Nos. 12-8505 and 12-8561

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

DOYLE RANDALL PAROLINE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

MYTHILI RAMAN
Acting Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2259, which provides for mandatory restitution for victims of child-exploitation offenses, requires a showing that the defendant's offense conduct proximately caused the victim's losses.

2. Whether the government can satisfy the requisite causation standard under 18 U.S.C. 2259 for child-pornography possession offenses. (No. 12-8505 only.)

3. Whether a defendant who is convicted of possessing images of child pornography can be held jointly and severally liable with other similarly situated defendants for the full amount of the victim's losses. (No. 12-8505 only.)

4. Whether a restitution award issued in accordance with the court of appeals' decision violates the Eighth Amendment's Excessive Fines Clause. (No. 12-8561 only.)

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OPINIONS BELOW

The amended opinion of the en banc court of appeals (Pet. App. A) is reported at 701 F.3d 749.[1] The original opinion of the en

[1] Unless otherwise noted, all references to "Pet. App." are to the appendix to the petition in No. 12-8561.

banc court of appeals (Pet. App. B) is reported at 697 F.3d 306. The panel opinion in No. 12-8505 is reported at 639 F.3d 679. The panel opinions in No. 12-8561 (Pet. App. C, D) are reported at 636 F.3d 190 and 591 F.3d 792. The district court opinion in No. 12-8561 (Pet. App. E) is reported at 672 F. Supp. 2d 781.

JURISDICTION

The amended judgment of the en banc court of appeals was entered on November 19, 2012. The petitions for a writ of certiorari were filed on January 31, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in separate and unrelated proceedings, petitioners were both convicted of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). The government sought restitution under 18 U.S.C. 2259 on behalf of a victim ("Amy") who was depicted in some of the images possessed by petitioners. The District Court for the Eastern District of Texas declined to order petitioner Paroline to pay any restitution. The District Court for the Eastern District of Louisiana ordered petitioner Wright to pay $529,661 in restitution. See Pet. App. A4-A6.

In Paroline's case, Amy filed a petition for a writ of mandamus under the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, Title I, § 102(a), 118 Stat. 2262 (18 U.S.C. 3771(d)(3)), and a notice of appeal. The court of appeals

initially denied the mandamus petition, but on rehearing the court issued a writ of mandamus and ordered the district court to award restitution. Wright, meanwhile, filed a direct appeal. The court of appeals vacated and remanded for further findings on the amount of restitution ordered. See Pet. App. A4-A7.

Petitioners independently filed petitions for rehearing en banc. The court of appeals granted the petitions and consolidated the cases for argument and decision. The en banc court granted Amy's mandamus petition in Paroline's case and remanded for further proceedings. The en banc court initially vacated the judgment in Wright's case and remanded for reconsideration of the amount of restitution, but it later amended the opinion to affirm the district court's judgment. See Pet. App. A, B.

1. When sentencing a defendant "for any offense" under Chapter 110 of Title 18, which covers sexual offenses involving children, a court is to order restitution in "the full amount of the victim's losses." 18 U.S.C. 2259(a) and (b)(1). The possession of child pornography is a Chapter 110 offense. See 18 U.S.C. 2252(a)(4)(B). A "victim," in turn, is defined as an "individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. 2259(c). And the "full amount of the victim's losses" is defined to include medical services (including psychiatric and psychological care); physical and occupational therapy or rehabilitation; necessary transportation, temporary

housing, and child care expenses; lost income; attorney's fees and other litigation costs; and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3).

Section 2259 further provides that the order of restitution "shall be issued and enforced in accordance with [18 U.S.C.] 3664." 18 U.S.C. 2259(b)(2). Section 3664(e) places on the government the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" and provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. 3664(e). Section 3664(h) provides that "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. 3664(h).

Although a crime victim is not a party to the criminal prosecution, the CVRA provides that the victim, or the government on the victim's behalf, may seek to enforce the victim's rights by filing a motion in the district court. See 18 U.S.C. 3771(d)(1) and (3). One such right is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. 3771(a)(6). If the district court "denies the relief sought, the movant" (i.e., the

victim or the government) "may petition the court of appeals for a writ of mandamus." 18 U.S.C. 3771(d)(3). The government may also "assert as error the district court's denial of any crime victim's right" through an "appeal" in the underlying criminal case. 18 U.S.C. 3771(d)(4).

2. a. On July 11, 2008, FBI agents in Tyler, Texas, met with petitioner Paroline after an employee of a computer company discovered that Paroline's laptop contained numerous images of children posing nude and engaging in various sexual acts with adults and animals. Paroline admitted that he had downloaded those images from the Internet and that he had downloaded and viewed child pornography for the last two years. A forensic analysis of Paroline's laptop uncovered 280 such images. Paroline Presentence Investigation Report (PSR) ¶¶ 9-12.

The government filed an information in the Eastern District of Texas charging Paroline with possession of images of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Paroline pleaded guilty, pursuant to a plea agreement, and the district court sentenced him to 24 months of imprisonment, to be followed by ten years of supervised release. See Pet. App. E1.

b. Following Paroline's guilty plea, the government received a request for restitution from one of the identified victims depicted in the child-pornography images possessed by Paroline. That victim, identified by the pseudonym "Amy" to protect her

privacy, submitted materials supporting her request for restitution in the amount of roughly $3.4 million, which included the cost of future psychological counseling, future lost income, and attorney's fees.[2] The materials included a victim-impact statement, a psychological evaluation, and an economic analysis. The government submitted her request to the district court. See Pet. App. E1, E6.

After extensive briefing and hearings, the district court declined to order any restitution. See Pet. App. E. The court agreed that Amy qualified as a "victim" under Section 2259 because she had been "harmed as a result of Paroline's possession of her images." Id. at E2-E3. The court concluded, however, that the government needed to demonstrate proximate cause and that it failed to make that necessary showing. Id. at E4-E7. In the court's view, the evidence submitted failed to establish "any specific

[2] Petitioners suggest (e.g., 12-8561 Pet. 4, 12, 14, 15) that Amy's claimed losses include those suffered solely as a result of her initial abuse. That is incorrect. According to Amy's expert forensic psychologist, she had completed therapy for the initial abuse and was "back to normal" until she learned years later that images depicting her sexual abuse were circulating on the Internet. United States v. Lundquist, 847 F. Supp. 2d 364, 374 n.13 (N.D.N.Y. 2011) (citation omitted). That knowledge caused Amy to regress and suffer a "resurgence of the trauma." Ibid. (citation omitted). The claimed losses include only future therapy costs and lost wages, beginning no earlier than 2009, and are based on the invasion of privacy caused by individuals (like petitioners) who receive, possess, transport, or distribute images of Amy's sexual abuse.

losses proximately caused by Paroline's conduct," as distinguished from the conduct of others who had also harmed Amy. Id. at E7.

c. Amy filed both a notice of appeal and a petition for a writ of mandamus under Section 3771(d)(3) of the CVRA. See Pet. App. C1. A divided panel of the court of appeals denied her mandamus petition. Id. at D1-D4. Applying prior precedent, the court reaffirmed that "[t]he standard of review [of a CVRA mandamus petition] is the usual standard for mandamus petitions," which meant that Amy, as the petitioner, had to show that the district court committed "clear and indisputable" error in adopting a proximate-cause requirement. Id. at D1. Because "[c]ourts across the country have followed and applied the proximate-cause requirement in imposing restitution under Section 2259," the court concluded that "it is neither clear nor indisputable that Amy's contentions regarding the statute are correct." Id. at D2. Judge Dennis dissented. Id. at D2-D4.

Amy filed a petition for panel rehearing. A different panel was assigned the rehearing petition as well as Amy's pending appeal. Pet. App. C1. That panel granted Amy's petition for rehearing and held that the district court had in fact committed "clear and indisputable error" by "[i]ncorporating a proximate causation requirement [into Section 2259] where none exists." Id. at C6. Rather, the court explained, the only showing of causation necessary for the enumerated categories of losses is the "general

causation" required for a claimant to qualify as a "victim" under Section 2259(c), i.e., a showing that the claimant suffered harm "as a result of" the offense. Id. at C5. Applying that standard, the court concluded that Amy was a "victim" entitled to restitution. Ibid. Accordingly, it issued a writ of mandamus and remanded the case to the district court with instructions to calculate an appropriate restitution award. Id. at C6.[3]

3. a. In October 2005, federal agents initiated an investigation into "Illegal.CP," a hard-core child pornography website. Through the investigation, agents obtained information that a credit card belonging to petitioner Wright was being used to obtain access to a website that provided images of child pornography. On March 26, 2009, agents went to Wright's residence to execute a search warrant. Wright admitted that he had purchased two subscriptions to online child-pornography websites, including Illegal.CP, and that he used his computer to search for, download, and save images of child pornography. A subsequent forensic examination of Wright's computer and related digital media disclosed roughly 30,000 images and videos depicting the sexual victimization of children. Agents also recovered e-mail receipts confirming that Wright subscribed to child-pornography websites,

[3] The court of appeals declined to reach the issue of whether a crime victim has a right to a direct appeal. Pet. App. C1.

including "Illegal.CP." See Wright C.A. R.E. 49-50; Wright PSR ¶¶ 9-12, 16.

The government filed an information in the Eastern District of Louisiana charging Wright with possession of images of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Wright pleaded guilty pursuant to a plea agreement. The plea agreement specified that "the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply," but it did not mention Section 2259. Wright C.A. R.E. 52. Wright "expressly waive[d] the right to appeal his sentence on any ground," but "reserve[d] the right to appeal any punishment imposed in excess of the statutory maximum." Ibid. The district court sentenced him to 96 months of imprisonment, to be followed by a lifetime term of supervised release. Id. at 88-90.

b. The government subsequently received a request for restitution from "Amy," one of the identified victims depicted in the child-pornography images possessed by Wright. Amy submitted materials supporting her request for restitution in the amount of roughly $3.4 million. Attached to the request were copies of the same materials Amy had submitted in petitioner Paroline's case (i.e., her victim-impact statement, a psychological report, and an economic analysis). The government submitted her request to the district court. See 639 F.3d 679, 681-682.

The district court awarded restitution in the amount of $529,661 which, the court explained, reflected the sum of "the estimated cost of the victim's future treatment and counseling at $512,681, and the cost of the victim's expert witness fees at $16,980." Wright C.A. R.E. 111. The court further noted that "[t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim." Id. at 111-112.

c. The court of appeals vacated and remanded. As an initial matter, the court rejected the government's argument that Wright's appeal was barred by his appeal waiver. 639 F.3d at 683-684. On the merits, the court recognized that it was bound by the recent decision in Paroline's case. Id. at 684. The court therefore held that the government did not have to prove that Amy's losses were the proximate result of Wright's offense conduct and that Amy was entitled to restitution because she was a "victim" of that offense. Id. at 684-685. The court nevertheless vacated the restitution order because the district court failed "to give a reasoned analysis of how it arrived at its award in a manner that allows for effective appellate review." Id. at 686.

All three panel judges specially concurred to express their "disagreement with the recent holding [in Paroline's case] that [Section] 2259 does not limit the victim's recoverable losses to those proximately caused by the defendant's offense and to urge the

court to grant en banc review of that decision." 639 F.3d at 686-692.

d. On June 7, 2011, Amy filed a letter in the district court withdrawing her restitution request with prejudice. See Amy Cert. Resp. App. 1-2. On June 16, 2011, the district court held a status conference about Amy's request, but it did not take any action at that time. See Dist. Ct. Dkt. 58 (Minute Entry). On April 25, 2013, Wright filed a motion to amend the June 16, 2011, minute entry to reflect the details of that status conference, which the court denied. See id. 62 (Motion), 64 (Order).

4. Both petitioners sought rehearing en banc. The court of appeals granted both petitions and consolidated the cases for argument and decision. After supplemental briefing and argument, the en banc court vacated the judgment in petitioner Paroline's case and remanded for further proceedings. In an amended opinion, the en banc court ultimately affirmed the judgment in petitioner Wright's case. See Pet. App. A, B.

a. As relevant here, the en banc court of appeals held that Section 2259 does not require a showing of proximate cause with respect to the enumerated categories of losses. Pet. App. A20-A21. Relying primarily on the "rule of the last antecedent," the court concluded that a proximate-cause requirement exists only for the catch-all category of "other losses suffered by the victim." Id. at A20-A21, A22-A26 (quoting 18 U.S.C. 2259(b)(3)(F)). The court

acknowledged that several circuits had held otherwise, but it found those decisions unpersuasive. Id. at A26-A31.

The en banc court next addressed "how to allocate responsibility for a victim's harm to any single defendant," given that numerous defendants have possessed Amy's images. Pet. App. A31. In answering that question, the court noted that the statute mandates an award for the "full amount of [the victim's] losses." Ibid. (citation omitted). The court explained that 18 U.S.C. 3664(h) permits a court to hold a defendant jointly and severally liable with other defendants, even defendants in different cases. Pet. App. A32-A33. Finally, the court dismissed concerns about overcompensation and the Eighth Amendment, noting (among other things) that a victim's total recovery would be capped at her losses and that district courts could "ameliorate the impact of joint and several liability on an individual defendant" through the use of a "payment schedule" corresponding to the defendant's ability to pay. Id. at A34-A38.

Applying those principles, the en banc court held that the district court's refusal to award any restitution in Paroline's case was "clear and indisputable" error. Pet. App. A40-A41.[4] The court explained that "[b]ecause Amy is a victim, [Section] 2259

[4] The en banc court held that crime victims do not have a right of appeal under the CVRA and, accordingly, only mandamus review is available. Pet. App. A10.

required the district court to award her restitution for the 'full amount of [her] losses' as defined under [Section] 2259(b)(3)." Id. at A40. Accordingly, the court granted Amy's mandamus petition and remanded to the district court for a determination of the "full amount of [Amy's] losses." Id. at A41 (brackets in original).

In Wright's case, the en banc court declined to enforce the appeal waiver. Pet. App. A5 n.4. The court initially vacated the district court's judgment and remanded for an explanation of the court's failure to order the full amount of restitution requested by Amy. See id. at B13. In an amended opinion, however, the court ultimately affirmed the district court's judgment in light of Greenlaw v. United States, 554 U.S. 237 (2008). See Pet. App. A41.

b. Judge Dennis concurred in part in the judgment, suggesting that the majority should have "le[ft] the decision as to how to proceed under these statutes to the district courts" in the first instance. Pet. App. A43-A44. Judge Davis, joined by three other judges, concurred in part and dissented in part, concluding that proximate cause is required for all categories of losses, but that the required showing should focus on the aggregate harms caused by possessors of child pornography generally. Id. at A45-A54. Judge Southwick filed a separate dissent. Id. at A55-A58.

ARGUMENT

Petitioners both seek review (12-8505 Pet. 10-12; 12-8561 Pet. 11-13) on the threshold question whether Section 2259 requires a

showing that the defendant's offense conduct was a proximate cause of the victim's losses. Petitioner Wright also seeks review of two related issues (12-8505 Pet. 13-28): whether the requisite causation standard can be satisfied in a case where the underlying offense is possession of child pornography, and whether a defendant in such a case can be ordered jointly and severally liable for the full amount of a victim's losses. Petitioner Paroline proposes one additional question (12-8561 Pet. 14-15): whether a restitution award issued in accordance with the court of appeals' decision would violate the Eighth Amendment. None of the questions presented warrant the Court's review at this time. The purported conflicts among the courts of appeals are overstated and percolation has proven critical to the development of this area of the law. Because neither case presents a suitable vehicle for the Court to consider these issues in any event, such percolation should be permitted to continue.[5]

1. Petitioners both contend (12-8505 Pet. 10-12; 12-8561 Pet. 11-13) that the court of appeals erred in holding that 18 U.S.C. 2259 does not require a showing that the defendant's

[5] The question presented in Amy and Vicky, Child Pornography Victims v. United States District Court for the Western District of Washington, No. 12-651 (filed Nov. 20, 2012), is similar to those presented in Paroline's and Wright's petitions and the government is accordingly filing its brief in opposition in that case at the same time. For the reasons discussed, that case is also an unsuitable vehicle to consider the question presented.

offense conduct proximately caused the victim's losses, except for the catch-all category of "other losses." Although the government agrees with petitioners that a showing of proximate cause is required for all categories of losses, the Court's review is nevertheless unwarranted.

a. Section 2259 mandates an award of restitution to a victim, like Amy, who was harmed "as a result of" a defendant's possession of images depicting her sexual abuse. See 18 U.S.C. 2259(a), (b)(4) and (c). A restitution order must cover "the full amount of the victim's losses." 18 U.S.C. 2259(b)(1). The statute defines that phrase to include five enumerated categories of losses (e.g., medical services; physical therapy; necessary transportation, temporary housing, or child care; lost income; and attorney's fees), as well as "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3)(A)-(F). The question is whether the government must also prove that the defendant's offense conduct proximately caused the enumerated categories of losses.

Every other court of appeals has answered that threshold question in the affirmative, holding that a showing of proximate cause is required. See United States v. Kearney, 672 F.3d 81, 95-96 (1st Cir. 2012), cert. dismissed, 133 S. Ct. 1521 (2013); United States v. Aumais, 656 F.3d 147, 152-154 (2d Cir. 2011); United States v. Burgess, 684 F.3d 445, 455-458 (4th Cir.), cert. denied,

133 S. Ct. 490 (2012); United States v. Gamble, 709 F.3d 541, 546-547 (6th Cir. 2013); United States v. Laraneta, 700 F.3d 983, 989-990 (7th Cir. 2012); United States v. Fast, 709 F.3d 712, 720-722 (8th Cir. 2013); United States v. Kennedy, 643 F.3d 1251, 1260-1261 (9th Cir. 2011); United States v. Benoit, No. 12-5013, 2013 WL 1298154, at *12-*16 (10th Cir. Apr. 2, 2013); United States v. McDaniel, 631 F.3d 1204, 1208-1209 (11th Cir. 2011); United States v. Monzel, 641 F.3d 528, 535–537 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011); cf. United States v. Crandon, 173 F.3d 122, 125–126 (3d Cir.) (applying proximate-cause requirement where defendant had personal contact with the victim), cert. denied, 528 U.S. 855 (1999).

The majority view is correct. As the courts of appeals have recognized, "Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor." Monzel, 641 F.3d at 536 (internal quotation marks omitted; brackets in original); accord Benoit, 2013 WL 1298154, at *15; Burgess, 684 F.3d at 457; Kearney, 672 F.3d at 96; United States v. Evers, 669 F.3d 645, 658-659 (6th Cir. 2012); Aumais, 656 F.3d at 153. By defining a "victim" as an individual harmed "as a result of" the defendant's offense conduct, Congress incorporated the preexisting "bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused." Monzel, 641 F.3d at 535 (footnote omitted).

Moreover, Congress used express proximate-cause language to describe the types of losses that are compensable under Section 2259. Although the phrase "proximate result" appears at the end of the catch-all subsection, several courts of appeals have reasonably read it as applying equally to the other enumerated categories. See Evers, 669 F.3d at 658-659; McDaniel, 631 F.3d at 1208-1209; cf. Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."). Other courts have explained that while "Congress determined that these restitution offenses typically proximately cause the losses enumerated in subsections 2259(b)(3)(A) through (E)," that does not mean "that a specific defendant automatically proximately causes those losses in every case." Fast, 709 F.3d at 721 (emphases omitted). At the very least, Congress's inclusion of an express proximate-cause requirement in the catch-all provision should not be read to abrogate "the traditional [proximate-cause] requirement for everything but the catch-all." Monzel, 641 F.3d at 537. If that had been Congress's intent, "surely it would have found a clearer way of doing so." Ibid.

b. Although the court of appeals therefore erred in concluding that Section 2259's proximate-cause requirement is

limited to the catch-all category of losses, further review is not warranted.

The circuit conflict that exists is exceedingly narrow: the Fifth Circuit is the lone outlier. And that disagreement has little practical importance. The presence or absence of a proximate-cause requirement should affect only those cases where the victim seeks to recover for losses that are unforeseeable. Cf. CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2637 (2011) ("The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.") (citation omitted). The losses Amy seeks to recover -- the costs of future psychological counseling, future lost income, already-incurred attorney's fees -- are all foreseeable losses stemming from petitioners' possession of images of child pornography depicting Amy's sexual abuse. See Kearney, 672 F.3d at 97 (victim's need for "substantial mental-health treatment" as a consequence of a defendant's possession of her images was "reasonably foreseeable at the time of [the defendant's] conduct"). The majority rule simply acknowledges that, in a hypothetical case, a victim would not be able to recover losses that are not foreseeable, such as medical expenses incurred by a victim as a result of a car accident on the way to her therapist's office. See Monzel, 641 F.3d at 537 n.7; Burgess, 684 F.3d at 458 n.9; see also Laraneta, 700 F.3d at 991 (identifying other unforeseeable harms

that may not be compensable); Evers, 669 F.3d at 660 (finding link between child-care costs and the defendant's crime too attenuated where sex offender had previously provided free babysitting services). The Fifth Circuit apparently agrees that such losses should not be compensable, but suggests that any such limitation should come from the statutory definition of "victim." Pet. App. A27 n.13. Accordingly, the narrow disagreement that does exist should have little bearing on the outcome of these cases or any other cases implicated by the circuit split, as all circuits agree that the statute places limits on the losses a victim may recover.

2. Petitioner Wright also raises two additional arguments. First, he contends (12-8505 Pet. ii, 13-18) that the circuits are divided on the precise definition of proximate cause and suggests that the requisite showing of causation cannot be made for child-pornography possession offenses. Second, he asserts that only the Fifth Circuit allows a defendant to be held jointly and severally liable for the full amount of a victim's losses (12-8505 Pet. 18-22), and that this holding conflicts with the Court's decision in Hughey v. United States, 495 U.S. 411 (1990) (12-8505 Pet. 25-28). Further review of those related issues is also unwarranted.

a. Wright first contends (12-8505 Pet. ii, 13-18) that the courts of appeals are further divided on the precise definition of proximate cause and, in particular, whether it can ever "be shown for the crimes of receipt or possession of child pornography where

the defendant has had no contact with the child." As an initial matter, any definitional confusion is better understood as an issue of "cause in fact," rather than proximate cause. As the Seventh Circuit explained, "[b]efore a judge gets to the issue of proximate cause, he has to determine what the defendant caused." Laraneta, 700 F.3d at 991. The fundamental issue in nearly all of these cases is not whether harm caused by the offense conduct is too attenuated (i.e., proximate cause), but "how to assess causation where a large number of individuals each contributed in some degree to an overall harm." Kearney, 672 F.3d at 100 n.16; see id. at 98 (noting that the defendant's "argument is in actuality an unsuccessful attempt to use a but-for causation standard to limit * * * reasonably foreseeable losses"). Properly understood, the disagreement is not nearly as stark as Wright suggests.

Several courts of appeals have expressly rejected "the theory that the victim of child pornography could only show causation if she focused on a specific defendant's viewing and redistribution of her images and then attributed specific losses to that defendant's actions." Kearney, 672 F.3d at 99; accord United States v. Hargrove, No. 11-6131, 2013 WL 1694422, at *2-*3 (6th Cir. Apr. 19, 2013); Burgess, 684 F.3d at 459-460. Finding that "viewers and distributors of the child pornography" depicting victims like Amy indisputably "caused the losses she has suffered * * * on the aggregate level," they find "no reason to find [such cause] lacking

on the individual level." Kearney, 672 F.3d at 98; accord Hargrove, 2013 WL 1694422, at *3; Burgess, 684 F.3d at 460. Those courts rest, in part, on a "widely accepted" principle of tort law: "When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event." Kearney, 672 F.3d at 98 (quoting W. Page Keeton et al., Prosser and Keeton on Torts § 41, at 268 (5th ed. 1984); accord Hargrove, 2013 WL 1694422, at *3; Burgess, 684 F.3d at 459. An unduly restrictive definition of causation would effectively preclude courts from awarding restitution under Section 2259 for child-pornography possession and similar offenses. Because Congress made clear that restitution is "mandatory" "for any offense under" Chapter 110, which includes possessory offenses, any causation requirement that effectively exempts entire categories of defendants from restitution is inconsistent with congressional intent. See, e.g., Kearney, 672 F.3d at 97, 99.

Wright contends (12-8505 Pet. 13-15) that three circuits have nevertheless adopted a more restrictive approach. A closer examination of the relevant case law, however, suggests that victims of child-pornography possession offenses can still successfully prove the requisite causal connection and obtain a restitution award in each of those circuits. For example, Wright

relies on the Ninth Circuit's decision in Kennedy. Although the court did suggest that Section 2259's causation requirement may "continue to present serious obstacles for victims seeking restitution in these sorts of cases," 643 F.3d at 1266, on remand the district court awarded restitution to one such victim, see In re Amy, 698 F.3d 1151, 1152 (9th Cir. 2012), petition for cert. pending, No. 12-651 (filed Nov. 20, 2012). Moreover, in another recent case involving Amy and one other victim, the court found that the record included "sufficient evidence to establish a causal connection between [the] defendant's offense and [the victims'] losses," and it held that the district court had abused its discretion in refusing to order any restitution. In re Amy, 710 F.3d 985, 987 (9th Cir. 2013). On remand, the district court awarded $17,307.44 in restitution to Amy and $2881.05 to the other victim. See In re Amy & Vicky, No. 13-71486, 2013 WL 1847557, at *1 (9th Cir. May 3, 2013). Restitution thus remains available to victims like Amy in the Ninth Circuit.

The same is true of the Second and Eleventh Circuits. In Aumais, the Second Circuit appeared to require "evidence linking [the defendant's] possession to any loss suffered by" the victim. 656 F.3d at 154-155. The court, however, made clear that its decision did not "categorically foreclose payment of restitution to victims of child pornography from a defendant who possesses their pornographic images." Id. at 155. And, in a subsequent case, the

court found the causation standard met based on a similar record. See United States v. Hagerman, No. 11-3421, 2012 WL 6621311, at *3 (2d Cir. Dec. 20, 2012). Similarly, the Eleventh Circuit's decision in United States v. McGarity, 669 F.3d 1218 (11th Cir.), cert. denied, 133 S. Ct. 374 (2012), on which Wright relies, reaffirms an earlier decision which upheld a restitution award to another victim after concluding that "end-user defendants may proximately cause injuries to the victims of sexual child abuse." Id. at 1269 (citing McDaniel, supra). In the end, no court of appeals has adopted the sort of inflexible, individualized causation standard that would functionally preclude the award of restitution in all child-pornography possession cases.

b. Wright also contends (12-8505 Pet. 18-24) that the court of appeals erred in holding that he could be held jointly and severally liable, with other defendants in other cases, for the full amount of Amy's losses. The government agrees but, contrary to Wright's contention, that decision does not conflict with Hughey.

As the Sixth Circuit recently explained, the question is "whether a defendant should be liable for restitution for all of the losses a victim has suffered when, as here, he is but one of hundreds of causes of the injuries, and the contribution of each individual defendant cannot be differentiated." Gamble, 709 F.3d at 550. Every other court of appeals to directly answer that

question has concluded that apportionment is the better approach. See, e.g., Fast, 709 F.3d at 723 n.6; Gamble, 709 F.3d at 550-553; Burgess, 684 F.3d at 458-459; Aumais, 656 F.3d at 155-156. The government agrees. Section 2259 "is meant to ensure full restitution to the victim," but it "is also meant to hold the defendant responsible for the damage he caused, [and] not for damage he did not cause." Gamble, 709 F.3d at 552. Moreover, the law does not appear to contemplate joint and several liability "among defendants in different cases, before different judges, in different jurisdictions around the country," Aumais, 656 F.3d at 156 & n.5 -- particularly where, as here, federal law does not authorize an action for contribution, Laraneta, 700 F.3d at 992-993. In holding that defendants like Wright and Paroline could be held jointly and severally liable for the full amount of Amy's losses, the Fifth Circuit again stands as an outlier.

Contrary to Wright's contention (12-8505 Pet. 25-28), however, the court of appeals' decision does not conflict with Hughey. In Hughey, this Court explained that the term "offense," as used in the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248, referred to the defendant's "offense of conviction," 495 U.S. at 415-416, and that the VWPA therefore "authoriz[ed] an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction," id. at 413. The Court concluded that the VWPA did not

permit a district court to order restitution for conduct that formed the basis of counts that were dismissed as part of a plea agreement. Rather, the Court held that "the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order." Id. at 420.

No court of appeals, including the court below, has addressed the relevance of Hughey to Section 2259. And that decision has no application to the restitution award at issue here. Wright was ordered to pay restitution to Amy based on his offense of conviction: possession of child pornography that included an image of Amy's sexual abuse. The district court did not order restitution for uncharged conduct. Nor did it award restitution based on conduct for which Wright was charged but not convicted. Hughey does not address whether or how a court may award restitution under Section 2259 when the defendant's offense of conviction caused harm to a victim -- but other defendants convicted of similar offenses also contributed to the victim's aggregate harm.

c. In any event, Wright's petition is not a suitable vehicle to resolve any of these issues. The court of appeals ultimately affirmed the district court's judgment, which did not "award Amy the full amount of her losses." Pet. App. A41-A42. The court explained that "because the Government did not appeal Wright's sentence and Amy did not seek mandamus review, under Greenlaw v.

United States, [554 U.S. 237, 246 (2008),] we must affirm Wright's sentence." Ibid. Accordingly, Wright has not actually been ordered to pay Amy the full amount of her losses.

More fundamentally, it is unclear whether Wright will have to pay Amy any restitution. Shortly after the panel decision in this case, Amy filed a letter in the district court withdrawing her restitution request with prejudice. See Amy Cert. Resp. App. 1-2. No court has resolved what impact Amy's withdrawal has on the district court's restitution order. This Court should not resolve that question, which has divided the courts of appeals, in the first instance. Compare United States v. Johnson, 378 F.3d 230, 244-246 (2d Cir. 2004) (district court must impose restitution under the Mandatory Victims Restitution Act), with United States v. Pawlinski, 374 F.3d 536, 540-541 (7th Cir. 2004) (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); United States v. Speakman, 594 F.3d 1165, 1174-1179 (10th Cir. 2010) (same). The uncertain status of the restitution award strongly counsels against further review.

Even if the restitution award is still enforceable, it is unlikely that Wright will ever pay anything close to the $529,661 ordered. Wright is indigent. The district court accordingly authorized a payment schedule based in significant part on Wright's ability to pay. Wright C.A. R.E. 94. To date, the Bureau of

Prisons has collected approximately $350 in restitution from Wright. Meanwhile, Amy has successfully recovered more than $1.6 million in less than five years, nearly half of her total losses. As the court of appeals recognized (Pet. App. A35), Amy is not entitled to double recovery. At the current rate of recovery, it is exceedingly likely that Amy will be fully compensated well before Wright pays any amount greater than the $5000 he suggests have been awarded by other courts (12-8505 Pet. 23).

3. a. Petitioner Paroline contends (12-8561 Pet. i, 14-15) that a restitution award entered in accordance with the court of appeals' decision would violate the Eighth Amendment's Excessive Fines Clause. Contrary to Paroline's suggestion (12-8561 Pet. i), the government did not make that argument below. Rather, the government observed that a construction of Section 2259 that adopts a proximate-cause requirement would have "the added virtue of avoiding" the district court's suggestion of a potential constitutional question. Gov't C.A. En Banc Br. 53. The court of appeals ultimately rejected any Eighth Amendment concerns, Pet. App. A37-A39, and that decision does not independently warrant further review.

In her response, Amy argues (Amy Cert. Resp. 24-28) that the court of appeals' Eighth Amendment holding implicates a different circuit conflict that does warrant this Court's review. Specifically, the court explained that it was "not persuaded that

restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture" because "[i]ts purpose is remedial, not punitive." Pet. App. A37. Amy contends that the courts of appeals (and state courts) are divided on that question. Paroline, however, barely addresses that aspect of the court of appeals' decision in his petition, and he makes no mention of any purported conflict on that issue. See 12-8561 Pet. 14-15.

In any event, the court of appeals did not rest solely on its determination that restitution does not constitute punishment for Eighth Amendment purposes. The court explained that "[e]ven" if restitution were subject to the Excessive Fines Clause, "restricting the 'proximate result' language to the catchall category in which it appears does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment." Pet. App. A37. The court explained further that restitution is still "limited to losses arising out of a victim's injury" and that district courts "can ameliorate the impact of joint and several liability on an individual defendant by establishing a payment schedule." Id. at A37-A38. Amy does not suggest that this alternative holding is incorrect, or that it conflicts with the decision of any other court of appeals. Because the purported circuit conflict was not raised by Paroline, and because it is not outcome-determinative, further review is unwarranted.

b. Amy also contends that Paroline's petition (unlike Wright's petition) presents a good vehicle for this Court's review. See Amy Cert. Resp. 28-32. For the reasons discussed above, the government agrees that Wright's petition is an unsuitable vehicle. But Paroline's petition is also a poor vehicle, albeit for different reasons.

First, Paroline's petition raises only the threshold proximate-cause issue. As discussed above, that issue implicates an exceedingly narrow circuit conflict of little practical significance and it does not independently warrant this Court's review. The questions Amy refers to as "secondary" (Amy Cert. Resp. 24) -- i.e., how to define the requisite causation standard and how to apportion the loss among similarly situated defendants -- have substantially greater practical importance. The Court should consider the threshold proximate-cause issue, if at all, only in conjunction with those related issues, and Paroline's petition does not provide the Court with an opportunity to do so.

Second, Paroline's petition arises in an interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); see also Virginia Military Inst. v. United

States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). The en banc court of appeals vacated and remanded for further proceedings. See Pet. App. A41-A42. On remand, the district court will need to ascertain the "full amount" of Amy's losses and will ultimately enter an appropriate order of restitution memorialized in an amended judgment. At that point, Paroline will be able to assert his current contentions -- together with any other claims that may arise on remand -- in a single certiorari petition after the entry of the amended final judgment. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam).

Third, Paroline's case comes to this Court on review of a mandamus petition. As the court of appeals recognized (Pet. App. A40), the only question presented is whether the district court's interpretation of Section 2259 was "clearly and indisputably" wrong. Amy suggests (Amy Cert. Resp. 29-30) that the mandamus posture makes Paroline's petition a more suitable vehicle because she is a party to the case and, accordingly, can provide an adversarial presentation of the issues. But whatever advantage that might afford is completely outweighed by the mandamus posture of this case, which limits the scope of review. If the Court wishes to definitively resolve any of the restitution issues

arising under Section 2259, it should do so in an appeal from a final judgment under a de novo standard of review.[6]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MYTHILI RAMAN
Acting Assistant Attorney General

MICHAEL A. ROTKER
Attorney

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[6] To date, only eight other victims have sought restitution from defendants convicted of child-pornography possession, receipt, distribution, or transportation offenses under Section 2259. In recognition of the concerns raised by some courts about the current statutory scheme, see, e.g., Burgess, 684 F.3d at 460; Kennedy, 643 F.3d at 1266, the Department of Justice is exploring possible legislative amendments that would focus specifically on the proper approach to restitution for child-pornography offenses.