

No. 26-____

**IN THE
SUPREME COURT OF THE UNITED STATES**

AURELIO QUINTANILLA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Hunter v. United States*, 608 U.S. 713 (2026), this Court held that an appeal waiver “is unenforceable when it would result in a miscarriage of justice,” rejected the Fifth Circuit’s rule that a valid waiver yields in “only two” circumstances, and remanded because the Fifth Circuit “did not address” the miscarriage-of-justice question. Nineteen days later, in this case, the Fifth Circuit enforced a waiver in the same form on the sole ground that it “is valid and encompasses” petitioner’s sentencing claims. It did not mention *Hunter*. It then denied rehearing that raised *Hunter* squarely.

The panel also enforced the waiver against petitioner’s challenge to a \$17,500 restitution order under 18 U.S.C. § 2259, a claim the Government had conceded was “not barred by the appellate waiver.” It did so by holding that the district court had “conducted the required inquiry.” Section 2259(b)(2) directs the court to “determine the full amount of the victim’s losses” and then to order restitution reflecting “the defendant’s relative role in the causal process.” The district court stated no losses, made no finding on causation or apportionment, adopted the amounts the victims requested, and left the judgment’s “Total Loss” column blank.

The questions presented are:

1. Whether a court of appeals may enforce an appeal waiver against a challenge to a sentence without deciding whether enforcement would result in a miscarriage of justice, as *Hunter* requires.

2. Whether a court of appeals may enforce an appeal waiver against a claim that the Government expressly conceded the waiver does not bar.
3. Whether a district court satisfies 18 U.S.C. § 2259(b)(2) and *Paroline v. United States*, 572 U.S. 434 (2014), by adopting the restitution amount a victim requests without determining the victim's losses or the defendant's relative causal role.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Petitioner Aurelio Quintanilla, Jr., was the defendant in the district court and the appellant in the court of appeals. Respondent United States of America was the plaintiff and appellee. No party is a corporation.

Related proceedings (Sup. Ct. R. 14.1(b)(iii)):

- *United States v. Quintanilla*, No. 4:24-CR-434-1 (S.D. Tex.) (judgment-imposed May 22, 2025, and entered June 3, 2025; Hittner, J.).
- *United States v. Quintanilla*, No. 25-20230 (5th Cir.) (published opinion and judgment entered July 7, 2026; petitions for panel rehearing and rehearing en banc denied August 4, 2026; mandate issued August 11, 2026).

There are no other directly related proceedings within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aurelio Quintanilla, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A to the petition (Pet. App. 1a–12a). It is reported at 180 F.4th 788. The judgment of the United States District Court for the Southern District of Texas appears at Appendix B (Pet. App. 13a–18a) and is unreported. The order of the court of appeals denying panel rehearing and rehearing en banc appears at Appendix C (Pet. App. 19a) and is unreported.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals decided this case on July 7, 2026. Pet. App. 1a. Timely petitions for panel rehearing and rehearing en banc were denied on August 4, 2026. Pet. App. 19a. This petition is filed within 90 days of that order. Sup. Ct. R. 13.1, 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2259(b)(2) provides:

(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.

18 U.S.C. § 3664(e) 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.”

STATEMENT OF THE CASE

A. The plea agreement

Petitioner, then twenty-one years old and in criminal-history category I, pleaded guilty in the Southern District of Texas to one count of transporting child pornography, 18 U.S.C. § 2252A(a)(1), (b)(1), under a written plea agreement. The Government dismissed two related counts. Pet. App. 2a.

The agreement's appeal waiver is in the Government's standard form, and its operative language matches the waiver in *Hunter*: petitioner "knowingly and voluntarily waive[d] the right to appeal or 'collaterally attack' the conviction and sentence, except that Defendant does not waive the right to raise a claim of ineffective assistance of counsel" Plea Agreement ¶ 7 (ROA.125); Pet. App. 2a; compare *Hunter*, 608 U.S. at 718. A later paragraph waived challenges to "any restitution order," "[s]ubject to" the agreement's acknowledgment that no sentence had yet been determined. *Id.* ¶¶ 9, 19 (ROA.126, 131). The agreement provided that "the Court will determine the amount of restitution . . . pursuant to Title 18, United States Code, Section 2259(b)(2)," at "no less than \$3,000.00 per victim." *Id.* ¶ 20 (ROA.131–32); Pet. App. 3a.

B. Sentencing

The Guidelines range was 360 months to life, capped by the 240-month statutory maximum. Pet. App. 4a. Petitioner's sentencing memorandum asked for the 60-month mandatory minimum, citing his youth, his own sexual exploitation as a child, his counseling and remorse, and a Guidelines range built on enhancements that apply in nearly every non-production case. ROA.315–21. The Government recommended 216 months.

The court imposed 240 months and lifetime supervised release. Earlier in the hearing it had read through the Government's sentencing memorandum, including that memorandum's summary of the defense request. Sent. Tr. 12–17 (ROA.99–104). Its statement of reasons when it pronounced sentence was this: "A lot of time was put

in on this, but I think these type of cases are difficult and they deserve the time. All right. I've considered 18, United States Code, Section 3553(a). I feel that the next -- the following sentence is appropriate in this case: It's the judgment of the Court the defendant is hereby committed to the custody of the Bureau of the Prisons to be imprisoned . . . for a term of 240 months." Sent. Tr. 21–22 (ROA.108–09; Pet. App. 22a–23a). That statement did not discuss any of petitioner's mitigation arguments.

Two victims, "April" and "Pia," had submitted restitution requests through counsel, which the probation office forwarded in two addenda to the presentence report. April requested \$10,000 and Pia \$7,500. April's submission stated total losses of \$3,610,878.88 and disclosed \$619,385.13 already received in restitution; Pia's stated total losses of \$1,980,793.67. ROA.176–84, 187–283. There was no evidentiary hearing. Before pronouncing sentence, the court confirmed the total requested, noted the victims' request to be informed of any waiver of restitution and said there would be none, and remarked that "[y]ou can't compensate anybody monetarily." Sent. Tr. 19 (ROA.106; Pet. App. 21a).

Its ruling was one sentence, followed by a question to the prosecutor:

It's further ordered that he pay restitution in the amount of \$10,000 to Victim [redacted] and \$7500 to Victim [redacted]. Now, any more restitution, counsel? That's the next question I have always in these cases by the government. Any other matters of restitution that need to be decided --

Sent. Tr. 22 (ROA.109; Pet. App. 23a). The prosecutor answered, "Not at all." *Ibid.* The court stated no loss figure for either victim and said nothing about causation, apportionment, or petitioner's relative role. The words "proximate cause,"

“apportion,” “relative role,” and “*Paroline*” do not appear in the transcript. The “Total Loss” column of the written judgment is blank for both victims. ROA.72 (Pet. App. 17a). The court did find petitioner indigent and on that basis waived a fine and the JVTa and AVAA assessments. Sent. Tr. 23 (ROA.110; Pet. App. 24a).

C. The appeal

Petitioner argued that the district court had misadvised him about his appellate rights, that the prison term and lifetime supervised release were unreasonable, and that the restitution order had been entered without the determinations § 2259(b)(2) and *Paroline* require.

The Government invoked the waiver against the sentencing claims but disclaimed it as to restitution: “although not barred by the appellate waiver, Quintanilla’s challenge to the restitution order lacks merit,” Gov’t C.A. Br. 21 (Pet. App. 26a); “[t]o the extent Quintanilla complains about the court’s lack of a *Paroline* analysis, his claim is not barred by the appellate waiver,” *id.* at 56 (Pet. App. 28a). It reserved the waiver only for “some other argument about restitution, such as the validity of the amounts claimed in the victim impact statements.” *Id.* at 56 n.7. The Government agreed that § 2259(b)(2) “requires the district court to determine the full amount of the victim’s losses and order restitution ‘in an amount that reflects the defendant’s relative role’” *Id.* at 56. On the merits, its brief recited the victims’ loss figures and calculated that the awards were “approximately 0.3%” of them. *Id.* at 61–62 (Pet. App. 29a–30a). The district court had made no such calculation.

Briefing closed on January 16, 2026, and the case was argued on June 2. On June 18, this Court decided *Hunter*. On June 29, it granted certiorari in several Fifth Circuit appeal-waiver cases, vacated the judgments, and remanded them for further consideration in light of *Hunter*. *Chaney v. United States*, No. 24-6543 (U.S. June 29, 2026); *Nyandoro v. United States*, No. 25-6218 (U.S. June 29, 2026).

D. The decision below

On July 7, 2026, the panel affirmed in a published opinion that does not cite *Hunter*. Pet. App. 1a–12a. It held the waiver knowing and voluntary, Pet. App. 5a–7a, and disposed of the sentencing claims in two sentences: “Because the waiver is valid and encompasses challenges to Quintanilla’s ‘conviction and sentence,’ it bars his claims attacking the prison term and lifetime of supervised release. We do not reach the merits of those challenges.” Pet. App. 7a. It cited two unpublished decisions. *Id.* at 7a n.20.

On restitution, the panel acknowledged circuit precedent holding that “if a court orders a defendant to pay restitution under § 2259 without determining that the defendant’s conduct proximately caused the victim’s claimed losses, the amount of restitution necessarily exceeds the statutory maximum,” so that the claim escapes a waiver. Pet. App. 9a (quoting *United States v. Winchel*, 896 F.3d 387, 389 (5th Cir. 2018)). It acknowledged as well that a “failure to conduct a *Paroline* proximate-cause analysis” is “clear and obvious error[] not subject to reasonable dispute,” and that such an order affects “substantial rights, as well as the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 9a–10a (citing *United States v. West*, 137

F.4th 395, 402 (5th Cir. 2025)). “The crucial distinction,” it said, “is between a court that fails to conduct the required inquiry and a defendant who merely disputes the result of an inquiry the court actually conducted.” Pet. App. 9a.

The panel then held that the district court “conducted the required inquiry,” pointing to three things. The court “specifically considered each victim’s restitution report,” and because “[t]hose reports estimated losses of \$3,610,878.88 for one victim, and \$1,980,793.67 for the other,” the awards “represent about 0.3% of each victim’s reported losses.” Pet. App. 11a. The court “considered that Quintanilla did not simply view pornography involving the victims: he downloaded” it. *Ibid.* And the court “read aloud portions of one victim’s impact statement.” *Ibid.* The panel concluded: “The court was not required to recite every *Paroline* guidepost or supply a mathematically exact apportionment. This is a disagreement with the outcome of a completed causation inquiry, not a claim that the court conducted none. The waiver therefore bars Quintanilla’s restitution challenge; in any event, the record reveals no error, much less plain error.” *Ibid.* A footnote added that even a plain error would not “seriously affect the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 11a n.36.

E. Rehearing

Petitioner sought panel rehearing and rehearing en banc. He argued that the panel had applied the framework *Hunter* abrogated, had enforced a waiver the Government disclaimed, and had credited the district court with findings that appeared only in the Government’s brief. While the petitions were pending, on July

29, 2026, another panel of the Fifth Circuit decided *Hunter* on remand. That panel had ordered supplemental briefing on this Court’s opinion, and it applied the miscarriage-of-justice standard to the record before it. *United States v. Hunter*, 183 F.4th 416, 418–420 (5th Cir. 2026). On August 4, the court denied rehearing in this case without opinion and without a poll. Pet. App. 19a. On September 4 and September 18, 2026, other panels decided *Nyandoro* and *Chaney* on remand, again applying the miscarriage-of-justice standard to the records before them. *United States v. Nyandoro*, No. 23-10579, 2026 WL 2619961 (5th Cir. Sept. 4, 2026); *United States v. Chaney*, No. 23-30454 (5th Cir. Sept. 18, 2026).

REASONS FOR GRANTING THE PETITION

Hunter was a Fifth Circuit case, and this Court granted review there to bring that court’s appeal-waiver doctrine into line with the majority rule. Nineteen days after *Hunter*, in a published opinion, the Fifth Circuit again enforced a waiver because it was valid and applied, and stopped there. Asked on rehearing to apply *Hunter*, it declined without comment, six days after applying *Hunter* on remand in *Hunter* itself. It has since applied *Hunter* on remand in at least two more cases this Court sent back, and on its own in others; by its own account it has “had several opportunities to determine just how high that bar really is.” *United States v. Chaney*, No. 23-30454, slip op. at 7 (5th Cir. Sept. 18, 2026). This is the case in which it did not apply *Hunter* at all. The decision below also enforced the waiver against a claim the Government had conceded was reviewable, and it did so by crediting the district court with a loss determination and an apportionment that appear nowhere in the

record. Each error independently warrants review. Together they warrant, at a minimum, the disposition this Court ordered in *Chaney* and *Nyandoro*.

I. The Fifth Circuit enforced the waiver under the rule *Hunter* rejected.

A. *Hunter* requires a miscarriage-of-justice inquiry. The panel conducted none.

Hunter holds that the validity and scope of an appeal waiver no longer end the inquiry. A waiver “is unenforceable when it would result in a miscarriage of justice,” meaning “the kind of egregious error that would bring the judicial system into disrepute.” 608 U.S. at 717; *id.* at 727. The Court’s examples were a sentence “exceeding what the relevant statute allows,” one “infected with a blatant constitutional error,” and one “imposed without ‘some minimum of civilized procedure.’” *Id.* at 728. Because the Fifth Circuit “did not address that question,” the Court remanded: “It is therefore now up to the Fifth Circuit to decide whether enforcing *Hunter*’s appeal waiver would result in a miscarriage of justice.” *Id.* at 730. *Hunter* thus imposes a procedural obligation as well as a substantive standard. A court of appeals asked to enforce an appeal waiver against a sentencing claim must decide whether enforcement would work a miscarriage of justice.

The panel did not decide that question. Its treatment of petitioner’s challenges to a 240-month term and lifetime supervision was two sentences long: the waiver “is valid and encompasses” the claims, so “it bars” them. Pet. App. 7a. That is the *Barnes* rule stated as a syllogism. See *United States v. Barnes*, 953 F.3d 383, 388–389 (5th Cir. 2020), *abrogated by Hunter*, 608 U.S. at 720–721 & n.2 (placing the Fifth Circuit among the minority of circuits that had rejected the miscarriage-of-justice limit). It

is complete under the framework *Hunter* rejected and incomplete under the one *Hunter* adopted. The panel did not mention the standard or cite the case. *Hunter* was controlling law when the opinion issued and governs this direct appeal in any event. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

B. The error will not self-correct.

The omission was not an oversight the court would have corrected if asked. Petitioner's rehearing petitions led with *Hunter*, quoted its holding and its remand instruction, and asked the court to conduct the inquiry. The court denied both petitions without opinion on August 4, 2026. Pet. App. 19a. Six days earlier, another panel of the same court had decided *Hunter* on remand after ordering supplemental briefing on this Court's opinion, and it had applied the miscarriage-of-justice standard to the record before it. *United States v. Hunter*, 183 F.4th 416, 418–420 (5th Cir. 2026). Nor was *Hunter* the only signal. Eight days before the decision below, this Court had vacated several Fifth Circuit waiver decisions and remanded them in light of *Hunter*. *Chaney*, No. 24-6543 (U.S. June 29, 2026); *Nyandoro*, No. 25-6218 (U.S. June 29, 2026). The Fifth Circuit decided both on remand, applying *Hunter*'s standard to the records before it. *Nyandoro*, 2026 WL 2619961; *Chaney*, No. 23-30454, slip op. at 2–8. It has applied *Hunter* without being directed to as well, including in a restitution case decided eight days after rehearing was denied here. *United States v. Brann*, 187 F.4th 216, 2026 U.S. App. LEXIS 24368, at *12–*15 (5th Cir. Aug. 12, 2026) (reaching the merits of a claim that a § 2259 restitution order exceeded the statutory maximum because, under *Hunter*, “an otherwise valid appeal waiver is not

enforceable to bar” such a claim). Members of the panel below sat on panels that applied *Hunter* on remand. The court knows how to apply *Hunter*. In this case it did not, and it declined to do so when asked.

The decision below is published and postdates *Hunter*. Under the Fifth Circuit’s rule of orderliness, a later panel may not depart from a prior published decision absent an intervening change in law from this Court or the en banc court. *Jacobs v. National Drug Intelligence Center*, 548 F.3d 375, 378 (5th Cir. 2008); *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014). *Hunter* is not intervening as to a decision that followed it. Future panels will therefore face a published post-*Hunter* opinion that enforces a waiver on validity and scope alone. Whether they treat it as binding or as having passed over *Hunter* sub silentio, the published law of the circuit now includes a decision that does not apply it, and the en banc court, asked to resolve the tension, did not poll. This Court granted certiorari in *Hunter* to correct the Fifth Circuit’s approach. The decision below shows that the correction has not taken.

C. The inquiry matters on this record.

The Government will say the omission is harmless because no miscarriage of justice could be found here. That asks this Court to do what it declined to do in *Hunter*: decide the question in the first instance. Petitioner asks only that the question be decided by the court *Hunter* charged with deciding it. And it is not an idle question.

Take restitution first. Fifth Circuit precedent holds that a § 2259 order entered without the required proximate-cause determination “necessarily exceeds the statutory maximum,” *Winchel*, 896 F.3d at 389, and is “an illegal sentence in excess of the statutory maximum,” *West*, 137 F.4th at 400. A sentence “exceeding what the relevant statute allows” is *Hunter*’s first example of a miscarriage of justice, 608 U.S. at 728, and three Justices expressly included sentences “that order remedies the law does not permit,” citing a restitution case. *Id.* at 739 (Gorsuch, J., concurring) (citing *United States v. Yung*, 37 F.4th 70, 82 (3d Cir. 2022)). The Fifth Circuit’s own post-*Hunter* decisions confirm the fit. In *Brann*, the court treated a claim that a § 2259 restitution order exceeded the statutory maximum as one *Hunter* permits a court to reach notwithstanding a waiver, and it decided the claim on the merits. 2026 U.S. App. LEXIS 24368, at *12–*15. On remand in *Chaney*, the court read *Hunter* to require an error that is “obvious—not one a judge could reasonably make,” *Chaney*, No. 23-30454, slip op. at 2, and, quoting its *Hunter* remand decision, one “apparent under controlling law” that “does not require an extension of precedent,” *id.*, slip op. at 4 (quoting *Hunter*, 183 F.4th at 420). Controlling Fifth Circuit law already holds that the failure to conduct the *Paroline* analysis is “clear and obvious error[] not subject to reasonable dispute,” *West*, 137 F.4th at 402, and the panel below said so. Pet. App. 9a–10a. An error the circuit’s own precedent calls clear, obvious, and productive of an illegal sentence is not “standard-fare.” A court that has said as much cannot enforce a waiver against the claim without deciding whether *Hunter*’s exception applies.

The prison term and supervised-release claims present a closer question, and that is a reason to decide it rather than skip it. A twenty-one-year-old in criminal-history category I received the statutory maximum and lifetime supervision. The term was two years longer than the Government sought, and the court’s statement of reasons did not discuss his mitigation arguments. Sent. Tr. 21–22 (ROA.108–09; Pet. App. 22a–23a); see *Rita v. United States*, 551 U.S. 338, 356–357 (2007). *Hunter* held that “standard-fare errors in misapplying sentencing law cannot cancel an appeal waiver,” 608 U.S. at 727, and the Fifth Circuit has since applied that limit to a disputed career-offender designation on which the circuits are split. *Chaney*, No. 23-30454, slip op. at 3–8. But three Justices observed in *Hunter* that courts applying the majority rule “have often declined to enforce appeal waivers when a district court breaks from rules requiring it to give reasons for its chosen sentence or address a defendant’s non-frivolous arguments for a different one.” 608 U.S. at 740 (Gorsuch, J., concurring). Three others cautioned that the concurrence “would set a lower bar” than the Court’s opinion. *Id.* at 746 (Kavanaugh, J., concurring). Whether a sentencing court’s failure to discuss a defendant’s mitigation arguments is a “standard-fare” misapplication of law or a departure from “some minimum of civilized procedure” is a question the Fifth Circuit has not confronted; *Chaney* involved an objection the court heard and overruled, not arguments left undiscussed in the court’s explanation. *Chaney*, No. 23-30454, slip op. at 7. The question is one *Hunter* assigned to the courts of appeals in the first instance. The panel did not reach it.

D. At a minimum, the Court should vacate and remand.

A grant, vacatur, and remand is appropriate where “recent developments that we have reason to believe the court below did not fully consider” reveal “a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Both conditions are met. The decision below rests on the premise that a valid and applicable waiver is an enforceable one, a premise this Court rejected in *Hunter*. And the redetermination may determine the outcome: the Fifth Circuit’s own precedent holds that a restitution order entered without the § 2259(b)(2) determinations is an illegal sentence, *West*, 137 F.4th at 400, which *Hunter* places squarely within the exception. This Court has already vacated and remanded several Fifth Circuit waiver decisions that predate *Hunter*: *Hunter* itself, 608 U.S. at 730, and *Chaney* and *Nyandoro* by summary disposition in light of *Hunter*. The decision below postdates *Hunter* and ignores it. That the court of appeals declined to reconsider when asked on rehearing is a reason for this Court to act, not to wait.

II. The panel enforced the waiver against a claim the Government conceded was not waived.

An appeal waiver is a term of the Government’s bargain, and it is the Government’s to invoke. *Hunter* confirmed that “the proper time for the Government to assert its right to enforce an appeal waiver” is “after a defendant has filed a notice of appeal,” because only then can it “assess whether the appeal violates the

agreement’s terms and, even if so, whether to turn a blind eye.” 608 U.S. at 722–723; see *Garza v. Idaho*, 586 U.S. 232, 238–239 (2019). *Garza* recognized that “even a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver.” 586 U.S. at 238–239. The Fifth Circuit’s own rule is the same: a waiver binds “to the extent that the government invokes” it. *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006).

The Government here did more than decline to invoke the waiver. It disclaimed it, twice, in terms. Gov’t C.A. Br. 21, 56 (Pet. App. 26a, 28a). The concession was deliberate. It reflected the Government’s reading of circuit law, which treats the waiver as reaching disputes about the method of an analysis the court conducted but not claims that no analysis occurred, and its judgment that this record fell in the second category. The panel enforced the waiver anyway, resolving against petitioner a question no party had raised, without notice or an opportunity to respond. That departs from the party-presentation principle, *United States v. Sineneng-Smith*, 590 U.S. 371, 375–376 (2020); *Greenlaw v. United States*, 554 U.S. 237, 243–244 (2008), and inverts the rule that appeal waivers are construed narrowly and against the Government as drafter, *Winchel*, 896 F.3d at 388–389; *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc). A court has no institutional interest in enforcing a waiver the Government has chosen not to enforce. *Hunter*’s concern, that enforcement “cement[s] into place a district court’s sentence, whether or not lawful,” 608 U.S. at 725, cuts the other way.

This error independently warrants summary reversal of the waiver holding on the restitution claim. It also disposes of any argument that the merits of that claim are not properly before the Court. The only party entitled to invoke the waiver has said in writing that it does not apply.

III. A district court does not “determine” a victim’s losses or a defendant’s relative role by adopting the amount the victim requests.

A. The statute requires determinations, not consideration.

Paroline held that § 2259 restitution is proper “only to the extent the defendant’s offense proximately caused a victim’s losses,” 572 U.S. at 448, and that the 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,” *id.* at 459. Congress codified and tightened that holding in the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, § 3, 132 Stat. 4383, 4384. Section 2259(b)(2) now prescribes two determinations in sequence: the court “shall determine the full amount of the victim’s losses,” and “[a]fter completing” that determination it “shall order restitution in an amount that reflects the defendant’s relative role in the causal process.” § 2259(b)(2)(A)–(B). Subparagraph (C) caps a victim’s aggregate recovery at her demonstrated losses “as measured by the greatest amount of such losses found in any case involving that victim.” The Government bears the burden of proof, and disputes are “resolved by the court.” § 3664(e).

“Shall determine” and “[a]fter completing the determination” are commands to find facts. Consideration is the process; a determination is the result. The statute

requires the result, in a fixed order, because the second step depends on the first: a court cannot order an amount that “reflects the defendant’s relative role” in causing losses it has not determined. Subparagraph (C) depends on it as well. A cap measured by losses “found in any case” cannot operate if courts adopt requested figures without finding anything. The Government agreed below that the statute “requires the district court to determine the full amount of the victim’s losses and order restitution ‘in an amount that reflects the defendant’s relative role’” Gov’t C.A. Br. 56.

B. The district court made neither determination, and the panel supplied them.

The district court’s ruling was one sentence. It stated no loss figure, and the judgment’s “Total Loss” column is blank. ROA.72. It said nothing about causation or relative role. Nor did it mention the number of prior defendants who have contributed to the victims’ losses. That is the first guidepost the panel itself listed, Pet. App. 10a, and the record squarely presented it: April’s submission disclosed \$619,385.13 in prior recoveries, a fact subparagraph (C) makes directly material. Neither court mentioned it. Having pronounced the two figures, the district court turned to the prosecutor: “any more restitution, counsel?” Sent. Tr. 22 (ROA.109; Pet. App. 23a).

The panel found a “completed causation inquiry” by crediting the district court with findings it never made. The loss figures in the opinion come from the victims’ counsel. The “about 0.3%” comes from the Government’s appellate brief, which did the arithmetic for the first time on appeal. Gov’t C.A. Br. 61–62 (Pet. App. 29a–30a). A court of appeals may not make in the first instance the findings a statute assigns to the district court, *Pullman-Standard v. Swint*, 456 U.S. 273, 291–292 (1982); *Icicle*

Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986), and the Government’s burden under § 3664(e) cannot be carried by its appellate lawyers. The panel’s other two points fare no better. The court’s observation that petitioner “downloaded” the images was the court reading from the Government’s sentencing memorandum (“you say,” “you cite,” Sent. Tr. 13, 15–16 (ROA.100, 102–03)), a passage the Government itself described as the court “not[ing] the prosecutor’s argument.” Gov’t C.A. Br. 64 (Pet. App. 31a). And reading a victim-impact statement bears on § 3553(a); it determines neither loss nor this defendant’s share. *Paroline* forbids treating a victim’s aggregate losses, “the product of the acts of thousands of offenders,” as a proxy for one defendant’s role. 572 U.S. at 455, 459.

Nor does adoption of the presentence report and its addenda fill the gap. ROA.95–96. The addenda forwarded the victims’ submissions. A submission can state the victim’s own estimate of her aggregate losses, but it cannot determine a particular defendant’s “relative role in the causal process,” because that assessment belongs to the court alone. *Paroline*, 572 U.S. at 459. The judgment itself records no loss figure for either victim. ROA.72.

The panel was right that a court need not “recite every *Paroline* guidepost or supply a mathematically exact apportionment.” Pet. App. 11a. That answers a question petitioner did not ask. He did not claim that a guidepost was skipped or that the arithmetic was imprecise. He claimed, and the record shows, that no determination of any kind was made. A rule under which a court with victim submissions before it “completes” the § 2259(b)(2) inquiry by adopting the sums

requested reads “shall determine” and “[a]fter completing the determination” out of the statute.

C. No other circuit would sustain this record.

The courts of appeals differ on how much a sentencing court must say and how it may calculate an award. They agree on the premise the decision below abandons: the district court itself must make an individualized determination of the defendant’s share and indicate on the record that it has done so. The Sixth Circuit, on plain-error review, vacated an award entered “without any explanation at all of the particular amounts,” holding the error clear, prejudicial because it “deprived [the defendant] of his ‘right to meaningful appellate review,’” and corrosive of the fairness and integrity of judicial proceedings. *United States v. Mobasseri*, No. 18-3341, slip op. at 2–3 (6th Cir. Apr. 17, 2019) (unpublished). The Fourth Circuit holds that “the district court is charged with the responsibility of determining the proper amount of restitution in each case,” and that a court departing from a requested figure must “explain[] its reasoning.” *United States v. Dillard*, 891 F.3d 151, 161 (4th Cir. 2018). Some circuits demand more. The Ninth Circuit requires the court to separate, “to the extent possible,” losses caused by the original abuse from losses caused by the trade in the images. *United States v. Galan*, 804 F.3d 1287, 1290–1291 (9th Cir. 2015). The Tenth Circuit vacated an award that held the defendant liable for the whole of the victim’s unpaid losses without assessing his own relative role in the causal process. *United States v. Dunn*, 777 F.3d 1171, 1179, 1181–1182 (10th Cir. 2015).

Even the Eleventh Circuit, which rejects the Ninth and Tenth Circuits' disaggregation requirement and is the most deferential of the circuits, requires the district court to "indicate in some manner that it has considered that the instant defendant is a possessor . . . and has assigned restitution based solely on the defendant possessor's particular conduct and relative role in causing those losses." *United States v. Rothenberg*, 923 F.3d 1309, 1334 (11th Cir. 2019). It cautions that "a strict 1/n approach, in which the only thing the district court does is divide the total loss amount by the total number of defendants who have been ordered to pay restitution, ordinarily will not meet the individualized assessment requirement of *Paroline*," *id.* at 1335 n.8, and it vacated an award where the evidence did not permit a reasonable determination of the defendant's share, *id.* at 1339–1340. The Fifth Circuit's own affirmances fit the pattern. In *United States v. Halverson*, 897 F.3d 645, 654 (5th Cir. 2018), the court affirmed because the district court had "relied 'on various factors that bear on the relative causal significance of [Halverson's] conduct in producing victim's losses,'" and it listed them. Under none of these decisions would two requested figures, adopted without a stated loss, method, or reason, survive.

The decision below also deepens a conflict within the Fifth Circuit that its judges have asked to have resolved. *Winchel* holds that an order entered "without determining" proximate cause exceeds the statutory maximum and escapes a waiver. 896 F.3d at 389. *West* vacated such an order on plain-error review. It described a "free-floating restitution order . . . untethered to any determination of the loss suffered by the victim," 137 F.4th at 400, and held that where "no proximate-cause

analysis was conducted, there is no basis upon which the district court can order any amount of restitution,” *id.* at 403. *United States v. Alfred*, 60 F.4th 979, 981–982 (5th Cir. 2023), by contrast, enforces a waiver where the court “explained its *Paroline* analysis” and the defendant “challenge[d] the outcome of that analysis.” The en banc court divided seven to ten on rehearing *West*; five judges would overrule *Winchel*, *United States v. Leal*, 933 F.3d 426 (5th Cir. 2019), and *West* outright; and two members of the *West* panel wrote separately, one to lament the “thick ‘cloud of uncertainty’” over “this recurrent part of our criminal docket,” 137 F.4th at 404 (Willett, J., concurring), the other to call the result “perplexing” and to urge the court to “revisit this question in a future case,” *ibid.* (Duncan, J., concurring in the judgment); *United States v. West*, No. 22-11001, slip op. at 1–2, 11, 16 (5th Cir. May 21, 2025) (order denying rehearing en banc). The decision below resolves that uncertainty in the wrong direction. By holding that a record with no findings reflects a “completed” inquiry, it makes the *Winchel* exception unreachable in practice.

The panel’s plain-error analysis adds to the confusion. Pages 9–10 of the opinion state that “[b]inding precedent” treats an excessive restitution order as affecting substantial rights and “the fairness, integrity, or public reputation of judicial proceedings.” Pet. App. 9a–10a & n.31 (citing *West*, 137 F.4th at 402). Footnote 36 states that even a plain restitution error would not “seriously affect” those interests, citing *Winchel*, which held that standard “easily satisfied” and rejected the Government’s request to withhold relief. 896 F.3d at 389–390. Both statements cannot be law.

D. The question recurs, and this case is a clean vehicle.

Restitution under § 2259 is mandatory in every trafficking conviction, and the same victims recover in case after case. In *Rothenberg*, the Government listed 215 prior awards to one victim and 659 to another, 923 F.3d at 1318–1319; April’s submission here disclosed \$619,385.13 in prior recoveries. Congress responded with subparagraph (C)’s aggregate cap, which works only if each court determines the victim’s losses and the defendant’s share. Under the decision below, none of that need happen. The victim’s lawyer states a figure, the Government adopts it, the court orders it, and any appeal is answered by observing that the court “considered” the submission. Fact-finding the statute assigns to Article III judges is delegated to victims’ counsel, with Government appellate lawyers supplying whatever ratio review requires. *Paroline* entrusted sentencing courts with “discretion and sound judgment,” 572 U.S. at 459, and discretion presupposes a decision. After *Hunter*, moreover, whether an unapportioned restitution order is a “remed[y] the law does not permit,” 608 U.S. at 739 (Gorsuch, J., concurring), will arise in every circuit. That inquiry cannot proceed if courts may deem the statutory determinations “completed” whenever a request was in the record.

This case is a clean vehicle. The Government conceded that the claim is reviewable notwithstanding the waiver. Gov’t C.A. Br. 21, 55–56 (Pet. App. 26a–28a); *supra* Part II. Plain-error review is no obstacle: the panel found “no error” at all, Pet. App. 11a, and the circuit precedent it recited holds that failing to conduct the required analysis is clear error, *West*, 137 F.4th at 402, that affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings, *id.* at 402–403;

Winchel, 896 F.3d at 389–390. See *United States v. Olano*, 507 U.S. 725, 732–736 (1993). The panel’s alternative merits holding rests on the same premise as its waiver holding: that consideration of victim submissions is a completed § 2259(b)(2) determination. Resolving the question therefore resolves the case. And the record could not be starker. One sentence, no stated losses, a blank “Total Loss” column, and a percentage computed for the first time in an appellate brief.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further consideration in light of *Hunter v. United States*, 608 U.S. 713 (2026).

Respectfully submitted,



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