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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ESTER OZKAR, AKA Eser Ozkay, Defendant-Appellant.	No. 21-10374 D.C. No. 3:21-cr-00144-CRB-1 MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted November 17, 2022[**]
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and SESSIONS,[***] District Judge.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

Ester Ozkar appeals the $1 million fine portion of his sentence imposed following his guilty-plea conviction for making a false statement to a financial institution, in violation of 18 U.S.C. § 1014, resulting from his fraudulent applications for Economic Injury Disaster Loan ("EIDL") Advances and Paycheck Protection Program ("PPP") loans. Ozkar argues that the fine was based on an erroneous presentence report ("PSR"), that it was unconstitutionally excessive, and that the disparity between his fine and his brother's violated 18 U.S.C. § 3553(a)(6) and his right to equal protection. We have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291. We affirm.

Because Ozkar did not raise objections to his sentence in district court, we review imposition of the fine for plain error. *See United States v. Kirilyuk*, 29 F.4th 1128, 1140 (9th Cir. 2022); *see also United States v. Olano*, 507 U.S. 725, 731 (1993). We review for reasonableness Ozkar's § 3553(a)(6) claim that there was an ex post facto disparity, *United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007), and apply a rational basis standard of review to equal protection challenges "based on a comparison of allegedly disparate sentences." *United States v. Ellsworth*, 456 F.3d 1146, 1149 (9th Cir. 2006).

The district court did not plainly err by imposing a $1 million fine based upon the PSR's description of Ozkar's financial assets. The district court confirmed at the hearing that both Ozkar and his counsel had reviewed the PSR.

The parties also agreed in the Plea Agreement on the Sentencing Guidelines calculations, which included a fine ranging from $10,000 to $1 million. Ozkar waived his challenge by failing to object to the PSR at the sentencing hearing. *See United States v. Mercado-Moreno*, 869 F.3d 942, 958 n.8 (9th Cir. 2017) (quoting *United States v. Visman*, 919 F.2d 1390, 1394 (9th Cir. 1990) ("[A] defendant waives a challenge to a presentence report by failing to object in the district court.")).

Nor did the district court plainly err with respect to justification for the fine, which may "be inferred from the presentence report or the record as a whole." *United States v. Hernandez-Arias*, 757 F.3d 874, 884 (9th Cir. 2014) (quoting *United States v. Blinkinsop*, 606 F.3d 1110, 1114 (9th Cir. 2010)) (cleaned up). The record supports that the district court imposed the fine to deter others from similar conduct. Additionally, the PSR revealed Ozkar possessed substantial assets. While using the fraudulently obtained loans to pay off his debts, Ozkar was able to leave his cryptocurrency investments intact, resulting in sizeable growth. The fine was necessary to ensure that Ozkar did not profit from his criminal activity. Furthermore, Ozkar's counsel emphasized his willingness to pay a fine in lieu of prolonged confinement.

Ozkar's fine did not violate the Excessive Fines Clause. In determining if a fine is "grossly disproportional to the gravity of a defendant's offense," *see United*

States v. Bajakajian, 524 U.S. 321, 334 (1998), we consider "(1) the nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense." *Pimentel v. City of Los Angeles*, 974 F.3d 917, 921 (9th Cir. 2020). Ozkar's offense was serious. He took advantage of a program designed to provide emergency relief for others in the early stages of the pandemic. The government did not seek forfeiture of Ozkar's cryptocurrency and therefore, the district court did not have forfeiture available as an alternative penalty. Although Ozkar paid restitution and attempted to pay back all the loans prior to the federal investigation, his actions nonetheless undermined the viability of, and potentially public confidence in, the relief programs. Ozkar's fine was within the statutory and Guidelines range. The fact that it was the upper bound of that range does not make it excessive. *See Bajakajian*, 524 U.S. at 336.

The district court did not violate 18 U.S.C. § 3553(a)(6) by later declining to impose a fine against Ozkar's brother for similar conduct. Courts may impose different sentences, while remaining consistent with the directive in *United States v. Booker*, 543 U.S. 220, 264–65 (2005), after considering how the sentencing factors apply to each defendant. *United States v. Plouffe*, 445 F.3d 1126, 1131 (9th Cir. 2006). The district court reasonably recognized that Ozkar's brother lacked the ability to pay a fine and, instead, imposed a longer period of confinement and

initiated forfeiture proceedings.

The fine disparity between the brothers did not amount to an equal protection violation. The class-of-one doctrine, raised by Ozkar, "does not apply to forms of state action that 'by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.'" *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012) (quoting *Engquist v. Or. Dep't Agric.,* 553 U.S. 591, 603 (2008)). Sentencing is a discretionary decisionmaking process. The district court had a rational basis for imposing different sentences.

AFFIRMED.[1]

[1] We deny Ozkar's motion for judicial notice as to Exhibit F as the documents were not before the district court. We grant the motion for judicial notice as to the unopposed Exhibits A-E and G.