No. ___-_____

IN THE

Supreme Court of the United States

MICHAEL M. MONZEL,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Paroline v. United States*, No 12-8561 — a case involving a request for criminal restitution on behalf of "Amy," a victim of digitally-distributed child pornography — this Court granted certiorari limited to the question: "What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?" 570 U.S. 931 (2013). The Court ultimately held that restitution is "proper under [18 U.S.C.] § 2259 only to the extent the defendant's offense proximately caused the victim's losses." *Paroline*, 572 U.S. 434, 448 (2014).

Because the question presented did not extend to *how* restitution should be determined if the proximate cause standard were adopted, the parties did not brief the issue. The Court nevertheless offered numerous "guideposts" (since dubbed "*Paroline* factors") that district courts "might consider in determining a proper amount of restitution," but twice expressly declined to offer more specific guidance, finding more precise instruction to be "neither necessary nor appropriate . . . at this point in the law's development." *Id.* at 459-60; *see also id.* at 462 (declining to provide "further detailed guidance at this stage in the law's elaboration"). Since *Paroline*, however, district courts have likened restitution analysis to "piloting a small craft to safe harbor in a Nor'easter." *United States v. DiLeo*, 58 F. Supp. 3d 239, 244 (E.D.N.Y. 2014). Throughout the country, restitution awards and methodologies vary widely; a significant circuit split has developed; and unwarranted disparities abound.

This case presents two questions:

1. Whether — in the context of a criminal restitution request on behalf of a victim of child pornography — § 2259/*Paroline* requires disaggregation of losses sustained as result of the victim's initial abuse, as distinct from those losses caused by the continuing traffic in the victim's image(s).

2. Whether this Court should provide much needed guidance — both substantive and procedural — as to *how* district courts should apply the proximate cause standard adopted in *Paroline v. United States*, 572 U.S. 434 (2014).

PARTIES TO THE PROCEEDINGS

All parties to the most recent restitution proceedings appear in the caption of the case on the cover page. Victim "Amy" had participated in earlier stages of the restitution litigation (via petitions for writs of mandamus in the D.C. Circuit), but made no appearance and took no part in the proceedings now under review.

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PETITION FOR WRIT OF CERTIORARI

Michael Monzel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the district court's $7,500 restitution award — after first awarding $5,000, then $0 — to child pornography victim "Amy."

OPINIONS BELOW

The opinion of the United States Court of Appeals for which review is sought appears at Pet. App. 1a-18a and is published at 930 F.3d 470 (D.C. Cir. 2019). The ruling of the district court appears at Pet. App. 19a-23a and is published at 209 F. Supp. 3d 73 (D.D.C. 2016).

The district court opinion explaining its initial $5,000 order appears at Pet. App. 28a-33a and can be found at 2011 WL 10549405 (D.D.C. Jan. 11, 2011). The Court of Appeals' resolution of Amy's resulting petition for writ of mandamus

appears at 34a-50a and is published at 641 F.3d 528 (D.C. Cir. 2011), *cert. denied*, 565 U.S. 1072 (2011) ("*Monzel I*").

The district court's denial of the government's renewed restitution request (resulting in a restitution award of $0) after remand from *Monzel I* appears at Pet. App. 51a-61a and can be found at 2012 WL 12069547 (D.D.C. Nov. 6, 2012). The Court of Appeals' order remanding the government's subsequent appeal and Amy's second mandamus petition (after briefing and argument) in light of this Court's opinion in *Paroline v. United States*, 134 S. Ct. 1710 (2014), appears at Pet. App. 62a-63a. The resulting remand proceedings are the subject of the Court of Appeals' judgment of which Petitioner now seeks review.

JURISDICTION

The D.C. Circuit issued its judgment (Pet. App. 1a-18a) on July 19, 2019. Orders denying panel rehearing and rehearing en banc (Pet. App. 26a-27a) were issued on November 8, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in relevant part that "[n]o person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

2. At the time of Petitioner's arrest and sentencing, 18 U.S.C. 2259, provided:

> (a) In general.--Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.—

(1) Directions.--The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.--An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.--For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

> (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.

(4) Order mandatory.--(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

> (i) the economic circumstances of the defendant; or
> (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition.--For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

3. On December 7, 2018, 18 U.S.C. § 2259 was amended to provide, in relevant part:

> (b) Scope and nature of order.—
>
> (1) Directions.--Except as provided in paragraph (2), the order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses.
>
> (2) Restitution for trafficking in child pornography.--If the defendant was convicted of trafficking in child pornography, the court shall order restitution under this section in an amount to be determined by the court as follows:
>
> > (A) Determining the full amount of a victim's losses.--The court shall determine the full amount of the victim's losses that were incurred or are reasonably projected to be incurred by the victim as a result of the trafficking in child pornography depicting the victim.
> >
> > (B) Determining a restitution amount.--After completing the determination required under subparagraph (A), the court shall order restitution in an amount that reflects the defendant's relative role in the causal process that underlies the victim's losses, but which is no less than $3,000.
> >
> > (C) Termination of payment.--A victim's total aggregate recovery pursuant to this section shall not exceed the full amount of the victim's demonstrated losses. After the victim has received restitution in the full amount of the victim's losses as measured by the greatest amount of such losses found in any case involving that victim that has resulted in a final restitution order under this section, the liability of each defendant who is or has been ordered to pay restitution for such losses to that victim shall be terminated. The court may require the victim to provide information concerning the amount of restitution the victim has been paid in other cases for the same losses.
>
> …
>
> (c) Definitions.—
>
> …
>
> (2) Full amount of the victim's losses.--For purposes of this

subsection, the term "full amount of the victim's losses" includes any costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim, and in the case of trafficking in child pornography offenses, as a proximate result of all trafficking in child pornography offenses involving the same victim, including—

> (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) reasonable attorneys' fees, as well as other costs incurred; and
> (F) any other relevant losses incurred by the victim.

4. Section 3664(e) of Title 18, United States Code, provides in relevant part:

Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.

INTRODUCTION

In *Paroline v. United States*, No 12-8561 — a case involving a request for criminal restitution on behalf of "Amy," a victim of digitally-distributed child pornography — this Court granted certiorari limited to the question: "What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?" 570 U.S. 931 (2013). The Court ultimately held that restitution is "proper under [18 U.S.C.] § 2259 only to the extent the defendant's offense proximately caused the victim's losses." *Paroline*, 572 U.S. 434, 448 (2014). "[A] court applying § 2259 should [therefore] order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." *Id.* at 458. In cases involving simple possession, "[t]he amount would not be severe . . . , given the nature of the causal connection between the conduct of a possessor [of child pornography] and the entirety of the victim's general losses from the trade in her images, which are the product of the acts of thousands of offenders." *Id.*

Because the question presented did not extend to *how* restitution should be determined if the proximate cause standard were adopted, the parties did not brief the issue. The Court nevertheless waded into the morass, offering numerous "guideposts" (since dubbed "*Paroline* factors") that district courts "might consider in determining a proper amount of restitution." *Id.* at 459-60. The Court twice expressly declined to offer more specific guidance, finding more precise instruction to be "neither necessary nor appropriate . . . at this point in the law's development."

Id.; *see also id.* at 462 (declining to provide "further detailed guidance at this stage in the law's elaboration").

Since *Paroline* district courts have likened restitution analysis to "piloting a small craft to safe harbor in a Nor'easter." *United States v. DiLeo*, 58 F. Supp. 3d 239, 244 (E.D.N.Y. 2014). Throughout the country, restitution awards and methodologies vary widely; a significant circuit split has developed; and unwarranted disparities abound. These inconsistencies persist despite Congress's December 2018 amendment of § 2259, which set a floor of $3,000 for restitution awards in child pornography cases, but retained the very same proximate cause standard/analysis set forth in *Paroline*. Additional guidance is necessary for the government and district courts to properly perform their statutorily-mandated duties, to gain some semblance of uniformity for/amongst similarly-situated criminal defendants, and — most importantly — to meet the demands of due process.

In December 2009, Petitioner pleaded guilty to a two-count superseding information, charging him with possession of child pornography, 18 U.S.C. 2252(a)(4)(B), and distribution, § 2252(a)(2). Two of the victims portrayed in the images possessed (but not distributed) by Petitioner — "Amy" and "Vicky" — sought restitution pursuant to 18 U.S.C. § 2259. Amy's images were originally created and digitally distributed by her uncle (to whom Petition has no connection), who began sexually abusing Amy in 1993, when she was only four. Petitioner was found in possession of *one* still image of Amy upon his arrest in October 2009; he did not distribute the image; and the government identified no additional aggregating

factors associated with his possession (e.g., involvement in image production, contact or attempted contact with Amy, use of image in grooming activity, etc.). The district court's restitution order with respect to Amy — which began as $5,000, then $0, and is now $7,500 — has been the subject of extensive litigation and is the subject of this Petition.

After the district court twice found — employing the same proximate cause standard that would be adopted years later by this Court in *Paroline* — that the government had not met its burden under 18 U.S.C. § 3664(e) "of demonstrating [by a preponderance of the evidence] the amount of the loss sustained by a victim as a result of the offense," the D.C. Circuit held Petitioner's case in abeyance pending this Court's resolution of *Paroline* and ultimately remanded it, with instructions to revisit the restitution issue in light of the Court's opinion.

On remand, after extensive briefing and statistical analysis presented by the defense (based on Amy's own analysis presented to this Court in *Paroline*), the district court awarded Amy $7,500 in restitution. Though the court recited the *Paroline* factors, it "accept[ed]" — without explanation and in the face of evidence to the contrary — the government's claim that no reliable data existed relevant to the most instructive factors. The court then listed five seemingly random cases from around the country that it had reviewed — none of which involved Amy and all of which employed different methodologies for calculating restitution, to the extent any is discernable — with an average award of $7,432.63. The court did not elaborate on the reasoning underlying its $7,500 award, identify a methodology, or address any of the arguments raised in Petitioner's pleadings. Significantly — in

light of the split in the circuits that has developed — the district court made no attempt to disaggregate losses sustained as a result of the initial physical abuse Amy suffered at the hands of her uncle. The court of appeals affirmed.

Beyond the innumerable methodological disparities that exist amongst district courts throughout the country, the courts of appeals are now split over the discreet issue of whether, in determining "the amount of the victim's losses caused by the continuing traffic in the victim's image," victims/the government/courts need to "disaggregat[e] losses sustained as a result of the initial physical abuse" — a task this Court in *Paroline* acknowledged would be "complicat[ed]," but assumed would be done. 572 U.S. at 460, 449. As Petitioner argued below, and as the Ninth and Tenth Circuits have held consistent with *Paroline*, it is critical that courts disaggregate losses attributable to a victim's original abuse so that a defendant like Petitioner, a mere possessor, is not unjustly burdened with costs that he had no role in bringing about. The D.C. Circuit's approach — merely requiring the district court to mention whether the defendant was involved in the victim's initial abuse, without actually disaggregating the losses attributable to that abuse — reduces this important analytical undertaking to a toothless procedural pronouncement.

The questions presented are urgently in need of resolution by this Court, as they impact thousands of federal defendants who are statutorily mandated to pay restitution under § 2259. The issues are cleanly presented in this case, which was extensively briefed below, as Petitioner's possession of a singular image with no aggravating factors makes him the least culpable child pornography defendant

(i.e., the "floor") still subject to § 2259 and removes all factual complications from the Court's consideration.

STATEMENT OF THE CASE

On December 10, 2009, Petitioner pleaded guilty to one count of possessing child pornography, 18 U.S.C. § 2252(a)(4)(B), and one count of distribution, § 2252(a)(2). On May 19, 2010, the district court sentenced him to concurrent terms of ten years' imprisonment and ten years of supervised release.

Two of the victims portrayed in the images possessed (but not distributed) by Petitioner — "Amy" and "Vicky" — sought restitution pursuant to 18 U.S.C. § 2259.[1] The district court's restitution $7,500 award to "Amy" — of whom Mr. Monzel possessed *one* image — is the subject of this Petition.

A. Amy

In 1993, when Amy was four years old, her uncle began sexually abusing her, photographing the abuse, and digitally distributing the images. It was not until Amy was nine that her uncle was arrested, sentenced, and ordered to pay $6,325 in restitution — an amount $1,175 *less* than Petitioner in this case. *See Paroline*, 572 U.S. at 469 n.4 (Roberts, C.J., dissenting); *see also* Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. Times Magazine, Jan. 24, 2013, *available at* https://www.

[1] All references to § 2259 are to the version in effect from April 24, 1996 to December 6, 2018 — as set forth in full above — unless otherwise noted. As explained above, the December 7, 2018 amendments to § 2259 have no substantive effect on the issues raised here or their importance going forward. The amendments retain the *Paroline* causation analysis and merely set a $3,000 floor for child pornography-related restitution awards.

nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html.

When Amy was 17, she learned for the first time that her uncle had distributed her images over the Internet. *Id.* In 2008, when Amy was 19, she began seeking criminal restitution from those convicted of possessing and distributing her images. *Id.* In that year, she drafted a Victim Impact Statement and her attorneys procured a psychological evaluation and economic loss report, which attempted to project and monetize the aggregate harm Amy has and will experience over her *lifetime* (to age 81) as a result of her uncle's conduct and the continuing circulation of her images. These items were submitted to the district court in this case in June 2010, along with Amy's original request for restitution (under the theory of joint and several liability) of $3,263,758 in aggregate lifetime losses.

As of February 2015, Amy had received approximately $1,789,525.87 from convicted federal defendants. (ECF:99.1.)[2] This Court has recognized that Amy's offenders "to date easily number in the thousands." *Id.* at 440.

B. Procedural History

The district court's current $7,500 restitution award is its *third* attempt at setting restitution in this case. In January 2011, the district court awarded Amy $5,000 in "nominal damages,"[3] despite acknowledging that there was "no evidence

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[2] The citation "ECF:X.Y" refers to the Pacer/ECF document number (X) and page (Y) in the district court case from which this petition arises, No. 1:09-cr-00243-GK (D.D.C.).

[3] Citing 25 C.J.S. Damages, § 14 (asserting that where a party "establishes a wrong for actual losses therefrom, he or she is entitled to nominal damages at

upon which the Court could reasonably calculate the measure of harm done to [Amy] proximately caused by the Defendant's conduct." (Pet. App. 31a (internal quotation marks omitted).) In *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011) ("*Monzel I*"), after rejecting Amy's joint and several liability argument, the court of appeals instructed the district court "to consider anew the amount of [Amy's] losses attributable to Monzel," *id.* at 544, as the $5,000 figure was arbitrary in light of the district court's internally-inconsistent explanation. Though the court of appeals "express[ed] no view as to the appropriate level of restitution," it "emphasize[d] that in fixing the amount[,] the district court must rely upon some principled method for determining the harm Monzel proximately caused." *Id.*

On remand, the district court denied Amy's restitution request altogether, observing both that "[t]here is absolutely no evidence as to what degree Monzel's conduct contributed to the injuries suffered by Amy" and that "the Government has not presented any principled calculation, formula, or procedure which would limit the [victim's] financial losses to those 'traceable to Monzel.'" (Pet. App. 58a-59a (quoting *Monzel I*, 641 F.3d at 537).) The government appealed and Amy sought mandamus (consolidated under D.C. Cir. Case No 12-3093, "*Monzel II*").

On June 27, 2013, after oral argument but before *Monzel II* was decided, this Court granted certiorari in *Paroline v. United States*, No. 12-8561, limited to the question: "What, if any, causal relationship or nexus between the defendant's

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least . . . where the evidence fails to show the extent of the resulting damages"). In choosing the $5,000 figure, the court referenced a single case in which Amy and Vicky were awarded $3,000. (Pet. App. 32a.)

conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259." 570 U.S. 931 (2013). The court of appeals held *Monzel II* in abeyance.

C. *Paroline*

In *Paroline*, Amy argued for joint and several liability; the government and Paroline advocated for proximate causation.

In her brief to this Court, Amy performed a rough application of the proximate cause requirement to impress upon the Court the effect of such a rule:

> Amy's images have been identified in 3,200 American federal and state criminal cases. [Brief for National Center for Missing and Exploited Children ("NCMEC") as Amicus Curiae in Support of Respondent Amy Unknown at 11, 18, *Paroline*, 572 U.S. 434 (No 12-8561), 2013 WL 6156518, at *11, 18.[4]] Unfortunately these cases represent just a few of the child pornography criminals who are harming Amy, because law enforcement can only apprehend a small fraction of those who distribute and possess Amy's images. *See* [U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* (2010)] at 23-25. Even ten percent is a generous assumption. *See id.* at 14 (9,793,430 domestic Internet Protocol addresses trading child pornography). Amy is harmed not only by child pornography crimes committed in this country, but also by those committed overseas. A fair estimate is that 45% of the child pornography criminals are American. *Id.* at 14 . . . . Based on these figures, a ballpark estimate of petitioner's "market share" of Amy's harm is 1/71,000 and his restitution obligation to Amy would be a trifling amount: about $47. [FN19]
>
> FN19 $3,367,854 x 1/3,200 x 1/10 x 45/100 = $47. . . .

[4] NCMEC reviews, on behalf of law enforcement, child pornography collections seized from individuals to identify known victims.

Brief for Amy at 64-65, *Paroline*, 572 U.S. 434 (No. 12-8561), 2013 WL 6056611, at *64-65.[5]

This Court ultimately adopted proximate causation, holding — as the D.C. Circuit had in *Monzel I* — that "a court applying § 2259 should 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). The Court's holding was driven by "the bedrock principle that restitution should reflect the consequences of the defendant's own conduct, . . . not the conduct of thousands of geographically and temporally distant offenders acting independently, and with whom the defendant had no contact." *Id.* at 455.

Because the question presented had not extended to *how* restitution should be determined if proximate causation were adopted, the parties did not brief the issue to any appreciable extent. Beyond Amy's "market share" example (above), the government's brief addressed potential considerations in only one paragraph. *See* Brief for the United States at 48, *Paroline*, 572 U.S. 434 (No. 12-8561), 2013 WL 5425148, at *49.

Nevertheless, the Court offered certain "guideposts" that courts "might consider" in contextualizing the defendant's "relative causal role," but declined to provide "further detailed guidance at this stage in the law's elaboration." 572 U.S. at 459-60. The Court explained that "district courts might, as a starting point,

[5] Amy's calculation does not account for, *inter alia*, the damage caused by her uncle or future offenders, which, if included, would make the market share amount even lower.

determine the amount of the victim's losses *caused by the continuing traffic in the victim's images* . . . then set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant's conduct in producing *those* losses." *Id.* at 460 (emphasis added). The factors/guideposts included "reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses" and "any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted)," *id.* — two factors that the Court itself added to the list of considerations proffered by the government in its brief.[6] *Compare* Brief for the United States at 48, 2013 WL 5425148, at *49.

With respect to determining "the amount of the victim's losses caused by the continuing traffic in the victim's images," the Court acknowledged that "[c]omplications may arise in disaggregating losses sustained as a result of the initial physical abuse," but concluded that "those questions may be set aside for present purposes." 572 U.S. at 449. Resulting restitution awards "would not be severe in a case like this [where Paroline possessed two images], given the nature of the causal connection between the conduct of a possessor like Paroline and the entirety of the victim's general losses from the trade in her images, which are the

[6] The other *Paroline* factors were: "the number of past criminal defendants found to have contributed to the victim's general losses; . . . whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role." 572 U.S. at 460.

product of the acts of thousands of offenders"; but they should not be "token or nominal." *Id.* at 458-59.

In dissent, Chief Justice Roberts (joined by Justices Scalia and Thomas) lamented that "[t]he statue as written allows no recovery; we ought to say so, and give Congress a chance to fix it." *Id.* at 472. He reasoned that "[w]hen it comes to Paroline's crime—possession of two of Amy's images—it is not possible to do anything more than pick an arbitrary number for that 'amount.' And arbitrary is not good enough for the criminal law." *Id.* at 463 (quoting 18 U.S.C. § 3664(e)); *see also id.* at 471 (comparing to § 3553(a) sentencing standards that constrain discretion and ensure due process).

Of the factors the majority suggested district courts consider, the dissent found the "estimate of the total number of persons involved in [Amy's] harm" to be the "only" one "relevant," "because Paroline's relative significance can logically be measured only in light of everyone who contributed to Amy's injury — not just those who have been, or will be, caught and convicted." *Id.* at 471. The dissent observed, as had Amy, that if courts apply the proximate cause requirement (with which the dissent agreed in principle), awards would likely be no more than the $47 she proffered. "The majority says that courts should not impose 'trivial restitution orders,' . . . but it is hard to see how a court fairly assessing this defendant's relative contribution could do anything else."[7] *Id.*

[7] This complication was later remedied by Congress in its December 2018 amendments to § 2259, which set $3,000 as the floor for such awards — $4,500 *less* than the award in this case.

D. Post-*Paroline* Remand

After *Paroline*, the D.C. Circuit remanded *Monzel II* without a merits opinion. (Pet. App. 62a-63a.) The government thereafter filed a supplemental request for restitution with supporting documentation virtually identical to its previous requests. Unlike in previous proceedings, Amy did not participate or communicate with the government. In parallel proceedings involving a possessor of four of Amy's images, however, Amy agreed that $5,000 in criminal restitution was appropriate. *United States v. Hite*, 113 F. Supp. 3d 91 (D.D.C. 2015).[8]

The government did not specify an amount of restitution it was requesting on Amy's behalf, nor did it suggest how the court should arrive at a restitution figure. It did, however, agree that Amy's losses "should exclude. . . losses attributable to the original abuse, as opposed to the child pornography circulation." (ECF:94.8.) It represented that it did not have "sufficient, reliable date from which to make reasonable estimates" of future defendants and/or total number of offenders. (ECF:94.9.)

Petitioner responded, *inter alia*, that there were in fact data from which to make projections — pointing to Amy's *Paroline* brief, which cited such data (including from sources published by the *Department of Justice*), and submitting updated NCMEC statistics. Using that data, Petitioner provided proposed disaggregation calculations (including disaggregation of losses caused by Amy's

[8] Amy is the victim in the "Misty" series.

original abuse) for the court to consider in evaluating Petitioner's relative causal role. (ECF:102; ECF:109.)

In a memorandum opinion, the district court awarded Amy $7,500 restitution. *United States v. Monzel*, 209 F. Supp. 3d 73 (D.D.C. 2016) (Pet. App. 19a-23a.)

In arriving at its starting $3,243,195 aggregate loss figure — which is/was supposed to represent "the amount of the victim's losses caused by the continuing traffic in the victim's images," *Paroline*, 572 U.S. at 460 (cited by district court at 209 F. Supp. 3d at 75) — the court did not address, *inter alia*, the government's concession that the figure "should exclude . . . losses attributable to the original abuse" (ECF:94.8), as the defense had repeatedly argued. The court instead took Amy's total lifetime loss figure of $3,263,758 — which *included* losses resulting from her original abuse and thus did *not* represent "losses caused by the continuing traffic in the victim's images" — and subtracted $20,563 for attorney's fees and other costs the court believed (erroneously) to have been included in the $3,263,758 figure.

In listing the data responsive to the *Paroline* factors, the court "accept[ed]" the government's factual representation regarding the availability of data to estimate/project future and total offenders. 209 F. Supp. 3d at 76. It did not address Petitioner/Amy's data to the contrary.

The court acknowledged that — beyond his possession of one image — Petitioner's offense conduct involved no aggravating factors. It thus concluded that Petitioner's "'contribution to the causal process underlying the victim's losses was

very minor, both compared to the combined acts of all other relevant offenders, and in comparison to the contributions of other individual offenders, particularly distributors (who may have caused hundreds or thousands of further viewings) and the initial producer of the child pornography.'" *Id.* at 76-77 (quoting *Paroline*).

The court next cited five seemingly random district court cases from around the country (of 38 post-*Paroline* published opinions), with an average restitution award of $7,370.13.[9] *Id.* at 77. The court did not note the methodologies of the various courts (all of which differed), nor did it reveal that *none* of the cases involved Amy (i.e., they involved wholly different victims with wholly different alleged losses).

The court concluded that $7,500 was appropriate "[i]n light of the parties' arguments, the relevant *Paroline* factors, . . . the information provided regarding prior restitution awards for Amy"[10] and "Defendant's causal - but minor -- role in Amy's ongoing losses resulting from the continued trafficking of her images." *Id.* The court did not elaborate on its reasoning or address any arguments raised in Petitioner's pleadings. Monzel appealed.

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[9] This number represents the average award based on the parenthetical information listed by the district court. That information was inaccurate, however, resulting in a corrected average of $7,432.63.

[10] With respect to the consideration of prior/other restitution awards, the *Paroline* dissent

E. The D.C. Circuit's Ruling

The D.C. Circuit found that the district court committed no error. *United States v. Monzel*, 930 F.3d 470 (D.C. Cir. 2019) ("*Monzel III*"). Its reasoning is addressed briefly here and more pointedly below.

The D.C. Circuit acknowledged that it was "not the first, and surely will not be the last, court to wrestle with giving practical effect to Section 2259's proximate-cause test for mandatory restitution in the context of child-pornography offenses." 930 F.3d at 478. Quoting — but decontextualizing — this Court's opinion in *Paroline*, the court observed that where "the defendant [i]s a non-distributing possessor of an image that thousands have trafficked," "the perpetrator's relative share '[sh]ould not be severe,' but neither should it be 'token or nominal.'" *Id.* (quoting *Paroline*, 572 U.S. at 458-59). "Instead, it should be 'reasonable and circumscribed,' geared to the statute's dual purposes of 'helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple, possession, affect real victims.'" *Id.* at 478-79 (quoting *Paroline*, 572 U.S. at 459).

The court twice asserted that the district court first "calculat[ed] Amy's total losses from the continued trafficking of her image," resulting in $3,243,195 in losses, *id.* at 478; *see also id.* at 479 — though the district court never claimed to have "disaggregate[ed] losses sustained as a result of [Amy's] initial physical abuse," *Paroline*, 572 U.S. at 449 — a necessary preliminary step for determining and separating out those losses attributable to trafficking. According to the court of appeals, the district court then "marched carefully through each of *Paroline*'s

factors," 930 F.3d at 479, though the district court had merely acknowledged the factors and simply "accept[ed]" — without explanation in the face of contrary evidence — the government's representations regarding the unavailability of data responsive to the most instructive factors. According to the D.C. Circuit, such a recitation "is all that *Paroline* requires." 930 F.3d at 479.

Indeed, according to *Monzel III*, district courts should "generally" feel "free to disregard" two of the *Paroline* factors — a rough projection of those likely to be convicted in the future and a rough estimate of the total number of persons involved in the victim's harm (the two factors the *Paroline* Court added to the government's list of potential considerations, the latter being the "only" factor the dissent considered to be "relevant" to the analytical framework adopted by the majority, 572 U.S. at 471 (Roberts, C.J., disseting)) — as both uninstructive and unknowable. 930 F.3d at 481-82. According to *Monzel III*, such factors are uninstructive, because they "are aimed mainly at preventing over-compensation of the victim, which is not an issue in . . . many cases[]." *Id.* at 482. The factors are apparently "unknowable," *not* based on the evidence and data presented in Petitioner's case (which, again, was largely based on the data Amy presented to this Court in *Paroline* and ignored by both the district court and court of appeals), but based on the findings of numerous unrelated district courts in which neither the government nor the defendant had even attempted to marshal any data or analysis responsive to the *Paroline* factors in question.

Instead of attempting to estimate future convictions and/or the universe of Amy's offenders, the *Monzel III* court opinioned that district courts should consider

factors such as, *inter alia*, "the length of [the defendant's] involvement in child pornography, whether he displayed a pattern of offenses, and whether he has distributed other images," 930 F.3d at 481 — factors that may be relevant to a defendant's incarceratory sentence, but are primarily focused on the potential harm to *others* as opposed to the particular victim seeking restitution.

The D.C. Circuit disagreed with the Ninth and Tenth Circuits, both of which have held — based directly on *Paroline*, *see, e.g.*, 572 U.S. at 449 (defining a victim's "general losses" as those "that stem from the *ongoing traffic* in the images as a whole," noting that "[c]omplications may arise in disaggregating losses sustained as a result of the initial physical abuse," but setting those "aside for present purposes" (emphasis added)) — that district courts must affirmatively disaggregate the harm caused by the victim's abuser — here, Amy's uncle. *See United States v. Galan*, 804 F.3d 1287 (9th Cir. 2015); *United States v. Dunn*, 777 F.3d 1171 (10th Cir. 2015).[11] In the D.C. Circuit's view, "*Paroline* requires no more" than the district court's mere acknowledgement that Petitioner was not connected to the initial production of Amy's images. 930 F.3d at 483.

The court concluded by asserting that Petitioner's position on appeal "fails to come to grips with [the fact] that the harm to Amy became greater, not less, when [Petitioner] joined the ranks of perpetrators, reinflicting and perpetuating her trauma," 930 F.3d at 487 — a "fact" to which neither Amy (who has always contended that her aggregate lifetime loss projection is static, and who has never

[11] The court's attempt to artificially limit the Tenth Circuit's holding in *Dunn*, *see Monzel III*, 930 F.3d at 484 n.2, does not withstand scrutiny.

contended that her claimed losses flowed and/or increased from any knowledge of Petitioner or his conduct) nor this Court subscribes. *See, e.g.*, *Paroline*, 572 U.S. at 454-57; *see also id.* at 468 ("Nothing in the record comes close to establishing that Amy would have suffered less if Paroline had not possessed her images, let alone how much less. . . . Amy's injury is indivisible.").

Petitioner sought panel rehearing and rehearing en banc. On November 8, 2019, the petitions were denied. (Pet. App. 26a-27a.)

Petitioner now seeks review on the merits of the D.C. Circuit's decision.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Opinion Contravenes the Essential Holding of *Paroline*.

The D.C. Circuit's opinion in *Monzel III* and the district court's underlying memorandum exemplify how courts around the country are nearly universally perverting the essential holding of *Paroline*.

The D.C. Circuit opens its analysis in *Monzel III* by asserting that, under *Paroline*, restitution awards in this area should be "*geared to* the statute's dual purposes of 'helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes . . . affect real victims.'" 930 F.3d at 478-79 (emphasis added) (quoting *Paroline*, 572 U.S. at 459). But the essential holding of *Paroline* — which this Court relayed repeatedly — was that those purposes must be counterbalanced by the "bedrock principle that restitution should reflect the consequences of the defendant's own conduct, . . . not the conduct of thousands of geographically and

temporally distant offenders acting independently." 572 U.S. at 455; *see also id.* at 462 ("[D]efendants should be held to account for the impact of their conduct on [child pornography] victims, but . . . should [only] be made liable for the consequences and gravity of their own conduct, not the conduct of others."). Otherwise, Amy's plea for joint and several liability would have prevailed. Indeed, the *Paroline* Court expressly rejected the argument the D.C. Circuit embraces, stating: "To be sure, the statute states a strong restitutionary purpose; but that purpose cannot be twisted into a license to hold a defendant liable for an amount drastically out of proportion to his own individual causal relation to the victim's losses." *Id.* at 461; *accord id.* at 462 (district courts must be "faithful to the competing principles at stake").

Nowhere in its opinion does the D.C. Circuit acknowledge *Paroline*'s offsetting considerations. Instead, it both rejects the *Paroline* factors that would put a defendant's causal role in context, *see* 930 F.3d at 482, and expands — well beyond any other court — the factors courts *should* consider, to include several that bear no relation to a *particular victim*'s harm, but are more appropriate for incarceratory sentencing, *see id.* at 481 (courts should consider "the length of [defendant's] involvement in child pornography, whether he displayed a pattern of offenses, and whether he has distributed other images").

The *Monzel III* court spends much of its opinion arguing against *Paroline* itself. First, it rejects as relevant those *Paroline* factors — "the number of future offenders" and "the broader number of offenders involved" — that this Court itself added to those proposed by the government; the latter being the "only" factor truly

"relevant, because [a defendant's] relative significance can logically be measured only in light of everyone who contributed to Amy's injury — not just those who have been, or will be, caught and convicted." 572 U.S. at 471 (Roberts, C.J., dissenting). The court says these factors are "aimed mainly at preventing over-compensation of the victim, which is not an issue in this case (or in many cases)." 930 F.3d at 482. But overcompensation is mentioned nowhere in *Paroline*. The factors were added *by this Court* because they provide crucial context for determining "the defendant's *relative* role in the causal process." *Id.* at 458 (emphasis added); *see also id.* at 459 ("[A] court must assess as best it can from available evidence the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses."). And though it may be impossible — as *Paroline* itself acknowledged — to determine these numbers with precision, considering them in the broadest of terms undermines the district court's $7,500 award. *Paroline* recognized no less than *11 times* that Amy's offenders "to date easily number in the thousands."[12] 572 U.S. at 440. But the district court's award effectively assumes that Petitioner was one of 432 people ($3,243,195/$7,500) who have harmed and will ever harm Amy. The need to avoid "trivial" awards, 572 U.S. at 460, alone cannot sustain the $7,500 figure, as there is no basis for deeming that figure the "floor" for non-trivial awards, yet given the district court's finding that Petitioner was among

[12] Amy estimated 71,111 worldwide offenders to date. *See supra.*

the least culpable offenders (A:239-40), that is the practical effect of the court's opinion.[13]

II. This Court Should Clarify Whether § 2259/*Paroline* Requires District Courts to Disaggregate Losses Sustained as a Result of the Victim's Initial Abuse.

Review by this Court with respect to this issue is necessary for at least two reasons: first, because there is an entrenched circuit split over this issue; and second, because the D.C. Circuit takes a position that conflicts with this Court's opinion in *Paroline* and is contrary to § 2259's statutory text.

The D.C. Circuit splits with the Ninth and Tenth Circuits who have held, consistent with *Paroline*, that district courts must affirmatively disaggregate the harm caused by the victim's abuser. *See United States v. Dunn*, 777 F.3d 1171 (10th Cir. 2015); *United States v. Galan*, 804 F.3d 1287 (9th Cir. 2015). The D.C. Circuit joins the Eight Circuit in *United States v. Bordman*, 895 F.3d 1048, 1058-59 (8th Cir. 2018), in holding otherwise.

The *Paroline* Court defined a victim's "general losses" as those "that stem from the ongoing traffic in her images as a whole," noting that "[c]omplications may arise in disaggregating losses sustained as a result of the initial physical abuse," but setting those "aside for present purposes." 572 U.S. at 449. As the Ninth Circuit observed, "[i]f losses caused by [a possessor] were not to be separated from those caused by the original abuser, there would be no complications because there

[13] As noted above, Congress has since amended § 2259, setting a statutory floor of $3,000. Because it did not change the standard for applying § 2259, however, the $7,500 figure approved in *Monzel III* would effectively supersede Congress's judgment, at least within the D.C. Circuit.

would be no need to disaggregate. Thus, the Court plainly perceived a need for separation." 804 F.3d at 1290. Moreover, the Court repeatedly emphasized "the bedrock principle that restitution should reflect the consequences of the defendant's own conduct," not the conduct of others. 572 U.S. at 455. Such a goal cannot be achieved without grappling — on the record and based on record facts — with the relative culpability of the victim's abuser, who here was also the initial distributor of Amy's images. *See id.* at 469 n.4 (Roberts, C.J., dissenting) ("Amy's uncle [is] the initial source of *all* of her injuries[.]").

The D.C. Circuit contends that disaggregating would be impossible, 930 F.3d at 483-84, but such a contention is baseless, as the government made no attempt to disaggregate in this case. Courts have done so, often with the help of an expert report, which would only need to be obtained once. *See, e.g.*, *United States v. Olivieri*, Crim. No. 09-743 (WHW), 2012 WL 1118763, at *11 (D.N.J. Apr. 3, 2012) (victim provided expert testimony that fifty percent of her total losses were proximately caused by her initial abuse). As Judge Bates recognized in *United States v. Loreng*, 956 F. Supp. 2d 213, 226 n.7 (D.D.C. 2013), "insofar as [disaggregation] may be hard for a psychologist to make in a principled manner based on access to the victims, experience with other victims, and specialized training, it is far more difficult for a Court to make without the benefit of such tools." Permitting courts to simply state that they have considered whether a defendant played any role in the initial abuse and/or distribution contravenes *Paroline*.

III. This Court Should Provide Much Needed Guidance To Lower Courts Throughout the Country Struggling to Effectuate *Paroline*.

A. Confusion Amongst Lower Courts Has Resulted in Countless, Materially Different Methodologies for Determining Restitution and Unwarranted Sentencing Disparities Among Similarly Situated Defendants.

As noted above, because the question presented in *Paroline* did not extend to *how* restitution should be determined if the proximate cause standard were adopted, the parties did not brief the issue to any appreciable extent. The Court nevertheless waded into the morass, offering several "guideposts" that district courts "might consider in determining a proper amount of restitution." 572 U.S. at 459-60. The Court twice expressly declined to offer more specific guidance, as it found more precise instruction to be "neither necessary nor appropriate . . . at this point in the law's development." *Id.*; *see also id.* at 462 (declining to provide "further detailed guidance at this stage in the law's elaboration"). The time for more detailed guidance has arrived.

Since *Paroline*, district courts have likened restitution analysis in the child pornography context to "piloting a small craft to safe harbor in a Nor'easter." *United States v. DiLeo*, 58 F. Supp. 3d 239, 244 (E.D.N.Y. 2014). Throughout the country, restitution awards and methodologies vary widely and unwarranted disparities abound. Below is just a brief overview of the disparate methodologies being employed.

As the government pointed out in its appellate briefing in this case, a small majority of district courts have purportedly employed the "1/n" method, where restitution is determined by dividing a victim's aggregate losses by "n": the number

of federal defendants that have been ordered to pay restitution to the requesting victim as of the day of the defendant's sentencing.[14] But even among these courts, there is significant disparity in *how* the 1/n is being applied. Many courts follow the most simplistic method of dividing aggregate losses by the number of previously convicted federal defendants with standing restitution orders. *See*, *e.g.*, *United States v. Ayer*, No. 2:15-cr-86-APG-NJK, 2015 WL 7259765 (D. Nev. Nov. 17, 2015) (considering only the number of orders entered after finding past and future offenders to be indeterminable); *United States v. Miltier*, No. 2:15cr151, 2016 WL 6821087 (E.D. Va. Nov. 17, 2016) (predicting that restitution orders would double in the future, but declining to use that number, ultimately dividing outstanding losses by number of restitution orders received by victim); *United States v. Romero-Medrano*, No. 4:14-CR-050, 2017 WL 5177647 (S.D. Tex. Nov. 8, 2017) (dividing total losses by number of restitution orders after declining to estimate number of future offenders and finding that *Paroline* factors support neither an increase nor decrease in restitution amount).

Other courts apply the 1/n method differently, either dividing total losses by both past and future offenders or arbitrarily adjusting the product downward when considering additional *Paroline* factors. *See*, *e.g.*, *United States v. DiLeo*, 58 F. Supp. 3d 239 (E.D.N.Y. 2014) (dividing aggregate losses by number of standing

[14] There are *numerous* substantive failings of the 1/n method, which were detailed at length before both the district court and the court of appeals in this case, especially in the context of *Monzel II*. Petitioner will defer substantive discussion of the various methods discussed above to the briefing on the merits, should his petition be granted.

restitution orders but modifying product downward by $2000 in recognition of existence of future offenders); *United States v. Crisostomi*, 31 F. Supp. 3d 361 (D.R.I. 2014) (doubling estimated number of restitution orders in order to include future offenders before dividing remaining damages by that number); *United States v. Daniel,* No. 3:07-CR-142-O, 2014 WL 5314834 (N.D. Tex. Oct. 17, 2014) (dividing victim's outstanding losses by number of evidence reviews submitted by law enforcement in which victim's images appeared; 5,000 estimated, awarded $368.28); *United States v. Cooley*, No. 4:14-CR-3041, 2014 WL 5872720 (D. Neb. Nov. 12, 2014) (guesstimating 10,000 viewers total and appearing to divide outstanding loss amounts by that amount); *United States v. Moody*, CR 417-256, 2018 WL 3887506 (S.D. Ga. Aug. 15, 2018) (using 1/n method but discounting result by 40% based on mitigating factors); *United States v. R.V.*, 157 F. Supp. 3d 207 (E.D.N.Y. 2016) (dividing total calculated loss by number of defendants with standing restitution orders and rounding down to nearest thousand).

Many courts purport to consider the *Paroline* factors in their analysis, using the government's (often unexplained) restitution request as a starting point and randomly adjusting upwards or downwards. *See*, *e.g.*, *United States v. Berry*, No. 1:18-cr-00107-AA, 2019 WL 5306960 (D. Or. Oct. 21, 2019) (increasing calculated award from $3000 to $4000 upon reasoning that victim is unlikely to be compensated for her full loss amount if she continues to receive small amounts from each defendant); *United States v. Safford*, No. 1:17-CR-54, 2019 WL 4044038 (N.D.N.Y. Aug. 15, 2019) (balancing certain *Paroline* factors after first finding any prediction of future offenders to be too speculative); *United States v. Clemans*, No.

2:15-cr-00227-JAM, 2018 WL 4794166 (E.D. Cal. Oct. 3, 2018) (granting government's requests — tied to no particular methodology — after acknowledging *Paroline* factors); *United States v. Schultz*, Cr. No. 14-10085-RGS, 2015 WL 5972421 (D. Mass. Oct. 14, 2015) (accepting total losses asserted by each victim and adjusting awards based on certain *Paroline* factors and other restitution awards).

Many other courts neglect even a clear analysis of *Paroline*, instead imposing amounts that either wholly reflect their "discretion" or a seemingly arbitrary "neither severe nor token or nominal" award. *See*, *e.g.*, *United States v. Baslan*, No. 13 CR 220(RJD), 2015 WL 1258158 (E.D.N.Y. Mar. 17, 2015) (setting arbitrary restitution awards of $25,000 and $16,000 after finding those amounts to be "neither 'severe' nor a 'token or nominal amount'"); *United States v. Hite*, 113 F. Supp. 3d 91 (D.D.C. 2015) (identifying various *Paroline* factors before settling on seemingly arbitrary $2,500); *United States v. Debruzzi*, Crim. No. 17-160 (DWF/KMM), 2019 WL 6975457 (D. Minn. Dec. 20, 2019) (finding $1,000 to be "fair and reasonable in consideration of the typical award in such cases" and to "serve the basic purposes of restitution"); *United States v. D.W.*, 198 F. Supp. 3d 18 (E.D.N.Y. 2016) (citing *Paroline* factors without discussing actual methodology for calculating award amounts).

Several courts have individually devised their own methodologies for calculating restitution whether or not they align with *Paroline*. *See*, *e.g.*, *United States v. Mobasseri*, No. 1:17CR138, 2019 WL 3807233 (N.D. Ohio. Aug. 12, 2019) (dividing number of months defendant trafficked victim's images by number of months since victim's first request for restitution and taking resulting percentage of

victim's total losses to determine those attributable to defendant before considering *Paroline* factors); *United States v. Miner*, No. 1:14-cr-33 (MAD), 2014 WL 4816230 (N.D.N.Y. Sept. 25, 2014) (using median amount of other restitution awards for victims); *United States v. Randjelovich*, No. 2:13-CR-00403-TLN, 2015 WL 4095655 (E.D. Cal. July 7, 2015) (acknowledging *Paroline* factors but appearing to settle generally on $1,000 per file possessed but $2,000 per file possessed for one victim who had received only a small number of restitution awards); *United States v. Gamble*, No. 1:10-CR-137, 2015 WL 4162924 (E.D. Tenn. July 9, 2015) (proposing tiered approach based on aggravating and mitigating circumstances that purportedly included *Paroline* factors as well as others such as length of possession, number of items viewed, and whether others viewed image while in defendant's possession).

Finally, several courts have altogether declined to impose any restitution for lack of clarity or basis in determining correct amounts. *See*, *e.g.*, *United States v. Berrios*, No. 14-cr-682 (BMC), 2015 WL 5793480 (E.D.N.Y. Oct. 1, 2015) (complaining that government provided no basis for calculating total losses since it only provided qualitative factors and rejecting restitution rather than arbitrarily guessing); *United States v. Chan*, Cr. No. 15-00224 DKW, 2016 WL 370712 (D. Haw. Jan. 29, 2016) (rejecting mental health expert's analysis that disaggregated victims' harms due to arbitrariness and declining to impose restitution because "*Paroline* and *Galan* set out an impossible task for district courts"); *United States v. Kugler*, CR 14-73-BLG-SPW, 2016 WL 816741 (D. Mont. Feb. 29, 2016) (finding, on record before it, impossible to (1) disaggregate losses caused by original abuser and (2)

disaggregate losses among distributors and/or among possessors, both of which court found necessary under *Paroline*).

As the *Paroline* dissent recognized:

> Nor can confidence in judicial discretion save the statute from arbitrary application. . . . It is true that district courts exercise substantial discretion in awarding restitution and imposing sentences in general. But they do not do so by mere instinct. Courts are instead guided by statutory standards: in the restitution context, a fair determination of the losses caused by the individual defendant under section 3664(e); in sentencing more generally, the detailed factors in section 3553(a). A contrary approach—one that asks district judges to impose restitution or other criminal punishment guided solely by their own intuitions regarding comparative fault—would undermine the requirement that every criminal defendant receive due process of law.

572 U.S. at 471 (Roberts, C.J., dissenting). In light of the varying methods discussed above, and the disparate results they produce among similarly-situated defendants, additional guidance is necessary for the government and district courts to properly perform their statutorily-mandated duties, to gain some semblance of uniformity for/amongst similarly-situated criminal defendants, and — most importantly — to meet the demands of due process.

B. In Addition to Substantive Guidance, This Court Should Provide Procedural Guidance, (1) Requiring District Courts to Articulate the Methodologies and Specific Factual Findings Underlying Their Restitution Orders to Better Enable Effective Appellate Review; and (2) Making Clear that *Paroline* Does Not Prohibit the Use of Math in Determining Restitution.

1. A District Court Should Be Required to Explain the Basis for Its Restitution Order, Beyond Simply Reciting the *Paroline* Factors.

Several circuits have required — outside the child pornography context — that district courts, in determining "the full amount of each victims losses," 18

U.S.C. § 3664(f)(1)(A), articulate the specific factual findings underlying their restitution orders in order to enable appellate review. *See, e.g.*, *United States v. Singletary*, 649 F.3d 1212, 1222 (11th Cir. 2011); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005). This Court should explicitly adopt such a requirement here.

The district court in this case provided no rationale as to how or why the court reached its $7,500 figure; the court of appeals' opinion likewise offers no insight, beyond rejecting the one explanation evident from the record: the averaging of awards in five cases — none of which involved Amy — cited by the district court as post-*Paroline* examples. Beyond that explanation, it appears, as Chief Justice Roberts warned, that the court "pick[ed] an arbitrary number" representing Petitioner's relative causal role, "[a]nd arbitrary is not good enough for the criminal law." *Paroline*, 572 U.S. at 463 (Roberts, C.J., dissenting). This is so, even where district courts are afforded wide discretion. *See Halo Electronics, Inc. v. Pulse Electronics Inc.*, 136 S. Ct. 1923, 1931 (2016) (explaining that "discretion is not whim").[15]

If the district court's $7,500 figure was *not* in fact arbitrary, Petitioner, this Court, other courts, and the public are entitled to know how it was derived (even if a specific algorithm is not required), as the award now serves as a benchmark in the

[15] In *Halo*, this Court observed that "[i]n a system of laws[,] discretion is rarely without limits, even when the statute does not specify any limits upon the district court's discretion. . . . [A] motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." 136 S. Ct. at 1931 (internal quotation marks and citations omitted).

D.C. Circuit (as well as courts apt to follow its reasoning) — indeed a floor — given Petitioner is the least culpable of offenders required to pay Amy restitution. As it stands, the district court offered a list of factors it said it considered in reaching the $7,500 figure, but not *how* it derived the figure in light of those factors (i.e., its reasoning) or *why* it rejected Petitioner's arguments. "[I]t is not enough for the district court to carefully analyze the sentencing factors. A separate and equally important procedural requirement is *demonstrating that it has done so*." *United States v. Merced*, 603 F.3d 203, 215 (3d Cir. 2010). The D.C. Circuit's approval of the district court's award in this case leaves future child pornography restitution awards effectively unreviewable and provides no guidance or guardrails for district courts — especially considering that there are no Sentencing Guidelines setting "minerun" restitution ranges as a basis for comparison.

Even were the district court's explanation sufficient in a vacuum, it failed to address Petitioner's arguments in mitigation. Though Petitioner filed 67 pages of pleadings in the district court, the D.C. Circuit found that "Monzel fails to identify any material mitigation arguments that the district court did not address" in its 4-page "Analysis" section — which listed factors, but provided no analysis connecting them to the $7,500 figure. First, the court's focus on "material" mitigation arguments is at odds with precedent throughout the circuits that requires sentencing courts to consider all "nonfrivolous arguments for mitigation." *See, e.g.*, *United States v. Bigley*, 786 F.3d 11, 12, 14 (D.C. Cir. 2015). The difference itself is material, in that — especially in an area of wide discretion — it is not possible or appropriate for a reviewing court to surmise how the *district court* within its

discretion would have responded to a particular sentencing argument. *Cf. United States v. Brown*, 610 F.3d 395, 398 (7th Cir. 2010) ("We find it pointless to speculate about the judge's reasons. If the district court fails to explain itself sufficiently, the rationale for deferential appellate review is weakened because this court cannot tell how particular facts influenced the district court's assessment of the totality of the circumstances."); *United States v. Carter*, 564 F.3d 325, 329 (4th Cir. 2009) ("[A]n appellate court may not guess at the district court's rationale[.]"); *United States v. Thomas*, 498 F.3d 336, 341 n.3 (6th Cir. 2007) ("[I]t is not our role to supply reasons for the district court's sentencing determination where the district court itself supplied none.").

Second, while Petitioner admittedly made arguments that nibbled at the edges of Amy's aggregate loss calculation — in an honest effort to get things right — there were several significant arguments that the district court failed to address. For example, the court did not address the *factual* dispute Petitioner raised regarding the availability of data predicting "the number of future offenders" and/or estimating "the broader number of offenders involved" — the two *Paroline* factors the Court itself added. Petitioner argued that Amy herself had cited data in *Paroline* from NCMEC and the DOJ itself. The district court did not address why this data was unacceptable.[16]

[16] The district court did not find the factors "uninstructive," 930 F.3d at 482. It accepted that they were relevant, but deferred to the government's representation that there was no information available to determine them.

Additionally, the district court did not address why its award effectively assumed that Petitioner was one of 432 people ($3,243,195/$7,500) who have harmed and will harm Amy when *Paroline* acknowledged *repeatedly* that Amy's offenders "to date easily number in the thousands." 572 U.S. at 440. Nor did it address why Petitioner was ordered to pay $1,175 more than Amy's uncle — "the initial source of *all* of her injuries," *id.* at 469 n.4 — or how it took that abuse into account; or why it awarded more than "the significant majority of defendants" who "have been ordered to pay Amy $5,000 or less," 572 U.S. at 470. Finally, the court failed to explain why its award was $2,500 *more* than the $5,000 award Amy *agreed to* in *Hite* — a case cited twice by the district court in its memorandum order.

Petitioner had asked only for a remand for additional explanation and the opportunity to answer the court's reasoning, which — as courts have recognized — would be "nowhere near as costly or as chancy an event as a trial." *In re Sealed Case*, 573 F.3d 844, 852 (D.C. Cir. 2009). Because the district announced its award in a memorandum opinion, as opposed to at sentencing, Petitioner did not have the opportunity to request additional explanation, engage the court's analysis, or ask the court to address specific arguments — as he would have at a sentencing hearing. *See, e.g.*, *United States v. Hunter*, 809 F.3d 677 (D.C. Cir. 2016). Indeed, this is precisely why there is an objection requirement at trial and sentencing.

2. This Court Should Clarify that *Paroline* Does Not Forbid the Use of Math in Determining or Reviewing Restitution Orders.

Finally, the D.C. Circuit appears to believe that *Paroline* affirmatively rejects the use of math in determining restitution in this area, even placing the term in

quotation marks, as if the concept has no place in this context. *See, e.g.*, 930 F.3d at 486 ("Monzel returns to the "math."); *see also id.* (restitution is "not an exercise in long division"); *id.* at 481, 483, 484, 486. The D.C. Circuit is not alone in eschewing the use of illustrative mathematical formulations, *see, e.g.*, *United States v. Miner*, 617 F. App'x 102, 103 (2d Cir. 2015), relying heavily on specific language in *Paroline*.

While *Paroline* states that determining restitution "cannot be a precise mathematical inquiry," 572 U.S. at 459, it does so by means of acknowledgment/ recognition, not prohibition. Indeed, *Paroline* suggests "disaggregating losses," "determin[ing]" "amount[s]" and considering "number[s]," "predictions," and "estimate[s]." 572 U.S. at 449, 460. While courts may not be required to adopt a specific algorithm or formula, "numbers" and "math" are necessarily instructive in any attempt to quantify *relative* harm — and any attempt to obtain meaningful appellate review. The alternative is a veritable witch's brew, into which courts simply stir ingredients, recite the magic words (e.g., the *Paroline* factors), and out magically pops a restitution figure. While this may not be far from what occurs in the context of setting criminal *fines*, it is not how criminal restitution is determined. To the extent *Monzel III* can be read to discourage the use and/or consideration of mathematical illustrations in this area, it is again contrary to *Paroline*.

The D.C. Circuit criticized Petitioner for suggesting that courts must adopt a "formulaic methodology for computing restitution," finding instead that courts have broad discretion, need only list their considerations, and need not "show[] every step of [their] homework." 930 F.3d at 480, 484. Though Petitioner offered his own

disaggregation formula (based on Amy's) in both courts, he did so for illustrative purposes and to provide a basis for review, never arguing that either court needed to do the same. Quoting the D.C. Circuit's previous opinion in *Monzel I*, Petitioner argued that "in fixing the [restitution] amount[,] the district court must rely upon some principled method for determining the harm Monzel proximately caused." 641 F.3d at 540. This Court should adopt such a requirement.

IV. This Case Presents an Ideal Vehicle for Deciding Both Questions, Which Are of Exceptional Importance.

The questions presented are urgently in need of resolution by this Court, as they impact thousands of federal defendants throughout the country who are statutorily mandated to pay restitution under § 2259. The issues are cleanly presented in this case, which was extensively briefed below, as Petitioner's possession of a singular image with no aggravating factors makes him the least culpable child pornography defendant (i.e., the "floor") still subject to § 2259 and removes all factual complications from the Court's consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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