No. 22-7286

IN THE SUPREME COURT OF THE UNITED STATES

VONTEAK ALEXANDER, PETITIONER

v.

JANE DOE, ET AL.

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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

SONJA M. RALSTON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the provision of petitioner's plea agreement in which he agreed to pay restitution to his victim gave the district court authority to order him to pay restitution to his victim.

ADDITIONAL RELATED PROCEEDINGS

U.S. Court of Appeals (9th Cir.):

United States v. Alexander, No. 21-10164 (July 12, 2022) (order staying appeal of conviction pending resolution of mandamus petition)

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-9a) is reported at 57 F.4th 667. The order of the district court (Pet. App. 50a-51a) is unreported but available at 2022 WL 1472887. The original opinion of the court of appeals (Pet. App. 35a-42a) is reported at 51 F.4th 1023.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2022. The judgment was amended and a petition for rehearing was denied on January 18, 2023 (Pet. App. 2a). The petition for

a writ of certiorari was filed on April 12, 2023. 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 two counts of interstate travel in aid of unlawful activity, in violation of 18 U.S.C. 1952(a)(3)(A). Judgment 1. The district court sentenced him to 96 months of imprisonment, to be followed by three years of supervised release, but took the view that it lacked authority to order petitioner to pay restitution. Pet. App. 4a-5a; see Judgment 2-3. The court of appeals granted the victim's petition for a writ of mandamus under the Crime Victims' Rights Act, Pub. L. No. 108-405, Tit. I, § 102(a), 118 Stat. 2261 (18 U.S.C. 3771(d)(3)), determined that the district court had erred, and instructed it to address the parties' remaining arguments regarding the propriety and amount of restitution. Pet. App. 5a-8a.

1. In March 2016, "[w]hen Jane Doe was twelve years old," petitioner "drove her from California to Las Vegas, Nevada, knowing that she would engage in prostitution." Pet. App. 2a; see id. at 55a; Amended Presentence Investigation Report (PSR) ¶¶ 14-15. Approximately three weeks later, Doe "approached security at the Orleans Hotel and Casino and told them she was a missing juvenile who was being sex trafficked." D. Ct. Doc. 219, at 1 (May 7, 2019).

Doe informed officers that petitioner had "coerced her to engage in prostitution in California and Nevada and transported her for that purpose," and that Doe "turned over the money she made to [petitioner]." PSR ¶ 14; D. Ct. Doc. 219, at 2. A local police detective "engaged in a series of text exchanges" with petitioner on a phone petitioner had given Doe; petitioner "suggested no confusion about who [Doe] was and the subject of her texts," which "corroborated" Doe's "description of her relationship with" petitioner. D. Ct. Doc. 219, at 3.

A federal grand jury in the District of Nevada indicted petitioner on five counts: (1) conspiring to commit child sex trafficking, in violation of 18 U.S.C. 1591 and 1594; (2) child sex trafficking, in violation of 18 U.S.C. 1591 and 2; (3) conspiring to transport a minor for prostitution or other sexual activity, in violation of 18 U.S.C. 2423; (4) transporting a minor for prostitution or other sexual activity, in violation of 18 U.S.C. 2423 and 2; and (5) coercing and enticing interstate travel for prostitution, in violation of 18 U.S.C. 2422. Indictment 1-4; see Pet. App. 3a.

2. Petitioner entered a binding plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(A) and (C) in which the government agreed to dismiss the counts in the indictment in favor of two counts of the lesser crime of interstate travel in aid of unlawful activity, in violation of 18 U.S.C. 1952(a)(3)(A),

to which petitioner would plead guilty. Pet. App. 3a. The parties also stipulated to a term of imprisonment between 60 and 96 months, with the government agreeing to recommend a within-Guidelines sentence. Ibid.; see Pet. App. 59a. The agreement also included a restitution provision. Id. at 3a.

a. The Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5(a), 96 Stat. 1253 (18 U.S.C. 3663), gives a sentencing court discretion to order restitution to a victim of any offense in Title 18 (as well as certain drug offenses). 18 U.S.C. 3663(a)(1)(A). The VWPA further authorizes restitution in "any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. 3663(a)(3); see 18 U.S.C. 3663(a)(1)(A) (permitting "restitution to persons other than the victim of the offense" if "agreed to by the parties in a plea agreement").

Under 18 U.S.C. 2259, a defendant is required to pay mandatory restitution to the victim of any offense under Chapter 110, relating to child sexual abuse material. 18 U.S.C. 2259(a). At the time of petitioner's indictment, Section 2259(b)(3) defined the "full amount of the victim's losses" for which the victim is entitled to restitution to include, inter alia, medical (including psychological) care, rehabilitation, transportation, temporary housing, lost income, and attorney's fees. 18 U.S.C. 2259(b)(3) (2012).[1] Petitioner's crimes of conviction do not fall within

[1] In 2018, that subsection was moved, unchanged, to subsection (c)(2); the cross-reference in Section 1593(b)(3) was

Chapter 110, but several other restitution provisions cross-reference Section 2259(b)(3)'s formula.

One of those is 18 U.S.C. 1593, which is part of the Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386, Div. A, 114 Stat. 1466. Section 1593 mandates restitution for victims of Chapter 77 offenses, relating to human trafficking (including 18 U.S.C. 1591 and 1594), for "the full amount of the victim's losses." 18 U.S.C. 1593(b)(1); see 18 U.S.C. 1593(a). And it defines the phrase "full amount of the victim's losses" to "ha[ve] the same meaning as provided in section 2259(b)(3) and * * * in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)." 18 U.S.C. 1593(b)(3). Petitioner's crimes of conviction do not fall within Chapter 77, though two of the originally charged crimes do.

Another restitution provision that cross-references Section 2259(b)(3)'s restitution formula is 18 U.S.C. 2429, which similarly mandates restitution for the "full amount of the victim's losses" -- but defines the term simply to "ha[ve] the same meaning as provided in section 2259(b)(3)" -- for victims of Chapter 117 offenses, relating to sex trafficking (including Sections 2422 and

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also updated. This brief refers to Sections 1593 and 2259 as they existed prior to those changes.

2423). 18 U.S.C. 2429(b)(3); see 18 U.S.C. 2429(a) and (b). Petitioner's crimes of conviction do not fall within Chapter 117, though three of the originally charged crimes do.

b. The restitution provision of petitioner's plea agreement provided:

> 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. 59a-60a.

At the plea hearing in May 2019, the prosecutor summarized the plea agreement's "essential terms," Pet. App. 75a, including its restitution provision, id. at 79a. Both petitioner and his attorney agreed with the prosecutor's recitation. Id. at 83a. After reviewing the binding plea agreement with the parties, the district court accepted it without changes. Id. at 86a-87a.

3. Consistent with the plea agreement, the district court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Pet App. 4a.

a. In advance of sentencing, and relying on the TVPA (Section 1593), Doe submitted a restitution request for $15,000, the alleged amount of petitioner's "ill-gotten gains" from Doe's prostitution. Sent. Tr. 19-20; see D. Ct. Doc. 272, at 10 (Dec.

21, 2020). At the sentencing hearing, the court started to grant Doe's motion, but petitioner objected to the amount of restitution, contending that the evidence elicited at an earlier suppression hearing was "not sufficient to establish" that petitioner received $15,000. Sent. Tr. 53. The district court deferred the issue of restitution to a subsequent hearing. Sent. Tr. 55; see Pet. App. 4a.

The day before the scheduled restitution hearing, petitioner filed a motion contending that the TVPA formula that Doe had used in generating her $15,000 request did not apply. Pet. App. 4a; D. Ct. Doc. 316, at 4-6 (Aug. 4, 2021). Petitioner "conceded that Section 2259 was applicable to this case and that the victim in this case could collect under that statute," Pet. App. 50a, but asserted that the amount of restitution was limited to the amount specified in Section 2259 and could not include the additional amounts that are part of the "full amount of the victim's losses" under Section 1593. D. Ct. Doc. 316, at 4; see id. at 4-5. The district court "agree[d] with [petitioner's counsel] that 2259 is the statute that applies" and asked Doe to submit a new request using that statute's formula. D. Ct. Doc. 317, at 9-10 (Aug. 5, 2021); see Pet. App. 4a.

b. Following a reassessment of her losses, Doe sought approximately $1.5 million in "lost future earnings, future medical expenses, attorney's fees, transportation costs, and past

lost wages." Pet. App. 4a; see id. at 50a; D. Ct. Doc. 321 (Aug. 23, 2021). After the district court ordered a response to Doe's revised restitution request, petitioner for the first time, through new counsel, argued that the district court "lacked authority to order restitution." Pet. App. 4a; D. Ct. Doc. 353 (Feb. 4, 2022). He contended that because mandatory restitution under Section 2259 is limited to Chapter 110 offenses and his convictions under Section 1952 do not fall within Chapter 110, the district court lacked statutory authority to require any restitution at all. Pet. App. 6a; see D. Ct. Doc. 353, at 4-12.

At the final restitution hearing in February 2022, petitioner's counsel "recognize[d] that [petitioner] in his plea agreement agreed to pay restitution." D. Ct. Doc. 358, at 6 (Feb. 24, 2022) (Restitution Hr'g Tr.); see id. at 20 (acknowledging petitioner's "understanding that * * * in his plea agreement he agreed to pay restitution"). Petitioner's counsel nonetheless asserted that petitioner "shouldn't be beholden to the drafters of this contract" because his former attorney, rather than petitioner himself, negotiated it with the government. Id. at 8.

When the district court asked the parties to discuss the appropriate amount of restitution should it be ordered, petitioner disputed the validity and amount of the losses for which Doe sought compensation. Restitution Hr'g Tr. 15-17, 20-22. After conferring with petitioner, petitioner's counsel requested that any

restitution order only "impose restitution of $1,000." Id. at 19; see Pet. App. 5a.

c. In May 2022, the district court issued an order denying Jane Doe's request for restitution. Pet. App. 50a-51a. Although it recognized that petitioner "committed egregious acts by which Jane Doe suffered and will continue to suffer," it "simply d[id] not find that it has the authority to order restitution to Jane Doe in this case." Id. at 51a. In particular, the court reasoned that the plea agreement could not grant the court authority to award restitution under Section 2259 because petitioner was not convicted of and did not commit a Chapter 110 offense. Ibid. The court did not address any other statute authorizing restitution. See id. at 50a-51a.

4. The court of appeals granted Jane Doe's petition for a writ of mandamus pursuant to the Crime Victims' Rights Act, 18 U.S.C. 3771(d)(3). Pet. App. 1a-9a. The Act directs that in such a proceeding, "the court of appeals shall apply ordinary standards of appellate review" to such petitions. 18 U.S.C. 3771(d)(3). And applying those ordinary standards here, the court of appeals determined that the district court did have statutory authority to order petitioner to pay restitution, because the VWPA "expressly grant[s] district courts authority to order restitution whenever a defendant has agreed in a plea agreement to pay restitution," "regardless of the crimes of conviction." Pet. App. 5a-6a.

The court of appeals rejected petitioner's argument that "the district court lacked authority to award restitution under the plea agreement in this case." Pet. App. 6a. Examining the plea agreement "'by contract law standards,'" ibid. (quoting United States v. Clark, 218 F.3d 1092, 1095 (9th Cir.), cert. denied, 531 U.S. 1057 (2000)), the court observed that under "the most natural reading of the [restitution] paragraph," "[t]he 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)." Id. at 7a.

The court of appeals also observed that the second sentence of the provision explicitly authorized the district court to order restitution for "losses caused from [petitioner's] dismissed counts and uncharged conduct." Pet. App. 7a. The court of appeals recognized that the restitution paragraph's first sentence -- in which petitioner "'acknowledge[d]' that his conduct [gave] rise to 'mandatory restitution,'" and ended with a citation to Section 2259 -- was "not a model of clarity." Ibid. But it reasoned that the first sentence, when "[r]ead in conjunction with the later sentences," "simply acknowledg[ed petitioner]'s obligation to pay restitution." Ibid.

The court of appeals observed that petitioner's contrary interpretation, under which the first sentence would mean that petitioner "agree[d] to pay restitution only to the extent that

the district court later determined that [his] conduct resulted in the commission of a crime encompassed by § 2259," would "contradict[] other parts of the plea agreement." Pet. App. 7a-8a. And faced with "competing interpretations" of the restitution provision, the court "'looked to the facts of the case to determine what the parties reasonably understood to be the terms of the agreement.'" Id. at 8a (quoting Clark, 218 F.3d at 1095).

The court of appeals found that "the record plainly reflects that the parties all understood that Defendant had agreed to pay restitution, limited to the categories of loss described in § 2259(b)(3)." Id. at 8a. The court cited, inter alia, petitioner's agreement to the summary of the plea's essential terms during the plea colloquy; his "object[ion] to the use of a definition other than the definition found in § 2259"; and his arguments at the first and second hearings that the amount of restitution should be lower. Ibid. And the court explained that because "'the extrinsic evidence unambiguously demonstrates' that [petitioner] agreed to pay restitution for Jane Doe's loss, as defined in § 2259(b)(3), * * * the rule that ambiguities are construed against the government does not apply." Ibid. (quoting Clark, 218 F.3d at 1096).

Finding that "the district court has statutory authority to order restitution," and that its "holding to the contrary was legal error," the court of appeals "grant[ed] the petition for a writ of

mandamus." Pet. App. 8a. In doing so, it "instruct[ed] 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." Ibid.

ARGUMENT

Petitioner contends (Pet. 13-25) that the court of appeals erroneously "reformed" the plea agreement after finding a mutual mistake of law. Pet. 11 (emphasis omitted). That argument lacks merit. The decision below does not implicate any question regarding mutual mistakes of law: the parties did not raise any issue of mutual mistakes of law and the court of appeals did not address any such issue. The court of appeals' factbound interpretation of the parties' plea agreement does not conflict with any decision of this Court or of any other court of appeals. In addition, this case's interlocutory posture would make it a poor vehicle for considering the question presented, even if it were implicated here. As petitioner acknowledges (Pet. 3 n.3), this Court has previously denied petitions raising questions similar to the question presented in this case. It should follow the same course here.

1. As a threshold matter, the interlocutory posture of this case renders it unsuitable for further review. The interlocutory

posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); see also Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari). Denial is particularly warranted in this case, the ultimate outcome of which depends on the disposition of multiple other pending proceedings.

First, the decision below -- which resolved the victim's mandamus petition -- returns the restitution issue to the district court, with instructions "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. Throughout the proceedings, petitioner has contested both the amount of loss and proximate cause. See Pet. C.A. Br. 41-43; Restitution Hr'g Tr. 15-17, 20-22. The district court has indicated that it will not take up the matter on remand until after this Court acts on the petition for a writ of certiorari. See D. Ct. Doc. 382 (Aug. 30, 2023). And a further decision by the district court, following a denial of certiorari at this interlocutory stage, could render it

unnecessary to resolve, or might otherwise affect, the question presented.

Second, petitioner has filed a separate direct appeal of his conviction, see D. Ct. Doc. 304 (Mar. 28, 2021), which the court of appeals stayed, at petitioner's request, pending resolution of the mandamus proceedings. See Clerk Order, United States v. Alexander, No. 21-10164 (9th Cir. July 12, 2022). In his most recent status update to the court of appeals, petitioner argued that "it would be in the interest of judicial economy" for the court to "abstain from" considering his direct appeal "until the District Court determines restitution," "so that [petitioner] can review his final sentence, and determine if he intends to include it into his appeal." Status Report, Alexander, No. 21-10164, at 2 (June 29, 2023).

The Court's practice of denying review in cases in an interlocutory posture promotes judicial efficiency because, among other things, it enables issues raised at different stages of court proceedings to be consolidated into a single petition. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). Petitioner offers no reason to deviate from that practice here. Particularly given that petitioner himself argued

to the court of appeals that his direct appeal and restitution order should be considered together, there is no sound reason for interlocutory review of the mandamus decision in this Court.

2. In any event, the court of appeals correctly recognized that the VWPA authorizes the district court to order restitution in this case.

a. The VWPA provides that "[t]he court, when sentencing a defendant convicted of an offense under" Title 18, "may order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to any victim of such offense." 18 U.S.C. 3663(a)(1)(A). In 1990, this Court held that a restitution award under the VWPA was limited to "the loss caused by the specific conduct that is the basis of the offense of conviction," and that the statute did not permit a court to order restitution for conduct charged in counts that were dismissed as part of a plea agreement. Hughey v. United States, 495 U.S. 411, 413.

In response, Congress amended the VWPA to authorize restitution orders beyond Hughey's scope. Specifically, 18 U.S.C. 3663(a)(3) now provides that the sentencing court may "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); see Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, Tit. XXV, § 2509, 104 Stat. 4863. Thus, "even if the defendant's conduct, or the crimes

to which a defendant pleads guilty, would not otherwise give rise to mandatory restitution, a defendant may agree to pay restitution, and the district court has authority to enforce that agreement by ordering restitution." Pet. App. 6a (collecting cases).

As the court of appeals explained, Section 3663(a)(3) allows victims, the government, and defendants "flexibility to reach a just result for all involved." Pet. App. 6a. For example, the statute allows a defendant to obtain a lower sentence by pleading guilty to a lesser crime, while nonetheless providing the victim the benefit of the restitution that accompanied the initial charges. Ibid. "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." Ibid.

b. Here, the court of appeals correctly determined that petitioner agreed to pay restitution as one of the concessions in his plea. See Pet. App. 6a-8a. Those concessions enabled him, among other things, to avoid "mandatory minimum sentences far greater than the 96-month sentence that he received," without prejudicing his victim. Id. at 6a.

To the extent that petitioner argues (Pet. 22) that the district court lacks authority to order any restitution at all, that argument is unsound. The VWPA expressly applies to all Title

18 offenses, including those for which petitioner was convicted. The district court accordingly had discretion to order petitioner to pay restitution to Doe if it found that she was harmed by petitioner's interstate transport of her for unlawful purposes. See 18 U.S.C. 3663(a)(1)(A). And far from attempting to divest the district court of that authority, the plea agreement here did precisely the opposite. As the court of appeals correctly recognized, it expressly required petitioner to pay restitution and expanded his obligation to include losses caused by uncharged conduct or dismissed counts. Pet. App. 6a-8a; see 18 U.S.C. 3663(a)(3).

Because plea agreements are "essentially contracts," Puckett v. United States, 556 U.S. 129, 137 (2009), courts interpreting plea agreements "examine first the text of the contract." United States v. Gebbie, 294 F.3d 540, 545 (3d Cir. 2002). That examination considers "'the agreement when viewed as a whole'" and does "not read ambiguous phrases in 'blinder-imposed isolation' from the rest of the paragraph." United States v. Taylor, 258 F.3d 815, 819 (8th Cir. 2001) (citations omitted). Moreover, "[p]lea agreements are not always models of draftsmanship," Puckett, 556 U.S. at 143, and "when the words of a plea agreement are unclear, extrinsic evidence may be considered to clarify the parties' understanding," United States v. Gall, 829 F.3d 64, 72 (1st Cir. 2016). Such evidence can include "any contemporaneous

documents that clarify [the agreement's] meaning, and the attorneys', the defendant's and the trial judge's understanding of the agreement." United States v. Rourke, 74 F.3d 802, 806 (7th Cir.), cert. denied, 517 U.S. 1215 (1996).

Applying those principles here, the court of appeals correctly determined that petitioner's plea agreement required him to pay restitution for the full amount of Doe's losses, as defined in Section 2259(b)(3). Petitioner expressly "agree[d]" to the scope of the losses for which he must pay restitution -- those "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. 59a-60a. And he "agree[d] to pay the victim(s)" according to a particular formula -- "'the full amount of the victim's losses' as defined in 18 U.S.C. § 2259(b)(3)." Id. at 60a.

Petitioner nonetheless asserts (e.g., Pet. 21-22) that those express agreements are vitiated because the plea agreement also states that he "acknowledges that the conduct to which he is entering a plea is [sic] gives rise to mandatory restitution to the victim(s). See 18 U.S.C. § 2259." Pet. 6 (citation omitted; brackets in original). But that "acknowledg[ment]" does not undercut petitioner's "agree[ment]" to pay restitution. Pet. App. 59a-60a. Instead, taken in context, it simply acknowledges that his "conduct" -- which exposed him to charges that do require

restitution, defined at least in part by cross reference to 18 U.S.C. 2259, see pp. 4-6 -- "g[ave] rise to mandatory restitution," which would be incorporated into the plea agreement, Pet. App. 59a, even if the specific offenses to which he was pleading did not. Petitioner provides no support for his assertion that the plea agreement's "see" citation eliminated the parties' agreement that he pay restitution consistent with the formula in Section 2259, which would have applied to all five originally charged counts via cross-references in 18 U.S.C. 1593 and 2429.

Moreover, as the court of appeals explained at length, petitioner's conduct through nearly three years of litigation illustrated that he understood the plea agreement to authorize the district court to impose restitution obligations in accord with what he expressly "agreed" to pay. Pet. App. 8a ("Everyone who negotiated the plea agreement understood that [petitioner] agreed to pay restitution to Jane Doe."). The extrinsic evidence thus confirms what the text expressly says: that petitioner agreed to pay restitution under a particular formula.

The court of appeals' decision thus correctly enforces the parties' expectations. As this Court has explained, "'plea bargaining' is an essential component of the administration of justice" and should "be encouraged" to expedite the resolution of cases, to bring finality, and to alleviate the burden on the courts. Santobello v. New York, 404 U.S. 257, 260 (1971). The

court of appeals' determination that petitioner agreed to pay restitution protects that principle by enforcing both the terms of the agreement and the parties' understanding of those terms. And that factbound determination does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

3. Petitioner errs in claiming (Pet. 16-20) that the court of appeals' factbound interpretation of his particular plea agreement conflicts with the decisions of other courts of appeals. Petitioner misreads the decision below and, in any event, he identifies no disagreement in the circuits on mutual mistakes of law in plea agreements that warrants this Court's review.

a. Petitioner's claim that the decision here implicates a circuit conflict rests on his assertion that the court of appeals "rewrote and reformed" the plea agreement to correct a "mutual mistake of law." Pet. 11 (emphasis omitted); see Pet. 11-12, 21-23. But the court of appeals did not find a mutual mistake of law, or even discuss the concept of mutual mistakes. And the court did not rewrite or reform the agreement; rather, as just discussed, the court interpreted the agreement's text in accordance with the parties' intent.

In fact, no party raised the concept of mutual mistakes of law in the briefing before the panel. Doe and the government both

contended that when read as a whole, the plea agreement obligated petitioner to pay restitution. Doe C.A. Br. 13-19; Gov't C.A. Br. 8-11. And petitioner argued that Doe had waived any reliance on 18 U.S.C. 3663; that the plea agreement did not support her restitution request; and that the district court had correctly concluded that it lacked authority to order restitution. Pet. C.A. Br. 15-49.[2]

Only in his petition for rehearing in the court of appeals did petitioner suggest that ordering him to pay restitution would reform the agreement and that the citation to Section 2259 was a mutual mistake -- and even then, only in passing. See Pet. App. 20a. Because petitioner's argument was neither pressed nor passed upon below, it is not properly presented here. See, e.g., Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005); United States v. Williams, 504 U.S. 36, 41 (1992).

b. At all events, petitioner identifies no disagreement in the circuits on mutual mistakes of law that would warrant this Court's review. In particular, he fails to support his contention (Pet. 18) that the courts of appeals "employ no less than eight

[2] In his petition for rehearing, petitioner suggested that the government had argued for reformation based on mistake. Pet. App. 20a; cf. Pet. C.A. Br. 27 (stating that the government had "suggest[ed] * * * that the binding plea agreement's restitution section was erroneous"). But the government stated only that "even if this Court concludes that citation [to Section 2259] was erroneous, the parties' error cannot extinguish the district court's authority, under 18 U.S.C. § 3663(a)(3), to order restitution for the full amount of Doe's losses." Gov't C.A. Br. 10 n.4.

differing doctrines to address mutual mistakes of law in federal plea agreements," or even that they are producing inconsistent results that would require this Court's intervention.

Some of the decisions address separate issues. Some involved post-sentencing changes in law, a situation that petitioner views (Pet. 15-16) as different from mutual mistakes of law at the time of the plea agreement. See, e.g., United States v. Peveler, 359 F.3d 369, 375 (6th Cir.) (finding that Fed. R. Crim. P. 11(c)(1)(C) limits a court's authority to reduce a defendant's sentence due to a retroactive amendment to the Sentencing Guidelines), cert. denied, 542 U.S. 911 (2004). Another (unpublished) decision concerned the proper remedy for a breach of a plea agreement, not a mutual mistake of law. See United States v. Foster, 527 Fed. Appx. 406, 410-411 (6th Cir. 2013).

The remaining decisions either do not find a mistake of law or decline to reform an agreement based on such a mistake.[3] Even

[3] See United States v. Hilliard, No. 21-2358-CR, 2022 WL 4479520, at *1 (2d Cir. Sept. 27, 2022) (stating that "[a] mutual mistake over the Guidelines range is * * * 'an insufficient basis to void a plea agreement' when * * * the plea agreement contains 'express provisions with respect to the possibility of a mistaken prediction as to sentencing calculations'") (quoting United States v. Rosen, 409 F.3d 535, 548 (2d Cir. 2005)); United States v. Frazier, 805 Fed. Appx. 15, 17 (2d Cir. 2020) (mistake regarding defendant's career-offender status did not warrant withdrawal where he "ultimately received a sentence within the range provided for in the plea agreement"); United States v. Johnson, 915 F.3d 223, 234 (4th Cir.) (assuming mutual mistakes existed, they "did not materially affect the exchange of performances or deprive Johnson of the benefits for which he bargained" in original plea agreement district court considered at resentencing), cert. denied, 140 S. Ct. 268 (2019); United States v. Atkinson, 979 F.2d

if petitioner were correct that the decision below in this case does otherwise -- but see pp. 15-21, supra -- he acknowledges (Pet. 20) that the court below also has a "published opinion[]" that adopts his preferred approach. And any intra-circuit conflict should be addressed by the court of appeals. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). The court of appeals' denial of rehearing en banc in this case, Pet. App. 2a, may be based, in part, on the correct perception that this case does not actually involve mutual-mistake-of-law doctrine at all. Further review is accordingly unwarranted.

1219, 1223 (7th Cir. 1992) (finding reformation inappropriate because it was "not the case" that the "contract fails to reflect accurately the terms of the agreement"); United States v. Ritchison, 887 F.3d 365, 369 (8th Cir. 2018) (court took "no position" on whether the plea agreement was based on a mutual mistake of law because even if it did, "the district court did not err in enforcing it"); United States v. Olesen, 920 F.2d 538, 542 (8th Cir. 1990) (reversing district court's "attempt[] to 'revisit' the original plea agreement because of a mutual mistake"); United States v. Frownfelter, 626 F.3d 549, 555-556 (10th Cir. 2010) (declining to void plea agreement because mutual mistake did not affect a "basic assumption on which the plea agreement was made" or have a "material effect on the agreed exchange"); United States v. Weaver, 905 F.2d 1466, 1472 (11th Cir. 1990) (upholding district court's determination that reformation was unwarranted where district court found no mutual mistake of law), cert. denied, 498 U.S. 1091 (1991); cf. Taylor, 258 F.3d at 817 n.1 (defendant did "not raise[]" mutual mistake "as an issue for appeal").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

SONJA M. RALSTON
Attorney

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