NO. _____

In the

Supreme Court of the United States

JOSEPH MICHAEL KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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I. QUESTION PRESENTED FOR REVIEW

Under 18 U.S.C. § 3014(a), defendants convicted of certain sexual offenses must be assessed a $5000 special assessment if one other condition is met – the district court finds that they are "non-indigent." The question presented in this Petition is whether the Government should bear the burden of proving that a defendant is "non-indigent," as it does with any other fact that provides a basis for enhancing a defendant's sentence.

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- *United States v. King*, No. 2:19-cr-000301, U.S. District Court for the Southern District of West Virginia. Judgment entered November 2, 2021.
- *United States v. King*, Appeal No. 21-4635, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on August 17, 2023, petition for rehearing denied on November 21, 2023.

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming King's sentence conviction is unpublished and is attached to this Petition as Appendix A. The Fourth Circuit's order denying King's petition for rehearing is also unpublished and is attached to this Petition as Appendix B. The district court's ruling regarding the $5000 special assessment was made orally at sentencing. The relevant portion of the sentencing hearing transcript is attached to this Petition as Appendix C. The judgment order is unpublished and is attached to this Petition as Exhibit D.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on August 17, 2023. King filed a timely petition for rehearing, which the Fourth Circuit denied on November 21, 2023. This Petition is filed within 90 days of the date the court's entry of its judgment on the petition for

rehearing. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of 18 U.S.C. § 3014(a), which provides, in pertinent part:

> Beginning on the date of enactment of the Justice for Victims of Trafficking Act of 2015 and ending on December 23, 2024, 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—
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> * * *
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> **(4)** chapter 117 (relating to transportation for illegal sexual activity and related crimes);

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On December 10, 2019, an indictment was filed in the Southern District of West Virginia charging Joseph Michael King with using a facility and means of interstate commerce to persuade a minor to engage in sexual activity, in violation of 18 U.S.C. § 2242(b). J.A. 7-8.[1] Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after King pleaded guilty to the indictment. J.A. 38-40. A Judgment and Commitment Order

[1] "J.A." refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

was entered on November 2, 2021. J.A. 133-141. King filed a timely notice of appeal on November 15, 2021. J.A. 142. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case arises from online interactions between King and an undercover officer that resulted in King pleading guilty to a sexual offense that requires the district court to impose an additional $5000 special assessment upon King – ***if*** he is "non-indigent." In spite of King qualifying for appointed counsel during the entirety of his case and not having the ability to pay a fine due to his indigency, the district court imposed the assessment, after placing the burden on King to prove he was indigent.

1. King pleads guilty to an offense under 18 U.S.C. § 2242(b), which requires the imposition of a $5000 special assessment if he is "non-indigent."

In February 2019, an undercover police officer on the Meet24 app began having a conversation with "Joe." Over the next eleven days, "Joe," who claimed he was twenty-four years old, engaged in repeated discussions of a sexual nature with the undercover officer, who was portraying a fifteen-year-old girl. "Joe" also sent her sexually explicit pictures. Investigators eventually learned that "Joe" was King, tracking him down via the phone number he had provided to the undercover officers. Investigators also learned that King had a prior 2002 conviction for sodomy involving a thirteen-year-old girl. J.A. 145-146.

As a result of that investigation, King was charged with using a facility of interstate commerce to persuade or entice a minor into sexual activity. J.A. 7-8. King pleaded guilty to the single count in the indictment, without a plea agreement. J.A. 38-40. During the plea hearing, the district court informed King that he faced a mandatory minimum sentence of ten years in prison and maximum of life, a fine of up to $250,000, and a supervised release term of up to life. J.A. 21-22. With regards to special assessments, the only one the district court informed King of was that he would be required to pay "a special assessment of $100 for having been convicted of this felony." J.A. 22.

Following King's guilty plea, a presentence investigation report ("PSR") was prepared to assist the district court at sentencing. J.A. 143-167. The probation officer recommended that King's final offense level be 34 and his Criminal History Category V, producing an advisory Guideline range of 235 to 293 months in prison. J.A. 148, 154, 160. The only financial penalties set forth in the PSR were the $100 special assessment and maximum $250,000 fine mentioned during the plea colloquy. J.A. 165. As to King's financial condition, the probation officer noted that before his arrest King "was financially supported by his parents and has a medical card." J.A. 160. He had "no monthly income" and "no assets," but had debts of more than $54,000. *Ibid*. Based on this, the probation officer concluded that King "does not appear to have the ability to satisfy a guideline range fine." *Ibid*.

Although neither party objected to the recommendations of the PSR directly, objections were lodged in memoranda filed prior to sentencing. As relevant to this

Petition, the Government in its initial sentencing memorandum argued that an additional $5000 special assessment must be imposed, pursuant to 18 U.S.C. § 3014, "unless this Court determines [King] is indigent." J.A. 47. King's memorandum did not address the $5000 special assessment. In a response memorandum, the Government reiterated its position that the $5000 special assessment applied. J.A. 77-79.

2. The district court imposes the $5000 special assessment because King failed to prove he was indigent.

Sentencing for King was held on November 1, 2021. J.A. 82-132. The district court ultimately adopted the range of 235 to 293 months set forth in the PSR. J.A. 96. It imposed a sentence of 204 months in prison, followed by a lifetime term of supervised release. J.A. 112.

As to the $5000 special assessment. King argued that it should not be imposed, noting that he has "an almost 20-year documented drug and criminal history based on his chronic addiction" and that he had little chance for employment after completing his sentence. J.A. 107-108. In addition, "while he wants to work and do things, physically he's not really capable of doing it." J.A. 108. He would also be "denied access to technology" and was "not going to have any future earning capacity to pay this." *Ibid*. King also referenced the conclusion from the PSR that he could not pay a fine. *Ibid*. The Government countered that King could be ordered to pay $25 of the assessment per month while incarcerated and then the district court could reevaluate the situation once he was released, concluding that "at this point it's

simply too speculative to make a decision as to what his earning capacity will be when he's out of prison." J.A. 108-109. King replied that imposing the assessment was "only going to make it that much more difficult for him to be a productive member of society whenever he's finally released," but that the "biggest thing is he is indigent." J.A. 109.

The district court observed that "I often find the ways of Congress mysterious and obscure, but I am obligated to follow the law as written." J.A. 109. It also stated that the "Fourth Circuit has held the defendant bears the burden of proving indigence" and that having court-appointed counsel is "not enough." J.A. 110. The district court also noted that "future earning potential may also be considered." The district court concluded that "I find the defendant has not made a showing that he will be unable to satisfy this payment obligation" and imposed the $5000 assessment. *Ibid*.

3. The Fourth Circuit affirms the imposition of the $5000 assessment.

The Fourth Circuit affirmed King's sentence in an unpublished opinion. *United States v. King*, 2023 WL 5289370 (4th Cir. 2023). On the issue of the $5000 special assessment, the panel rejected King's argument that the assessment was an enhanced statutory penalty for which the Government bore the burden of proof. The panel noted that 18 U.S.C. § 3014(f) stated that the assessment "shall . . . be collected in the manner that fines are collected in criminal cases." *Id*. at *1. The panel went on, "as we have explained in the context of a fine, the defendant bears the burden of demonstrating his present and prospective inability pay." *Ibid*. (cleaned up). The court quoted *United States v. Meek*, 32 F.4th 576, 582 (6th Cir. 2022) – "because the

§ 3014 special assessment is akin to a fine, a defendant seeking to avoid the special assessment bears the burden of proving his indigence" – and concluded that "the district court did not err in determining that King bore the burden to prove his indigence under § 3014." *Ibid.*

King filed a petition for rehearing and suggestion for rehearing *en banc*. *United States v. King*, Appeal No. 21-4635, Dkt. No. 35. In it, he argued that the panel opinion in his case conflicted both with a decision from another Circuit Court of Appeals as well as other Fourth Circuit cases resolving related issues. *Id*. at 5-12. The court rejected King's petition.

IX. REASON FOR GRANTING THE WRIT

The writ should be granted to determine whether under 18 U.S.C. § 3014(a) the Government should bear the burden of proving that a defendant is "non-indigent," as it does with any other fact that provides a basis for enhancing a defendant's sentence, before the district court imposes upon the defendant a $5000 special assessment.

A district court has only the authority to impose a special assessment that Congress has given it. Before imposing the $5000 assessment under 18 U.S.C. § 3014(a) the district court must determine that the defendant is "non-indigent." The Fourth Circuit, in a decision that conflicts with a decision of the Sixth Circuit and is internally inconsistent with its own decisions on related matters, held that the defendant bears the burden of proving he is indigent, rather than the Government bearing the burden to prove the defendant is "non-indigent," as it does for any other fact that increases a defendant's sentence. The issue of who bears the burden of proof

in that situation is an issue that has both split the Circuit Courts of Appeals (as well as the Fourth Circuit internally) and is an important question of federal law that this Court should resolve.[2] *See* Rules of the Supreme Court 10(a) and (c); *John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939)(due to "conflict in the rulings of the Court of Appeals of the Fifth Circuit, due to the differing views of the judges composing the court in the cases cited, and because of the importance of the question, we granted certiorari")(footnote omitted); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950)(granting certiorari "because of this intracircuit conflict"); *Scarborough v. United States*, 431 U.S. 563, 567, n.4 (1977)(granting certiorari where there was a "split among the Circuits" as well as a conflict in one particular circuit).

A. A court's authority to impose a special assessment is limited by statute. Congress provided courts with the authority to impose the $5000 special assessment only after making a finding that the defendant was "non-indigent."

Courts are required to impose a special assessment "on any person convicted of an offense against the United States." 18 U.S.C. § 3013(a). For an individual convicted of a felony, the special assessment is generally $100. 18 U.S.C. § 3013(a)(2)(A). For certain sexual offenders, however, courts are required to impose an additional assessment of $5000. 18 U.S.C. § 3014(a).

[2] At least 4.5% of federal criminal cases where sentence was imposed in 2022, nearly 3000 in total, were for offenses involving child pornography or sexual abuse and would have involved the application of the $5000 special assessment. United States Sentencing Commission, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics*, Table 15, Figure 2.

The regular assessment is not subject to any limitation aside from the requirement of a qualifying conviction. In particular, a defendant's indigent status is irrelevant to the imposition of the assessment. *See United States v. Cooper*, 870 F.2d 586 (11th Cir. 1989)(imposition of assessment was Constitutional in spite of defendant's indigent status); *United States v. Rivera-Velez*, 839 F.2d 8 (1st Cir. 1988) (same, noting that Constitutional considerations arise only if the Government attempts to collect assessment from defendant while he is indigent). Thus, no finding is required by the district court before imposing the general special assessment since the condition precedent for its imposition – the defendant's conviction – has been established by the time of sentencing.

The $5000 additional special assessment requires more. First, it requires that the defendant be convicted of an offense from one of the listed Code sections. 18 U.S.C. § 3014(a)(1)-(5). Second, it requires that the district court impose the assessment only upon a "non-indigent person . . . convicted of an offense." 18 U.S.C. § 3014(a). The "starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If there is no "clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Ibid.*; *see also United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010)(courts must "first and foremost strive to implement congressional intent by examining the plain language of the statute")(cleaned up). Thus, it "is well established that when the statute's language is plain, the sole function of the courts – at least where the disposition required by

the text is not absurd – is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)(cleaned up). With regard to the $5000 assessment there is no ambiguity – the plain meaning of the statute is that the assessment can only be imposed on a defendant who is not indigent. Therefore, "before imposing an assessment under § 3014(a), sentencing courts must ensure that the defendant is not indigent." *United States v. Fowler*, 956 F.3d 431, 439 (6th Cir. 2020).

Special assessments are creatures of statute. A district court has only as much authority to impose them as provided by Congress. In the case of § 3014(a), Congress has made clear that the $5000 special assessment only applies when the defendant is "non-indigent." The question in this Petition is whether the Government bears the burden of proving that a defendant is "non-indigent," which requires the district court to impose the assessment. Bedrock principles of criminal law show that it does.

B. Placing on the Government the burden of proving the facts necessary to increase a defendant's sentence under § 3014(a) comports with long-standing law placing the burden of increasing a defendant's sentence on the Government.

The imposition of the $5000 assessment was an increase in the statutory maximum penalty associated with King's offense of conviction. As a result, like any other fact that increases a defendant's sentencing exposure, the burden of proof rests on the Government to prove King is non-indigent, not the other way around.

It is black letter law that the Government bears the burden of proof for proving facts that increase a defendant's sentence. *United States v. Garnett*, 243 F.3d 824, 828 (4th Cir. 2001)(the "government bears the burden of proving the facts necessary

to apply the enhancement"); *see also United States v. Florence*, 333 F.3d 1290, 1294 (11th Cir. 2003)("our precedent states that 'the government's burden of proof [in establishing the applicability of a sentencing enhancement] is the preponderance of the evidence standard'"); *United States v. Kinard*, 472 F.3d 1294, 1298 (11th Cir. 2006)(the "government bears the burden of establishing by a preponderance of the evidence the facts necessary to support a sentencing enhancement"). Moreover, "the defendant does not have to prove the negative to avoid the enhanced sentence." *United States v. Diallo*, 710 F.3d 147, 151 (3d Cir. 2013). That burden is particularly acute when the facts are the basis for enhancing the statutory penalties related to a defendant's sentence, such as the existence of prior offenses under the Armed Career Criminal Act. *See Kirkland v. United States*, 687 F.3d 878, 890-891 (7th Cir. 2012); *see also United States v. Kibble*, 2021 WL 5296461, *2 (4th Cir. 2021)(waiver did not cover appeal of imposition of assessment because "a defendant cannot waive the right to appeal an illegal sentence" and a "sentence imposed above the statutory maximum is illegal"); *United States v. Peggs*, Appeal No. 21-4072, Dkt. No. 21 at 1-2 ("Peggs' challenge to the district court's authority to impose the $5,000 special assessment falls outside the scope of the appeal waiver because it concerns the legality of the sentence").

The $5000 assessment is no different. It applies, to defendants convicted of particular offenses, ***only*** if they are also "non-indigent." Without such a finding, their conviction requires only that they pay the regular $100 special assessment. The

additional $5000 assessment increases the sentence imposed and is therefore the Government's burden to prove the facts supporting it.

That is part of why it is incorrect to analogize the $5000 special assessment to a fine, as the Fourth Circuit did. *King*, 2023 WL 5289370 at *1. The Fourth Circuit was correct that the $5000 assessment "shall . . . ***be collected*** in the manner that fines are collected in criminal cases." 18 U.S.C. § 3014(f)(emphasis added). However, that language appears in a subsection labeled "Collection method" and applies to the "amount assessed under subsection (a)." *Ibid*. As subsection (a) makes clear, the $5000 assessment is not assessed in the manner of a fine. The imposition of the $5000 special assessment requires just two findings: (a) that a person has been convicted of a covered offense and (b) that the person is "non-indigent." 18 U.S.C. § 3014(a). If those conditions are present then then imposition of the full assessment is mandatory. By contrast, before imposing a fine, a district court must consider numerous factors, only some of which are related to whether the defendant is or is not indigent. Some factors include the amount of pecuniary loss from the offense, whether restitution is ordered, the expected cost of imprisonment or supervision to the Government, and whether the defendant could pass on the cost of the fine to another person. 18 U.S.C. § 3572(a). Furthermore, the statute directs that if a defendant is ordered to pay "restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution." 18 U.S.C. § 2572(b). None of those considerations are relevant to the

imposition of the $5000 special assessment – if the defendant has been convicted of a covered offense and is non-indigent the district court must impose the assessment. It is thus incorrect to conclude that the assessment of the $5000 special assessment is "akin to" the assessment of a fine, even if the collection of any assessment proceeds in the same manner.

The Fourth Circuit's error in analogizing the process for imposing the $5000 assessment and fines was compounded by its reliance on outdated legal support for concluding that the burden of proof regarding indigency rests with the defendant. The Fourth Circuit relied on *United States v. Aramony*, 166 F.3d 655, 665 (4th Cir. 1999), for the proposition that the "defendant bears the burden of demonstrating his present and prospective inability to pay." *King*, 2023 WL 5289370 at *1. The defendants in *Aramony* "challenge[d] their respective fines on the basis that they lack the ability to pay them." *Aramony*, 166 F.3d at 665. To conclude that the "defendant bears the burden of demonstrating his present and prospective in ability to pay," the Fourth Circuit relied on the Sentencing Guidelines, specifically U.S.S.G. § 5E1.2(a). The cases cited in *Aramony* to support that conclusion likewise based their analysis on the Guidelines. *See United States v. Hairston*, 46 F.3d 361, 376 (4th Cir. 1995); *United States v. Blanchard*, 9 F.3d 22, 25-26 (6th Cir. 1993). At the time those cases were decided the Guidelines, including § 5E1.2(a), were mandatory. After *United States v. Booker*, 543 U.S. 220 (2005), however, none of the Guidelines are mandatory and they cannot control the interpretation of a binding statute. Furthermore, when Congress enacted § 3014 it was after *Booker* had been decided and it legislated

against that background. As a matter of statutory construction, courts "presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 184-185 (1988). Congress therefore would have known a Guideline provision related to fines could not control the implementation of a new statutory provision regarding a special assessment.

The Fourth Circuit's decision in this case rested on the fundamentally flawed conclusion that the $5000 assessment is imposed in the same manner as a fine. Whatever the proper burden of proof for imposing a fine in a post-*Booker* world, imposition of the $5000 assessment is controlled by the plain statutory language of § 3014(a), which shows that assessing the enhancement on an indigent defendant increases that defendant's statutory maximum sentence. Therefore, as with any other fact that enhances a defendant's sentence, the burden to prove it rests with the Government.

C. The Fourth Circuit's decision in this case conflicts with that of the Sixth Circuit on the same issue, as well as the Fourth Circuit's own decisions on related issues.

The Fourth Circuit's conclusion as to the burden of proof for the $5000 assessment conflicts with the published opinion of another Circuit Court, *United States v. Fowler*, 956 F.3d 431 (6th Cir. 2020). Fowler pleaded guilty to possession of child pornography. In the PSR, the probation officer "noted that the court shall assess this $5,000 assessment on any non-indigent person convicted of possession of child pornography, but otherwise neglected to address whether Fowler is indigent for purposes of this assessment," while noting he was represented by appointed counsel

and setting forth his educational and financial details. *Id.* at 434. The district court imposed the assessment without hearing any argument on the matter. *Id.* at 435. On appeal, the court found this insufficient, as the district court "fail[ed] to make any findings on indigency or Fowler's ability to pay." *Id.* at 438. Turning to the issue of who bore the proof on this issue, the court examined the Guideline provisions regarding fines, noting that they place the burden on the defendant to show they should not apply. However, the "text of § 3014(a) does not place a similar burden on the defendant to raise the issue of indigency." *Id.* at 439. That is because "the statute here uses mandatory language, leaving no room for discretion." *Ibid.*, quoting *United States v. Shepherd*, 922 F.3d 753, 757 (6th Cir. 2019). In such situations, as courts have made clear for decades, the burden rests on the Government to provide the facts necessary to support the assessment.[3]

The Fourth Circuit's decision as to the burden of proof with regard to the $5000 special assessment also conflicts with other cases in which the Fourth Circuit has resolved the related issue of whether a waiver of appellate rights covers issues related to the assessment. In those cases, the Fourth Circuit concluded a $5000 assessment imposed without a finding of non-indigence would be an illegal sentence, above the statutory maximum for the offense of conviction. As set forth above, such an enhanced sentence would require the Government to bear the burden of proof to trigger it.

[3] While *Fowler* has been limited to its facts by subsequent Sixth Circuit decisions, *see Meek*, 32 F.4th at 582-583, its analysis with regard to the burden of proof under § 3014(a) remains the correct interpretation of the statutory language.

In a prior case with the same name as this one, the defendant pleaded guilty to travelling in interstate commerce to engage in illicit sexual conduct, an offense that triggered the additional $5000 special assessment. *United States v. King*, 2021 WL 5296461 (4th Cir. 2021). At sentencing, the district court imposed the assessment over King's objection, leading King to appeal that decision. *Id.* at *1. King pleaded guilty pursuant to plea agreement in which he "knowingly and voluntarily waive[s] the right to seek appellate review of . . . any sentence of imprisonment, fine, or term of supervised release . . . or the manner in which the sentence was determined." *Id.* at *2. The Government moved to dismiss the appeal, arguing that "this appeal challenges the manner in which the sentence was determined and is therefore within the scope of the appeal waiver." *Ibid.* (cleaned up). The Fourth Circuit, however, noted that "a defendant cannot waive the right to appeal an illegal sentence" and that a "sentence imposed above the statutory maximum is illegal because such a sentence is imposed in excess of the court's statutory power." *Ibid.*, *citing United States v. White*, 987 F.3d 340, 342 n.2 (4th Cir. 2021)(appeal waiver could not foreclose challenge to Armed Career Criminal Act classification which increases statutory penalties). The court concluded that "this appeal turns on whether [King]'s sentence is illegal, which takes the appeal outside the scope of the appeal waiver" and denied the Government's motion to dismiss. *Ibid.*

In *United States v. Kibble*, Appeal No. 20-4106, the defendant was convicted of traveling in interstate commerce for the purpose of engaging in illicit sexual conduct and the $5000 assessment was applied. Appeal No. 20-4106, Dkt. No. 10 at 1-6. On

appeal, Kibble argued that the district court erred by imposing the assessment without making a particular finding that he was non-indigent and, at any rate, he was not non-indigent and the district court erred by imposing the assessment. *Id*. at 1-2. After Kibble's opening brief was filed, the Government filed a motion to dismiss. Appeal No. 20-4106, Dkt. No. 15. The Government argued that a provision in Kibble's plea agreement, in which he waived his right to appeal "any sentence of imprisonment, fine, or term of supervised release . . . on any ground whatsoever," covered the issues raised by Kibble and required dismissal of his appeal. *Id*. at 2, 4-7. Kibble responded that because the assessment can only be imposed if a defendant is non-indigent that to "impose the $5000 assessment on an indigent defendant is to impose a sentence above the statutory maximum." Appeal No. 20-4106, Dkt. No. 18 at 3. The Fourth Circuit resolved the issue in an unpublished decision remanding Kibble's case for resentencing. *United States v. Kibble*, 2021 WL 5296461 (4th Cir. 2021). Noting that it will generally enforce appellate waivers, the court stated that "a defendant cannot waive the right to appeal an illegal sentence." *Id*. at *2. Furthermore, a "sentence imposed above the statutory maximum is illegal because such a sentence is imposed in excess of the court' statutory power." *Ibid*. For the $5000 special assessment, "a finding of non-indigency is the key that unlocks the availability of the $5,000 assessment" and "[a]bsent such a finding . . . imposing a special assessment is beyond the authority of the district court." *Ibid*. The court denied the Government's motion to dismiss. *Ibid*.

Finally, the same reasoning was applied to the issue in *United States v. Peggs*, Appeal No. 21-4072. Peggs was also convicted of an offense that could trigger the $5000 special assessment and it was imposed at sentencing. Appeal No. 21-4072, Dkt. No. 10 at 3-11. In addition to other sentencing issues, Peggs raised the same two issues related to the $5000 assessment as Kibble did. *Id*. at 1-2. As in *Kibble*, the Government filed a motion to dismiss the appeal as to all the issues raised by Peggs, including those dealing with the $5000 assessment. Appeal No. 21-4072, Dkt. No. 16. The court partially granted and partially denied the Government's motion. Appeal No. 21-4072, Dkt. No. 21. As to the $5000 assessment issues, the court concluded that "Peggs' challenge to the district court's authority to impose the $5000 assessment falls outside the scope of the appeal waiver because it concerns the legality of the sentence" and denied the motion on those issues. *Id*. at 1-2.[4]

The holdings of these three cases are all in line with the fundamental nature of appeal waivers. As this Court has recognized, "no appeal waiver serves as an absolute bar to all appellate claims," and "all jurisdictions appear to treat at least some claims as unwaiveable." *Garza v. Idaho*, 139 S. Ct. 738, 745 (2019). Among those claims are those "that a sentence . . . exceeds the statutory maximum authorized." *Id.* at 745, n.6; *see also United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019)(collecting cases holding waivers do not cover claims related to sentences in excess of the statutory maximum). It would be inconsistent to, on the one hand, hold that the $5000

[4] Peggs' sentence was ultimately affirmed. *United States v. Peggs*, 2023 WL 5500428 (4th Cir. 2023).

special assessment is an increased statutory penalty that is illegal if not imposed properly and conclude, on the other hand, that the Government did not bear the burden of providing the facts to support such a sentence in the first place. The decisions in *Kibble*, *Peggs*, and *King* (2021) are not the outliers – the decision in this case is.

X. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

JOSEPH MICHAEL KING

By Counsel

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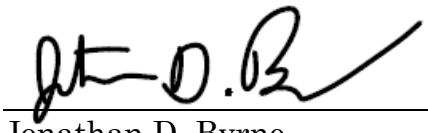

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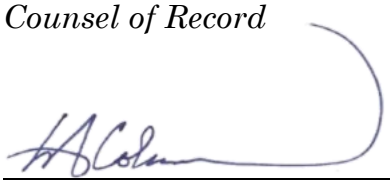

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