NO. 23-6244

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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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REPLY ARGUMENT

The question presented here, one that has split the circuits, is straightforward: namely, whether the additional $5,000 special assessment provided for in 18 U.S.C. § 3014 is to be imposed on a per-defendant or a per-count basis. The government has twice before argued against the Court addressing this important question of statutory interpretation, and its Brief in Opposition here reprises those same refrains.[1] But they carry far less force today, and in this case, and ultimately none of the reasons the government offers weigh persuasively against this Court's review.

A. The circuits are split, and the relevant legal arguments require no further development.

Initially, while the government acknowledges (at 6, 9) that the circuits are split, it attempts to downplay that tension, describing the split as "limited" and "narrow." For three reasons, this minimization rings hollow.

First, the government's rote nose counting—comparing three circuits to one—belies the actual tension in the opinions below. For one thing, the Second Circuit not only concluded that § 3014 applies on a per-defendant basis, but determined that it did *so straightforwardly* that it reached this conclusion and reversed on plain error review, which applies only where the error is "clear or obvious." *United States v.*

[1] See the Briefs in Opposition in *Randall v. United States*, 22-6109 and *Johnman v. United States*, No. 19-8799.

Haverkamp, 958 F.3d 145, 149, 150 n.3 (2d Cir. 2020).[2] This "obvious[ness]" stands in stark contrast to the Third Circuit's conclusion—also reached on plain error review—that the statute was "clear" in the *completely opposite* way, and must be applied on a per-count basis. *See United States v. Johnman*, 948 F.3d 612, 615, 621 (3d Cir. 2020). Additionally, the majority view on which the government relies is not itself a clean consensus, as the Ninth Circuit's per-count reading of § 3014 was a fractured opinion, with a strong dissent echoing the Second Circuit's per-defendant approach. *See United States v. Randall*, 34 F.4th 867, 878 (9th Cir. 2022) (Wardlaw, J., dissenting). All told, the judges of the courts of appeals have reached not only opposite conclusions, but *starkly* opposite conclusions, when interpreting § 3014. This alone warrants the Court's intervention.

[2] That the Second Circuit described its plain error review of sentencing decisions as "relaxed" changes nothing about the force of this split. *Haverkamp*, 958 F.3d at 149. That standard is the same as this Court has endorsed for plain sentencing errors, under which the third and fourth prongs of plain error review are more readily satisfied in the sentencing context, in part due to the clear relationship between such errors and the ultimate sentence imposed, as well as the relatively low costs of error correction in the sentencing context. *See Rosales-Mireles v. United States*, 585 U.S. 129, 140-41 (2018) (explaining that the failure to correct a plain Guidelines sentencing error that affects a defendant's substantial rights will in the ordinary case also seriously affect the fairness, integrity, and public reputation of judicial proceedings, and quoting *United States v. Williams,* 399 F.3d 450, 456 (2d Cir. 2005)); *Molina-Martinez v. United States*, 578 U.S.189, 204 (2016) (concluding that plain errors in establishing a defendant's Guidelines sentencing range will typically affect the sentence, and in the ordinary case, therefore, affect that defendant's substantial rights under the third prong of plain-error review); *accord United States v. Olano*, 507 U.S. 725 (1993) (articulating plain error prongs).

Second, the government also acknowledges that other circuits have applied the statute inconsistently and uncritically, affirming special assessments imposed on *both* a per-defendant *and* per-count basis.[3] The government thinks this weighs against certiorari, but the opposite is true. That *both* competing interpretations can be presumed correct only further demonstrates the interpretive challenge posed by § 3014 and the unlikelihood of resolution without this Court's intervention. Moreover, these discrepancies only further illustrate the striking lack of uniformity in sentencing throughout the country on this issue, an inconsistency that means a defendant in New York City or Kansas City, Missouri is subjected to a $5,000 penalty, while a defendant in Newark or Kansas City, Kansas convicted of the *same offenses* is subjected to multiples of that penalty. *Compare, e.g.*, *Haverkamp*, 958 F.3d at 149; *United States v. Kelly*, 861 F.3d 790, 792 (8th Cir. 2017) (affirming a $5,000 assessment under § 3014 where defendant convicted of five eligible counts); *with Johnman*, 948 F.3d at 621; *United States v. Warrington*, 78 F.4th 1158, 1171 (10th Cir. 2023) (affirming $15,000 fine assessment under § 3014 where defendant convicted of three eligible counts). These inconsistent cases, therefore, only add support to the need for this Court's

[3] *See, 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); *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).

review. *See Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (explaining that resolving a split on the same matter of federal law, and bringing uniformity to federal courts, is a purpose of granting certiorari).

Third, while the question presented may be narrow, the split is well-defined. Indeed, the government does not dispute that further development of the issue is unlikely. That is, with four circuits weighing in with published opinions, the respective statutory-interpretation arguments for each position have been fully articulated and are now simply being adopted. *See, e.g. Warrington*, 78 F.4th at 1168 (agreeing with *Johmman* and *Randall* majority); *Randall*, 34 F.4th at 878 (Wardlaw, J., dissenting) (arguing for adoption of *Haverkamp* analysis). That is, on the one hand, the Third Circuit and Ninth Circuit majority have focused on the phrase "convicted of an offense," in the JVTA's command to "assess an amount of $5,000 on any non-exempt person or entity *convicted of an offense* under certain enumerated chapters of the criminal code." *Johnman*, 948 F.3d at 617. In contrast, the Second Circuit and Ninth Circuit dissent focused on the phrase "an amount of $5,000," explaining that "as a matter of grammar and common understanding," "an amount of $5,000 is assessed one time. *Haverkamp*, 958 F.3d at 149; *see also Randall*, 34 F.4th at 878-81. The former courts found that similarities with § 3013 supported their view, while the latter found the differences between § 3013 and § 3014 supported their view. *Compare Johnman*, 948

F.3d at 619-20 *and Randall*, 34 F.4d at 875-76 *with Haverkamp*, 948 F.3d at 149-50 and *Randall*, 34 F.4th at 880 (dissent).

This Court is not required to simply wait until more circuits line up on either side. *See* Sup. Ct. R. 10(a) (explaining that certiorari may be appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter") (emphasis added). Put simply, the question presented is ripe for this Court's review, and just as it did when the circuits split on how to implement § 3013's special assessment provision, the Court should do the same now for the special assessment Congress implemented thirty years later, using different statutory language, in § 3014. *See Rutledge v. United States*, 517 U.S. 292, 296-97, 301 (1996) (resolving split on interpretations of § 3013).

B. Neither the statute's sunset provision nor the plain error standard weigh against this Court's review of this important question.

The also government argues that review is unwarranted because § 3014(a) is a statute with a sunset date and is currently due to expire on December 23, 2024 and because this case arose in the circuit below on plain-error review. The government drastically overstates these facts as concerns.

As to the sunset date, the government entirely ignores the fact that Congress has consistently reauthorized the JVTA since its 2015 enactment. *See, e.g.*, PL 115-392, 132 Stat 5250 (Dec. 21, 2018) *and* Petition at 2 n.1 (recounting recent reauthorization).

It offers no reason—just speculation—to think the same will not happen for the current sunset date. Moreover, if the government's argument were correct, then this Court would *never* review a statute with a sunset provision, because of the mere *possibility* it would not be reauthorized. But of course, that's not the case—this Court *does* grant review of statutes with expiration dates. *See, e.g.*, *Maryland v. King*, 569 U.S. 435 (2013) (evaluating state DNA collection statute notwithstanding statutory expiration date falling during the Court's term) *and id.*, Sup. Ct. No. 12-207, Petition for Writ of Certiorari at 12 n. 4, 2012 WL 3527847 (identifying sunset provision at time of certiorari); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 404 n.2 (2013) (granting review to address the constitutionality of surveillance provision months before scheduled sunset, which was reauthorized while case was pending before this Court) *and id.*, Sup. Ct. No. 11-1025, Reply to Brief in Opposition at 11, 2012 WL 1561108 (identifying sunset provision at time of certiorari); *see also Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 535, 538-39 (2013) (recounting cases considering challenges to Voting Rights Act provisions notwithstanding sunset provisions and repeated reauthorizations). This case is no different and the speculative and remote possibility that the JVTA special assessment will suddenly cease to exist while this case is pending presents no bar to review.

Next, the government's suggestion that the plain-error posture below disfavors certiorari misses the mark for at least three reasons.

First, The Tenth Circuit did not decide the issue on plainness grounds. Rather, just like the Second Circuit, Third Circuit, and the Ninth Circuit majority and dissent, the court engaged in a full statutory analysis and issued a published decision explaining its binding interpretation of § 3014 for the Tenth Circuit. *See Warrington*, 78 F.4th at 1167-71.

Second, if the government were right, it would mean that this Court's review would be categorically unavailable where a party fails to object before a district court. But again, that's not so. Rather, this Court *does* grant review when, as here, a legal issue is squarely presented, even absent a contemporaneous objection. In such cases, this Court's practice is to decide the legal issue and remand for the courts of appeals to determine whether relief is warranted under the plain-error standard. *See, e.g.*, *Tapia v. United States*, 564 U.S. 319, 322 (2011) (conducting statutory analysis, notwithstanding objection below, and concluding that 18 U.S.C. § 3582(a) "precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation"); *Fowler v. United States*, 563 U.S. 668, 678 (2011) (clarifying an evidentiary standard and remanding to the court of appeals to decide whether there was plain error).

Third, the government's contention that Mr. Warrington might not prevail on remand—even were this Court to agree with his reading of § 3014—presupposes a requirement this Court has never imposed at the certiorari stage. To be sure, Mr.

Warrington argues that he *would* prevail because the statute plainly—as the Second Circuit concluded—requires a per-defendant $5,000 special assessment. But ultimately, the question is neither here nor there: the possible outcome of a remand should have no bearing on this Court's decision to grant review.

Indeed, quite to the contrary, this Court routinely grants writs of certiorari to address important questions even where the Petitioner *may* not prevail on remand. *See, e.g.*, *Tapia*; 564 U.S. at 335 ("Consistent with our practice, we leave it to the Court of Appeal to consider the effect of Tapia's failure to object to the sentence when imposed.") (citations omitted); *United States v. Marcus*, 560 U.S. 258, 266-67 (2010) (remanding for the court of appeals to "consider[] whether the error at issue in this case satisfies this Court's 'plain error' standard"); *Brendlin v. California*, 551 U.S. 249, 263 (2007) (remanding suppression question "for the state courts to consider in the first instance"); *Rodriguez v. United States*, 575 U.S. 348, 358 (2015) (remanding "for further proceedings consistent with this opinion").[4] This case is no different, and what could happen on remand should present no bar to review now.

[4] Incidentally, in many such cases the Petitioner criminal defendant did not ultimately prevail on remand. *See, e.g.*, *People v. Brendlin*, 195 P.3d 1074, 1081 (2008), *cert denied*, *Brendlin v. California*, 556 U.S. 1192 (2009) (concluding that discovery of an outstanding arrest warrant attenuated taint of unlawful stop such that suppression of evidence was not warranted); *United States v. Rodriguez*, 799 F.3d 1222, 1224 (8th Cir. 2015), *cert denied*, *Rodriguez v. United States*, 578 U.S. 907 (2016) (concluding that officer's reliance on binding circuit precedent meant that suppression was not warranted).

Finally, the government never suggests the question presented isn't important. That's unsurprising, because it is. This case asks *what* special assessment penalty Congress imposed in § 3014—$5,000, or $5,000 per count—and that is a question that goes straight to the heart of the sentencing court's authority. After all, courts may not "prescribe[e] greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); *see also Mistretta v. United States*, 488 U.S. 361, 391 (1989) (explaining that federal courts must sentence defendants "within the statutory range established by Congress"). Moreover, 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.

CONCLUSION

The question presented concerns a fully developed circuit split on an important legal question of statutory interpretation on which no further meaningful development is likely in the courts of appeal. It is, simply put, precisely the type of case in which this Court's review is warranted, and as the government offers no persuasive reasons that weigh against review, the writ of certiorari should be granted.

Respectfully submitted,

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