in § 2259. But [petitioner's] obligation to pay was never in doubt." Pet. App. 8a. In sum, the Circuit held, the extrinsic evidence "unambiguously demonstrates" that petitioner agreed to pay restitution for Jane Doe's losses, as defined in § 2259(b)(3). Accordingly, the Circuit held, "the rule that ambiguities are construed against the government does not apply." Pet. App. 8a (*citing Clark*, 218 F.3d at 1096 ("Only if the extrinsic evidence regarding the parties' intent fails to resolve the term's ambiguity must the court apply the rule construing ambiguous terms against the drafting party.")).

Because the district court had held that it lacked statutory authority to order restitution, the Circuit concluded that the district court had committed legal error. Pet. App. 8a. The Circuit remanded and instructed the district court "to address the parties' remaining arguments, including any factual disputes concerning the amount of loss, any factual disputes as to whether [petitioner's] conduct proximately caused the losses, and any other arguments raised by the parties." Pet. App. 8a.

The Circuit remanded to the district court. On March 24, 2023, the government filed a motion in the district court to revise the pre-sentence report and schedule a restitution hearing. Dkt. #379, U.S. v. Alexander, 2:17-cr—00-72-RFB (D. Nev.). These issues remain pending.

REASONS FOR DENYING THE PETITION

Petitioner contends that this Court should review a purported circuit split concerning how to interpret plea agreements containing a mutual mistake of law. His petition does not warrant review by this Court for at least five reasons. First, the decision below is interlocutory. Until the district court calculates restitution, there is no reason for immediate review. Second, petitioner conceded below that the district court possessed authority to impose restitution—so his newly minted "mutual mistake" argument was not presented below and not reached below. Third, the decision below is entirely fact-bound, as it concerns how to interpret several inartful sentences in a plea agreement that appear to be truly one-of-a-kind. Fourth, no circuit split exists regarding how to handle the facts of this case. Petitioner's argument would render a significant part of his plea agreement a nullity—something that no circuit would accept. Fifth and finally, the decision below is entirely correct. The Ninth Circuit properly concluded that there was a meeting of minds between the prosecution and petitioner that Jane Doe would receive restitution. Accordingly, the Court should deny the petition.

I. No Reason Exists to Immediately Review the Interlocutory Decision Below, as the District Court Has Yet to Finally Determine the Amount of Restitution for Jane Doe.

In its decision below, the Ninth Circuit remanded to the district court for a final determination of restitution issues. Specifically, the Circuit instructed the district court "to address the parties' remaining arguments, including any factual disputes concerning the amount of loss, any factual disputes as to whether [petitioner's] conduct proximately caused the losses, and any other arguments raised by the parties." Pet. App. 8a. District court proceedings to determine the amount of restitution for Jane Doe are the next step in the process.

Against the backdrop of anticipated district court proceedings, even assuming that the Ninth Circuit's decision presents an important and recurring question (which it does not), it would make no sense for this Court to rush to review the decision now. The district court's resolution of the ultimate restitution issues may help to crystallize the issues in this case. Indeed, petitioner has conceded that it would be appropriate for the district court to award some restitution to Jane Doe and requested that the Court impose restitution in the amount of $1000. Mand. App. 199. Until the district court has acted and entered a final restitution award, it would be premature for this Court to review the case.

To be sure, this Court possesses jurisdiction to review the interlocutory decision below. *See* 28 U.S.C. 1254(1). But the interlocutory nature of the Ninth Circuit's judgment is highly relevant to this Court discretionary decision of whether to grant certiorari. Ordinarily, the Court does not issue a writ of certiorari to review a decree of the Court of Appeals that has not fully resolved all the issues below. *See,*

e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co., 389 U.S 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the cases [and thus it] is not ripe for review by this Court"); *see also Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945(2012) (Alito, J., respecting the denial of petitions for writs of certiorari) ("Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari"); *Virginia Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"). Until all restitution issues have been resolved below, there is no reason for the Court to immediately review the Ninth Circuit's decision.

II. The Mutual-Mistake-of-Law Issue Was Neither Presented Below Nor Reached Below.

Petitioner frames his question presented as whether a court may "reform an accepted, valid, federal plea agreement containing a *mutual mistake of law* to circumvent the mistake to the defendant's prejudice?" Pet. at i (emphasis added). Petitioner did not present the issue regarding "mutual mistake" below. The Court can immediately confirm that fact by running a word search in petitioner's Ninth Circuit brief. The word "mutual" (and its variants) does not appear anywhere in it. And the word "mistake" (and its variants) appears only once—where petitioner expressly argues *against* the proposition that the plea agreement contained a mistake." Resp. in Opposition to Mand. Pet. at 27-28 ("The record undermines the government's new assertion of a mistake").

Given that petitioner steadfastly disavowed below that he made any mistake, it is unsurprising that the Ninth Circuit did not discuss any issue of *mutual* mistake. Here again, the Court can quickly confirm that fact through a word search of the Circuit's opinion; neither the word "mutual" nor "mistake" (nor any relevant variants) appear.

Because the Ninth Circuit did not address any issue of mutual mistake of law below, the issue is not properly before this Court. *See, e.g., Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us").

III. The Decision Below Is Fact-Bound and Does Not Have Significant Application.

The decision below involves a fact pattern unlikely to recur. The issue involving the stray reference to § 2259 in the plea agreement in this case has never recurred in any other case. Instead, what appears to have happened here is that, while drafting a plea agreement, the parties simply used a boilerplate form and failed to fully adjust it to reflect the changing details of the case. But, nonetheless, the parties all understood what the plea agreement meant—a meaning that was readily apparent to the Ninth Circuit. *See* Pet. App. 8a ("Everyone who negotiated the plea agreement understood that [petitioner] agreed to pay restitution to Jane Doe ... [Petitioner's] obligation to pay was never in doubt.").

In any event, the details of the inartful wording of a paragraph in this particular plea agreement present a fact-bound, one-of-a-kind situation hardly worthy of this Court's consideration. *Cf.* S. Ct. Rule 10(a) ("A petition for a writ of certiorari will be granted only for compelling reasons.").

IV. No Circuit Split Exists Regarding How to Handle the Facts of This Case.

Even assuming for the sake of argument that the Ninth Circuit's decision below somehow, silently, rests on interpreting the doctrine of mutual mistake of law, no circuit split exists regarding how to handle the facts of this case. Petitioner's purported circuit split rests on various cases addressing the question of whether a mutual mistake of law renders a plea agreement "void or voidable." *See, e.g.*, Pet. 18 (citing *United States v. Rosen*, 409 F.3d 534, 548 (2d Cir. 2005) (rejecting argument that plea agreement was void or voidable given parties' mutual mistake regarding Guidelines range). As petitioner appears to concede, those cases involve issues pertaining to "the 'foundation' of the parties' agreement 'such that it prevents the contract from representing the meeting of the minds in some material respect.'" Pet. 19 (*citing United States v. Hilliard*, No. 21-2358-CR, 2022 WL 4479520, at *1 (2d Cir. Sept. 27, 2022 (unpublished)).

Here, in contrast, the issue pertains to a plea agreement containing a stray reference to a separate statute not directly relevant to petitioner's restitution obligations. Nonetheless, all concerned (e.g., the government, Jane Doe, *and* petitioner) understood that the plea agreement obligated petitioner to pay restitution to Jane Doe. *See* Pet. App. 8a. In other words, "a meeting of the minds" existed that petitioner owed restitution to Jane Doe under the plea agreement. And the law permits a defendant in a plea agreement to agree to restitution. *See* 18 U.S.C. § 3663(a)(3). Accordingly, this case cannot present a mutual-mistake-of-law issue because of a common understanding of what the agreement meant—an understanding that was consistent with the law.

Petitioner contends, however, that several circuit courts are at odds over how and when a court may modify a previously accepted plea agreement. On this topic, none of the circuits have acknowledged that they are deviating from the view of other circuits. So petitioner attempt to conjure an unacknowledged split by selectively quoting from a handful of cases. However, a close review of these cases demonstrates not a circuit split but a circuit alignment. Across the circuits considered by petitioner (and beyond), courts have articulated the same general standard that plea agreements may only be modified if an ambiguity or mistake exists that would have prevented the parties from understanding or receiving the agreed-upon material terms. *See, e.g., United States v. Peveler*, 359 F.3d 369, 375 (8th Cir. 1990) (holding that "reformation of a written agreement is warranted only when the evidence demonstrates that the parties' mutual mistake resulted in a written document which does not accurately reflect the terms of their agreement."); *United States v. Frazier*, 805 F. App'x 15, 17 (2d Cir. 2019) (holding that the defendant must show that the mistake causes such an extreme imbalance in the agreement that it cannot fairly be carried out).

Petitioner begins his analysis with the Eighth Circuit's decision in *United States v. Ritchison*, 887 F.3d 365 (8th Cir. 2018). Pet. 18. But that case is inapplicable to the facts here. *Ritchinson* considered not the circumstances for modifying a plea agreement but rather the circumstances in which an agreement could be voidable. *Id.* at 369 (declining to extend the contract principle of mutual mistake to plea agreements). As petitioner's question presented relates to potential *modification* of a plea agreement, *Ritchinson*'s holding is not informative here.

Petitioner next cites *United States v. Rosen*, 409 F.3d 535 (2d Cir. 2005). But as with other circuits, the Second Circuit considers plea agreement unmodifiable unless a mutual mistake existed that prevented the defendant from fully understanding the terms of his agreement. *Id.* at 548. In much the same fashion, both the Fourth and Tenth Circuits (in cases cited by petitioner) hold that mutual mistake or ambiguities in the plea agreement may only be addressed by the court if the mistake undermines the understood terms of the agreement. *See United States v. Johnson*, 915 F.3d 223, 234 (4th Cir. 2019); *United States v. Frownfelter*, 626 F.3d 549, 554 (10th Cir. 2010). Similarly, the Seventh and Eleventh Circuit (in cases next cited by petitioner) echo essentially the same approach as the previously discussed circuits. *See United States v. Atkinson*, 979 F.2d 1219, 1223 (7th Cir. 1992) (stating that "[w]hile a contract may be reformed for a mutual mistake, this remedy is appropriate only when the contract fails to reflect accurately the terms of the agreement."); *United States v. Weaver*, 905 f.2d 1466 (11th Cir. 1992) (holding that "... reformation of a written agreement is warranted only when the evidence demonstrates that the parties' mutual mistake resulted in a written document which does not accurately reflect the terms of their agreement.").

Nor is there some sort of unrecognized "intra-circuit" conflict within the Ninth Circuit. Petitioner points to *United States v. Transfiguracion*, 442 F.3d 1222, 1229 (9th Cir. 2006) ("The inability to rescind a plea agreement based on a mutual mistake of law applies to criminal defendants as well as to the government."). But *Transfiguration* was not cited in the briefing below. Nor did the Ninth Circuit cite the case in its decision below. And for good reason. *Transfiguracion* involved a

situation where "all parties mistakenly thought that defendants were pleading guilty" to one crime rather than another. *Id.* at 1230. *Transfiguracion* held that, despite that mutual mistake, the government could not void its agreement. Here, in stark contrast, the Ninth Circuit found that there was no mutual mistake but rather that "everyone ... understood" what the agreement meant. Pet. App. 8a.

In sum, the circuits may at times use slightly varying language when discussing the need for modification of plea agreements. But the general principles are the same. There is no split—much less a "deep split" (Pet. 21)—warranting this Court's review.

V. The Ninth Circuit's Decision Was Correct.

Finally and in any event, this case would be an unsuitable vehicle for reviewing the question presented. The Ninth Circuit decision below was correct. Accordingly, petitioner would not be entitled to relief even if he were to prevail on the question presented.

Petitioner seeks review of the issue of whether a court may "reform" a plea agreement containing a mutual mistake of law. Pet. i. But the Ninth Circuit did not believe that it was "reforming" the agreement. Rather, the Circuit believed that it was simply interpreting the plea agreement between the parties to implement the meeting of the minds that existed. Pet. App. 8a. Because the Court of Appeals simply interpreted the agreement's language to enforce the parties' intent, this Court's guidance on whether a court could further "reform" an agreement to reflect the parties' intent would have no bearing on the outcome below.

Petitioner seeks to manufacture a "reformation" of his plea agreement by claiming that the Ninth Circuit somehow undertook an "aggressive" approach "by rewriting a binding plea agreement to the [petitioner's] prejudice." Pet. 24. Indeed, petitioner claims that both he and the government "seek to enforce the binding plea agreement as written. Only [Jane Doe] seeks to reform the binding plea." Pet. 24. That is not a fair description of the positions below. All three participants to the case below—Jane Doe, the government, and petitioner—offered their interpretations of the plea agreement. None of the three participants called for a "reformation" of the agreement. And the Ninth Circuit never described its decision as a "reformation" of the agreement. The word "reformation" (and its variants) does not even appear in the decision below.

Nowhere in his petition does petitioner even attempt to explain what the restitution provision in his plea agreement actually means. As best one can glean from reading his petition, petitioner believes the entire restitution paragraph is a nullity—and that several years of litigation below were, apparently, much ado about nothing. But petitioner cannot dodge the fact that, after conferring with counsel, he took the position that the district court should award restitution (albeit in the "nominal" amount of $1000). Mand. App. 149. Thus, even under his own interpretation of the agreement, he owes payment of *some* amount to Jane Doe.

It would be height of unfairness for Jane Doe to receive *no* restitution—even when everyone had a meeting of the minds that, in exchange for a lenient prison sentence, petitioner was agreeing to pay her restitution. *Cf.* 18 U.S.C. § 3771(a)(8) (requiring that crime victims be treated with "fairness"). This Court should simply

allow the proceedings below to continue and for the district court to make its final determination of how much restitution petitioner should pay to Jane Doe.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

/s/ Paul G. Cassell

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