No. 19-5384

IN THE

Supreme Court of the United States

DAVID ROTHENBERG

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government expressly concedes that "tension exists in the case law regarding disaggregation following *Paroline v. United States*, 572 U.S. 434 (2014)." BIO 8. Indeed, in child pornography cases, the courts of appeals are divided on whether a victim's losses caused by the initial abuse must be disaggregated from the losses caused by the subsequent traffic in her images. *See* Pet. 8–15. Although *Paroline* purported to "set aside" that "disaggregation" question, 572 U.S. at 449, the time has come for the Court to resolve it. The government does not dispute that this disaggregation question frequently recurs and affects numerous child pornography cases, defendants, and victims each year. *See* Pet. 15–16 & n.2.

Despite acknowledging the conflict and failing to dispute the importance of the disaggregation question, the government opposes review. First, it argues that this is not a suitable vehicle because the victims experienced distinct traffic-related harm. BIO 16–17. But that fact cuts in *favor* of review, for it neatly tees up the disaggregation question: must that harm be disaggregated from the abuse-related harm? Second, the government argues that review is "premature" because the court of appeals vacated one of the nine restitution awards for insufficient evidence. BIO 8–9. But denying review on that discretionary basis would serve no useful purpose and would instead engender duplicative litigation. Finally, the government defends the decision below on the merits. BIO 9–14. But Petitioner has already explained why the government's arguments fail; and, in any event, the conflict should be resolved whichever side is correct. Certiorari should be granted.

I. THE CIRCUITS ARE ADMITTEDLY DIVIDED ON DISAGGREGATION

As explained in the Petition, the Ninth and Tenth Circuits have read *Paroline* to require disaggregation of the victim's losses. *See* Pet. 8–11 (discussing *United States v. Dunn*, 777 F.3d 1171, 1181–82 (10th Cir. 2015); *United States v. Galan*, 804 F.3d 1287 (9th Cir. 2015); and *United States v. Grovo*, 826 F.3d 1207, 1221–22 (9th Cir. 2016)). The government acknowledges that those circuits "have vacated restitution awards in child-pornography cases in which the district courts did not make an explicit finding with respect to disaggregation." BIO 14–15. In fact, there was no disaggregation in those cases at all, explicit or otherwise.

Meanwhile, in the precedential decision below, the Eleventh Circuit rejected disaggregation, joining the Eighth Circuit in *United States v. Bordman*, 895 F.3d 1048, 1058–59 & n.3 (8th Cir. 2018). *See* Pet. 11–14. In so holding, both of those circuits have expressly rejected the approach adopted by the Ninth and Tenth Circuits. *See* Pet. App. 41a, 48a, 56a & n.7 (observing that "the results are mixed" on disaggregation, other circuits have ruled "in contrast" to the Ninth and Tenth Circuits, and the Ninth Circuit's reading of *Paroline* was particularly unpersuasive); *Bordman*, 895 F.3d at 1058 n.3 (rejecting the Ninth and Tenth Circuit's decisions). The government does not dispute this. *See* BIO 6–7, 13–14.

Thus, the government is forced to concede that "tension exists in the case law regarding disaggregation following *Paroline*." BIO 8; *see* BIO 14–16. But that concession is an understatement. There is not mere "tension" in the law. Rather,

there is a conflict on a pure legal issue: the Ninth and Tenth Circuits require disaggregation; the Eighth and Eleventh Circuits do not.

Further minimizing that conflict, the government neglects that, since this Petition was filed, the D.C. Circuit has also declined to require disaggregation. *United States v. Monzel*, 930 F.3d 470, 483–84 (D.C. Cir. 2019). In so holding, that court expressly relied on the Eleventh Circuit's decision in this case and the Eighth Circuit's decision in *Bordman*. *Id*. at 483. It also recognized that, while the "Ninth Circuit has taken the opposite tack," and the Tenth Circuit appears to "endorse a categorical disaggregation requirement" as well, the court rejected those decisions as unpersuasive. *Id*. at 483–84 & n.2. Accordingly, the circuits are now openly divided 3–2 on the disaggregation question. This Court should resolve that conflict.

II. THE DISAGGREGATION QUESTION WARRANTS REVIEW

The government fails to dispute that the disaggregation question dividing the circuits is important and recurring. Restitution is mandatory in child pornography cases; those cases number in the thousands each year; and they lead to numerous and substantial restitution awards. *See* Pet. 15–16 & n.2. In every one of those cases, moreover, there will be a threshold question about whether the lower courts must disaggregate the losses caused by the initial abuse from the losses caused by the ongoing traffic in the images. In three circuits, they will not; in two circuits, they will. Thus, identically-situated defendants and victims will be subject to different restitution awards based solely on geography. Such disparities are "unwarranted." 18 U.S.C. § 3553(a)(6). The government does not argue otherwise.

III. THIS CASE IS AN EXCELLENT VEHICLE

This case is an excellent vehicle to resolve the disaggregation question. The government does not dispute that: Petitioner repeatedly pressed his disaggregation argument below; the Eleventh Circuit squarely rejected disaggregation in a lengthy precedential opinion; and there was no attempt to disaggregate any of the victims' losses here. *See* Pet. 16–17. Nonetheless, the government argues that this case is a poor vehicle. But its arguments are specious and should give the Court no pause.

a. As an initial matter, the government observes that this Court recently denied review in *Bordman*, BIO 8, but that case is distinguishable in several respects. First, the Eighth Circuit's decision in *Bordman* pre-dated the Eleventh Circuit's decision here and the D.C. Circuit's decision in *Monzel*, which deepened the split and gave further reasons for rejecting disaggregation. Second, the lone restitution award in *Bordman* was for only $3,000, lessening the importance of the disaggregation question there. Third, the victim in that case had recovered from the abuse before learning about the traffic in her images—an unusual fact pattern that, as in *Paroline*, may have removed any complications in connection with disaggregation. *See Bordman*, BIO 14–15 (U.S. No. 18-6758) (opposing review on that basis). Finally, no reply was filed in support of the petition in *Bordman*.

b. The government separately argues that the victims in this case all "experienced a distinct harm" from the traffic in their images. BIO 16. But that fact cuts in favor of review, not against it. Victims *always* suffer upon discovering that their images are being traded online. And that harm—common in virtually all

child pornography cases—is what gives rise to the disaggregation question. After all, if victims did not suffer any harm from the traffic in their images, there would nothing to disaggregate. Thus, the fact that the victims in this case suffered harm from the traffic in their images—but did not seek to disaggregate those losses from the losses caused by the initial abuse—neatly tees up the disaggregation question presented. If the existence of distinct traffic-related harm rendered this case a poor vehicle, then *every* child pornography case would be a poor vehicle. And that would effectively insulate the disaggregation question from any review by this Court.

The government also speculates (BIO 16–17) that the Ninth and Tenth Circuits might have upheld the restitution awards in this case because the district court considered the victims' traffic-related harm. That argument has no basis in any Ninth or Tenth Circuit decision. The Ninth Circuit has vacated restitution awards for one reason: failure to disaggregate the victim's losses. *See Galan*, 804 F.3d at 1291 ("We hold that in calculating the amount of restitution to be imposed upon a defendant who was convicted of distribution or possession of child pornography, the losses, including ongoing losses, caused by the original abuse of the victim should be disaggregated from the losses caused by the ongoing distribution and possession of images of that original abuse, to the extent possible."); *Grovo*, 826 F.3d at 1221–22 ("Under *Galan*, th[e] failure to disaggregate losses caused by the initial abuse was an abuse of discretion"). The Tenth Circuit has similarly held that courts may not rely on loss figures that do "not disaggregate th[e] harms" caused by the initial abuse. *Dunn*, 777 F.3d at 1181–82.

At no point have these courts ever suggested that they would uphold a restitution award merely because the district court considers a victim's traffic-related harm, without disaggregating the losses. Nor would that make sense: their decisions are premised on some losses caused by the abuse and some losses caused by subsequent traffic in the images. *See, e.g.*, *Grovo*, 826 F.3d at 1221–22. Indeed, in *Grovo*, the Ninth Circuit vacated the restitution award for failure to disaggregate despite recognizing "the district court's careful and thorough examination of the *Paroline* factors," including its consideration of the "continued harm and abuse arising out of the viewing of child pornography images." *Id.* at 1221 (quotation omitted). In short, there is no support in Ninth or Tenth Circuit law for the government's suggestion that the mere consideration of traffic-related harm—without disaggregating the resulting losses—would suffice under *Paroline*.

c. Finally, the government argues that review would be "premature" because, despite affirming eight restitution awards totaling $100,000, the Eleventh Circuit vacated a ninth award for insufficient evidence and remanded for further proceedings as to that one victim. BIO 8–9. But that disposition only implicates this Court's discretion, not its power, to grant certiorari. *See United States v. Gulf Refining Co.*, 268 U.S. 542, 545 (1925); *Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co*, 148 U.S. 372, 384 (1893). And, "[i]n a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court." 17 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4036 & nn.74–75 (3d ed. 2019) (citing over a

dozen cases). That includes cases like this one, where "there was a conflict on a question of law," and where "the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." S. Shapiro, et al., Supreme Court Practice 283–85 (10th ed. 2013) (citing cases).

Here, there is no possibility that the disaggregation question will become moot or unimportant. *See id.* at 285. The Eleventh Circuit affirmed eight restitution awards totaling $100,000. Those awards are now final. Petitioner may not challenge them on remand, as that proceeding is limited only to the ninth award. Pet. App. 66a–67a. Nor could he do so otherwise: the Eleventh Circuit has definitively rejected his disaggregation challenge in a precedential opinion that is now also law of the case. Yet the government would nonetheless require Petitioner to return to the lower courts just to re-preserve his disaggregation argument all over again and then re-file an identical petition in this Court. That exercise in futility would require a duplicative round of litigation, but would do nothing to help facilitate this Court's review of the disaggregation question.

Bolstering that conclusion, the district court has stayed the proceeding on remand pending resolution of this petition. Dist. Ct. Dkt. Entry Nos. 92–93. The government itself agreed to that course because the disaggregation question will affect the evidence that the ninth victim and government must submit, as well as the findings that the district court must make. Were the Court to deny review now, the parties will go forward under the Eleventh Circuit's no-disaggregation rule, and

Petitioner will preserve his disaggregation challenge once again. But were this Court to later grant review and to require disaggregation, then yet another (third) restitution proceeding would be required for all nine victims. Granting review now would obviate that possibility. In light of the stay below, deciding the disaggregation question now would hasten rather than delay completion of this case. *See* Shapiro, *supra*, at 285 (explaining that a stay in the proceedings below counsels in favor of certiorari for cases in interlocutory posture) (citing examples).

In short, the disaggregation question will forever determine at least $100,000 in final restitution obligations for Petitioner. Meanwhile, denying review as premature would serve no useful purpose. Rather, it would serve only to create unnecessary litigation burdens on the parties, the lower courts, and victims.

IV. THE DECISION BELOW IS WRONG

Finally, the government defends the Eleventh Circuit's no-disaggregation holding on the merits. *See* BIO 9–14. But Petitioner has already explained why that holding is incorrect. *See* Pet. 17–21. And the government declines to meaningfully engage with any of Petitioner's arguments.

For example, Petitioner has explained why *Paroline* itself contemplated disaggregation. The government acknowledges (BIO 14) that *Paroline* instructs district courts to "order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's *general losses*." 572 U.S. at 458 (emphasis added). But the government ignores that *Paroline* defined "general losses" as those "that stem from the *ongoing traffic* in her images as a

whole." *Id.* at 449 (emphasis added). Thus, the "general losses" to be apportioned exclude the losses caused by the initial abuse. That is why the Court said that "[c]omplications may arise in disaggregating the losses sustained as a result of the initial physical abuse." *Id.* No such complications would arise if disaggregation was unnecessary. The government fails to address this crucial language in *Paroline*.

Nor does the government deny that failing to disaggregate the losses would inevitably make mere-possessor defendants liable for abuse-related losses that they played no role in causing. Yet that result would run "contrary to the bedrock principle that restitution should reflect the consequences of the defendant's own conduct," and "not the conduct of others." *Id.* at 455, 462. Although *Paroline* repeatedly emphasized that bedrock principle, the government makes no attempt to reconcile it with the no-disaggregation rule that the government now defends.

Instead, the government emphasizes that the district court here discussed several of the so-called *Paroline* "factors." BIO 12. But the purpose of those factors is to help courts ascertain a possessor-defendant's "relative role" with respect to the pool of losses to which his conduct actually contributed—*i.e.*, the "general losses" caused by the ongoing traffic in the images. Although a mere possessor does not cause *all* of those losses, his possession does contribute to them in the aggregate. That is why courts must seek to ascertain his relative role vis-à-vis that particular pool of losses—*e.g.*, by analyzing the number of images he possessed, the number of prior awards, the number of other defendants, etc.…. That analysis makes sense

only if courts first disaggregate the abuse-related losses that the possessor-defendant had absolutely no role in causing.

The government (BIO 13) also emphasizes the *Paroline* factor that asks "whether the defendant had any connection to the initial production of the images." 572 U.S. at 460. But, contrary to the government's argument, this is not a "disaggregation" factor. Rather, this factor (like the rest) comes into play only after a court has ascertained the "general losses" to be apportioned by disaggregating the abuse-related losses. Where a particular defendant has some "connection to the initial production of the images," his relative causal role with respect to the traffic-related losses will surely be greater. And where a possessor-defendant actually participated in the underlying abuse, disaggregation will be unnecessary because the defendant will have contributed to *all* of the victim's losses.

The government also argues (BIO 13) that disaggregation would unduly constrain the discretion of district courts. But disaggregation can be accomplished through reasonable estimates by experts and judges; indeed, the Ninth Circuit has recognized that "precision is neither expected nor required." *Galan*, 904 F.3d at 1291. Relatedly, the government argues (BIO 14) that, although it was impossible to quantify the traffic-related losses attributable to a particular possessor, *Paroline* nonetheless required restitution. But disaggregating losses caused by the abuse from losses caused by the traffic *is* possible; courts have successfully done so. *See* Pet. 20 (citing *United States v. Miner*, 617 F. App'x 102, 103 (2d Cir. 2015) and *United States v. Rodgers*, 758 F.3d 37, 39 (1st Cir. 2014)).

And, in any event, there is a qualitative difference between, on the one hand, awarding restitution from a pool of losses to which a possessor-defendant actually contributed (albeit in an unquantifiable amount), and, on the other hand, awarding restitution from a pool of losses to which a mere possessor did not contribute at all. The latter approach would make possessor-defendants like Petitioner criminally liable for the abuser's conduct. The government fails to justify that unjust result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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