

1
2 **United States Court of Appeals**
3 **for the Second Circuit**

4
5 August Term, 2019

6
7 (Argued: November 5, 2019
8 Final Submission: August 24, 2020
9 Decided: July 29, 2021)

10
11 Docket Nos. 18-2739, 20-2268

12
13
14 UNITED STATES OF AMERICA,

15 *Appellee,*

16 v.

17
18 CARLOS ROSARIO,

19 *Defendant-Appellant.*
20

21
22 Before:

23
24 SACK and PARK,* *Circuit Judges*, and RAKOFF, *District Judge*.[†]
25

26 Carlos Rosario appeals the imposition by the district court (Pauley, J.) of a
27 \$5,000 special assessment, pursuant to 18 U.S.C. § 3014(a), following Rosario's
28 conviction for sexual exploitation of a minor. Rosario contends that the district
29 court improperly considered his future earning potential in finding him "non-
30 indigent" under section 3014(a) and that, in any event, the district court erred in
31 making that finding. We reject both arguments and hold that the district court did

* Judge Peter W. Hall, originally a member of the panel, died on March 11, 2021. Judge Park was designated to replace Judge Hall pursuant to Second Circuit Internal Operating Procedure E(b).

† Judge Jed S. Rakoff of the United States District Court for the Southern District of New York, sitting by designation.

1 not err by (1) considering Rosario’s future earning potential in determining
2 indigency under section 3014(a), or (2) finding him to be non-indigent within the
3 meaning of the statute. We therefore **AFFIRM** the imposition of the special
4 assessment.

5
6 Judge Rakoff concurs in a separate opinion.

7
8 PHILIP L. WEINSTEIN (Matthew B. Larsen, *on*
9 *the brief*), Federal Defenders of New York,
10 Inc., New York, NY, *for Defendant-Appellant*.

11
12 JUSTIN V. RODRIGUEZ (Anna M. Skotko,
13 Alexandra Rothman, *on the brief*), *for* Audrey
14 Strauss, United States Attorney for the
15 Southern District of New York, New York,
16 NY, *for Appellee*.

17
18 PARK, *Circuit Judge*:

19 Carlos Rosario pled guilty in the United States District Court for the
20 Southern District of New York to three offenses stemming from his sexual
21 exploitation of a minor. As part of Rosario’s sentence, the district court (William
22 H. Pauley III, *J.*) ordered Rosario to pay a \$5,000 special assessment under the
23 Justice for Victims of Trafficking Act of 2015 (“JVTA”), which requires courts to
24 impose the assessment on all “non-indigent” persons convicted of specified
25 offenses.

26 On appeal, Rosario argues that the district court erred by considering his
27 future earning capacity in finding him to be “non-indigent.” We disagree. The

1 ordinary meaning of “indigent” encompasses not only a lack of present resources,
2 but also includes a forward-looking assessment of the defendant’s “means” or
3 ability to pay. This understanding is reinforced by the statutory scheme, which
4 provides defendants 20 years after their release to make payment. It is also
5 consistent with our precedent and the view of all six of our sister circuits that have
6 addressed the issue.

7 The district court properly considered Rosario’s future earning potential in
8 concluding that he is “non-indigent” under the JVTAs and did not otherwise clearly
9 err in reaching that conclusion. We therefore affirm.

10 I. BACKGROUND

11 A. JVTA Assessment

12 The JVTAs provide that courts “shall assess an amount of \$5,000 on any non-
13 indigent person or entity convicted of” certain specified offenses, including
14 “offense[s] under . . . chapter 110 (relating to sexual exploitation and other abuse
15 of children).” 18 U.S.C. § 3014(a). The JVTAs assessment is “collected in the manner
16 that fines are collected in criminal cases,” *id.* § 3014(f), and the obligation to pay
17 the assessment continues for 20 years after the entry of judgment or defendant’s
18 release from prison, whichever is later, *id.* §§ 3014(g), 3613(b).

1 Funds collected under section 3014(a) are deposited in the “Domestic
2 Trafficking Victims’ Fund.” *Id.* § 3014(c)–(d). The Attorney General must “use
3 amounts available in the Fund to award grants or enhance victims’ programming”
4 under the Trafficking Victims Protection Act, the Trafficking Victims Protection
5 Reauthorization Act, the Victims of Child Abuse Act, or the PROTECT Our
6 Children Act. *Id.* § 3014(e).

7 B. Procedural History

8 In 2017, Rosario pled guilty to sexual exploitation of a minor and possession
9 and distribution of child pornography. The district court sentenced him to 240
10 months’ imprisonment, followed by a lifetime term of supervised release. The
11 court did not impose a fine, but it ordered Rosario to pay \$12,000 in restitution, a
12 \$300 mandatory assessment, and the \$5,000 special assessment under the JVTA.

13 Rosario appealed to this Court, challenging only the imposition of the JVTA
14 assessment. His sole argument on appeal was that the district court plainly erred
15 in finding him “non-indigent” under section 3014(a). He did not raise any
16 challenge to the district court’s consideration of his future earning ability.

17 In accordance with the procedure outlined in *United States v. Jacobson*, 15
18 F.3d 19 (2d Cir. 1994), we remanded this matter to the district court for further

1 proceedings because we found the record “unclear as to why and how the district
2 court determined that Rosario was not indigent.” *United States v. Rosario*, 785 F.
3 App’x 22, 23 (2d Cir. 2019). We noted that “[w]hile the district court explicitly
4 adopted the Presentence Investigation Report (PSR)” prepared by the Probation
5 Department, “which had recommended the JVTAs assessment, the PSR contained
6 no specific finding with respect to Rosario’s indigency.” *Id.* We further observed
7 that “the non-imposition of fines may not be determinative in establishing
8 indigency under Section 3014(a),” and we advised the district court, if it saw fit, to
9 “further develop the record with regard to Rosario’s present financial condition
10 and his predicted earnings capacity.” *Id.*

11 On remand, the district court received new sentencing submissions from the
12 parties and held a resentencing hearing. Rosario again did not argue that
13 consideration of his future earning potential was improper under section 3014(a).
14 The court ultimately reimposed its original sentence, including the \$5,000 JVTAs
15 assessment. Tr. at 15–17.¹

16 As to the JVTAs assessment, the district court, citing decisions of our sister
17 circuits, stated that a sentencing court “may consider both a defendant’s financial

¹ Citations to “Tr.” refer to the transcript of Rosario’s resentencing hearing, attached as Exhibit A to Rosario’s supplemental letter brief dated August 4, 2020.

1 situation and future earnings potential when making [the] indigency
2 determination.” *Id.* at 6. The court then found Rosario to be “non-indigent” under
3 section 3014(a). It considered Rosario’s health, outstanding debts and current
4 assets, employment while incarcerated, “extensive prior work history,” and
5 “transferable skills” in “basic plumbing, painting, flooring and tile work.” *Id.* at
6 7–12. The court also noted it was “mindful that [Rosario’s] felony convictions and
7 sex-offender status will likely have an adverse effect on his employability,” but
8 stated that Rosario could not “use that fact as a shield against paying the special
9 assessment.” *Id.* at 12.

10 II. DISCUSSION

11 On appeal, Rosario again challenges the district court’s imposition of the
12 JVT A assessment. This time, he argues that the district court (1) improperly
13 considered his future earning capacity in finding him to be “non-indigent,” and
14 (2) erred in imposing the assessment even if consideration of future earning
15 capacity were proper. We reject both arguments.

16 A. The district court appropriately considered Rosario’s future earning
17 potential

18 First, Rosario argues that a district court may consider only the defendant’s
19 resources at the time of sentencing, and not his future earning potential, when

1 determining whether he is “non-indigent” under section 3014(a). We review the
2 district court’s interpretation of section 3014(a) for plain error because Rosario
3 failed to raise this statutory challenge below. *Puckett v. United States*, 556 U.S. 129,
4 138 (2009); *United States v. Harris*, 838 F.3d 98, 103–04 (2d Cir. 2016).

5 The government contends that Rosario waived this argument by choosing
6 not to argue to the district court “that Section 3014(a) prohibits consideration of
7 future ability to pay.” Gov’t Suppl. Br. at 4. We disagree. Waiver is the
8 “intentional relinquishment or abandonment of a known right,” and Rosario’s
9 submissions do not reflect a “strategic, calculated decision” to abandon his
10 statutory challenge. *United States v. Dantzler*, 771 F.3d 137, 146 n.5 (2d Cir. 2014).

11 1. *Statutory Text and Precedent*

12 We start, as always, with the statutory text. Section 3014(a) does not define
13 “indigent,” so we look to its “ordinary meaning.” *Asgrow Seed Co. v. Winterboer*,
14 513 U.S. 179, 187 (1995). In determining ordinary meaning, “[t]ext may not be
15 divorced from context,” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 356
16 (2013), and “the same words, placed in different contexts, sometimes mean
17 different things,” *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality op.).

1 The word “indigent” encompasses not only a person’s present lack of
2 resources, but also indicates that a person “lacks the means of subsistence.”
3 *Indigency*, Black’s Law Dictionary (11th ed. 2019); *see also Indigence*, Oxford English
4 Dictionary (3d ed. 2020) (defining the term as the “[w]ant of the means of
5 subsistence”). As several other circuits have concluded, this “forward-looking”
6 sense of the word “refers to a person’s capabilities—whether a person has or lacks
7 the *capacity* to earn subsistence.” *United States v. Graves*, 908 F.3d 137, 141 (5th Cir.
8 2018) (emphasis in original); *see also United States v. Shepherd*, 922 F.3d 753, 758 (6th
9 Cir. 2019) (noting that “an indigent person not only lives in poverty but also lacks
10 the means—*e.g.*, skills or education—to exit poverty”). Thus, “the district court
11 must resolve two basic questions in assessing the defendant’s indigency: (1) Is the
12 defendant impoverished *now*; and (2) if so, does the defendant have the means to
13 provide for himself so that he will *not always* be impoverished?” *Shepherd*, 922 F.3d
14 at 758 (emphases in original).

15 The Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits—all of our sister
16 circuits to have considered the issue—have held that courts may consider a
17 defendant’s future earning potential when determining indigency for purposes of
18 imposing the JVT A assessment. *See United States v. McMiller*, 954 F.3d 670, 675 (4th

1 Cir. 2020); *Shepherd*, 922 F.3d at 758–59; *Graves*, 908 F.3d at 141; *United States v.*
2 *Kelley*, 861 F.3d 790, 802 (8th Cir. 2017); *see also United States v. Janatsch*, 722 F. App’x
3 806, 810–11 (10th Cir. 2018); *United States v. Strange*, 692 F. App’x 346, 348–49 (9th
4 Cir. 2017). We agree with our sister circuits, concluding that when determining
5 whether a defendant is indigent pursuant to section 3014(a), a court may consider
6 both the resources available to the defendant at the time of sentencing and the
7 defendant’s future earning potential. *See United States v. Clarke*, 979 F.3d 82, 101
8 (2d Cir. 2020) (“When making an indigency determination, a district court ‘may
9 consider both [the] defendant’s present financial resources and those that may
10 become available in the future.’” (quoting *United States v. Salameh*, 261 F.3d 271,
11 276 (2d Cir. 2001))). We decline Rosario’s invitation to hold otherwise.

12 2. *Statutory Structure and Context*

13 The statutory structure of section 3014(a) supports this interpretation. First,
14 the defendant’s obligation to pay the JVT A assessment continues for 20 years after
15 entry of judgment or release from prison, whichever is later. 18 U.S.C. §§ 3014(g),
16 3613(b). This long payment period “underscores that a district court must impose
17 the assessment unless it finds the defendant could not pay it today—or at any
18 point for the next twenty years.” *Graves*, 908 F.3d at 141. “[I]t would make little

1 sense for the district court to consider *only* the defendant's financial condition at
2 the time of sentencing" because "[t]hat snapshot in time may not accurately
3 represent the defendant's condition five, ten, or twenty years after sentencing."
4 *Shepherd*, 922 F.3d at 758 (emphasis in original). Even Rosario acknowledged this
5 commonsense reading, explaining in his sentencing submission that the relevant
6 "question" for the district court on remand was "whether between 2034 and 2054,
7 [he] will rise above his current station to become non-indigent such that he must
8 pay this assessment." Def.'s Sentencing Ltr. at 2, *United States v. Rosario*, No. 17-
9 cr-306 (S.D.N.Y. Mar. 6, 2020), ECF No. 42.

10 The long-lasting JVTA obligation is unlike other contexts in which courts
11 consider only a defendant's financial resources at the time of sentencing. For
12 example, "[i]n granting court-appointed counsel, the court assesses a defendant's
13 immediate ability to pay because 'any person haled into court, who is too poor to
14 hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.'" *Kelley*,
15 861 F.3d at 800 (quoting *Martinez v. Ryan*, 566 U.S. 1, 12 (2012)).
16 Appointment of counsel is not dispositive of indigency for purposes of imposing
17 monetary penalties. *Clarke*, 979 F.3d at 101; *see also United States v. Valdez*, 522
18 F. App'x 25, 33 (2d Cir. 2013) (holding that "the fact that [the defendant] had been

1 appointed counsel as an indigent defendant” was not “determinative of his ability
2 to pay a fine”). There is no reason to consider a defendant’s future earning
3 potential in assessing his ability to pay for a lawyer now. By contrast, courts *should*
4 consider a defendant’s future earning potential when determining whether he is
5 “indigent” for purposes of paying an obligation over 20 years into the future.

6 Second, section 3014 provides that the JVTA assessment “shall . . . be
7 collected in the manner that fines are collected in criminal cases.” 18 U.S.C.
8 § 3014(f). The Sentencing Guidelines require courts to consider defendants’ future
9 earning capacity in determining whether to impose criminal fines. *See* U.S.S.G.
10 § 5E1.2(a) (providing that courts “shall impose a fine in all cases, except where the
11 defendant establishes that he is unable to pay and *is not likely to become able to pay*
12 any fine”) (emphasis added)). This further supports our reading of section 3014(a).
13 *See, e.g., McMiller*, 954 F.3d at 675; *Graves*, 908 F.3d at 142.

14 Rosario argues that the statutory scheme cuts the other way because section
15 3014(a), unlike other statutes, does not explicitly refer to future earning ability.
16 Rosario points to 18 U.S.C. § 3572(a), which instructs district courts to consider
17 factors including “the defendant’s income, earning capacity, and financial
18 resources” in imposing a fine, and 18 U.S.C. § 3663(a)(1)(B)(i), which requires

1 courts to consider the defendant's "financial resources," "financial needs," and
2 "earning ability" in ordering restitution. In Rosario's view, those provisions show
3 that "Congress knows how to make potential earnings relevant," and the absence
4 of an express reference to potential earnings in section 3014(a) suggests that
5 Congress intended to exclude consideration of that factor. Rosario Suppl. Br. at 1.

6 We are not persuaded. The provisions Rosario identifies have little in
7 common with section 3014(a). Sections 3572(a) and 3663(a)(1)(B)(i) describe factors
8 that courts should consider in deciding whether to impose fines or restitution
9 generally. Unlike the JVTA's \$5,000 assessment, these provisions do not specify
10 the amount of a fine or assessment for the commission of particular offenses. Nor
11 do they condition a financial penalty on the defendant's "indigence." Most
12 importantly, these provisions are not structured like section 3014(a) because in lieu
13 of a finding of indigence, they provide a list of factors for courts to consider when
14 determining whether to impose a monetary penalty at all. That Congress knew
15 how to legislate differently for other criminal punishment purposes does not
16 support Rosario's argument.²

² In fact, while sections 3572(a) and 3663(a)(1)(B)(i) list "earning capacity" (or "earning ability") as a required consideration, they both also list the defendant's "financial resources." Rosario argues that indigence should be determined *only* with reference to financial resources at

1 Rosario further contends that the 20-year timeframe to pay the \$5,000 special
2 assessment is a reflection of the assessment's subordination to other fines and
3 restitution amounts, not an indication that the assessment should be imposed on
4 a defendant who may be able to pay it in the future. Rosario Suppl. Br. at 4. We
5 disagree. This 20-year time period is consistent with the statute's purpose because
6 it "increase[s] the possibility [that] the assessments would be collected and used
7 to help victims." *Graves*, 908 F.3d at 141.

8 Rosario also argues that Congress could not have permitted consideration
9 of earning ability in determining indigency under section 3014(a) because "it
10 would mean declaring almost everyone 'non-indigent.'" Rosario Suppl. Reply Br.
11 at 4. This concern is overstated. Many defendants have no work history, are
12 physically disabled, or are serving sentences so long that they are unlikely ever to
13 obtain post-release employment. And it is not necessarily the case that every
14 defendant with post-release earning potential is "non-indigent."

the time of sentencing, but he provides no basis for this selective parsing of sections 3572(a) and 3663(a)(1)(B)(i).

1 B. The district court properly found Rosario to be “non-indigent”

2 Finally, Rosario contends that “[e]ven if the district court was right to
3 consider ‘future earnings potential,’ it was still wrong to deem Rosario ‘non-
4 indigent.’” Rosario Suppl. Br. at 6 (citation omitted). Again, we disagree.

5 A court’s determination that a defendant is “non-indigent” under section
6 3014(a) is a factual finding that we review for clear error. *United States v. Jeffers*,
7 329 F.3d 94, 97 (2d Cir. 2003). “We will find clear error only where we as the
8 reviewing court on the entire evidence are left with the definite and firm
9 conviction that a mistake has been committed.” *United States v. Dumitru*, 991 F.3d
10 427, 436 (2d Cir. 2021) (cleaned up). Applying this deferential standard, we affirm
11 the district court’s indigency determination.

12 The district court carefully weighed the record evidence in finding Rosario
13 non-indigent. It noted Rosario’s health, limited financial resources, outstanding
14 debts, and other court-imposed obligations. Against those factors, the district
15 court considered Rosario’s education, “extensive prior work history,” basic
16 vocational skills, language proficiency, and participation in training courses while
17 incarcerated. Tr. at 11–12. The district court’s conclusion was “plausible in light

1 of the record viewed in its entirety” and thus not clearly erroneous. *Anderson v.*
2 *City of Bessemer City*, 470 U.S. 564, 573–74 (1985).

3 Rosario argues that his “sex-offender status” will have a negative effect on
4 his ability to find future employment. Rosario Suppl. Br. at 6. While this may be
5 true, the fact of Rosario’s convictions for sexual offenses against children “does not
6 compel the district court to find him indigent.” *Shepherd*, 922 F.3d at 760. Section
7 3014(a) expressly “contemplates assessing sex offenders” by listing sex crimes
8 against minors among the enumerated predicate offenses. *Id.* As the district court
9 correctly observed, Rosario “cannot use his sex-offender status to shield him from
10 paying the assessment.” *Id.*; see Tr. at 12; cf. *United States v. Thompson*, 227 F.3d 43,
11 46–47 (2d Cir. 2000) (where applicable statutory provisions “specifically
12 contemplate[d] the imposition of fines upon defendants who [would]
13 undoubtedly be deported,” defendant’s post-release deportation was not a basis
14 for vacating imposition of \$5,000 fine).

15 Rosario also points to his \$6,000 debt and \$12,300 in other court-imposed
16 obligations as evidence of indigency. But given Rosario’s vocational skills and
17 pre-incarceration record of employment, we see no clear error in the district court’s
18 determination that Rosario could successfully pay the special assessment by 2054,

1 20 years after his expected release from prison. Indeed, courts have affirmed the
2 imposition of the JVTAs assessment even when the defendant had a negative net
3 worth and faced additional financial obligations upon release. *See, e.g., United*
4 *States v. Wandahsega*, 924 F.3d 868, 889 (6th Cir. 2019) (defendant had “no assets
5 other than a checking account containing \$200” and “\$30,000 in outstanding
6 medical bills”); *Shepherd*, 922 F.3d at 760 (defendant would owe \$25,000 in
7 restitution and as much as \$30,000 in child support upon release); *Kelley*, 861 F.3d
8 at 802 (PSR reflected defendant’s “slightly negative net worth at the time of
9 sentencing”).

10 In sum, we hold that the district court did not clearly err in finding, after
11 careful consideration of Rosario’s present financial position and likely future
12 earnings, that Rosario is “non-indigent” under section 3014(a).

13 III. CONCLUSION

14 For the reasons set forth above, we affirm the district court’s imposition of
15 the \$5,000 special assessment pursuant to 18 U.S.C. § 3014(a).

1 RAKOFF, *District Judge*, concurring:

2 I concur that we should affirm the district court’s imposition of the \$5,000
3 special assessment on the Defendant under the Justice for Victims of Trafficking
4 Act (JVTA), but I would do so only by applying plain error review. I write
5 separately to explain why I remain unpersuaded by the reasons articulated by the
6 panel majority for interpreting “indigent” in 18 U.S.C. § 3014(a) to permit
7 speculation about a defendant’s future earning potential. Instead, I would
8 construe the statute to require that a district court find a defendant to be non-
9 indigent at the time of sentencing before imposing the JVTA special assessment.

10 **STATUTORY BACKGROUND**

11 Under the JVTA, a sentencing court “shall assess an amount of \$5,000 on
12 any non-indigent person or entity” convicted of offenses in one of five categories.
13 18 U.S.C. § 3014(a) (emphasis added). The special assessments collected under the
14 JVTA go, not to direct victim compensation, but rather to a federally administered
15 fund that awards grants for victims’ programming. *See id.* § 3014(c)-(e). The JVTA
16 specifies that the assessment imposed on a defendant “shall ... be collected in the
17 manner that fines are collected in criminal cases, including the mandatory
18 imposition of civil remedies for satisfaction of an unpaid fine.” *Id.* § 3014(f).

1 Pursuant to the standard civil remedy provision, “the liability to pay a fine shall
2 terminate the later of 20 years from the entry of judgment or 20 years after release
3 from imprisonment of the person fined, or upon the death of the individual fined.”
4 *Id.* § 3613. However, the JVT A places the special assessment at the end of the line
5 for collection, specifying that the “assessment ... shall not be payable until the
6 person subject to the assessment has satisfied all outstanding court-ordered fines,
7 orders of restitution, and any other obligation related to victim-compensation
8 arising from the criminal convictions on which the special assessment is based.”
9 *Id.* § 3014(b).

10 DISCUSSION

11 Following our remand to the district court for further development of the
12 record regarding “why and how [it] determined that Rosario was not indigent,”
13 *United States v. Rosario*, 785 F. App’x 22, 23 (2d Cir. 2019), Rosario again
14 challenges the district court’s imposition of the JVT A assessment. He argues that
15 the district court improperly considered his future earning potential in finding
16 him to be “non-indigent.”

17 For the reasons set forth below, I agree with Rosario that district courts
18 should not speculate about a defendant’s future earnings potential in assessing

1 whether he is “indigent” and so excused from section 3014(a)’s special
2 assessment. But Rosario did not raise this statutory construction challenge below,
3 and thus his appeal is subject to plain error review. Since neither this Court nor
4 the Supreme Court had yet construed the scope of a district court’s inquiry under
5 section 3014(a)’s indigency exception, the district court did not plainly err. I
6 therefore concur in affirming imposition of the \$5,000 special assessment.

7 **Section 3014(a)’s Exception for “Indigent” Defendants**

8 Like the panel majority, I begin with the text of the JVTAs “indigency
9 exception,” *United States v. Haverkamp*, 958 F.3d 145, 150 n.3 (2d Cir. 2020). The
10 statute speaks in the present tense, directing the district court to assess whether
11 the person or entity being sentenced is “non-indigent,” not whether a defendant
12 might become non-indigent at some future date. However, the JVTAs provides no
13 definition for the term “indigent.” Therefore, like the panel majority, I look to the
14 “ordinary meaning” of “indigent.” *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187
15 (1995). *See ante* at 7.¹ Someone is “indigent” if he is a “poor person.” Black’s Law
16 Dictionary (11th ed. 2019). Numerous dictionaries share a focus on whether a
17 person is *currently* “[l]acking the necessities of life; in needy circumstances;

¹ “Ante” refers to the majority opinion.

1 characterized by poverty; poor, needy." *Indigent*, Oxford English Dictionary (3d
2 ed. 2021). *See also, e.g., Indigent*, American Heritage Dictionary (5th ed. 2020)
3 ("Experiencing want or need; impoverished"); *Indigent*, Cambridge Academic
4 Content Dictionary (2017) ("having no money or anything else of value"). Each of
5 these definitions of the statutory term—indigent—directs the reader to consider
6 what a person presently *has*, relative to what he needs. None of these dictionaries
7 invites the reader to speculate as to whether a person may earn more in the future
8 in determining whether he is "indigent."

9 The panel majority imports a "forward-looking" meaning by departing
10 from the conventions of careful textual analysis. It finds references to the "means
11 of subsistence" in definitions of cognates that do not themselves appear in Section
12 3014(a). *See ante* at 7-8 (citing *Indigency*, Black's Law Dictionary (11th ed. 2020);
13 *Indigence*, Oxford English Dictionary (3d ed. 2020)). It is "significant" that "in
14 ordinary usage," cognates, like adjectival and nominal forms of the same word,
15 "may have meanings as disparate as any two unrelated words." *FCC v. AT&T, Inc.*,
16 562 U.S. 397, 403 (2011).

17 The panel opinion's reliance on other circuits' textual exegeses is similarly
18 unpersuasive. In *United States v. Graves*, for instance, the Fifth Circuit relied on an

1 edition of Webster’s New International Dictionary from 1954, which defined
2 “indigent” as including someone who is “[d]estitute of ... *means* of comfortable
3 subsistence.” 908 F.3d 137, 141 (5th Cir. 2018) (quoting *Indigent*, Webster’s New
4 International Dictionary 1266 (2d ed. 1954)) (alteration and emphasis in original).
5 But Webster’s now defines “indigent” as “being in a condition of indigence; being
6 poor usually without being destitute,” following the contemporary trend by
7 considering only present resources. *Indigent*, Miriam-Webster’s Unabridged
8 Dictionary, <https://unabridged.merriam-webster.com/unabridged/indigent> (last
9 visited July 14, 2021). The Sixth Circuit case cited by the panel opinion similarly
10 relies on decades-old definitions of “indigent” (along with contemporary
11 definitions of “indigency”) to infer a that the “defendant [must be] impoverished
12 *now*” and lack “the means to provide for himself so that he will ... *always* be
13 impoverished.” *United States v. Shepherd*, 922 F.3d 753, 758 (6th Cir. 2019).
14 However, this Court has insisted that an undefined statutory term “is properly
15 construed according to its contemporary dictionary definition,” *State v. Dep’t of*
16 *Justice*, 951 F.3d 84, 106 (2d Cir. 2020), because contemporary sources are more
17 likely to reflect the term’s ordinary meaning at the time the statute took effect.
18 Since the JVRTA was enacted in 2015, I would privilege contemporary dictionaries,

1 which define someone as “indigent” if he is experiencing poverty at the time of
2 sentencing, without speculating whether he might one day earn enough to no
3 longer be considered poor.

4 Nor am I persuaded by the inferences that the panel opinion draws from
5 statutory structure. The panel opinion infers that future earnings capacity is
6 relevant because “the defendant’s obligation to pay the JVTAs assessment
7 continues for 20 years after entry of judgment or release from prison.” *Ante* at 9;
8 *accord Graves*, 908 F.3d at 141; *Shepherd*, 922 F.3d at 758. The twenty-year
9 termination of a defendant’s liability for the special assessment arises through the
10 existing provision for collection of criminal fines through civil remedies. *See* 18
11 U.S.C. § 3613(b). That the JVTAs employ an existing, time-limited statutory tool
12 for collection through civil remedies does not change whether the assessment
13 should be imposed in the first instance. The twenty-year termination of liability
14 also “increases the possibility that the assessments [will] be collected and used to
15 help victims,” *ante* at 13 (quoting *Graves*, 908 F.3d at 141), in light of the special
16 assessment’s subordination to all other fines, restitution orders, and victim
17 compensation payments arising from the same conviction, *id.* § 3014(b). This
18 subordination, rather than a *sub silence* directive to speculate about future earning

1 potential as a means of narrowing the indigency exception, better explains why
2 Congress made the obligation to pay the special assessment coextensive with the
3 obligation to pay a criminal fine.

4 Moreover, the fact that the JVTA makes use of the existing statutory
5 structures for collection of criminal fines adds credence to the textual comparisons
6 between section 3014(a)'s indigency exception and the means testing that
7 Congress wrote into other sections of Title 18 that impose criminal fines. As
8 Rosario persuasively argues, several of these other means testing provisions
9 expressly direct district courts to consider a defendant's future earning potential.
10 For instance, "in determining whether to impose a fine, and the amount[and] time
11 for payment," Congress directed that a "court shall consider ... the defendant's
12 income, *earning capacity*, and financial resources." 18 U.S.C. § 3572(a)(1) (emphasis
13 added). Likewise, in determining [non-mandatory] restitution," the court "shall
14 consider ... the financial resources of the defendant[and] the financial needs *and*
15 *earning ability* of the defendant and the defendant's dependents." 18 U.S.C.
16 § 3663(a)(1)(B)(i)(II) (emphasis added).² And, as the panel opinion observes, *ante*

² Congress has also expressly directed when a court must order mandatory restitution "in the full amount of each victim's losses ... *without* consideration of the economic circumstances of the defendant." *Id.* § 3664(f)(1)(A) (emphasis added). But even then, Congress provided that a

1 at 11, the Sentencing Guidelines similarly oblige courts to consider future earning
2 potential in assessing whether a defendant is too poor for a criminal fine to be
3 justly imposed. *See* U.S.S.G. § 5E1.2(a). These express references to future earning
4 potential in other provisions of Title 18 indicate that “Congress has shown that it
5 knows how to adopt the omitted language or provision.” *Rotkiske v. Klemm*, 140
6 S.Ct. 355, 361 (2019). In this circumstance “[a]textual judicial supplementation is
7 particularly inappropriate.” *Id.* Since the contemporary, ordinary meaning of
8 “indigent” refers only to present poverty, and these variations in provisions of
9 Title 18 should be treated as meaningful, this Court should not add consideration
10 of future earnings capacity to the text of section 3014(a), thereby substantially
11 narrowing the JVTA’s exception for indigent defendants.³

12 The panel opinion offers reasons not to infer that Congress’s omission here
13 constitutes meaningful variation, but they are unpersuasive. Congress invited the

court ordering such restitution may consider future earnings capacity by “direct[ing] the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.” *Id.* § 3664(f)(3)(B).

³ Since the contemporary, ordinary meaning of “indigent” refers only to present poverty, it does not amount to “selective parsing” to conclude that section 3014(a)’s requirement to determine whether a defendant is indigent is analogous to the consideration of his financial resources at the time of sentencing, rather than future “earning capacity” (or “earning ability”), under sections 3572(a) and 3663(a)(1)(B)(i). *Cf. ante* at 12 n. 2.

1 comparisons to the criminal fines statutes that Rosario urges by specifying that the
2 JVTA’s special assessment “shall ... be collected in the manner that fines are
3 collected in criminal cases,” subject only to the requirement that fines, restitution,
4 and other victim-compensation obligations be paid first. 18 U.S.C. § 3014(f), (b).
5 The JVTA’s express reference to the statutory structure governing criminal fines is
6 more persuasive textual evidence for comparison than the fact that section 3014
7 specifies the amount of the special assessment, whereas sections 3572(a) and
8 3663(a)(1)(B)(i) do not, since they are provisions governing impositions of fines
9 and restitution in general. *See ante* at 12. Nor should we refuse to draw inferences
10 from these other sections of Title 18 simply because section 3014(a) directs courts
11 to consider only a single factor in deciding whether to impose the JVTA special
12 assessment—*i.e.*, whether the defendant is “indigent”—whereas sections 3572(a)
13 and 3663(a)(1)(B)(i) require courts to consider factors in addition to a defendant’s
14 present economic resources. *See ante* at 12.

15 Finally, there is practical sense in construing “indigent” according to its
16 ordinary meaning by restricting the assessment of whether a defendant is
17 “indigent” to an analysis of financial resources and needs at the time of sentencing.
18 Consideration of a defendant’s earning potential once he has been released after a

1 lengthy prison sentence and reentered the labor market as a convicted felon is,
2 frankly, an invitation to speculate wildly, something a district court is poorly
3 equipped to do. This is particularly true where, as here, a defendant's prior
4 employment history was amassed before he had a criminal record. *See* PSR ¶ 80.
5 Rosario will reenter the labor market in 2034 with a high-school education, limited
6 skills, federal felony convictions, and a sex-offender registration. *See* Dkt. 81 at 19
7 (resentencing transcript). It is therefore unknown, indeed unknowable, what Mr.
8 Rosario's financial condition will be between 2034, when he is expected to leave
9 federal prison, and 2054, when his liabilities from this sentence will terminate.
10 What is certain, however, is that (considering only his present financial condition)
11 Mr. Rosario was in poverty at the time of sentencing. As the district court
12 acknowledged, the pre-sentence investigation reported that Rosario had a
13 negative net worth of approximately \$6,000. *Id.* at 20. Against this backdrop, the
14 court's finding under section 3014(a) that Rosario was not indigent depended
15 entirely upon "his future earnings." *Id.* As Rosario argues, construing "indigent"
16 to permit such speculation collapses section 3014(a)'s indigency exception and
17 make it a virtual dead letter. Only those defendants so disabled as to be undeniably
18 bereft of all future earning potential would qualify. Permitting consideration of

1 future earning potential therefore conflicts with the plain meaning of section
2 3014(a) and produces a result at odds with the manifest intent of Congress not to
3 impose additional fines on people already living in poverty.

4 **Plain Error Analysis**

5 Notwithstanding my disagreement over the proper inquiry under section
6 3014(a)'s indigency exception, I still vote to affirm because the district court did
7 not plainly err.

8 As the panel opinion accurately explains, we review the district court's
9 statutory interpretation for plain error because Rosario failed to raise his statutory
10 challenge to section 3014(a) below. *Ante* at 6-7; see *United States v. Harris*, 838 F.3d
11 98, 103-104 (2d Cir. 2016). Among the requirements to reverse on plain error
12 review is that the error "is clear or obvious, rather than subject to reasonable
13 dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). This Court has repeated
14 explained this requirement by stating that "'for an error to be plain, it must, at a
15 minimum, be clear under current law,' which means that 'we typically will not
16 find such error where the operative legal question is unsettled, including where
17 there is no binding precedent from the Supreme Court or this Court.'" *United States*

