No. ____

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

PETITION FOR A WRIT OF CERTIORARI

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SEPTEMBER 14th, 2020

QUESTION PRESENTED

In *Paroline v. United States*, 572 U.S. 434 (2014), the Court addressed how to calculate restitution for criminal defendants convicted of possessing child pornography. In doing so, the Court parenthetically observed that "[c]omplications may arise in disaggregating losses sustained as a result of the initial physical abuse, but those questions may be set aside for present purposes." *Id.* at 449.

In this case, the Eleventh Circuit held that *Paroline* does not require the losses sustained as a result of the initial physical abuse to be "disaggregated" from the losses sustained as a result of trafficking in the victim's images. In so holding, the Eleventh Circuit joined the Eighth Circuit and rejected contrary holdings by the Ninth and Tenth Circuits. The D.C. Circuit has since joined the Eighth and Eleventh Circuits.

The question presented is:

When calculating restitution for a possessor of child pornography, must the victim's losses caused by the initial physical abuse be disaggregated from the losses caused by the subsequent traffic in the victim's images?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

RELATED PROCEEDINGS

United States v. Rothenberg, No. 20-10990 (11th Cir. June 18, 2020)

United States v. Rothenberg, No. 17-12349 (11th Cir. May 8, 2019)

United States v. Rothenberg, No. 16-cr-60054 (S.D. Fla. Mar. 11, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit decision under review is unreported but is reproduced as Appendix ("App.") A. An earlier Eleventh Circuit decision in this case is reported at 923 F.3d 1309 and is reproduced as App. C. The district court's original restitution order is unreported but is reproduced as App. D.

JURISDICTION

The Eleventh Circuit issued its decision on June 18, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2259 of Title 18 provides that "the court shall order restitution for any offense under this chapter," including possession of child pornography. 18 U.S.C. § 2259(a). "The issuance of a restitution order under this section is mandatory." § 2259(b)(4)(A). The restitution order "shall direct the defendant to pay the victim . . . the full amount of the victim's losses." § 2259(b)(1). "An order of restitution under this section shall be issued and enforced in accordance with section 3664 . . . ." § 2259(b)(2). Section 3664(e), in turn, 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. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on . . . the Government."

STATEMENT

A. LEGAL BACKGROUND

In *Paroline v. United States*, 572 U.S. 434 (2014), the Court addressed "how to determine the amount of restitution a possessor of child pornography must pay to the victim whose childhood abuse appears in the pornographic materials possessed." *Id.* at 439. As a threshold matter, it held that restitution is "proper under § 2259 only to the extent the defendant's offense proximately caused a victim's losses." *Id.* at 448. The Court then addressed the "difficult question" of "determining the 'full amount' of [the victim's] general losses, if any, that are the proximate result of the offense conduct of a particular defendant who is one of thousands who have possessed and will in the future possess the victim's images but who has no other connection to the victim." *Id.* at 449. The Court declined to adopt a causation standard that would produce extreme results in either direction.

On the one hand, it rejected a "but-for" causation standard, recognizing that it would be virtually impossible to satisfy in this context, leaving victims "emptyhanded." *Id.* at 449–451, 461. The Court explained: where the "defendant is an anonymous possessor of images in wide circulation on the Internet," "it is not possible to prove that [the victim's] losses would be less (and by how much) but for one possessor's individual role in the large, loosely connected network through which her images circulate." *Id.* at 450–51. Thus, there was no "practical way to isolate some subset of the victim's general losses that [the defendant's] conduct alone would have been sufficient to cause." *Id.* at 451.

On the other hand, the Court rejected a less-demanding, alternative causation standard, under which "each possessor [w]ould be treated as a cause in fact of all the trauma and all the attendant losses incurred as a result of the entire ongoing traffic in her images." *Id.* at 452–53. "The striking outcome of this reasoning," the Court found, would impermissibly hold the defendant liable not for his "own conduct," but rather for "the conduct of thousands of geographically and temporally distinct offenders acting independently, and with whom the defendant had no contact." *Id.* at 453–54. In that regard, the Court observed that a single possessor's "contribution to the causal process underlying the losses was very minor, both compared to the combined acts of all other relevant offenders, and in comparison to contributions of other individual offenders, particularly distributors (who may have caused hundreds or thousands of other viewings) and the initial producer of the child pornography." *Id.* at 454. And the Court refused to "hold a defendant liable for an amount drastically out of proportion to his individual causal relation to the victim's losses." *Id.* at 461.

Having rejected both an impossible-to-satisfy but-for standard on the one hand and a joint-and-several liability standard on the other, the Court focused instead on the defendant's "relative role in the causal process." *Id.* at 458. Although the Court recognized that even a mere possessor "plays a part in sustaining and aggravating" the harm caused by the trade in the victim's images, *id.* at 457, the amount of restitution in a case like that "would not be severe," "given the nature of the causal connection between the conduct of a possessor . . . 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*. at 458–59. At the same time, restitution "would not be . . . a token or nominal amount." *Id*. at 459. Rather, it "would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role." *Id*.

More concretely, the Court instructed district courts to begin the calculation by isolating the victim's losses "that stem from the ongoing traffic in her images as a whole." *Id*. at 449. Referring to those losses as the victim's "general losses," the Court stated that it will "perhaps [be] simple enough for the victim to" establish those losses. *Id*. And those general losses should be used "as a starting point" from which the defendant's relative causal role could be ascertained. *Id*. at 460. The Court parenthetically observed, however, that "[c]omplications may arise in disaggregating losses sustained as a result of the initial physical abuse, but those questions may be set aside from present purposes." *Id*.

To determine the defendant's relative role in the general losses caused by the ongoing traffic in the victim's images, the Court eschewed any "precise mathematical inquiry" or "algorithm." *Id*. at 459. Instead, the Court emphasized that district courts must use their "discretion and sound judgment" to ascertain the defendant's relative role "as best [they] can from available evidence." *Id*. And, to aid in that inquiry, the Court enumerated several factors for consideration:

> [D]istrict courts might, as a starting point, 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. These could include the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); 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.

Id. at 459–60. These "factors," the Court cautioned, were "rough guideposts for determining an amount that fits the offense," not a "rigid formula." *Id.* at 460.

Ultimately, the Court recognized that its "approach [w]as not without its difficulties," as it "involve[d] discretion and estimation." *Id.* at 462. The Court, however, stated that courts "can only do their best to apply the statute as written in a workable manner, faithful to the competing principles at stake: that victims should be compensated," but that "defendants should be made liable for the consequences and gravity of their own conduct, not the conduct of others." *Id.*

B. PROCEEDINGS BELOW

1. Petitioner pled guilty in the Southern District of Florida to possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), (b)(2). The government sought restitution on behalf of nine different minor victims whose images Petitioner possessed. Through the government, the victims submitted evidence supporting their claims for restitution. The parties agreed that *Paroline* governed the district court's restitution determination. The parties also agreed that Petitioner merely possessed their images; he neither distributed them nor participated in the initial abuse

producing them. Relying on the Ninth Circuit's decision in *United States v. Galan*, 804 F.3d 1287 (9th Cir. 2015), Petitioner argued that *Paroline* required the district court to "disaggregate" the losses caused by the initial abuser from those caused by subsequent distributors and possessors, and the victims had made no attempt to so disaggregate their losses. *See* Dist. Ct. Dkt. Entry 63.

Following a hearing, the district court entered an order awarding restitution to all nine victims in the total amount of $142,600. *See* App. D, 41a –56a. The court made no attempt to disaggregate the victim's losses. Instead, it stated that, for each victim, it was assigning restitution in an amount that reflected Petitioner's relative role in the losses he had proximately caused, observing that he neither distributed the images nor was involved in the initial abuse. To calculate the amounts, the court used as its baseline the victims' total (disaggregated) loss figures. The court then discussed each victim's supporting evidence—which generally included a forensic psychological report, a victim impact statement, and a list of restitution awards in previous cases—as well as the number of images that Petitioner possessed. After that discussion, the court awarded restitution in an amount that either matched the victim's request or, where the government sought a lower amount, was slightly below the victim's request. The nine individual awards ranged from $3,000 to $42,600.

2. On appeal, Petitioner reiterated that *Paroline* required the district court to disaggregate the losses caused by the initial abuser from those caused by subsequent possessors and distributors, and that none of the victims or the district court had made any attempt to do so here. He relied on the Ninth Circuit's decisions

in *Galan* and *United States v. Grovo*, 826 F.3d 1207 (9th Cir. 2016), as well as the Tenth Circuit's decision in *United States v. Dunn*, 777 F.3d 1171 (10th Cir. 2015). *See* Pet. C.A. Br. 15, 23–34; Pet. C.A. Reply Br. 1–7 (11th Cir. No. 17-12349). Relying in part on *United States v. Bordman*, 895 F.3d 1048 (8th Cir. 2018), the government responded that no disaggregation was required, and the district court complied with *Paroline* merely by stating that it was not holding Petitioner liable for losses caused by other actors. *See* U.S. C.A. Br. 21–25; U.S. Rule 28(j) Ltr. #2 (Oct. 31, 2018).

Following oral argument, the Eleventh Circuit issued a published opinion. 923 F.3d 1309 (11th Cir. 2019); App. C, App. 11a–40a. After a lengthy analysis, the court acknowledged that "the expert reports did not disaggregate the losses," but it held that no such disaggregation was required. *Id*. at 1328–35. In so holding, the court surveyed the case law from other circuits and found that "the results are mixed." *Id*. at 1329. The Ccurt explained that the Eighth Circuit had declined to require disaggregation. *Id*. at 1329–30 (citing *Bordman*). But, "[i]n contrast" to that decision and others, "the Ninth and Tenth Circuits have determined that district courts must engage in some level of disaggregation as to the harms caused by the original abuse versus harms caused by later distribution and possessors." *Id*. at 1332 (citing *Galan* and *Dunn*). Ultimately, the Eleventh Circuit concluded that "*Paroline* requires no such disaggregation." *Id*. at 1313, 1333. It reasoned: "Like the Eighth Circuit, we think it would be inconsistent with *Paroline*'s flexible, discretionary framework" to do so. *Id*. at 1334. Rather, the court of appeals believed that "the district court need only indicate in some manner that it has considered that the instant defendant is a

possessor, and not the initial abuser or a distributor, and has assigned restitution based solely on" his particular conduct and role. *Id*. The court expressly rejected the Ninth Circuit's contrary reading of *Paroline*. *Id*. at 1334–35 & n.7.

Despite rejecting Mr. Rothenberg's disaggregation argument, as well as other arguments, the Eleventh Circuit agreed that the $42,600 award for one of the nine victims was not supported by sufficient evidence. *Id*. at 1338–39. Accordingly, the Eleventh Circuit affirmed the district court's order imposing $100,000 in restitution to eight of the nine victims. But it vacated the $42,600 award for the ninth victim, and it remanded for further proceedings as to her alone. *Id*. at 1313, 1340.

3. Petitioner sought a writ of certiorari in this Court on the disaggregation issue. Sup. Ct. No. 19-5384. The government responded that review was premature because, since the court of appeals remanded with respect to one victim, there was no final judgment, and the case was in an "interlocutory posture." The government assured Petitioner and this Court that he would "have the opportunity to raise his current claim, together with any other claims that may arise from resentencing, in a single petition for a writ of certiorari" after final judgment was entered on remand. U.S. Br. in Opp. 8–9 (Dec. 2, 2019). This Court denied review on January 13, 2020.

4. On remand in the district court, the government filed a memorandum seeking $3,000 in restitution for the ninth victim. The claim package consisted of a cover letter, psychological evaluation, an economic report estimating future losses, and a victim impact statement. Although she argued that disaggregation was unnecessary, she claimed that her materials sufficiently disaggregated her losses.

Those materials, however, made no attempt to do so. Petitioner responded by reiterating his earlier disaggregation argument, but acknowledged that it was foreclosed by the Eleventh Circuit's earlier decision in his case. He nonetheless sought to preserve it for further review in this Court. Subject to that reservation, he did not oppose the $3,000 request. Dist. Ct. Dkt. Entry 104. Accordingly, the district court entered an amended judgment imposing restitution for all nine victims in the total amount of $103,000. App. 9a.

5. On appeal, Petitioner again reiterated his disaggregation argument. He acknowledged that it was foreclosed by the Eleventh Circuit's earlier published decision in his case. Nonetheless, he sought to preserve it for further review in this Court given the circuit conflict. *See* Pet. C.A. Br. 10–16 (11th Cir. No. 20-10990).

The Eleventh Circuit summarily affirmed. App. A, 1a–4a. It explained that its earlier published decision in this case had expressly rejected Petitioner's disaggregation argument. And because that decision remained binding circuit precedent, it "foreclosed" Petitioner's sole argument on appeal, which was made only to "preserve" his argument for further review in this Court. *Id*. at 3a–4a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT

In *Paroline*, the Court observed that "[c]omplications may arise in disaggregating losses sustained as a result of the initial physical abuse, but those questions may be set aside from present purposes." 572 U.S. at 449. The courts of appeals have since divided on whether, in calculating restitution in possession and distribution cases, the losses caused by the initial abuse must be "disaggregated" from

the losses caused by the subsequent traffic in the victim's images. The Ninth and Tenth Circuits have said yes; the Eighth, Eleventh, and D.C. Circuits have said no.

1. a. In *United States v. Dunn*, 777 F.3d 1171, 1179–82 (10th Cir. 2015), the Tenth Circuit vacated a pre-*Paroline* restitution award that had "represented the amount of [the victim's] *total losses* minus the amount of restitution she had previously received from other defendants." *Id.* at 1179. This award, the Tenth Circuit easily recognized, "cannot stand in light of *Paroline*" because it rendered the defendant liable for the conduct of other offenders, "in contravention of *Paroline*'s guidance." *Id.* at 1181.

But more importantly for present purposes, the Tenth Circuit also rejected the district court's use of the victim's total losses as the starting point for its analysis. *Id.* The defendant argued that this figure was flawed because the expert report upon which it was based did not distinguish between the "primary harms associated with [the] original abuse" and the "secondary harms flowing from the dissemination of images online." *Id.* (citation omitted). The Tenth Circuit agreed. Although it opined that *Paroline* "did not resolve this precise question"—referring to the parenthetical statement about disaggregation—the court of appeals nonetheless concluded that it would be inconsistent with *Paroline*'s "clear rationale" to "hold Mr. Dunn accountable for those harms initially caused by Vicky's abuser" rather than his own conduct. *Id.* "Thus, to the extent that the district court relied on an expert report that did not disaggregate these harms, the district court's adoption of . . . the total measure of damages cannot stand." *Id.* at 1182.

b. The Ninth Circuit has reached the same conclusion. In *United States v. Galan*, 804 F.3d 1287 (9th Cir. 2015), the district court declined "to disaggregate the losses resulting from the original abuse from the losses resulting from [the defendant's] own activities," which included possession and distribution. *Id.* at 1288–89 & n.5. The Ninth Circuit concluded that this was error, "hold[ing] 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." *Id.* at 1291.

The court reasoned that *Paroline* compelled that conclusion because it "note[d] a difference between original abusers and those who engage in distribution." *Id.* at 1290. Indeed, by stating that "'[c]omplications may arise in disaggregating losses sustained as a result of the initial physical abuse,'" *Paroline* "plainly perceived a need for separation." *Id.* (quoting *Paroline*, 572 U.S. at 449). The court explained that, if losses caused by distribution "were not to be separated from those caused by the original abuser, there would be no complications because there would be no need to disaggregate." *Id.* The Ninth Circuit further observed that *Paroline* "again recognized the distinction between original abusers on the one hand, and distributors and possessors on the other, when it declared that one factor a district court could consider . . . was whether 'the defendant had any connection to the initial production of the images.'" *Id.* (quoting *Paroline*, 572 U.S. at 460).

The Ninth Circuit went on to state that, not only did *Paroline* compel such disaggregation, but it was "logical to separate" the harms caused by the initial abuser from the harms caused by distributors and possessors. *Id*. Indeed, "an original abuser is responsible for harms caused by his actions, including ongoing harms; distributors and possessors of images of those actions commit separate wrongs with separate, albeit unlawful, harmful consequences of their own." *Id*. Relying on the Tenth Circuit's decision in *Dunn*, the court emphasized that the defendant "should not be required to pay for losses caused by the original abuser's actions." *Id*. at 1290–91. Accordingly, the Court vacated the restitution award for failure to disaggregate. *Id*. at 1291.

The Ninth Circuit reiterated that holding in *United States v. Grovo*, 826 F.3d 1207, 1220–22 (9th Cir. 2016). Applying *Galan*, the Court again vacated a restitution award under *Paroline* because, in using the victim's total losses as a starting point, the district court failed to "disaggregate the portion of the victims' losses caused by the original abuse from those attributable to continued viewing of her image." *Id*. at 1222. Although the district court carefully examined many of the *Paroline* factors, its loss calculation was fatally flawed because it was based "on a psychological report that focused primarily on the resulting harms and costs from her initial abuse and showed only that her ongoing costs were at least in part related to—not caused by—the continuing traffic in her image." *Id*. at 1221 (emphasis omitted). Because the court failed to disaggregate the losses caused by the initial abuse from those caused by the ongoing distribution and possession, the Ninth Circuit vacated the restitution

award and remanded for such disaggregation. *Id*. at 1221–22. Notably, the court of appeals explained that, once the district court on remand disaggregated the losses, it could then re-apply its sound method of apportioning those losses under the *Paroline* factors. *Id*. at 1222.

2. a. By contrast, the Eighth Circuit refused to require disaggregation in *United States v. Bordman*, 895 F.3d 1048, 1058–59 & n.3 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1618 (2019). There, the defendant argued "that the district court abused its discretion by failing to disaggregate the harm caused by the initial abuse from the harm that his later possession caused." *Id*. at 1058. Rejecting that argument, the court of appeals reasoned that that "one of the *Paroline* factors already accounts for disaggregation"—*i.e.*, whether the defendant had any connection to the initial production of the images—and *Paroline* said those factors were only "rough guideposts." *Id*. at 1059. The Eighth Circuit "decline[d] to transform one of the *Paroline* factors—the disaggregation factor—from a 'rough guidepost' into a 'rigid formula." *Id*. (quoting *Paroline*, 572 U.S. at 460). In a lengthy footnote, the court of appeals acknowledged that the Ninth and Tenth Circuits had required such disaggregation, but it stated that those opinions were "not without its critics" and, according to certain district courts, created an "impossible task" for them. *Id*. at 1058 n.3 (quotation omitted).

b. In this case, the Eleventh Circuit expressly agreed with the Eighth Circuit, disagreed with the Ninth and Tenth Circuits, and held that *Paroline* does not require disaggregation. 923 F.3d at 1333 ("After careful review of *Paroline*, we

conclude that a district court is not required to determine, calculate, or disaggregate the specific amount of loss caused by the original abuser-creator or distributor of child pornography before it can decide the amount of the victim's losses caused by the later defendant who possesses and views the images. *Paroline* requires no such disaggregation."). The court reasoned: "Like the Eighth Circuit, we think it would be inconsistent with *Paroline*'s flexible, discretionary framework to require district courts to perform an initial, formal step of calculating and then separately assigning a total loss amount to the initial abuse, then one to the distributors and possessors generally, and only then one to the particular defendant possessor." *Id.* at 1334. In the Eleventh Circuit's view, the district court "need only indicate in some manner that it has considered that the instant defendant is a possessor, and not the initial abuse or a distributor, and has assigned restitution based solely on the defendant possessor's particular conduct and relative role in causing those losses." *Id.* "Under *Paroline*, that is enough. We therefore reject Rothenberg's disaggregation argument." *Id.*

Before reaching that conclusion, the Eleventh Circuit surveyed the legal landscape on the disaggregation issue and found that "[s]everal of our sister circuits . . . have grappled with that question, *and the results are mixed*." *Id.* at 1324 (emphasis added). In addition to summarizing the Eighth Circuit's decision in *Bordman*, the court also noted that the Fifth Circuit had rejected a disaggregation argument on plain-error review, noting that it was "not clear" that *Paroline* required disaggregation. *Id.* at 1330 (discussing *United States v. Halverson*, 897 F.3d 645,

654–55 n.4 (5th Cir. 2018)). The court also relied on decisions by the Fourth and Seventh Circuits, which, while not directly addressing the disaggregation question, "refused to impose more structure beyond [*Paroline*'s] multi-factored test." *Id.* at 1330–32 (discussing *United States v. Dillard*, 891 F.3d 151, 160–62 (4th Cir. 2018) and *United States v. Sainz*, 827 F.3d 602, 605–07 (7th Cir. 2016)).

Again acknowledging the circuit split, the Eleventh Circuit then stated: "*In contrast to these decisions*, the Ninth and Tenth Circuit have determined that district courts must engage in some level of disaggregation as to the harms caused by the original abuse versus the harms caused by the later distributors and possessors before awarding restitution against a particular possessor of child pornography." *Id.* at 1332 (emphasis added); *see id.* at 1332–33 (discussing *Dunn* and *Galan*). The Eleventh Circuit also noted that the First Circuit had upheld a restitution award after disaggregation, but stated that "[t]he mere fact that this type of formal disaggregation is permissible under *Paroline* . . . does not mean that it is required." *Id.* at 1332 n.6 (discussing *United States v. Rodgers*, 758 F.3d 37, 39 (1st Cir. 2014)); *see also United States v. Miner*, 617 F. App'x 102, 103 (2d Cir. 2015) (rejecting the defendant's argument "that the district court failed to adequately disaggregate the losses caused by the victims' initial abuses").

In rejecting the disaggregation approach required by the Ninth and Tenth Circuits, the Eleventh Circuit acknowledged *Paroline*'s reference to disaggregation. *Id.* at 1334. However, the court did "not read this dicta, which is contained in a parenthetical, as requiring in any way that the district court in possessor cases take

on the job of determining the harm and loss caused by the initial abuser or the distributors." *Id.* at 1334–35. The court recognized that "the Ninth Circuit concluded that the set-aside statement in this parenthetical meant the Supreme Court 'plainly perceived a need for separation' of losses from the initial abuser and the later possessor defendants." *Id.* at 1335 n.7 (quoting *Galan*, 804 F.3d at 1290). But the Eleventh Circuit rejected that reading, concluding that "nothing in *Paroline* requires disaggregation, and everything in *Paroline* suggests otherwise." *Id.*

c. The D.C. Circuit has since joined the Eighth and Eleventh Circuits. In *United States v. Monzel*, 930 F.3d 470 (D.C. Cir. 2019), that court rejected the defendant's "demand that courts . . . mathematically disaggregate the losses from before the images entered the marketplace." *Id.* at 483. Citing *Bordman* and *Rothenberg* with approval, the D.C. Circuit declined to require courts "to formally disaggregate the intertwined" losses. *Id.* The court acknowledged that "[t]he Ninth Circuit has taken the opposite tack," *id.* (citing *Galan*), but the D.C. Circuit rejected it as too complex and difficult, *id.* at 483–84. It also recognized that the Tenth Circuit's decision in *Dunn* "could also be read to endorse a categorical disaggregation requirement," but it stated (incorrectly) that *Dunn* "may have meant simply that distributors and possessors should pay only for their relative roles." *Id.* at 484 n.2.

* * *

In sum, the circuits are now openly divided on the question presented. The Eighth, Eleventh, and D.C. Circuits do not require disaggregation. The Ninth and Tenth Circuits do. This Court should resolve that conflict in *Paroline*'s application.

II. THE QUESTION PRESENTED WARRANTS REVIEW

Due to the circuit conflict above, geography alone now determines whether district courts must disaggregate the victim's losses when calculating restitution awards in child pornography cases. That creates "unwarranted sentencing disparities" among similarly-situated defendants. 18 U.S.C. § 3553(a)(6). And it is unfair to victims. As a practical matter, they submit the same claim package in every case involving one of their images. If they do not disaggregate their losses, then the exact same claim packages will continue to yield restitution awards in the Eighth, Eleventh, and D.C. Circuits, but not in the Ninth and Tenth Circuits.

Moreover, the disaggregation issue recurs frequently. Indeed, restitution is routinely awarded in federal child pornography cases because it is mandated by statute. 18 U.S.C. § 3559(a), (b)(4)(A). The record in this one case alone reflects that dynamic. Some of the victims who submitted a restitution claim here had already received dozens and even hundreds of restitution awards in other prior criminal cases. *See Rothenberg*, 923 F.3d at 1318 (155 awards to Sarah and 659 to Vicky); *id.* at 1319 (215 awards to Amy); *id.* at 1320 (49 awards to Casseaopeia). And because there are over a thousand federal child pornography cases each year, district courts determine restitution in that context all the time. *See* U.S. Courts, Statistics & Reports, Table D-2 (Mar. 31, 2020) (reporting over 1,400 federal criminal cases involving sexually explicit material over each of the past 5 years). The disaggregation question resides at the threshold of that calculation. Therefore, the question presented here affects numerous child pornography cases, defendants, and victims.

III. THIS IS AN IDEAL VEHICLE

This case is an ideal vehicle to resolve that question dividing the circuits.

As a procedural matter, the question presented is squarely before the Court. Relying on the Ninth and Tenth Circuit decisions, Petitioner expressly made the disaggregation argument at every stage in this litigation. He did so in the district court and then on appeal. And, after oral argument, the Eleventh Circuit issued a precedential opinion thoroughly addressing and rejecting that argument.

Back in the district court on remand with respect to the ninth victim, Petitioner expressly preserved his disaggregation argument again. He then reiterated it on appeal a second time for the express purpose of preserving it. And the Eleventh Circuit squarely rejected his argument as foreclosed by its earlier decision.

In short, the disaggregation question was repeatedly pressed and passed on in the courts bellows. And because the district court has now issued a final judgment with respect to all nine victims, and the Eleventh Circuit has affirmed that judgment, the question presented is now ripe for review. This case is no longer in an interlocutory posture, as it was when Petitioner last sought review in this Court.

Factually too, this is a clean case. There was no dispute that Petitioner was a mere possessor; he did not distribute any of the images and was not involved in the initial abuse or production. Likewise, there was no dispute that neither the victims nor the district court attempted to disaggregate the losses. Indeed, the Eleventh Circuit expressly recognized that the victims' "expert reports did not disaggregate the losses caused by the original abuser from those caused by the distributors or

possessors." *Rothenberg*, 923 F.3d 1329. Rather, the expert reports lumped the victims' total losses together, without differentiating which losses were attributable to which harm. And the district court expressly used those non-disaggregated loss figures as its baseline when calculating the awards. *See* App. 9a, 48a–56a. Because there was no disaggregation for any of the victims, a ruling in Petitioner's favor on the question presented would be case dispositive. And that would be of great practical benefit to him, as the awards totaled $103,000, a substantial amount.

IV. THE DECISION BELOW IS WRONG

The Eleventh Circuit's decision below misreads *Paroline*.

1. *Paroline* itself contemplated disaggregation. In explaining how to calculate restitution in possession cases, this Court used as its baseline the victim's "general losses." And the Court specifically defined that term to mean "the aggregate losses . . . that stem from the ongoing traffic in her images as a whole." *Paroline*, 572 U.S. at 449. Those "general losses" thus exclude the losses caused by the abuser. *See id*. at 456 ("The cause of the victim's general losses is the trade in her images."). Because a possessor is "part of the overall phenomenon that caused [the victim's] general losses," *id*. at 457, those "general losses" are what the district court must apportion based on the defendant's relative role in the trafficking process. *See id*. at 458 (explaining that courts "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"). Only at that point in the analysis do the various "factors" come into play, for they assist the court determine the defendant's relative role. But without

first isolating the losses caused by the ongoing traffic, and excluding the losses caused by the abuse, there is an intolerable risk that the court will hold the defendant liable for losses he played no role in causing. That result would be "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.

Moreover, *Paroline* expressly contemplated disaggregation in the lead-in paragraph to the section of its opinion addressing how to calculate restitution. It stated: "It is perhaps simple enough for the victim to prove the aggregate losses . . . that stem from the ongoing traffic in her images as a whole. (Complications may arise in disaggregating losses sustained as a result of the initial physical abuse, but those questions may be set aside for present purposes.)." *Id*. at 449. As the Ninth Circuit has explained: "If the losses caused by [possessors and distributors] were not to be separated from those caused by the original abuser, there would be no complications because there would be no need to disaggregate." *Galan*, 804 F.3d at 1290. While the Eleventh Circuit dismissed that language in *Paroline* as dicta, that court failed to explain why complications in disaggregation might arise if no disaggregation was required in the first place. *Rothenberg*, 923 F.3d 1335 n.7

2. The Eighth Circuit gave two more reasons for declining to require disaggregation. First, that court reasoned that "one of the *Paroline* factors already account[ed] for disaggregation," and the court "decline[d] to transform one of the *Paroline* factors . . . from a 'rough guidepost' into a 'rigid formula.'" *Bordman*, 895 F.3d at 1059 (quoting *Paroline*, 572 U.S. at 460). But, as explained, the purpose of

the "factors" is to ascertain the defendant's relative role in causing the victim's "general losses"—*i.e.*, those losses caused by the ongoing traffic in the images. Thus, those factors come into play only *after* the court determines the general losses, which requires disaggregating the losses caused by the initial abuser. *See Grovo*, 826 F.3d at 1221–22. Indeed, before enumerating the factors, this Court stated that the "starting point" would be to "determine the amount of the victim's losses caused by the continuing traffic in the victim's images." *Paroline*, 572 U.S. at 460. Where a possessor or distributor had some "connection to the initial production of the images," then his relative role in causing those losses would be much greater. *Id*.

Second, the Eighth (and D.C.) Circuit thought disaggregating the losses caused by the initial abuser would be too difficult. But the government bears the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense." *Id*. at 443 (quoting 18 U.S.C. § 3664(e)). The victims supply that evidence to the government, and they routinely employ experts to conduct psychological evaluations and loss assessments. The government need only ask the victims and their experts to disaggregate the losses as best they can. Notably, there are several cases where they have been able to do just that. *See, e.g.*, *Miner*, 617 F. App'x at 103 (rejecting the defendant's argument "that the district court failed to adequately disaggregate the losses caused by the victims' initial abuses," as the expert "reports appear to have distinguished the original abuse from the ongoing trafficking of the image"); *Rodgers*, 758 F.3d at 39 (district court "limited the losses to general losses from 'continuing' traffic in Vicky's images").

3. In addition to embracing the Eighth Circuit's flawed reasoning, the Eleventh (and D.C.) Circuit declined to require disaggregation because it deemed it "inconsistent with *Paroline*'s flexible, discretionary framework." *Rothenberg*, 923 F.3d at 1334. In the Eleventh Circuit's view, that discretion is so wide that the district court "need only indicate in some manner that is has considered that the instance defendant is a possessor, and not the initial abuser or a distributor, and has assigned restitution based solely on the defendant possessor's particular conduct and relative role in causing those losses." *Id*. In other words, the district court need do no more than state that it is holding a possessor liable only for his own conduct.

That "magic words" approach effectively gives district courts unfettered discretion to pluck any figure out of thin air, as long as the court says that it represents the losses caused by the defendant's conduct. But merely saying that doesn't make it so. Without disaggregating the losses caused by the initial abuse, the district court will not be apportioning the limited pool of losses to which a mere possessor actually contributed. By apportioning the victim's total disaggregated losses, district courts will inevitably hold possessor defendants liable for losses to which they could not have possibly contributed. Yet *Paroline* emphasized that, in the field of criminal restitution, defendants must be held liable only for their own conduct, not the conduct of others. By refusing to require disaggregation, the Eleventh Circuit's approach not only disregards that principle but ensures its evisceration.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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