No. 12-_____

In The
Supreme Court of the United States

AMY AND VICKY, CHILD PORNOGRAPHY VICTIMS,

Petitioners,

v.

JOSHUA OSMUN KENNEDY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the Mandatory Restitution for Sexual Exploitation of Children Statute, 18 U.S.C. § 2259, to benefit victims of federal child pornography crimes, including petitioners like Amy and Vicky, whose child sex abuse images are traded and collected over the internet by countless individuals worldwide. The statute provides in part that a court "shall order restitution" for a victim of any child pornography crime in "the full amount of the victim's losses." Congress defined these losses as including psychological counseling, lost income, attorneys' fees, child care expenses, as well as "any other losses suffered by the victim as a proximate result of the offense." The question presented is whether the Mandatory Restitution for Sexual Exploitation of Children Statute, 18 U.S.C. § 2259, excuses a defendant from paying restitution for the itemized loss categories unless there is proof that the victim's losses were the proximate result of an individual defendant's child pornography crime.

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a criminal prosecution in the United States District Court for the Western District of Washington. Petitioners "Amy" and "Vicky" are victims of child sexual exploitation and child pornography crimes. As such, they proceed here (as they have in the lower courts) under pseudonyms to protect their privacy.

The first respondent is Joshua Osmun Kennedy, a convicted criminal defendant from whom Amy and Vicky sought restitution in the courts below.

The United States is also a respondent to this action and prosecuted the criminal case below.

Since this petition involves a Crime Victims' Rights Act mandamus action, *see* 18 U.S.C. § 3771(d)(3), the United States District Court for the Western District of Washington is a pro forma respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Amy and Vicky respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS

The Ninth Circuit's decision for which review is sought is reported at ___ F.3d ___, No. 12-73414, 2012 WL 5266955 (9th Cir. 2012), and reprinted at App. 1-4. The opinion relies on the Ninth Circuit's earlier decision in this case, which is reported at 643 F.3d 1251 (9th Cir. 2011), and is reprinted at App. 22-56.

The district court's amended restitution judgment is unreported but reprinted at App. 5-21.

JURISDICTION

The decision of the Ninth Circuit was entered on October 24, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reprinted in the appendix.

INTRODUCTION

Petitioners Amy and Vicky were both sexually exploited as young girls in order to produce child sex abuse images and videos. The resulting images and videos are now among the most widely-disseminated child pornography series in the world. Amy and Vicky both require lifetime psychological counseling. They both dropped out of college and find it difficult to engage in full-time employment because they fear encountering individuals who may have seen the images and videos of their sexual exploitation. They have thus suffered serious financial losses because of child pornography crimes.

Congress passed a broad restitution statute for child pornography victims like Amy and Vicky. The Mandatory Restitution for Sexual Exploitation of Children Statute, 18 U.S.C. § 2259, requires that when sentencing a defendant for a child pornography crime, the district court must direct the defendant to pay the victim the "full amount of the victim's losses." The statute defines losses as including expenses for psychological counseling, lost income, child care expenses, and attorneys' fees. 18 U.S.C. § 2259(b)(3)(A)-(E). It also authorizes restitution for "any other losses suffered by the victim as a *proximate result* of the offense." 18 U.S.C. § 2259(b)(3)(F) (emphasis added).

A clear, acknowledged circuit split has developed on how to interpret this commonly-used restitution statute. The Ninth Circuit below joined seven other circuits by interpreting the "proximate result" limitation

as implicitly applying not only to the last item in the list (the "any other losses"), but also to all the other enumerated losses. For example, under the Ninth Circuit's interpretation, in order to obtain restitution for the cost of psychological counseling, Amy and Vicky must show that the counseling was the "proximate result" of an individual defendant's crime. As a practical matter, this showing is almost impossible to make. Indeed, the Ninth Circuit specifically acknowledged that its interpretation of the statute would create "serious obstacles" to child pornography victims obtaining the full restitution promised by Congress in the statute.

Last month, however, the Fifth Circuit en banc reached the opposite conclusion. Specifically rejecting the view of the Ninth and other circuits, the Fifth Circuit held, 10 to 5, that Congress intended to provide broad restitution to victims of federal sex offenses without requiring proof that the losses proximately resulted from an individual defendant's crime. The decision is faithful to the text of the statute, which contains a proximate result requirement only in subsection (F) and not in subsections (A) through (E). The Fifth Circuit sensibly construed the statute as requiring an award of full restitution to a victim in each individual case because Congress intended to impose joint-and-several liability among multiple defendants who were all involved in causing harm.

This important issue of statutory construction recurs every year in hundreds of federal sentencings. This case is the perfect vehicle for reviewing this

issue because of its truly adversarial posture. This Court's review is warranted and the Ninth Circuit's ill-conceived decision should be reversed.

STATEMENT OF THE CASE

1. On August 27, 2009, a jury found Joshua Osmun Kennedy guilty of possessing and transporting child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2252(a)(1). The forensic evidence presented at trial showed that Kennedy had collected more than 5,000 images of child pornography on his laptop computer. After his conviction, the National Center for Missing and Exploited Children identified Amy and Vicky as two of the many children depicted in the child sex abuse images Kennedy illegally transported.

2. After being notified of Kennedy's conviction pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771, Amy and Vicky filed timely restitution requests. In their separate statements, Amy and Vicky each recounted their sexual abuse as young children in order to produce child sex abuse images. Both victims further explained that since these images went "viral" on the internet, their worldwide distribution has continued in an unbroken chain to the present day. The unending trading and collecting of this material traumatizes both victims. Amy explained in her victim impact statement that because countless individuals are actively seeking, possessing, and

distributing her child sex abuse images, she feels "like I am being abused over and over again." In her victim impact statement, Vicky stated that "[i]t feels like I am being raped by each and every [person who is looking at my pictures]." Doc. #138 at 13-15.[1]

Both Amy and Vicky sought restitution from Kennedy for the full amount of their losses. As documented in great detail in their requests, Amy and Vicky have both lost significant future income in large measure because of their difficulty interacting with the public. They also have a need for lifetime psychological counseling. In their expert reports from economists and clinical psychologists, Amy and Vicky quantified their requested restitution, requesting substantial awards primarily for lost future income and future lifetime psychological counseling expenses. Amy and Vicky asked the district court to order Kennedy to pay them restitution for the full amount of their losses. They argued that Section 2259 does not require them to show that their losses were the "proximate result" of an individual defendant's crime. *Id.* at 3-4.[2]

The government agreed with Amy and Vicky that full restitution was appropriate because the evidence

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[1] References to "doc. #" are to the docket entries in the district court, case no. 2:08-cr-00354-RAJ.

[2] The document cited is the Government's description of Amy's and Vicky's initial restitution requests which were submitted to the probation office.

established that Amy and Vicky had suffered harm as a result of Kennedy's crimes, even if other individuals also contributed to their losses. The government maintained, however, that the restitution statute contains a requirement that any losses be the "proximate result" of a defendant's crime. *Id.* at 10-15.

Kennedy objected to the restitution requests. Kennedy did not dispute the loss figures that Amy and Vicky submitted to the district court. He contended, however, that he should be liable only for the portion that represented his specific contribution to their losses. Doc. #141 at 4-9.

The district court sentenced Kennedy to 60 months in prison for transporting child pornography.[3] At a later restitution hearing, the district court found that Amy and Vicky were "victims" of Kennedy's crime, doc. #153 at 48, and that the materials supporting their restitution claims were "compelling and persuasive." *Id.* at 46-47. The district court, however, decided not to award full restitution to Amy and Vicky. The court explained that "although no amount of restitution would remove the ongoing damage that these victims [are] suffering, the amount of $1000 per image appear[s] to be reasonable to the court." *Id.* at 49. Since Kennedy had illegally transported seventeen images of Amy and forty-eight images of Vicky,

[3] The district court vacated Kennedy's conviction on the possession count, finding it to be a lesser included offense.

the court ordered Kennedy to pay $17,000 to Amy and $48,000 to Vicky. *Id.* at 49-50.

3. Kennedy appealed the decision, challenging his conviction and the restitution order. Concerning the restitution order, Kennedy argued that 18 U.S.C. § 2259 contains a general "proximate result" limitation which requires a victim to show that all her losses are the proximate result of an individual defendant's crime. In response, the Government defended the restitution awards.[4] The Government, however, agreed with Kennedy's position that the statute contains a general "proximate result" requirement.

After briefing and argument, the Ninth Circuit affirmed Kennedy's conviction and sentence except as to restitution. App. 22. The Ninth Circuit initially acknowledged that the case presented "[a] difficult issue of statutory interpretation [which] has been considered, but not satisfactorily resolved, by several of our sister circuits." App. 40. Developing a different test from these other circuits, the Ninth Circuit first held that Amy and Vicky were "victims" of Kennedy's crimes for purposes of Section 2259. *Id.* at 48-49. The

[4] Amy and Vicky were not parties to the initial appeal in *Kennedy*. Under the Crime Victims' Rights Act, the Government was required to defend their rights including their right to restitution. *See* 18 U.S.C. § 3771(c)(1) (Government obligated to make "best efforts to see that crime victims are . . . accorded the rights described in [the CVRA]"); 18 U.S.C. § 3771(a)(6) (extending to crime victims the "right to full and timely restitution as provided in law").

Circuit then concluded that the statute contains a general "proximate result" requirement which obligates a victim seeking restitution to show that her losses were the proximate result of a defendant's crimes. App. 49. Concerning that requirement, the Circuit concluded that "the government's evidence showed only that Kennedy participated in the audience of persons who viewed the images of Amy and Vicky. While this may be sufficient to establish that Kennedy's actions were one cause of the generalized harm Amy and Vicky suffered due to the circulation of their images on the internet, it is not sufficient to show that they were a proximate cause of any particular losses." App. 50.

The Ninth Circuit also rejected the district court's decision to calculate losses to Amy and Vicky as $1000 per image. The Circuit suggested that to obtain restitution, a victim needed specific proof such as "evidence that Kennedy's conduct led to Amy and Vicky needing additional therapy sessions or missing days at work." App. 52.

In the end, the Ninth Circuit held that the Government had not shown that "Kennedy's offense was a material and proximate cause of [Amy's and Vicky's] losses," while noting that "no court has yet developed a method for calculating a restitutionary award under § 2259 that comports with the statutory language." App. 54. The Circuit finally observed that "we suspect that § 2259's proximate cause and reasonable calculation requirements will continue to present serious obstacles for victims seeking restitution in

these sorts of cases." App. 55-56. The panel remanded for further proceedings.

4. On remand, both Amy and Vicky submitted newly revised requests for restitution. Doc. #178, attachments 1 & 2 (Vicky's request); doc. #179 (Amy's request). Vicky filed a restitution request stating that she was aware of Kennedy and his actions since before his first sentencing, and noted that his actions stood out "because he was caught at the airport and could have been anyone travelling through there." Doc. #178, Attachment 1 at 10. Amy's counsel, however, decided not to specifically inform Amy that Kennedy was transporting her child sex abuse images, concerned that such detailed information might further traumatize her. Instead, Amy's counsel filed a restitution request reiterating Amy's position that Section 2259 does not contain a general proximate result requirement as a precondition to obtaining full restitution. Doc. #179.

The district court held a resentencing hearing to address the issue of restitution. The district court first denied Amy's restitution request because she did not provide any new information. Doc. #83 at 34-35. The district then turned to Vicky's restitution claim, finding that Vicky's updated information demonstrated the required proximate connection to Kennedy's crime for at least some of her losses. *Id.* at 35-36. It calculated her restitution by dividing her total losses by the total number of defendants who have been ordered to pay her restitution. *Id.* at 37. Later, based on submissions from the parties, taking her full losses

(which were now documented to be $1,327,166.24) and dividing them by the number of defendants who were ordered to pay restitution to Vicky in other cases around the country (292), the district court calculated a restitution award of $4,454.08. Doc. #189. On October 11, 2012, the district court entered a revised judgment with $0 in restitution for Amy and $4,454.08 in restitution for Vicky. App. 12. Presumably since these awards were smaller than previously entered, the district court imposed a new fine on Kennedy of $40,000. App. 12.[5]

5. Amy and Vicky filed a timely petition in the Ninth Circuit for review of the reduced restitution awards as specifically authorized by the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3). Their petition was premised on the Fifth Circuit's en banc decision which specifically rejected the Ninth Circuit's narrow interpretation of Section 2259. Amy and Vicky asked the Ninth Circuit to follow the Fifth Circuit's approach, while acknowledging that the Ninth Circuit's earlier ruling in *Kennedy* was controlling circuit precedent.

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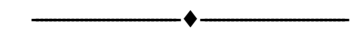
[5] Kennedy filed an appeal to the Ninth Circuit challenging only the imposition of this additional fine on remand. No. 12-30319. Kennedy also filed a motion with the Ninth Circuit "to stay this appeal until such time as the Writ of Mandamus filed by Vicky and Amy has been finally decided." Motion to Stay Further Proceedings, doc. #2 at 3. The Ninth Circuit granted the stay.

The Ninth Circuit issued a published opinion rejecting Amy's and Vicky's petition. App. 1. The Ninth Circuit acknowledged that the Fifth Circuit en banc adopted "a different statutory interpretation of 18 U.S.C. § 2259" than it had previously adopted in *Kennedy*. App. 3. Nonetheless, "[t]o change the law of this circuit, [Amy and Vicky] must raise this issue . . . in a petition for [a] writ of certiorari at the United States Supreme Court." App. 4. The Ninth Circuit accordingly denied Amy's and Vicky's request for relief. This petition follows.



REASONS FOR GRANTING THE PETITION

The issue of whether Section 2259 contains a general proximate result limitation has deeply divided the circuit courts. Although eight circuits (including the Ninth Circuit below) have read such a proximate cause requirement into Section 2259, the Fifth Circuit recently rejected such judicial rewriting of the statute. Acting en banc, the Fifth Circuit held, ten to five, that "we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse." *In re Unknown*, ___ F.3d ___, ___, 2012 WL 4477444, at *21 (5th Cir. 2012).

The practical effect of this clearly-acknowledged circuit split is that child pornography victims in the

Fifth Circuit are now receiving restitution for "the full amount of their losses," 18 U.S.C. § 2259(b)(1), as commanded by Congress. Yet in many other circuits, victims face what the Ninth Circuit below admitted are "serious obstacles" to collecting anything at all. This division represents a recurring issue of great significance, not only for the many identified victims of child pornography, but also for the thousands of criminal defendants who have mandatory restitution obligations to child pornography victims.

This Court should review and reverse the Ninth Circuit's decision. As the Fifth Circuit carefully explained, reading a general proximate result requirement into Section 2259 ignores both the plain language of the statute and its clear purpose to benefit victims of child pornography crimes. Such a requirement forces victims, defendants, prosecutors, and district courts into interminable litigation about what proportion of a victim's losses are due to an individual defendant's criminal violation of the child pornography laws which clearly cover not only production, but transportation, distribution and possession. Congress did not intend to force victims to trace out their losses to an individual defendant as a precondition to receiving restitution for the full amount of their losses.

I. The Lower Courts Are Intractably Divided on Whether the Mandatory Restitution for Sexual Exploitation of Children Statute Imposes a General Proximate Cause Requirement.

Whether the Mandatory Restitution for Sexual Exploitation of Children Statute contains a general proximate cause requirement is a recurring issue that divides the federal courts of appeals. The statute, 18 U.S.C. § 2259, requires restitution for all victims of child pornography and many other federal child sex crimes. 18 U.S.C. § 3771(b)(4) ("[t]he issuance of a restitution order under this section is mandatory"). The statute broadly defines a "victim" as "the individual harmed as a result of a commission of . . . [a federal sex offense]." 18 U.S.C. § 2259(c). The statute requires that, when sentencing a defendant convicted of such an offense, the district court "shall direct the defendant to pay the victim . . . the full amount of the victim's losses. . . ." 18 U.S.C. § 3771(b)(1). The statute then defines the phrase "full amount of the victim's losses" as including six specified categories of losses:

> (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.

18 U.S.C. § 2259(b)(3) (emphasis added). Whether the "proximate result" language applies only to the catch-all subsection (F) where it appears, or should implicitly be read backwards through subsections (A) through (E) as well, is a question producing disagreement throughout the country.

Eight circuits – including the Ninth Circuit below – have held that a victim must show that all her losses were the proximate result of an individual defendant's crime in order to obtain full restitution. *See United States v. Kearney*, 672 F.3d 81, 94-95 (1st Cir. 2012), *petition for cert. filed*, No. 12-6574; *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir. 2011); *United States v. Burgess,* 684 F.3d 445, 456-57 (4th Cir. 2012); *United States v. Evers*, 669 F.3d 645, 658-59 (6th Cir. 2012); *United States v. Laraneta*, No. 12-1302, ___ F.3d ___ (7th Cir. 2012); *United States v. Kennedy*, 643 F.3d 1251, 1260-66 (9th Cir. 2011); *United States v. McDaniel,* 631 F.3d 1204, 1208-09 (11th Cir. 2011); *United States v. Monzel,* 641 F.3d 528, 535 (D.C. Cir.), *cert. denied sub nom. Amy v. Monzel,* ___ U.S. ___, 132 S.Ct. 756, 181 L.Ed.2d 508 (2011).[6] The Third Circuit has suggested the same

[6] The Government opposed certiorari in *Monzel,* arguing that it was "premature" to review the circuit split created by the

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conclusion, albeit in dicta. *United States v. Crandon*, 173 F.3d 122, 125-26 (3d Cir. 1999).[7]

The Fifth Circuit en banc recently reviewed all of these decisions and specifically rejected them. *In re Unknown*, ___ F.3d ___, 2012 WL 4477444, at *11-*21 (5th Cir. 2012). The Circuit explicitly stated that it "reject[ed] the approach of our sister circuits" and instead believes that "[t]he structure and language of § 2259(b)(3) limit the phrase 'suffered by the victim as a proximate result of the offense' in § 2259(b)(3)(F) to the miscellaneous 'other losses' contained in that subsection." *Id.* at * 21, *11.

The remaining two circuits with criminal jurisdiction have not yet ruled on the issue. But it is an indication of how frequently this issue recurs that both of these circuits recently held oral argument on this specific question. *See United States v. Fast*, No. 12-2752 (8th Cir.) (argued Nov. 15, 2012); *United States v. Benoit*, No. 12-5013 (10th Cir.) (argued Nov. 6, 2012).

Even the decisions in the majority are fractured in their views and reasoning. In surveying the other

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Fifth Circuit's decision because petitions for rehearing en banc were pending. The Fifth Circuit has now ruled on those petitions, fully accepting the position argued by Amy and Vicky here. Accordingly, the grounds advanced by the Government in *Monzel* against certiorari have now disappeared.

[7] The dictum is confusing because, in the same decision, the Third Circuit stated that "[t]here is nothing in the statute that provides for a proportionality analysis." 173 F.3d at 126.

decisions, the Fifth Circuit en banc quoted the First Circuit's description of the landscape: "[a]ny 'seeming agreement on a standard [in the circuits] suggests more harmony than there is.'" *In re Unknown*, 2012 WL 4477444, at *13 n.11 (quoting *Kearney*, 672 F.3d at 96); *accord Kennedy*, 643 F.3d at 1260 (noting that construing Section 2259 presents "[a] difficult issue of statutory interpretation [which] has been considered, but not satisfactorily resolved, by several of our sister circuits."). After the Ninth Circuit's decision in *Kennedy*, several judges within the Circuit directly criticized the circuit's precedent deriding it as unpersuasive. *See United States v. Aguirre*, 448 Fed. Appx. 670, 674, 2011 WL 3629236 (9th Cir. 2011) (Callahan, Tallman, & Smith, JJ., specially concurring) ("The causation standard we set in *Kennedy* may insulate all but the producer and original distributor of child pornography from liability for the victims' damages . . . even though Congress intended to reach such losses by including possession crimes as part of the mandatory restitution scheme.").

Among the eight circuits holding that Section 2259 contains a general proximate result requirement, the rationales have varied widely. Two circuits have based such a requirement on the principle of general statutory construction: the Ninth Circuit below and the Eleventh Circuit. *See Kennedy*, 643 F.3d at 1261-62 (relying on statutory interpretation to find a general proximate cause limitation) *and McDaniel*, 631 F.3d at 1208-09 (same). Three other circuits have rejected the Ninth and Eleventh Circuits'

reasoning, holding instead that "traditional principles of tort and criminal law" require a general proximate cause limitation. *Monzel*, 641 F.3d at 535 ("Unlike those circuits, however, our reasoning rests not on the catch-all provision of § 2259(b)(3)(F), but rather on traditional principles of tort and criminal law. . . ."); *see also Burgess*, 684 F.3d at 456-57("declin[ing] to adopt this line of reasoning [relying on statutory language]."); *Aumais,* 656 F.3d at 153 (recognizing competing lines of reasoning and "endors[ing] the D.C. Circuit's reasoning.").[8] The Sixth Circuit noted these diverging principles, but concluded "[w]e need not choose between the rationales." *Evers*, 669 F.3d at 659. The First Circuit acknowledged the disagreement, but it developed its own resolution by imposing a general proximate result requirement, while concluding that the requirement could be shown in the "aggregate" rather than at the "individual" level. *Kearney*, 672 F.3d at 98. And most recently, the Seventh Circuit added yet another variation on the theme. The Seventh Circuit held that a proximate result requirement exists; but that it results in full liability (i.e., joint and several liability) for any offender who has *distributed* child pornography but not an offender who has *possessed* that pornography.

[8] Like many other decisions, *Aumais* also directly acknowledged the existence of a circuit split. 656 F.3d at 152 ("A circuit split has opened as to whether the Government must show that a victim's losses . . . were proximately caused by the defendant's actions, or whether it is enough to show causation more generally").

United States v. Laraneta, No. 12-1302, ___ F.3d ___, 2012 WL ___ at *___ (7th Cir. Nov. 14, 2012).[9]

It is against this backdrop of conflicting rationales and results that the Fifth Circuit granted rehearing en banc in order to "address the discrepancy between the holdings of [it] and other circuits. . . ." *In re Unknown*, 2012 WL 4477444 at *1. The en banc court then explicitly rejected the other circuits' decisions, concluding that their rationales were unpersuasive. *Id.* at *12-21. The Fifth Circuit finally concluded: "For [these reasons], we reject the approach of our sister circuits and hold that § 2259

[9] Adding to the confusion, the circuits do not agree on what exactly this proximate result standard entails. Indeed, as the First Circuit pointed out, in cases with extremely similar facts the circuits have "reached different outcomes" which "cannot be entirely explained by the difference in the facts of the record." *Kearney*, 672 F.3d at 96. *Compare Monzel*, 641 F.3d at 537-40 (finding proximate cause but remanding to determine the amount of harm so caused), *and McDaniel*, 631 F.3d at 1209 (holding that the district court did not clearly err in finding proximate cause), *with United States v. McGarity*, 669 F.3d 1218, 1267-70 (11th Cir. 2012) (finding that proximate cause was not established); *Aumais*, 656 F.3d at 154-55 (same), *and Kennedy*, 643 F.3d at 1263-65 (same). A petition for certiorari was recently filed on this secondary issue of how to apply any general proximate result standard. *See* Petition for Cert. at 11-13, *Kearney v. United States*, No. 12-6574 (1st Cir.) (petition filed Sept. 28, 2012) (noting that the courts of appeals are "deeply divided as to their application of the proximate [result] analysis"). As explained at page 24, *infra*, the Court should hold this petition (and any others like it) until it decides whether a proximate result requirement even exists in the statute.

imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse." *Id.* at *21.

In light of the Fifth Circuit's en banc repudiation of the other circuits, an acknowledged and intractable circuit split exists on the issue of whether Section 2259 contains a general proximate result requirement. Commentators have suggested that this Court will need to step in sooner or later to resolve the question. *See*, *e.g.,* Professor Douglas Berman, *En banc Fifth Circuit Clarifies Its Standard for Restitution in Child Porn Downloading Cases*, http://sentencing.typepad.com/sentencing_law_and_policy/2012/10/en-banc-fifth-circuit-clarifies-its-standard-for-restitution-in-child-porn-downloading-cases.html (Oct. 1, 2012) ("[T]his issue seems now destined for a cert grant in some case before too long."); Robert William Jacques, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 Ga. L. Rev. 1167, 1188 (2011) (as victims of child pornography "continue to petition courts and appeals are brought, there is likely to be a continued split among courts that must be resolved"). The numerous differing opinions applying the statute to essentially identical facts indicate not only that lower courts are facing a flood of child pornography litigation, but also that the lower courts are unlikely to coalesce around any common approach without intervention by this Court.

II. The Issue Is Recurring and Important to Both Crime Victims and Defendants.

How to interpret and construe Section 2259 is an issue that the lower courts are confronting on an almost daily basis. *See United States v. Wright*, 639 F.3d 679, 682 (5th Cir. 2011) (noting that interpreting Section 2259 is an issue "raised in a large number of federal district and circuit courts in recent years"). In fiscal year 2011, the district courts sentenced more than two thousand defendants in criminal prosecutions where Section 2259 was likely the operative restitution statute. U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 3 (2012) (1,855 sentences for child pornography crimes; 395 defendants for sexual abuse crimes). That year, district judges ordered restitution in 240 child-pornography cases and 61 other sex-abuse cases. *Id.* tbl. 15.[10]

[10] Section 2259 mandates restitution for crimes "under this Chapter," 18 U.S.C. § 2259(a) – i.e., Chapter 110 of Title 18 of the Criminal Code. The Chapter criminalizes many federal sex offenses, including sexual exploitation of children (*id.* § 2251), buying and selling children (§ 2251A), transporting child pornography (*id.* §§ 2252 and 2252A), production of sexually explicit depictions of a minor for importation into the U.S. (*id.* § 2260), and victimization of minors by registered sex offenders (*id.* § 2260A). Thus, all 240 child pornography cases listed by the Sentencing Commission were subject to Section 2259 along with some additional number of the other sex offense cases. In addition, there were probably a significant number of additional cases in which Section 2259 was at issue, but the victim was not

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During the last decade, child pornography prosecutions have been dramatically increasing and can be expected to keep rising. For example, in 2002 the National Center for Missing and Exploited Children identified 73 new child pornography "series" (i.e., a collection of child sex abuse images of the same child).[11] By January 2011, "more than 3,500 children depicted in child pornography have been identified. . . ."[12] The Justice Department responded to this expanding victimization by increasing child pornography prosecutions 40% since fiscal year 2006.[13]

As the number of federal child pornography prosecutions increase, so does the number of victims seeking restitution. *See* Note, Michael A. Kaplan, *Mandatory Restitution: Ensuring that Possessors of Child Pornography Pay for Their Crimes,* 61 SYRACUSE L. REV. 531, 552 (2011). When sex offense

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awarded any restitution. In this case, for example, Amy was awarded nothing under a narrow interpretation of Section 2259.

[11] U.N. COMM. ON THE RIGHTS OF THE CHILD: OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION & CHILD PORNOGRAPHY: PERIODIC REPORT OF THE UNITED STATES OF AMERICA & U.S. RESPONSE TO RECOMMENDATIONS IN COMM. CONCLUDING OBSERVATIONS OF JUNE 25, 2008, U.S. Dep't of State 6-7 (Jan. 22, 2010), *available at* http://www.state.gov/documents/organization/136023.pdf.

[12] Fact Sheet: Project Safe Childhood, U.S. DEPT. OF JUSTICE (last visited Oct. 17, 2012), *available at* http://www.justice.gov/psc/fact-sheet.html.

[13] NAT'L STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 5 (Aug. 2010), executive summary, *available at* http://www.justice.gov/psc/docs/execsummary.pdf.

victims file restitution requests, district courts must always confront the issue of how to interpret Section 2259 because Congress directed that "[t]he issuance of a restitution order under [§ 2259] is *mandatory*." 18 U.S.C. § 2259(b)(4) (emphasis added).

Moreover, the circuit split has caused wildly disparate results in factually identical cases throughout the country. For example, after receiving essentially identical victim impact statements, district courts awarded Amy and Vicky millions of dollars in restitution, no restitution, and various amounts of restitution in between. *Compare United States v. Laraneta*, No. 2:10-CR-13 (N.D. Ind.) (awarding $4.3 million in restitution to Amy and Vicky), *appeal filed*, No. 12-1302 (7th Cir. 2012), *with United States v. Tallent*, No. 1:11-CR-84, 2012 WL 2580275 at *13 (E.D. Tenn. Jun. 22, 2012) (denying restitution in light of the "proximate result" standard because Section 2259 "promises more than it can deliver. It makes a court's imposition of restitution mandatory, but it then demands the government to prove what is in essence unprovable.").

In an attempt to reconcile the incongruity, some district courts have awarded restitution which is less than the full amount of the victim's losses but more than nothing. On remand in this case, for example, the district court awarded Vicky $4,545.08 in restitution. It calculated this amount by taking her full losses ($1,327,166.24) and dividing by the number of defendants who have been ordered to pay restitution to Vicky in other cases around the country (292).

While this "1/*n*" approach results in a restitution number that can be entered in a judgment, it creates unexplainable paradoxes. Under the 1/*n* approach, the first defendant who collects an image of a child pornography victim is responsible for 100% of her losses, the second 50%, the third 33% and so forth. Of course, it is impossible to determine at the outset of the process how many defendants will ultimately be apprehended. Nor is there any way of determining which will have collectable assets. So as a practical matter, the 1/*n* approach will prevent victims from ever collecting full restitution since the awards will infinitely regress towards zero. Perversely, the true beneficiaries of this approach are wealthy defendants who escape paying the full amount of their victims' losses by writing a check for a few thousand dollars. It is difficult to imagine that Congress would allow rich child pornographers to limit their liability by raising a defense of "everyone is doing it."

Such divergent principles also interfere with the important objective of uniformity in federal sentencing. *See United States v. Booker*, 543 U.S. 200, 253 (2005) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."). Restitution awards are part of a criminal sentence. Yet because of the current split in authority, defendants in different circuits face dramatically different restitution obligations. This plainly interferes with the congressional scheme which seeks to create a nationwide system of joint and several liability for child pornography criminals. *See In re Unknown*, 2012 WL 4477444 at

*16-17 (explaining how Section 2259 and other restitution statutes create joint and several liability for criminals who harm child pornography victims).

Finally, prompt review of the "proximate result" issue is important because a second circuit split has clearly developed on how to apply any such proximate result requirement. As explained in a recently-filed certiorari petition, "there is a deep and mature split in the circuit and district courts concerning" how to determine whether losses are the proximate result of a particular defendant's crime. Petition for Cert. at 17, *Kearney v. United States*, No. 12-6574 (1st. Cir.) (petition filed Sept. 28, 2012) (collecting numerous authorities). This Court cannot even begin to consider that issue until it decides the threshold issue of whether such a proximate result requirement even exists. This Court should accordingly first determine whether Section 2259 contains a general proximate result requirement by granting this petition. Any other petitions which raise additional, secondary issues should be held until the Court decides this petition.

For all these reasons, the issue of how to interpret Section 2259 is an important and recurring one worthy of this Court's review.

III. This is the Right Case to Resolve the Issue of How to Interpret the Mandatory Restitution for Sexual Exploitation of Children Statute.

This is a good case to review the question of how to construe and apply Section 2259. Unlike many

other cases pending in the lower courts, this case involves an adversarial presentation of the critical "proximate result" issue.

In the great majority of child pornography restitution cases pending in the lower courts, only the Government and the defendant are directly litigating the restitution issue. *See, e.g.*, *United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012), *petition for cert. filed*, No. 12-6574. In a typical child pornography prosecution, a victim will file her own victim impact statement and restitution request in the district court, but she will not have legal counsel, and if she does, her legal counsel will not appear nor intervene in the case. Given that the Justice Department's current litigation position is that Section 2259 contains a general proximate cause requirement,[14] many of the lower court cases are not in an adversarial posture since the Government and the defendant *both* agree that Section 2259 requires proximate cause. Indeed, this lack of adversarial presentation of the issues likely explains why many circuits have ruled that Section 2259 contains such a proximate cause requirement.

In this case, in contrast, Amy and Vicky have retained pro bono appellate legal counsel to advocate the opposite position. Amy and Vicky were undeniably

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[14] Until recently, many career federal prosecutors took the opposite position: that Section 2259 does not contain such a requirement. *See, e.g., United States v. Van Brackle*, 2009 WL 4928050 at *3 (N.D. Ga. Dec. 17, 2009).

proper parties in the court of appeals below which directly ruled on the question. This Court should use this case as the vehicle for reviewing this question.

IV. The Ninth Circuit Misinterpreted the Child Pornography Restitution Statute.

Unless reversed, the Ninth Circuit's decision will largely nullify a mandatory restitution statute, depriving exploited and abused child victims of the full restitution they desperately need and that was promised by Congress. The Ninth Circuit misconstrued the statute for at least three reasons. First, the Circuit ignored the plain language of the statute. Second, the Circuit overlooked this Court's decisions applying the basic rule of statutory construction known as the rule of the last antecedent. Finally, the Circuit thwarted the statute's underlying purpose.

A. Section 2259's Plain Language Does Not Contain a General Proximate Result Requirement.

As the Fifth Circuit recognized en banc, Section 2259 is a "clearly-worded statute." *In re Unknown*, 2012 WL 4477444 at *13 n.12. The statute provides that a district court "shall direct the defendant to pay the victim . . . the *full amount* of the victim's losses. . . ." 18 U.S.C. § 2259(b)(1) (emphasis added). The statute then defines those losses as follows:

> (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.

18 U.S.C. § 2259(b)(3) (emphasis added).

Section 2259's plain language is dispositive. When interpreting a statute, "a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted) (internal quotation marks omitted).

Section 2259 should be interpreted according to the Alpha and Omega of statutory construction – its

plain, conclusive language. Congress enacted a law that requires victims of child pornography to establish proximate result only for losses listed in subsection (F). If Congress wanted the "proximate result" limitation to run throughout the statute, it could easily have placed the phrase at the beginning of the list of losses or at the very end of the list in a stand-alone clause. Congress did neither. As the Fifth Circuit explained, "[W]e cannot accept the Ninth Circuit's conclusion. To do so would contradict the statute's plain terms and be tantamount to judicial redrafting." 2012 WL 4477444 at *13.

Indeed, when Congress wanted to include a general proximate cause requirement in a restitution statute, it knew how to draft such a general requirement. The 1994 Violence Against Women Act (VAWA) contains the child pornography restitution statute at issue here (Section 2259) as well as a restitution provision for telemarketing fraud victims (18 U.S.C. § 2327). *See* Pub. L. No. 103-322, Title XXV, § 250002(a)(2), Sept. 13, 1994, 108 Stat. 2082. In striking similarity to Section 2259, Section 2327 requires mandatory restitution in telemarketing fraud cases for the "full amount of the victim's losses." 18 U.S.C. § 2327. But unlike the child pornography restitution statute, Section 2327 provides: "For purposes of this subsection, the term 'full amount of the victim's losses' means *all losses suffered by the victims as a proximate result of the offense*." 108 Stat. 2082 (currently codified in 18 U.S.C. § 2327(b)(3)) (emphasis added).

This provision is extremely significant because it demonstrates that if Congress truly wanted to impose a general "proximate result" requirement on Section 2259, it could have drafted a much shorter version of the "full amount of the victim's losses" clause exactly as it did in the telemarketing restitution provision. In that scenario, if Congress' intent was to limit child pornography victims to "losses suffered [ ] as a proximate result of the offense," there would be no need to enumerate six different categories of losses in subsections (A) through (F). All that was necessary was the much shorter (27 word) formulation used to provide restitution to telemarketing fraud victims.

The clear reason Congress wrote six separate subsections into the child pornography statute was to differentiate the well-defined losses which do not require proximate cause (i.e., those losses identified in subsections (A) through (E)), from the more attenuated, uncategorized, and unpredictable losses which do require proximate cause (i.e., subsection (F)). Simply put, Congress wrote a "proximate result" limitation into one subsection but not others – end of story.

B. The Ninth Circuit's Decision Contradicts the Well-Established Rule of the Last Antecedent.

The Ninth Circuit completely disregarded an important rule of statutory construction – the "rule of the last antecedent." According to this well-established

canon of construction, absent a clearly expressed contrary intention, "a limiting clause or phrase . . . should ordinarily be read as modifying *only* the noun or phrase that it *immediately* follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (emphases added); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) ("[a] pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent"). Under this rule, the qualifying phrase "proximate result" in Section 2259 only applies to the last antecedent – the "any other losses" referred to in Subsection (F) – rather than the more remote categories of losses identified in the earlier subsections of the statute.

Most notably, in *Barnhart,* this Court relied on the rule of the last antecedent in a case involving a statute that used a phrase identical to that contained in Section 2259. The statute at issue in *Barnhart* provided:

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in *any other* kind of substantial gainful work which exists in the national economy. . . .

Id. (emphasis added). Applying the rule of the last antecedent, this Court held that the words "which exists in the national economy" modified only to the

noun "any other kind of substantial gainful work" (and not also to the noun "previous work"). *Id.* at 24-27.

So too here. Subsection (F) of Section 2259 begins with exactly the same two words at issue in *Barnhart*: "*any other* losses suffered by the victim. . . ." Accordingly, as one court has explained "[t]his finding [from *Barnhart*] – that the words 'any other' do not create a 'contrary intention' sufficient to overcome the rule of the last antecedent – appears particularly instructive here, where the [child pornography restitution] statute at issue involves the use of the words 'any other' in the last loss listed." *United States v. Hagerman*, 827 F.Supp.2d 102, 113 (N.D.N.Y. 2011).

The Ninth Circuit simply overlooked the rule of the last antecedent. That standard rule of statutory construction clearly dictates that the qualifying "proximate result" language found in Subsection (F) applies only to Subsection (F). As the Fifth Circuit properly held, this Court's "recent articulations of the rule of the last antecedent . . . confirms that the application of the rule of the last antecedent to limit the proximate result language to the subsection in which it is contained makes . . . sense here." 2012 WL 4477444 at *13.

C. Reading a General "Proximate Result" Limitation into the Statute Defeats the Congressional Remedial Purpose of Making Victims Whole.

The Ninth Circuit's stilted interpretation of Section 2259 interferes with Congress' overarching remedial purpose. Congress enacted a broad mandatory restitution statute that promises child pornography victims that they will receive restitution for the "full amount" of their losses. 18 U.S.C. § 2259(b)(1). Congress sought to address the serious, life-long injuries that child pornography victims suffer. As this Court explained, "A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *New York v. Ferber,* 458 U.S. 747, 759 n.10 (1982).

In adopting Section 2259, Congress intended "to make whole . . . [these] victims of sexual exploitation." *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). This generous remedial purpose was highlighted in *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001), which explained that Congress generally sought through mandatory restitution "to ensure that 'the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being.'" *Id.* at 1247 (*quoting* SEN. REP. 104-179, at 42-44 (1995)).

Section 2259 also broadly extends its protections to any "victim" who is merely "harmed" by a crime of child pornography, requiring neither "proximate harm" nor "direct harm." *See* 18 U.S.C. § 2259(c) ("For purposes of this section, the term 'victim' means the individual *harmed* as a result of a commission of a crime under this chapter. . . ."). By purposely omitting narrowing qualifiers like "directly" and "proximately" found in other general restitution statutes (*see* 18 U.S.C. §§ 3663(a)(2) and 3663A(a)(2)), the clear inference is that Congress decided not to burden child pornography victims – a particularly vulnerable and disadvantaged subset of victims – with the obligation to demonstrate a "direct" or "proximate" harm before receiving restitution. *Cf.* 18 U.S.C. § 3663(a)(2) (defining "victim" as "a person *directly* and *proximately* harmed as a result of [the crime]" (emphasis added)).

Yet despite this broad intent and expansive provisions, the Ninth Circuit converted a generous statute into a parsimonious regime that is "largely unworkable." *United States v. Paroline*, 672 F.Supp.2d 781, 793 n. 12 (E.D. Tex. 2009), *rev'd*, 636 F.3d 190 (2011), *aff'd* 2012 WL 4477444 (5th Cir. 2012) (en banc). As the plethora of diverse attempts to calculate restitution demonstrates, it is almost impossible for child pornography victims whose images are widely trafficked on the Internet to trace precisely how their losses are the "proximate result" of any individual defendant's crime. Indeed, the Ninth Circuit acknowledged "that § 2259's proximate cause

and reasonable calculation requirements will continue to present serious obstacles for victims seeking restitution in these sorts of cases." 643 F.3d at 1266. The Ninth Circuit nonetheless deflected the blame, suggesting that "the responsibility lies with Congress, not the courts, to develop a scheme to ensure that defendants . . . are held liable for the harms they cause through their participation in the market for child pornography." *Id.* The Circuit ignored whether it was responsible for creating these "serious obstacles" in the first instance by imposing its own "judge-made limitations patently at odds with the purpose of [§ 2259]." *In re Unknown*, 2012 WL 4477444 at *13 n.12 (internal citation omitted).

If the Ninth Circuit's opinion stands (along with those in the First, Second, Third, Fourth, Sixth, Seventh, Eleventh, and D.C. Circuits), it will condemn Amy, Vicky, and countless other child pornography victims to years of litigation across the country attempting to link specific losses to an individual defendant in a particular case. District courts will struggle to determine precisely what losses should be assigned to a specific defendant without regard to other criminals already prosecuted in other jurisdictions, other criminals who have not yet been apprehended and prosecuted, and others who are beyond the law's reach. Congress did not intend for child pornography victims to bear such an impossible burden in which "the intent and purposes of § 2259 would be impermissibly nullified . . . in virtually *every* case. . . ." *In re Amy*, 591 F.3d 792, 797 (5th Cir. 2009)

(Dennis, J., dissenting), *rev'd*, 636 F.3d 190 (5th Cir. 2011), *aff'd In re Unknown*, ___ F.3d ___, 2012 WL 4477444 (5th Cir. 2012) (en banc). Instead, Congress broadly commanded that district courts must award restitution in every case for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1).

This Court should review and reverse the Ninth Circuit's ill-conceived decision. It should adopt the Fifth Circuit's en banc reasoning and construe the Mandatory Restitution for Sexual Exploitation of Children Statute, 18 U.S.C. § 2259, in a way which guarantees that child pornography victims will receive the full restitution Congress intended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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