No. 12-8561

In The

Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

vs.

AMY UNKNOWN and UNITED STATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Congress enacted the Mandatory Restitution for Sexual Exploitation of Children Act of 1994, 18 U.S.C. §2259, to benefit victims of federal child pornography crimes, including victims like respondent-Amicus Amy, whose child sex abuse images are traded and collected over the internet by countless individuals worldwide. The statute provides in part that a court "shall order restitution" for a victim of any child pornography crime in "the full amount of the victim's losses." Congress defined these losses as including psychological counseling, lost income, attorneys' fees, child care expenses, as well as "any other losses suffered by the victim as a proximate result of the offense." The question presented is whether the Mandatory Restitution for Sexual Exploitation of Children Statute, 18 U.S.C. §2259, excuses a defendant from paying restitution for the enumerated loss categories unless there is proof that the victim's losses were the proximate result of an individual defendant's child pornography crime.

2. The Excessive Fines Clause of the Eighth Amendment provides that "excessive fines [shall not be] imposed." U.S. Const., Amdt. VIII. This Court has applied the Excessive Fines Clause in *United States v. Bajakajian*, holding that "[f]orfeitures – payments in kind – are . . . 'fines' if they constitute punishment for an offense." 524 U.S. 321, 328 (1998). In applying *Bajakajian* to crime victim restitution, the United

QUESTIONS PRESENTED – Continued

States Courts of Appeals are divided on whether restitution awards are similarly punishment for an offense and thus subject to the limitations of the Excessive Fines Clause. The second question presented is whether a district order directing a defendant to make restitution payments to the victim of his crime is punishment subject to the limitations of the Excessive Fines Clause, or is a remedial payment not restricted by the Clause.

LIST OF PARTIES

These petitions involve two criminal prosecutions brought by the United States for child pornography crimes committed by Doyle Randall Paroline and Michael Wright. "Amy" (who proceeds here by pseudonym) is a victim of these crimes.

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OPINIONS BELOW

Petitioners Doyle Randall Paroline and Michael Wright have both filed separate petitions for writs of certiorari seeking review of a reported, en banc opinion of the United States Court of Appeals for the Fifth Circuit. 701 F.3d 749 (5th Cir. en banc 2012), reprinted in Paroline App. 1-54.[1] The Fifth Circuit's en banc decision covers two cases which were consolidated for purposes of argument and decision. 668 F.3d 776. The first of these two cases is *In re Unknown*, 636 F.3d 190 (5th Cir. 2011), which granted mandamus on rehearing from *In re Amy*, 591 F.3d 792 (5th Cir. 2009), which in turn affirmed the district court's decision in *United States v. Paroline*, 672 F.Supp.2d 781 (E.D. Tex. 2009). The second of these two cases is *United States v. Wright*, 668 F.3d 776 (5th Cir. 2012), which affirmed an unreported district court decision.

"Amy"[2] was the successful mandamus petitioner in the first of these two cases and is thus a respondent to Paroline's petition. Amy was a successful amicus participant in the second of these two cases and is thus not a respondent to Wright's petition. She files in response to Paroline's petition.[3] The two

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[1] This decision superseded 697 F.3d 306 (5th Cir. en banc), by correcting an issue about the scope of the remand with regard to petitioner Wright.

[2] As she did in the courts below, Amy proceeds by way of a pseudonym because she is the victim of child sexual abuse.

[3] Because Amy's response supports Paroline's petition in part, Amy and the Government have agreed to a briefing

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cases have been vided and will be decided at the same time, so Amy also discusses the Wright petition here.

STATEMENT

Respondent Amy was exploited as a young girl in order to produce child sex abuse images. The resulting images are among the most widely-disseminated child pornography series in the world. Amy requires lifetime psychological counseling. She dropped out of college and finds it difficult to engage in full-time employment because she fears encountering individuals who may have seen the images of her sexual exploitation. She has suffered serious financial losses because of child pornography crimes.

Congress passed a broad restitution statute for child pornography victims like Amy. The Mandatory Restitution for Sexual Exploitation of Children Act of 1994, 18 U.S.C. §2259, requires that when sentencing a defendant for a child pornography crime, the district court must direct the defendant to pay the victim the "full amount of the victim's losses." The statute defines losses as including expenses for psychological counseling, lost income, child care expenses, and attorneys' fees. 18 U.S.C. §2259(b)(3)(A)-(E). It also authorizes restitution for "any other losses suffered

schedule in which Amy will file her response in advance of the Government.

by the victim as a *proximate result* of the offense." 18 U.S.C. §2259(b)(3)(F) (emphasis added).

A deep, acknowledged circuit split has developed on how to interpret this commonly-used restitution statute. In the last three years, eleven circuits have ruled on this recurring issue. Applying varying rationales, ten circuits have interpreted the "proximate result" limitation as implicitly applying not only to the last item in the list (the "any other losses") but also to all the other enumerated losses. Under this interpretation of the statute, in order to obtain restitution for the cost (for example) of psychological counseling, Amy and other victims must show that the counseling was the "proximate result" of an individual defendant's crime. As a practical matter, this showing is quite difficult to make given that thousands of defendants are currently being prosecuted for possessing, transporting, and distributing Amy's child sex abuse images with thousands of more to come in the foreseeable future.

In the decision below, however, the Fifth Circuit en banc reached a different interpretation of the statute. Specifically rejecting the view of the other circuits, the Fifth Circuit held, 10 to 5, that Congress intended to provide broad restitution to victims of federal child sex offenses without requiring proof that losses proximately resulted from an individual defendant's crime. This lengthy and well-reasoned decision is faithful to the text of the statute, which contains a proximate result requirement only in subsection (F) and not in subsections (A) through (E).

The Fifth Circuit also held that this interpretation does not implicate Eighth Amendment excessive punishment concerns since restitution is not punishment but a remedial measure to compensate crime victims.

Two petitions challenging the Fifth Circuit's ruling were filed, one by each of the two defendants in the two cases. Petitioner Paroline's petition is an ideal vehicle for reviewing this issue because of its well-developed record and truly adversarial posture. To resolve the circuit split, this Court should grant his petition and affirm the Fifth Circuit's well-reasoned en banc decision below. In contrast, petitioner Wright's petition is not a good vehicle for resolving the circuit split. His case does not stand in an adversarial posture because the Government agrees with him on how to interpret the statute and Amy is not a party to the case. Moreover, Amy long ago withdrew her request for restitution (a fact not disclosed in Wright's petition), now rendering the case effectively moot.

STATEMENT OF THE CASE

United States v. Paroline Procedural History

1. When she was eight and nine years old, Amy was repeatedly raped and sexually exploited by her uncle in order to produce child pornography. The images of her abuse memorialize Amy being forced to endure rape, cunnilingus, fellatio, and digital

penetration as a young girl. Amy was sexually abused specifically for the purpose of producing child sex abuse images. After this initial abuse was discovered, Amy received significant psychological counseling and (as reflected in her therapist's notes) by the end of her treatment in 1999, Amy was "back to normal" and engaged in age-appropriate activities such as dance.

Sadly, Amy's condition drastically deteriorated as she realized that her child sex abuse images are widely collected and traded on the internet. As her psychologist explained in Amy's victim impact statement, the "Misty" series depicting Amy is one of the most widely-trafficked sets of child sex abuse images in the world. As a result, Amy continues to be "known, revealed and publicly shamed, rather than anonymous. . . ."

The collection and trading of Amy's child sex abuse images on the internet has caused "long lasting and life changing impact[s] on her" that "are more resistant to treatment than those that would normally follow a time limited trauma." The re-victimization Amy suffers from the continued collection and distribution of her images will last throughout her entire life. She will require weekly therapy, and it is likely there will be periods where more intensive inpatient treatment or rehabilitation services will be required.[4]

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[4] In January 2013, the *New York Times Magazine* published a cover story about the difficulties faced by Amy and other victims of child pornography. Emily Bazelon, *The Price of a*

(Continued on following page)

2. One of the criminals who joined in the collective world-wide exploitation of Amy is petitioner Paroline. On January 9, 2009, he pleaded guilty to one count of possession of material involving the sexual exploitation of children in violation of 18 U.S.C. §§2252(a)(4)(B) and 2252(b)(2). The National Center for Missing and Exploited Children (NCMEC) identified Amy as one of the children victimized in the child sex abuse images he collected.

The United States Attorney's Office notified Amy's attorney that she was a victim in the case.[5] Amy's counsel filed a detailed victim impact statement on her behalf, describing not only the harm she suffered from childhood sexual abuse, but also the harm she continues to endure from knowing that she is powerless to stop the trading of her child sex abuse images on the internet. In her request for restitution, Amy sought $3,367,854 from Paroline (primarily for future lost income and psychological counseling). This amount reflected the total amount of Amy's losses from the production, distribution and possession of child pornography.

3. On June 10, 2009, the district court sentenced Paroline to 24 months in prison and severed

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Stolen Childhood, N.Y. TIMES MAG. (Jan. 24, 2013) (*available at* http://bit.ly/stolenchildhood).

[5] Due to the widespread distribution of her images, Amy's trial attorney currently receives an average of one notification each day of a new federal criminal case involving Amy's child sex abuse images; the total federal criminal cases now exceed 1600.

the restitution issue from the other sentencing issues. Later, the Court conducted a two day restitution hearing pursuant to 18 U.S.C. §3664(d)(5). Amy's counsel presented arguments in support of her restitution request which the Government supported. An extensive record on the restitution issues was developed.

On December 7, 2009, the district court issued an opinion refusing to award Amy restitution even though restitution is "mandatory" under 18 U.S.C. §§2259(a) and (b)(4). *United States v. Paroline*, 672 F.Supp.2d 781 (E.D. Tex. 2009). The court began by making a factual finding that Amy was a "victim" of Paroline's crime because she was harmed by his crime. The district court explained "the continual online distribution and possession of the child pornography images re-victimizes these child victims, stripping them of any control over the disclosure of their abuse and exposing them to further shame and humiliation." *Id.* at 787.

The district court then concluded Section 2259 requires that all of "a victim's losses [must] be proximately caused by the defendant's conduct to be recoverable in restitution." *Id.* at 791. Although the district court recognized that a "significant" amount of Amy's losses "are attribute[able] to the widespread dissemination and availability of her images and the possession of those images by many individuals such as Paroline," it nonetheless refused to award her restitution. *Id.* at 792-93. The district court concluded that Amy could not specify which losses Paroline had

caused. *Id.* at 793. The district court admitted that its interpretation of the child pornography restitution statute rendered it "unworkable." *Id.* at 793 n.12.

4. Amy then promptly sought review of the district court's denial of her restitution request, using the appellate review provision found in the Crime Victim's Rights Act (CVRA), 18 U.S.C. §3771(d)(3). Acting rapidly, a divided panel of the Fifth Circuit declined to grant any relief, with Judge Dennis dissenting. *In re Amy*, 591 F.3d 792 (5th Cir. 2009).

Amy then sought a panel rehearing and rehearing en banc. Paroline and the Government opposed her position. On March 22, 2011, a unanimous panel of the Fifth Circuit granted Amy's petition for panel rehearing and concluded that the district court had "clearly and indisputably erred in grafting a proximate causation requirement onto the CVRA." *In re Amy*, 636 F.3d at 192. The panel explained that Congress included a "proximate" cause requirement only on a catchall category of restitution losses, not to the specific enumerated restitution losses (e.g., psychiatric counseling expenses). *Id.* at 198-99.

Both Paroline and the Government sought rehearing en banc of the panel's decision. On January 25, 2012, the Fifth Circuit granted rehearing en banc.

United States v. Wright Procedural History

1. When federal agents executed a search warrant at petitioner Wright's home, they discovered

30,000 images and videos in his possession depicting the sexual exploitation of children. The material included children less than twelve years old engaged in "sexually explicit conduct" including "adult males vaginally or anally penetrating minor victims and minors performing oral sex on adults." On June 17, 2009, Wright pleaded guilty to a one-count information for possessing images depicting the sexual abuse of children in violation of 18 U.S.C. §2252(a)(4)(B). His plea agreement included an appeal waiver provision, which he acknowledged during the plea proceedings.

The Bureau of Immigration and Customs Enforcement identified 21 known victims among Wright's 30,000 child sex abuse images, including Amy. After Amy's counsel was notified, she filed a victim impact statement and detailed restitution request outlining $3,367,854 in losses (as in the *Paroline* case). The prosecutors handling the case supported Amy's request and Wright objected.

At sentencing, the district court granted a fraction of the restitution Amy was seeking. The court awarded restitution of $529,661 based on the future projected costs of $512,681 for counseling and $16,980 for Amy's expert witness fees.

2. Wright appealed. He challenged the restitution award by arguing that he did not proximately cause any of Amy's losses. The Government responded with a brief fully defending the award and arguing that, in any event, Wright had waived his right to

appeal. The Government "assumed" that the statute generally requires proof that a defendant proximately caused a victim's losses, but contended that record evidence established the necessary proximate cause. Amy, who was not a party to the action, did not file a brief and did not participate in oral argument.

On April 20, 2011, following oral argument, a panel of the Fifth Circuit found that the appeal waiver in Wright's plea agreement did not foreclose his right to appeal the restitution order. *United States v. Wright*, 639 F.3d 679, 683 (5th Cir. 2011). The panel then reversed the district court's restitution award, concluding that the district court failed to adequately explain why it ordered Wright to pay some parts of Amy's restitution request but not others. *Id.* at 686. The three judges on the panel, however, also filed a special concurring opinion. In it, they expressed their disagreement with the panel decision in *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), and urged that this issue be reheard en banc. *See id.* at 686 (Davis, J., specially concurring).

3. On June 2, 2011, Wright filed a petition for rehearing en banc. The Government filed a petition for panel rehearing, referencing its support for rehearing en banc in the parallel case of *In re Amy Unknown.*

On June 3, 2011, Amy filed a letter "withdraw[ing] with prejudice the request for criminal restitution" in the case. *See* Appendix. The Government later took the position that the letter was

irrelevant to the Fifth Circuit's jurisdiction because "the district court currently lacks jurisdiction to address [Amy's] counsel's letter." Gov't Pet. for Panel Rehearing p. 8 n.4 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (district court divested of jurisdiction over a case when notice of appeal filed)); *see also* Letter from Appellant Mr. Michael Wright, Court of Appeals Docket No. 09-31215, Doc. 00511504289 (June 9, 2011) (making similar argument).

On January 25, 2012, the Fifth Circuit granted rehearing en banc in this case and the companion case of *In re Amy Unknown*. On February 22, 2012, the Court granted Amy's motion to file a brief and argue as amicus in support of the judgment below.

The En Banc Decision Below

1. On November 19, 2012 the Fifth Circuit en banc held 10 to 5 that the Mandatory Restitution for Sexual Exploitation of Children Act of 1994, 18 U.S.C. §2259, does not contain a general requirement that a child pornography victim establish that her losses were the "proximate result" of an individual defendant's crime. After finding that it had jurisdiction in both the *Paroline* and *Wright* cases,[6] the Fifth

[6] The Fifth Circuit concluded that, while Amy could not take an appeal from the district court's decision denying restitution – she was specifically authorized by the Crime Victims Rights Act (CVRA) to seek mandamus review. Paroline App.

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Circuit turned to the plain language of the statute. The Circuit explained that Section 2259 "reflects a broad restitutionary purpose" and makes an award for the "full amount of the victim's losses" mandatory. Paroline App. 17. The plain language of Section 2259 contains a "proximate result" requirement only in the last of six separately-enumerated subsections. According to "rule of the last antecedent," a limiting phrase "should ordinarily be read as modifying only the noun or phrase it immediately follows." *Id.* at 21 (*quoting Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). The Circuit held that this approach makes sense in construing Section 2259. The statute

> begins with an introductory phrase composed of a noun and verb . . . that feeds into a list of six items, each of which are independent objects that complete the phrase. Only the last of these items contains the limiting language 'proximate result.' A double-dash opens the list, and semi-colons separate each of its elements, leaving §2259(b)(3) with a divided grammatical structure. . . .

Id. at 22-23. It would "stretch[ ] the modified too far" and "disregard the structure of §2259(b)(3) as written" to use canons of construction to apply the "proximate result" limitation outside of the subsection

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14-15. The Fifth Circuit also concluded that, while Wright specifically waived his right to appeal, it "need not further address the appeal waiver issue" since the Government was not seeking to enforce the appeal waiver during the en banc proceedings. Paroline App. 6 n.4.

where it appears. *Id.* at 26 (internal quotations omitted).

The Fifth Circuit also noted that while a number of circuits had applied the "proximate result" limitation beyond subsection (F), at least three of those circuits held that doing so was not supported by standard rules of statutory construction but by a general "proximate result" requirement inherent in the statute. *Id.* at 26 (citing decisions from the Second, Fourth, and D.C. Circuits). These circuits found ordinary rules of statutory construction were overridden by general principles of tort law.

The Fifth Circuit rejected this reasoning. "The selective inclusion and omission of causal requirements in §2259's subsections, together with language pointing away from ordinary causation, suggest that Congress intended to depart from, rather than incorporate, a tradition of generalized proximate cause." *Id.* at 31. The Fifth Circuit explained that this "joint and several liability mechanism applies well in these circumstances, where victims like Amy are harmed by [multiple] defendants acting separately who have caused her a single harm." *Id.* at 33.

2. The Fifth Circuit also rejected any suggestion that allowing Amy to recover full restitution imposed on defendants excessive punishment under the Eighth Amendment. The Circuit held that restitution is not "punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive." *Id.* at 37. Moreover, any

harsh impact on a defendant can be ameliorated through an appropriate payment schedule. *Id.*

3. After rejecting the arguments of both the defendants and the Government, and resolving the statutory construction issue in Amy's favor, the Fifth Circuit turned to the remands in the two cases. In *Paroline*, the Circuit noted that the district court was obligated to award Amy restitution for "the 'full amount of [her] losses' as defined under §2259(b)(3))." Paroline App. 40. The Fifth Circuit accordingly directed that, "[o]n remand, the district court must enter a restitution order reflecting the 'full amount of [Amy's] losses' in light of our holdings today." Paroline App. 41. In *Wright*, the Fifth Circuit noted that the district court did not award Amy the full amount of her losses, but only the full amount of her losses from psychological counseling. Since only Wright appealed, the Fifth Circuit affirmed the restitution award entered by the district court. *Id.* at 41.

REASONS FOR GRANTING PAROLINE'S PETITION AND DENYING WRIGHT'S PETITION

The issue of whether Section 2259 contains a general proximate result limitation has deeply divided the circuit courts. Although a number of circuits have imposed such a proximate cause requirement onto Section 2259 for various conflicting reasons, the Fifth Circuit correctly rejected such judicial rewriting

of the statute. The practical effect of this clearly-acknowledged circuit split is that child pornography victims in the Fifth Circuit are now receiving restitution for "the full amount of their losses," 18 U.S.C. §2259(b)(1), while in many other circuits victims face what the Ninth Circuit declared are "serious obstacles" to collecting anything at all. This division represents a recurring issue of great significance, not only for the many identified victims of child pornography, but also for the several thousand criminal defendants who have mandatory restitution obligations to child pornography victims every year.

This Court should consider Paroline's petition in order to resolve the circuit split by affirming the Fifth Circuit's en banc decision. As the Fifth Circuit carefully explained, "Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation." Paroline App. 32 n.15. Such a requirement forces victims, defendants, prosecutors, and district courts into interminable litigation about what proportion of a victim's losses are caused by an individual defendant's criminal violation of the child pornography laws. Congress did not intend to make victims trace out their losses to each individual defendant as a precondition to eventually receiving restitution for the full amount of those losses.

This Court should also use Paroline's petition to review the second issue on which the Circuits (and state courts) are divided: whether restitution awards

are limited by the Eighth Amendment. This is also an important issue that requires clarification from the Court.[7]

The Court should not grant review of Wright's petition. The Wright petition does not stand in an adversarial posture since both Wright and the Government (the only two parties to the case) both agree that the statute contains a general proximate result requirement. The Wright petition is also effectively moot since Amy long ago withdrew her restitution request.

I. The Lower Courts Are Intractably Divided on Whether the Mandatory Restitution for Sexual Exploitation of Children Statute Imposes a General Proximate Cause Requirement.

Whether the Mandatory Restitution for Sexual Exploitation of Children Act contains a general proximate cause requirement is a recurring issue that has divided the federal courts of appeals. The statute, 18 U.S.C. §2259, requires restitution for all victims of child pornography and many other federal child sex crimes. 18 U.S.C. §3771(b)(4) ("[t]he issuance of a restitution order under this section is mandatory"). The statute broadly defines a "victim" as "the individual harmed as a result of a commission of . . . [a

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[7] If the Court grants review, Amy requests that the questions presented be reformulated to track her questions here.

federal child sex offense].” 18 U.S.C. §2259(c). The statute requires that when sentencing a defendant convicted of such an offense, the district court “shall direct the defendant to pay the victim . . . the full amount of the victim’s losses. . . .” 18 U.S.C. §3771(b)(1). The statute then defines the phrase “full amount of the victim’s losses” as “include[ing] any costs incurred by the victim for –

> (A) medical services relating to physical, psychiatric, or psychological care;
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> (B) physical and occupational therapy or rehabilitation;
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> (C) necessary transportation, temporary housing, and child care expenses;
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> (D) lost income;
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> (E) attorneys’ fees, as well as other costs incurred; and
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> (F) any other losses suffered by the victim as a *proximate result* of the offense.”

18 U.S.C. §2259(b)(3) (emphasis added). Whether the “proximate result” language applies only to the catch-all subsection (F) where it appears, or should implicitly be read backwards through subsections (A) through (E) as well, is a question producing disagreement throughout the country.

Ten circuits have held that a victim must show that all her losses were the proximate result of an individual defendant’s crime in order to obtain full restitution. *See United States v. Kearney*, 672 F.3d 81,

94-95 (1st Cir. 2012); *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir. 2011); *United States v. Burgess,* 684 F.3d 445, 456-57 (4th Cir. 2012); *United States v. Evers*, 669 F.3d 645, 658-59 (6th Cir. 2012); *United States v. Laraneta*, 700 F.3d 983 (7th Cir. 2012); *United States v. Fast*, 709 F.3d 712, 721-22 (8th Cir. 2013);[8] *United States v. Kennedy*, 643 F.3d 1251, 1260-66 (9th Cir. 2011), *petition for cert. filed*, No. 12-651; *United States v. Benoit*, ___ F.3d ___, 2013 WL 1298154 (10th Cir. Apr. 2, 2013); *United States v. McDaniel,* 631 F.3d 1204, 1208-09 (11th Cir. 2011); *United States v. Monzel,* 641 F.3d 528, 535 (D.C. Cir.), *cert. denied sub nom. Amy v. Monzel,* 132 S.Ct. 756 (2011),[9] *on appeal after remand*, No. 12-3093 (oral argument scheduled May 10, 2013). The Third Circuit has suggested the same conclusion, albeit in dicta. *United States v. Crandon*, 173 F.3d 122, 125-26 (3d Cir. 1999).

The Fifth Circuit below reviewed these decisions and – acting en banc – specifically rejected them. Paroline App. 41 ("we reject the approach of our sister circuits and hold that §2259 imposes no generalized proximate cause requirement"). The Fifth Circuit

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[8] On or about May 20, 2013, the victim in this case will file a petition for a writ of certiorari from the Eighth Circuit's divided ruling.

[9] The Government opposed certiorari in *Monzel,* arguing that it was "premature" to review the circuit split created by the Fifth Circuit's decision because petitions for rehearing en banc were pending. Of course, the grounds advanced by the Government in *Monzel* against certiorari have disappeared.

noted that these decisions are fractured in both their views and reasoning. In surveying the other decisions, the Fifth Circuit observed that "[a]ny 'seeming agreement on a standard [in the circuits] suggests more harmony than there is.'" *Id.* at 26 n.12 (*quoting Kearney*, 672 F.3d at 96); *accord Kennedy*, 643 F.3d at 1260 (noting that construing Section 2259 presents "[a] difficult issue of statutory interpretation [which] has been considered, but not satisfactorily resolved, by several of our sister circuits.").

Among the ten circuits holding that Section 2259 contains a general proximate result requirement, the rationales have varied widely. Two circuits based such a requirement on the principle of general statutory construction: the Ninth Circuit and the Eleventh Circuit. *See Kennedy*, 643 F.3d at 1261-62 (relying on statutory interpretation to find a general proximate cause limitation); *McDaniel*, 631 F.3d at 1208-09 (same). Four other circuits have rejected the Ninth and Eleventh Circuits' reasoning, holding instead that "traditional principles of tort and criminal law" require a general proximate cause limitation. *Monzel*, 641 F.3d at 535 ("Unlike those circuits, however, our reasoning rests not on the catch-all provision of §2259(b)(3)(F), but rather on traditional principles of tort and criminal law. . . ."); *see also Burgess*, 684 F.3d at 456-57 ("declin[ing] to adopt this line of reasoning [relying on statutory language]."); *Aumais,* 656 F.3d at 153 (recognizing competing lines of reasoning and "endors[ing] the D.C. Circuit's reasoning."); *Benoit*, 2013 WL 1298154 at *15 (agreeing with *Monzel* and

Burgess). The Sixth Circuit noted these diverging principles, but concluded "[w]e need not choose between the rationales." *Evers*, 669 F.3d at 659. The First Circuit acknowledged the disagreement, but it developed its own resolution by imposing a general proximate result requirement, while concluding that the requirement could be shown in the "aggregate" rather than at the "individual" level. *Kearney*, 672 F.3d at 98. The Eight Circuit followed the First Circuit. *Fast*, 709 F.3d at 721. And recently the Seventh Circuit added yet another variation on the theme. The Seventh Circuit held that while a proximate result requirement exists, it results in full liability (i.e., joint and several liability) for any offender who *distributes* child pornography but not an offender who *possesses* child pornography. *United States v. Laraneta*, 700 F.3d 983, 990-92 (7th Cir. 2012).

It is against this backdrop of conflicting rationales and results that the Fifth Circuit granted rehearing en banc in order to "address the discrepancy between the holdings of [it] and other circuits. . . ." Paroline App. 3. The en banc Court then explicitly rejected the other circuits' decisions, concluding that their rationales were unpersuasive. *Id.* at 20-36. Because the Fifth Circuit's ruling is en banc – and because it explicitly considered and rejected the rulings of the other circuits – the circuit split is intractable. The only way to resolve this issue is through intervention by this Court.

II. The Issue Is Recurring and Important to Both Crime Victims and Defendants.

How to interpret and construe Section 2259 is an issue that the lower courts are confronting on an almost daily basis. *See United States v. Wright*, 639 F.3d 679, 682 (5th Cir. 2011) (noting that interpreting Section 2259 is an issue "raised in a large number of federal district and circuit courts in recent years"). In fiscal year 2012, the district courts sentenced more than 2,000 defendants in criminal prosecutions where Section 2259 was the operative restitution statute. U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 3 (2013) (2,014 sentences for child pornography crimes; 428 defendants for sexual abuse crimes). That year, district judges ordered restitution in 250 child-pornography cases and 59 other sex abuse cases. *Id.* tbl. 15.[10]

The number of federal prosecutions for child pornography offenses has grown significantly during the past three decades, particularly in recent years. For example, the caseload of non-production offenses

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[10] Section 2259 mandates restitution for crimes "under this Chapter," 18 U.S.C. §2259(a) – i.e., Chapter 110 of Title 18 of the United States Criminal Code. All 250 child pornography cases reported by the Sentencing Commission are found in Chapter 110 and are thus subject to Section 2259, along with some additional number of other child sex offenses. In addition, there were probably a significant number of additional cases where Section 2259 was an issue, but the victims received no restitution.

increased from 624 cases in fiscal year 2004 to 1,649 in fiscal year 2011; during that same period, the annual number of production cases rose from 94 cases to 231 cases.[11] As the number of prosecutions has increased, so has the number of identified victims. In 2002, the National Center for Missing and Exploited Children identified 73 new child pornography "series" (i.e., a collection of child sex abuse images of the same child).[12] By January 2011, "more than 3,500 children depicted in child pornography have been identified. . . ."[13] The Justice Department has responded to this expanding victimization by increasing child pornography prosecutions 40% since fiscal year 2006.[14]

As the number of federal child pornography prosecutions increases, so does the number of victims seeking restitution. *See* Note, Michael A. Kaplan, *Mandatory Restitution: Ensuring that Possessors of*

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[11] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES at 7 & n.43 (Dec. 2012).

[12] U.S. DEP'T OF STATE, U.N. COMM. ON THE RIGHTS OF THE CHILD: OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION & CHILD PORNOGRAPHY: PERIODIC REPORT OF THE UNITED STATES OF AMERICA & U.S. RESPONSE TO RECOMMENDATIONS IN COMM. CONCLUDING OBSERVATIONS OF JUNE 25, 2008, at 6-7 (Jan. 22, 2010), *available at* http://bit.ly/USPeriodicReport.

[13] Fact Sheet: Project Safe Childhood, U.S. DEPT. OF JUSTICE (last visited Oct. 17, 2012), *available at* http://bit.ly/PSCFactSheet.

[14] NAT'L STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 5 (Aug. 2010), executive summary, *available at* http://bit.ly/NatStrategyExecSummary.

Child Pornography Pay for Their Crimes, 61 SYRACUSE L. REV. 531, 552 (2011). When victims of child sex offenses file restitution requests, district courts must confront the issue of how to interpret Section 2259 because Congress directed that "[t]he issuance of a restitution order under [§2259] is *mandatory*." 18 U.S.C. §2259(b)(4) (emphasis added).

Moreover, the circuit split has caused wildly differing restitution awards in factually identical cases. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 330 (Dec. 2012), available at http://bit.ly/USSCchildPornographyOffense ("The [child pornography] restitution statute has generated confusion and disparate result in courts around the country."). For example, after receiving essentially identical victim impact statements, district courts have awarded child pornography victims millions of dollars in restitution, no restitution, and various amounts of restitution in between. *Id.* at 117. Such divergent awards interfere with the important objective of uniformity in federal sentencing. *See United States v. Booker*, 543 U.S. 200, 253 (2005).

Finally, prompt review of the "proximate result" issue is important because a second circuit split has clearly developed on how to apply any such proximate result requirement. In cases with extremely similar facts the circuits have "reached different outcomes" which "cannot be entirely explained by the difference in the facts of the record." *Kearney*, 672 F.3d at 96. As explained in a recently-filed certiorari petition, "there

is a deep and mature split in the circuit and district courts concerning" how to determine whether losses are the proximate result of a particular defendant's crime. Petition for Cert. at 17, *Kearney v. United States*, No. 12-6574 (1st. Cir.) (filed Sept. 28, 2012) (collecting numerous authorities).[15] This Court cannot even begin to consider that issue until it decides the threshold issue of whether such a proximate result requirement even exists. This Court should accordingly first determine whether Section 2259 contains a general proximate result requirement by granting this petition. Any other petitions which raise additional, secondary issues should be held until the Court makes this determination.

For all these reasons, the issue of how to interpret Section 2259 is an important and recurring one worthy of this Court's review.

III. The Related Issue of Whether Restitution Is Punishment Under the Eighth Amendment Is Also Worthy of Review.

Paroline seeks review of not only the issue of whether Section 2259 contains a general proximate result requirement, but also the related issue of whether restitution is subject to the Eighth Amendment's limitation against excessive punishment. Paroline Pet. 14-15. The circuits (and a number of

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[15] This Court recently dismissed this petition on stipulated motion in light of Mr. Kearney's death.

state courts) are divided on this fundamental question. The Court should review this important issue as well.

The Excessive Fines Clause of the Eighth Amendment provides that "excessive fines [shall not be] imposed." U.S. Const., amdt. VIII. The Court applied the Excessive Fines Clause in a similar context in *United States v. Bajakajian,* 524 U.S. 321 (1998), holding that "[f]orfeitures-payments in kind-are . . . 'fines' if they constitute punishment for an offense." *Id.* at 328.

In this case, the district court cited *Bajakajian* to reach the conclusion that "construing the statute as Amy suggests could render section 2259 unconstitutional." 672 F.Supp.2d at 788. The Government raised this same argument below, but the Fifth Circuit rejected it. The Circuit held that "we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive." Paroline App. 37.

In so ruling, the Fifth Circuit added to a clear and mature circuit split. At least three other circuits have announced identical holdings. *United States v. Webber*, 536 F.3d 584, 602-03 (7th Cir. 2008) ("Restitution is remedial in nature, and its goal is to restore the victim's loss."); *see also United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 430 & 132 S.Ct. 1069 (2012); *Necula v. Conroy*, 13 F. App'x 24, 26 (2d Cir. 2001); *United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008), *cert. denied,* 555

U.S. 883 (2008). Additionally, the Sixth and Tenth Circuits have indicated in related reasoning that they will likely stand with the Fifth Circuit on this issue. *See United States v. Boring*, 557 F.3d 707, 714 (6th Cir. 2009); *United States v. Garcia-Castillo*, 127 F. App'x 385, 390 (10th Cir. 2005).[16]

On the other side of the circuit split are the Ninth and Eleventh Circuits, and perhaps others as well. In *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998), *cert. denied*, 525 U.S. 975 (1998), the Ninth Circuit held that "restitution under the MVRA is punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes." *Id.* at 1144; *accord Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000) (affirming *Dubose*). The Eleventh Circuit has taken the same position. *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998) (concluding, for the same reasons, that restitution under the MVRA is 'punishment' for purposes of the Ex Post Facto Clause). Two other circuits have also suggested that the Eighth Amendment restricts restitution awards. *See United States v. Lessner*, 498 F.3d 185, 205 (3d Cir. 2007), *cert. denied*, 552 U.S.

[16] These related holdings also implicate another circuit split: whether restitution is sufficiently penal to implicate the Ex Post Facto Clause. *Compare, e.g., United States v. Schulte*, 264 F.3d 656, 661-62 (6th Cir. 2001) (answering yes); *United States v. Dugan,* 150 F.3d 865, 868 (8th Cir. 1998) (same), *with, e.g., United States v. Newman*, 144 F.3d 531, 542 (7th Cir. 1998) (answering no); *United States v. Nichols*, 169 F.3d 1255, 1279-80 (10th Cir. 1999) (same).

1260 (2008); *United States v. Bollin*, 264 F.3d 391, 419 (4th Cir. 2001), *cert. denied*, 534 U.S. 935 (2001).

The split of authority extends to the state courts. Although this Court has never incorporated the Excessive Fines Clause against the states, *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3035 n.13 (2010), many states courts have either assumed incorporation or consider this Court's holdings almost dispositive for purposes of similarly worded state constitutional provisions. These state courts are clearly divided on whether restitution is punishment under the Excessive Fines Clause. For example, courts in Delaware, New Jersey, and Colorado hold that restitution is a remedy, not a punishment. *Benton v. State*, 711 A.2d 792, 799 (Del. 1998) ("Accordingly, we have concluded that the Superior Court's order of restitution was not a punitive fine at all and a fortiori was not imposed in violation of the Eighth Amendment."); *State v. DeAngelis*, 747 A.2d 289, 295-96 (N.J. App. Div. 2000) ("The restitution order in this case does not violate the prohibition against excessive fines."); *People v. Stafford*, 93 P.3d 572, 574 (Colo. Ct. App. 2004) ("[F]or purposes of Eighth Amendment analysis, restitution is not the equivalent of a fine."). In contrast, courts in Montana and Iowa hold that restitution is punishment and therefore subject to the Excessive Fines Clause. *State v. Good*, 100 P.3d 644, 649 (Mont. 2004) ("[A]s *Bajakajian* tells us, restitution of the kind imposed upon Good is still punitive in part and therefore is within the purview of the Excessive Fines Clause."); *State v. Izzolena*, 609 N.W.2d

541, 549 (Iowa 2000) ("The [restitution] award is a 'fine' within the Eighth Amendment of the United States Constitution. . . .").

The Court should review this significant constitutional question by granting Paroline's certiorari petition. If the Court grants review, Paroline will argue (as he has in his petition) that Section 2259 should be interpreted to avoid constitutional doubt under the Eighth Amendment by reading a general proximate result interpretation into it. If the Government adheres to the position it argued below, it will take the same view. Amy will respond by defending the Fifth Circuit's holding below that the Eighth Amendment is not implicated at all when interpreting Section 2259 because it is a restitution statute that compensates victims rather than imposing punishment. This Court's ruling will resolve the circuit split among the Courts of Appeals (and among various state courts too).

IV. *Paroline* Is the Right Case (and *Wright* Is the Wrong Case) to Determine How to Interpret the Mandatory Restitution for Sexual Exploitation of Children Act of 1994.

Paroline's petition is a good vehicle for reviewing the question of how to construe Section 2259, while Wright's petition is not. Unlike many other cases pending in the lower courts, Paroline involves an adversarial presentation of the critical "proximate

result" issue. Wright, on the other hand, involves a non-adversarial case that is effectively moot.

A. The Court Should Grant Review of Paroline's Petition.

In the vast majority of child pornography restitution cases pending in the lower courts, only the Government and the defendant are directly litigating the restitution issue. In a typical child pornography prosecution, a victim files a restitution request in the district court without the assistance of legal counsel. Even if a victim has legal counsel, counsel will rarely appear or intervene in a case. Instead, a restitution request substantiating losses along with a victim impact statement is submitted to the United States Attorney's victim-witness coordinator, who forwards it to the probation office. Because the Justice Department's current litigation position is that Section 2259 contains a general proximate cause requirement, many lower court cases were not decided in an adversarial posture; the Government and the defendant *both* agree that Section 2259 requires proximate cause. Indeed, this lack of adversarial presentation of the issues likely explains why many circuits have ruled that Section 2259 contains a proximate cause requirement.

In contrast, Paroline's petition involves a case in which restitution was fully and fairly litigated by opposing parties from the district court through the Court of Appeals. Recognizing the importance of the

issue, the district court invited Amy to present her best case supporting restitution and developed an extensive record concerning restitution. Despite her involvement, the district court denied Amy restitution and Amy appealed. The Fifth Circuit then reviewed the case three separate times with several dissenting opinions. Accordingly, unlike the vast majority of cases at every level, Paroline's case has a fully-developed factual record along with a comprehensive distillation of every competing legal position.[17]

The Government may claim that the *Paroline* case is somehow in an "interlocutory" posture because the Fifth Circuit ultimately remanded. The case, however, stands in an interlocutory posture in name only. The Fifth Circuit sent the case back to the district court with explicit directions that "[o]n remand, the district court must enter a restitution order reflecting the 'full amount of [Amy's] losses' in light of our holdings today." Paroline App. 41. Little remains to be done. Given the Fifth Circuit's en banc holding, the critical "proximate result" issue presented by Paroline in his petition has been finally decided by the court below.

The technical "interlocutory" posture of this case is simply one factor the Court considers. It is not a

[17] Paroline is also represented by capable and experienced counsel, Stanley G. Schneider, who was appointed by the district court specifically to insure that Paroline received effective appellate representation.

bar to this Court's review. *See* 28 U.S.C. §1254(1). The Court can grant certiorari to review interlocutory decisions involving a fundamental issue of law important to the further conduct of a case. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997); EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE §4.18 at 281 (9th ed. 2008) (collecting cases). Indeed, this Court frequently grants review when a lower court decides an important issue otherwise worthy of review, and an immediate decision will hasten resolution of the litigation. *See, e.g., F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (vacating denial of motion to dismiss); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver,* 511 U.S. 164 (1994) (reversing denial of summary judgment).

Resolution of the issues in this case is obviously important to Paroline and countless other criminal defendants, as well as to Amy and numerous other victims. But just as important are the interests of the federal judiciary in avoiding continuing litigation. Given the many circuits aligned against the Fifth Circuit's holding, every defense attorney in a child pornography case in the Fifth Circuit must now appeal the issue and file a certiorari petition to protect their clients' interests. In the other circuits, crime victims must file claims raising the Fifth Circuit's approach. In the circuits that require proximate cause, the district courts continue to struggle to understand where the requirement comes from and what it really means. The often-litigated issues surrounding Section 2259 need to be resolved.

If the Court decides that the interlocutory posture of this case is a barrier to review, it has one previously-filed petition and one soon-to-be-filed petition from two final child pornography restitution decisions that could allow it to review the issue. Amy (and another victim, Vicky) have a currently pending certiorari petition before this Court seeking review of the Ninth Circuit's decision in *United States v. Kennedy*. (No. 12-651). And Vicky will soon seek review of the Eight Circuit's decision in *United States v. Fast*. If the Court decides not to grant certiorari in this case, then the Court could – and should – grant certiorari in either of these two other cases.

B. The Court Should Deny Review of Wright's Petition.

Wright's petition is an obvious example of a non-adversarial certiorari petition. While it is true that Amy was allowed to participate as an amicus in the court below, she is not a party to the criminal case, *United States v. Wright*. Thus, if the Court grants Wright's certiorari petition, no one will defend the judgment below since both Wright and the Government agree that Section 2259 does not contain a general proximate result limitation. If the Court grants certiorari in Wright's case, the Court will then need to appoint an attorney to argue in defense of the judgment below. The Court's ability to invite such representation is controversial. *See, e.g.,* Note, Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curiae to Defendant Abandoned Lower Court*

Decisions?, 63 STAN. L. REV. 907 (2011). Because there are other, less problematic vehicles to address Section 2259, the Court should avoid the needless complications entailed by granting Wright's petition.[18]

The Court should also deny Wright's petition because he executed an appeal waiver as part of his plea agreement. The court below considered Wright's case only because it found that the Government was not enforcing the waiver. Paroline App. 5-6 n.4. It is unclear whether the Government will be as accommodating before this Court since in other cases it has argued that an appeal waiver deprives the appellate court of subject matter jurisdiction to consider the case. *See, e.g., United States v. Hahn*, 359 F.3d 1315, 1320-22 (10th Cir. 2004) (describing and rejecting Government's jurisdictional argument). *But cf. United States v. Jacobo Castillo*, 496 F.3d 947, 957 (9th Cir. 2007) (while appeal waivers are not jurisdictional bars to reviewing a case, they are enforceable absent a miscarriage of justice). A case with such unresolved procedural issues is a poor vehicle for reviewing an important restitution question.

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[18] If the Court grants certiorari in Wright's case, the logical amicus to defend the judgment below is Amy's counsel, since Amy's counsel both argued as an amicus below and obtained the judgment below. *See, e.g., United States v. Dickerson*, 528 U.S. 1045 (1999) (inviting Paul G. Cassell, Esq., to brief and argue as amicus curiae in support of the judgment below when he argued and obtained the judgment below as an amicus).

Finally, the Wright petition also suffers from the problem that the restitution issue has effectively become moot in this case. Although Wright does not disclose this fact in his petition, Amy long ago withdrew her restitution request. *See* June 3, 2011 Letter from Amy's Counsel (appended to this brief). The district court was unable to take action on that letter while the matter was before the Fifth Circuit. But on December 11, 2012, the Fifth Circuit issued its mandate, sending the case back to the district court. Unlike the *Paroline* case where the district court stayed further proceedings pending this Court's action,[19] the district court in the *Wright* case is now free to consider Amy's letter and dismiss the restitution award at any time without further ado.[20] Thus, "the course of legal proceedings" against him is now "hypothetical," a fact strongly arguing against this Court exercising its certiorari jurisdiction. *See Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring).

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[19] *See USA v. Paroline*, Order Granting Motion to Stay, Eastern District of Texas Criminal Docket for Case No. 6:08-cr-00061-LED-JDL-1, Doc. 79 (filed Feb. 25, 2013).

[20] Interestingly, the circuits appear to be divided on whether a court is required to order a defendant convicted of a qualifying offense to pay restitution in the absence of a formal assignment of rights by the victim. *Compare United States v. Johnson*, 378 F.3d 230, 244-46 (2d Cir. 2004) (district court must impose restitution under the Mandatory Victims Restitution Act) *with, e.g., United States v. Speakman*, 594 F.3d 1165, 1175-76 (10th Cir. 2010) (restitution must go to victims of crimes, and court may not order restitution paid to the Crime Victims Fund in the absence of a victim recipient).

V. The Fifth Circuit Properly Interpreted the Child Pornography Restitution Statute.

If this Court grants review in the *Paroline* (or *Wright*) case, it should affirm the Fifth Circuit's well-reasoned decision. As the Fifth Circuit correctly recognized en banc, Section 2259 is a "clearly-worded statute." Paroline App. 28 n.13. The statute provides that a district court "shall direct the defendant to pay the victim . . . the *full amount* of the victim's losses. . . ." 18 U.S.C. §2259(b)(1) (emphasis added). The statute then defines those losses as follows:

> (3) Definition. – For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –
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> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) any other losses suffered by the victim *as a proximate result* of the offense.

18 U.S.C. §2259(b)(3) (emphasis added).

Section 2259's plain language is dispositive. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted) (internal quotation marks omitted). Section 2259 should be interpreted according to the Alpha and Omega of statutory construction – its plain, conclusive language. Congress enacted a law that requires victims of child pornography to establish proximate result only for losses listed in subsection (F). If Congress wanted the "proximate result" limitation to run throughout the statute, it could easily have placed the phrase at the beginning of the list of losses or at the very end of the list in a stand-alone clause. Congress did neither.

Any other reading of the statute would interfere with Congress' overarching remedial purpose. Congress enacted a broad mandatory restitution statute that promises child pornography victims that they will receive restitution for the "full amount" of their losses. 18 U.S.C. §2259(b)(1). Congress sought to address the serious, life-long injuries that child pornography victims suffer. As this Court explained, "A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *New York v. Ferber,* 458 U.S. 747, 759 n.10 (1982).

In adopting Section 2259, Congress intended "to make whole . . . [these] victims of sexual exploitation." *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). This generous remedial purpose was highlighted in *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001), which explained that Congress generally sought through mandatory restitution "to ensure that 'the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being.'" *Id.* at 1247 (*quoting* Sen. Rep. 104-179, at 42-44 (1995)).

Section 2259 also broadly extends its protections to any "victim" who is merely "harmed" by a crime of child pornography, requiring neither "proximate harm" nor "direct harm." *See* 18 U.S.C. §2259(c) ("For purposes of this section, the term 'victim' means the individual *harmed* as a result of a commission of a crime under this chapter. . . ."). By purposely omitting narrowing qualifiers like "proximately" and "directly" found in other general restitution statutes, the clear inference is that Congress decided not to burden child pornography victims – a particularly vulnerable and disadvantaged subset of victims – with the obligation to demonstrate a "direct" or "proximate" harm before receiving restitution. *Cf.* 18 U.S.C. §3663(a)(2) (defining "victim" as "a person *directly* and *proximately* harmed as a result of [the crime]" (emphasis added)).

Yet despite these broad aims and expansive provisions, Paroline's interpretation of the statute converts it into a parsimonious regime that is "largely unworkable." *United States v. Paroline*, 672 F.Supp.2d

781, 793 n.12 (E.D. Tex. 2009). As the plethora of diverse lower court attempts to calculate restitution demonstrates, it is almost impossible for child pornography victims whose images are widely trafficked on the internet to trace precisely how their losses are the "proximate result" of any individual defendant's crime. For example, the Ninth Circuit acknowledged its proximate cause interpretation "will continue to present [a] serious obstacle[ ] for victims seeking restitution in these sorts of cases." 643 F.3d at 1266.

If the Fifth Circuit's ruling is overturned, it will condemn Amy and countless other child pornography victims to years of litigation across the country attempting to link specific losses to individual defendants in particular cases. District courts will struggle to determine precisely what losses should be assigned to specific defendants without regard to other criminals already prosecuted in other jurisdictions, other criminals who have not yet been apprehended and prosecuted, and still others who are beyond the law's reach. Congress did not intend for child pornography victims to bear such an impossible burden in which "the intent and purposes of §2259 would be impermissibly nullified . . . in virtually *every* case. . . ." *In re Amy*, 591 F.3d 792, 797 (5th Cir. 2009) (Dennis, J., dissenting). Instead, Congress broadly commanded that district courts must award restitution in every case for "the full amount of the victim's losses." 18 U.S.C. §2259(b)(1).

This Court should review and affirm the Fifth Circuit's en banc decision and construe the Mandatory Restitution for Sexual Exploitation of Children Act of 1994, 18 U.S.C. §2259, in a way which guarantees that child pornography victims will receive the full restitution Congress intended.

CONCLUSION

Paroline's petition for a writ of certiorari should be granted and then the Fifth Circuit's decision affirmed.[21]

Respectfully submitted,

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[21] If the Court grants certiorari in this case, it should require Paroline and the Government to divide the petitioner's argument time between themselves, as they both attack the judgment below. Amy should receive the argument time of respondents, as she alone defends the judgment below. The Fifth Circuit below assigned half of the argument time to Amy, and this Court has followed a similar approach in other cases. *See, e.g., Dickerson v. United States*, 528 U.S. 1045 (1999) (mem.) (criminal defendant and government attacking judgment below assigned to petitioner side of the case).

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June 3, 2011

(Filed Jun. 7, 2011)

Loretta G. Whyte
Clerk of Court
U.S. District Court
Eastern District of Louisiana
500 Poydras St Rm C151
New Orleans LA 70130-3367

Re: **United States of America v. Michael Wright**
Case Number: 09-103 "N"
USM Number 30965-034

Dear Ms. Whyte,

Please be advised that I hereby withdraw with prejudice the request for criminal restition filed in the above-named case on July 15, 2009 on behalf of Amy, the victim in the Misty child pornography series.

Please contact me if you have any questions. Thank you.

Very truly yours,

/s/ James R. Marsh
James R. Marsh

cc: Donna Duplantier, Victim Witness Coordinator
Diane Copes, Assistant United States Attorney
Brian Klebba, Assistant United States Attorney
Roma A. Kent, Federal Public Defender