NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EDMOND CARL WARRINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the $5,000 additional special assessment imposed under 18 U.S.C. § 3014, which applies upon conviction of certain enumerated federal offenses, requires a non-indigent defendant to pay a single special assessment in "an amount of $5,000," as held by Second Circuit, or to pay $5,000 for every qualifying conviction, as held by the Tenth Circuit below as well as the Third and Ninth Circuits?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Edmond Carl Warrington, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on August 11, 2023.

OPINION BELOW

The published decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Warrington*, 78 F.4th 1158 (10th Cir. 2023) is found in the Appendix at A1.

JURISDICTION

The United States District Court for the District of Eastern District of Oklahoma had jurisdiction in this criminal case under 18 U.S.C. § 3231 and § 1153. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on August 11, 2023. On October 23, 2023, this Court extended the time to file this petition to December 11, 2023. (Appendix at 9.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

18 U.S.C. § 3014. Additional special assessment

(a) In general. -- Beginning on the date of enactment of the Justice for Victims of Trafficking Act of 2015 and ending on [December 23, 2024][1], 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—

(1) chapter 77 (relating to peonage, slavery, and trafficking in persons);

(2) chapter 109A (relating to sexual abuse);

(3) chapter 110 (relating to sexual exploitation and other abuse of children);

(4) chapter 117 (relating to transportation for illegal sexual activity and related crimes); or

(5) section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) (relating to human smuggling) . . . .[2]

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[1] Section 3014, enacted as part of the Justice for Victims of Trafficking Act ("JVTA"), included a sunset provision; originally set to end in September 2019, Congress has extended the assessment repeatedly, and it is currently due to expire December 23, 2024. *See, e.g.*, September 11, 2022. *See* Pub. L. 114-22, Title I, § 101(a), Title IX, § 905, May 29, 2015; Pub. L. 117-103, Div. O, Title IV, § 401, Mar. 15, 2022, 136 Stat. 788; Pub. L. 117–177, § 1, Sept. 16, 2022, 136 Stat. 2109; Pub. L. 117–180, div. C, title I, § 102, Sept. 30, 2022, 136 Stat. 2133; Pub. L. 117–229, div. B, title I, § 102, Dec. 16, 2022, 136 Stat. 2309; Pub. L. 117–328, div. X, § 101, Dec. 29, 2022, 136 Stat. 5523; Pub. L. 117–347, title I, § 105(c), Jan. 5, 2023, 136 Stat. 6204.

[2] The full text of § 3014, as well as the full text of § 3013, which provides for special assessments of varying amounts in *all* federal criminal cases, including those covered and which is discussed *infra*, appear in the Appendix at A11.

STATEMENT OF THE CASE

This case originated over five years ago with state criminal charges in Oklahoma. (Vol. II at 109-11, 114-15. 147.)[3] There, Mr. Warrington, who is a member of the Cherokee Nation, a federally recognized Indian tribe (vol. III at 278), was accused of engaging in unlawful sexual activity with his 18-year-old niece-by-adoption, S.R. (Vol. II. at 114-15.) Two years into that case, however, this Court held in *McGirt v. Oklahoma*, that the state of Oklahoma "lack[ed] jurisdiction to prosecute" a defendant who, like Mr. Warrington, is an Indian and where, as here, the crime occurred in Indian Country. 140 S. Ct. 2452, 2474 (2020). This Court made clear, however, that the federal government instead had jurisdiction to prosecute such offenses, *Id.* at 2476, 2480, and, accordingly, in the wake of *McGirt* federal charges were filed.

The federal case proceeded to a jury trial, at which Mr. Warrington was acquitted of three counts of sexual abuse, but convicted of three counts of violating 18 U.S.C. § 2242 by engaging in specified acts with someone determined to be incapable of appraising the nature of the sexual conduct charged. (Vol. I at 347, 349, 351; *see also id.* at 20-22.)

[3] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

At sentencing, the government urged the court to impose a $5,000 assessment under 18 U.S.C. § 3014, and to do so on each count of conviction. (Vol. III at 1055; Vol. II at 118.) This provision, enacted as part of the Justice for Victims of Trafficking Act ("JVTA"), is a relatively new, and narrow, special assessment. First established in May 2015, *see* Pub. L. No. 114-22, 129 Stat. 227 (2015), the JVTA added a new section 3014 to Title 18, providing for a $5,000 "[a]dditional special assessment" on covered offenses. As pertinent here, the statute provides:

> (a) In General.—Beginning on the date of enactment of the Justice for Victims of Trafficking Act of 2015 and ending on [December 23, 2024],[4] 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—
>
> . . .
>
> (1) chapter 77 (relating to peonage, slavery, and trafficking in persons);
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> (5) section 274 of the Immigration and Nationality Act (U.S.C. 1324) (relating to human smuggling) . . . .

18 U.S.C. § 3014(a) (emphasis added).

[4] The JVTA included a sunset provision which Congress repeatedly has extended. *See supra* n.1.

The statute under which Mr. Warrington's convictions arose, § 2242, falls within chapter 109A of Title 18, and is, therefore, a JVTA-qualifying offense. Without objection from defense counsel (Vol. II at 146; Vol. III at 1056), the court imposed this additional penalty as requested by the government—that is, on a per-count basis, or $5,000 for *each* of three counts for $15,000 total. (*Id.* at 1056-57; Vol. I at 411.)

On appeal, Mr. Warrington argued that the district court plainly erred in imposing this $15,000 special assessment under § 3014 because the statute's clear language calls for a single $5,000 fine for each eligible *person*, not $5,000 for each count of conviction. (Appendix at A5.) Although this claim was subject to plain-error review in light of the lack of objection at sentencing, the Tenth Circuit considered and answered the legal question in full, publishing its opinion and definitive statutory interpretation for application in the Tenth Circuit. (*Id.* at A4-7.) Specifically, the court acknowledged that there was a circuit split on this question, but opted to join the now-majority view that the special assessment provided for in § 3014 is to be applied on every count of conviction. (*Id.* at A6-7.) This petition follows.

REASONS FOR GRANTING THE WRIT

Congress mandates that any person convicted of "an offense against the United States" pay a nominal special assessment under 18 U.S.C. § 3013. The total amount of this special assessment ranges between $5 to $400, depending on the type of infraction or class of offense and whether the defendant is an individual or

an organization. 18 U.S.C. § 3013(a)(1)-(2). In *Rutledge v. United States*, 517 U.S. 292, 301 (1996), this Court explained that § 3013 requires a "special assessment for every conviction."

In 2015, Congress mandated "an additional" special assessment in "an amount of $5,000" under 18 U.S.C. § 3014(a), triggered only if "any non-indigent [defendant]" is "convicted of an offense" that falls under five enumerated offense categories. *See* 18 U.S.C. § 3014(a)(1)-(5). Because the text and structure of § 3014 differ from § 3013, the federal circuit courts do not agree on how to interpret § 3014—that is, whether this additional assessment in "an amount of $5,000," once triggered by a conviction under a qualifying offense category, is to be imposed only once per defendant or repeatedly for each qualifying conviction the defendant sustains. Because this important and recurring constitutional question is the subject of a circuit split, and because the Tenth Circuit's approach is inconsistent with the statute's plain text, this Court should grant certiorari.

A. The circuits are split as to whether the $5,000 special assessment imposed under 3014 applies on a per case or per count basis.

The federal circuits disagree on how to interpret 18 U.S.C. § 3014(a)'s mandate to impose an additional special assessment in an amount of $5,000 on non-indigent defendants convicted of a qualifying offense under 18 U.S.C. § 3014(a)(1)-(5).

1. One view, followed by the Second Circuit, limits the assessment to "an amount of $5,000" per-defendant once the § 3014 is triggered by a qualifying

conviction. That's because, that court explained, "the text of § 3014, taken as a whole and in its context, is straightforwardly meant to be applied on a per-offender, not a per-count, basis." *United States v. Haverkamp*, 958 F.3d 145, 149 (2d Cir. 2020). Specifically, the Second Circuit began with the statute's text, and found the "provision directs the court to 'assess an amount of $5,000' on any non-indigent person or entity convicted of an [eligible] offense.'" *Id.* (quoting 18 U.S.C. § 3014(a) (emphasis in original). Applying "grammar and common understanding," the Second Circuit concluded the phrase "'an amount' on any person convicted means the amount is assessed one time. It does not mean an amount for each count of conviction." *Id.*

Confirming this textual analysis, the Second Circuit compared the language Congress chose to enact 18 U.S.C. § 3014 with the language Congress chose to enact 18 U.S.C. § 3013. *Id.*at 149-150. That comparison revealed "that when Congress intended multiple amounts to be assessed rather than 'an amount' it knew how to do so." *Id.* at 149. That is,

> [s]pecifically, under § 3013, courts are instructed to: to impose a special assessment, the amount of which varies, with specifications for the grade or classification of the offense or offenses of which the defendant is convicted. Indeed, § 3013(a) is divided into subsections, providing for distinct and nominal charges depending on whether the offense is an infraction, misdemeanor, or felony, and then further divided based on the class of misdemeanor. 18 U.S.C. § 3013(a). Section 3013 specifically ties the amount of the special assessment to the classification of the offense of conviction, and therefore plainly authorizes multiple assessments where there are multiple counts of conviction.

> The special assessments of § 3013 are also nominal, ranging from $5 for an infraction or a class C misdemeanor to $50 for a felony. As this Court has noted, it would not make sense to read § 3013 as imposing only one assessment on a given defendant.

Id. at 149-50. As such, § 3013 "is a reticulated provision that calibrates assessments according to the severity of the offense(s)—from infractions to felonies and then sub-classifies them according to the class of misdemeanors." *Id.* at 150 n.3. Accordingly, each such discrete category of offense is subject to assessments in "the amount" indicated. *Id.*

On the other hand, the circuit explained, § 3014—underpinned by the phrase "an amount"—only authorizes courts to impose "a single assessment: $5,000 if a defendant is convicted of an eligible offense. The classification of the offense and the number of offenses is not relevant to the assessment." *Id.* at 150 & n.3. Viewing the $5,000 assessment as a singular penalty is reinforced by its exponential increase from those in § 3013 by "one hundred to one thousand times." *Id.* at 150 n.3. Indeed, the circuit found this reading of § 3014 to be so clearly correct, that it reversed the per-count imposition of the special assessment in *Haverkamp* under plain error review, which standard applies only where the error is "clear or obvious." *Id.* at 150 n.3.

2. In contrast, another view, first adopted by the Third Circuit and then by a split panel of the Ninth Circuit and the Tenth Circuit below, requires a $5,000 assessment be imposed for each qualifying conviction.

In *United States v. Johnmann*, , the Third Circuit interpreted § 3014(a) to mandate a $5,000 assessment for each "enumerated offense" falling within the five designated offense categories. 948 F.3d 612, 618 n.6 (3d Cir. 2020). The Third Circuit flatly discounted the textual and structural differences between § 3014(a) and § 3013(a) discussed by the Second Circuit. *See id.* at 617-20. Instead, because each statute contains the phrase "convicted of an offense," the court relied on cases interpreting § 3013 to define that phrase in § 3014. *Id.* at 616 n.2, 617, 619. And, when applying § 3013's interpretative gloss to § 3014 and insularly focusing on this "convicted of" phrase, the court concluded that *every* triggering offense "requires a separate assessment, no matter how many convictions." *Id.* at 617.

A split panel of the Ninth Circuit later adopted the Third Circuit's view, over a strong dissent embracing the Second Circuit's approach. *See United States v. Randall*, 34 F.4th 867 (9th Cir. 2022), and the Tenth Circuit followed suit in this case.

3. Finally, at least three other circuits similarly have similarly split in cases that simply assume, without discussion or argument, that § 3014 provides for a $5,000 penalty on a per-defendant basis, or, on the other hand, on a per-count basis. *Compare, e.g.*, *United States v. Kelly*, 861 F.3d 790, 792 (8th Cir. 2017) (affirming a $5,000 fine under § 3014 where defendant convicted of five eligible counts), *with, e.g.*, *United States v. Perez*, 693 F. App'x 364, 364-65 (5th Cir. 2017) (affirming $15,000 assessment under § 3014 where defendant convicted of three eligible counts); United States v. Pye, 781

F. App'x 808, 814 (11th Cir. 2019) (upholding without analysis a $15,000 assessment under 18 U.S.C. § 3014)

* * *

All told, this split is entrenched and long standing, and the respective answers to the question presented require no further development in the lower courts. The issue is ripe for this Court's review, and only it's intervention can resolve the statutory-interpretation question. *See Rutledge v. United States*, 517 U.S. 292, 296-97, 301 (1996) (resolving split on interpretations of § 3013). Certiorari should be granted for this reason alone.

B. The Tenth Circuit's approach is inconsistent with the statute's plain text.

Certiorari also is warranted, however, because the majority approach is inconsistent with the most fundamental tenets of statutory construction. Section 3014's additional special assessment plainly applies once per *defendant*, not once per *count* of conviction.

Statutory construction, of course, begins with the text of the statute. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). Here, that analysis is straightforward—section 3014(a) unambiguously states that only one $5,000 fine is to be imposed on *a defendant* (any non-indigent person), not $5,000 for each count of conviction. That is, it directs the court to "assess an amount of $5,000 *on any non-indigent person* or entity convicted of an [eligible offense]." § 3014 (emphasis added). As

the Second Circuit explained, "[a]s a matter of grammar and common understanding 'an amount' on any person convicted means the amount is assessed one time." *Haverkamp*, 958 F.3d at 149. Moreover, when, as here, the word 'amount' is followed by 'of' and a specific numerical value (here, $5,000), that value is naturally understood as fixed. *See, e.g.*, *Amount*, 2.c, Oxford English Dictionary Online (noting that when "[c]hiefly followed by *of* and a numerical value, 'amount' refers to "[a] precise sum, total, or quantity amounting to the specified figure").

Put simply, a single $5,000 assessment—"an amount"—is to be assessed "on any [eligible offender]." The statue says nothing about the number of counts at issue being relevant, let alone hints that a defendant may be ordered to pay multiples of $5,000 if convicted of more than one count. To be sure, Congress *could* have included language assessing that amount for each qualifying count of conviction; that it did not is telling. The straightforward application of the statute's plain text answers the question here—as this Court has explained, "when a statutory examination yields a clear answer, judges must stop." *Food Mktg. Inst. V. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

* * *

Although the likelihood of prevailing on the merits is not a prerequisite to review, the plainness of the statutory interpretation at issue here further belies that this Court's review is appropriate before the split among the circuits deepens further.

C. The issue is important and recurring, and only this Court's intervention can address it.

Finally, review is warranted because the statutory question presented is recurring and important. Section 3014 assessments may be imposed upon conviction for a multitude of qualifying felony offenses. *See* 3014(a). Moreover, the impact in an individual case is far-reaching as it is the difference of owing $5,000—already an amount that is *50 times* greater than the $100 assessed for most felony convictions—or a penalty that may be many orders of magnitude higher.

This is important because it implicates fundamental sentencing rights. Federal judges must sentence defendants "within the statutory range established by Congress." *Mistretta v. United States*, 488 U.S. 361, 391 (1989), a restraint that is crucial to the fair administration of justice. But the divide over what penalty amount is mandated by § 3014 undermines that fairness and results in inequitable sentences among similarly-situated defendants. A defendant convicted in New York of the *same* offenses as Mr. Warrington in New York would owe *$10,000 less* under the same law than was imposed here. Put simply, defendants like Mr. Warrington receive *harsher* federal sentences in circuits where a $5,000 additional special assessment under § 3014 is aggregated for each qualifying conviction. That discrepancy, based entirely on a question of statutory interpretation, is intolerable, and only this Court's intervention can address it. *See Rutledge*, 17 U.S. at 296-97.

Moreover, this case is a good vehicle to address the issue before the split deepens further. Although this case went before the Tenth Circuit on plain error review, the circuit addressed the merits of the error alleged and definitively answered the question as a matter of now-controlling law for the Tenth Circuit. Its decision deepened the existing split.

Nor do any other factors weight against review. The fact that this is a provision that applies only to "non-indigent" defendants does not impact the importance of the question of statutory analysis, nor does it diminish the frequency of this provision's applicability. Indeed, as demonstrated by this case itself, a defendant may be indigent for purposes of qualifying for appointed counsel under the Criminal Justice Act but nonetheless be determined non-indigent for purposes of 3014. *See also Randal*, 34 F.4th at 868. And nor does the fact that § 3014 contains a sunset provision prevent this issue from necessitating review. Since the JVTA's enactment in 2015, Congress has consistently reauthorized the special $5,000 special assessment, which is currently not due to expire again for another year, in December of 2024. *See supra* n.1 (recounting statutory extensions). There is no reason to believe that Congress will not continue to re-authorize collection of this special assessment, as it has done consistently for nearly a decade.

* * *

Put simply, this is an important statutory question that is currently the subject of entirely inconsistent applications, and one, therefore, that only this Court can finally resolve. This case is an excellent vehicle in which to do, and for these additional reasons this Court should grant review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 11, 2023