No. 12-651

In the Supreme Court of the United States

AMY AND VICKY, CHILD PORNOGRAPHY VICTIMS,
PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on mandamus review, the court of appeals properly rejected petitioners' argument that the defendant's offense conduct need not have proximately caused the losses for which restitution is sought under 18 U.S.C. 2259.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 698 F.3d 1151. A prior decision of the court of appeals (Pet. App. 22-56) is reported at 643 F.3d 1251.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2012. The petition for a writ of certiorari was filed on November 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek this Court's review of a judgment arising from a federal prosecution in the United States District Court for the Western District of Washington. Following a jury trial, respondent Kennedy was convict-

ed on one count of transporting child pornography, in violation of 18 U.S.C. 2252(a)(1). Kennedy was sentenced to 60 months of imprisonment, to be followed by 15 years of supervised release. The government sought restitution under 18 U.S.C. 2259 on behalf of petitioners, victims depicted in some of the images Kennedy transported, and the district court ordered Kennedy to pay $17,000 to one petitioner ("Amy") and $48,000 to the other petitioner ("Vicky"). The court of appeals affirmed the conviction and sentence, but vacated the restitution awards and remanded for further proceedings. See Pet. App. 6-9, 22-56.

On remand, the district court ordered Kennedy to pay $4545.08 to petitioner Vicky, but declined to order any restitution for petitioner Amy. Petitioners filed a petition for a writ of mandamus under the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, Title I, § 102(a), 118 Stat. 2262 (18 U.S.C. 3771(d)(3)). The court of appeals denied mandamus relief. See Pet. App. 1-4, 12.

1. When sentencing a defendant "for any offense" under Chapter 110 of Title 18, which covers sexual offenses involving children, a court is to order restitution in "the full amount of the victim's losses." 18 U.S.C. 2259(a) and (b)(1). The transportation of child pornography is a Chapter 110 offense. See 18 U.S.C. 2252(a)(1). A "victim," in turn, is defined as an "individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. 2259(c). And the "full amount of the victim's losses" is defined to include medical services (including psychiatric and psychological care); physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; attorney's fees and other

litigation costs; and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3). Section 2259 further provides that the order of restitution "shall be issued and enforced in accordance with [18 U.S.C.] 3664." 18 U.S.C. 2259(b)(2). Section 3664(e) places on the government the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" and provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. 3664(e).

Although a crime victim is not a party to the criminal prosecution, the CVRA provides that the victim, or the government on the victim's behalf, may seek to enforce the victim's rights by filing a motion in the district court. See 18 U.S.C. 3771(d)(1) and (3). One such right is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. 3771(a)(6). If the district court "denies the relief sought, the movant" (*i.e.*, the victim or the government) "may petition the court of appeals for a writ of mandamus." 18 U.S.C. 3771(d)(3). The government may also "assert as error the district court's denial of any crime victim's right" through an "appeal" in the underlying criminal case. 18 U.S.C. 3771(d)(4).

2. a. On November 9, 2007, Kennedy arrived at a Seattle airport from a trip overseas. After a customs inspection uncovered images of child pornography on his laptop computer, the computer was seized. A later forensic analysis uncovered 30 images of child pornography in the active files and approximately 5000 such images in the deleted cache files. See Pet. App. 23.

A federal grand jury in the Western District of Washington returned an indictment charging Kennedy with possession of child pornography, in violation of

18 U.S.C. 2252A(a)(5)(B), and transportation of child pornography, in violation of 18 U.S.C. 2252(a)(1). Kennedy was convicted on both counts after a jury trial. The district court vacated the possession conviction as a lesser-included offense. It sentenced Kennedy to 60 months of imprisonment, to be followed by 15 years of supervised release. See Pet. App. 23-27.

b. Following the jury verdict, the government received a request for restitution from petitioners, two of the identified victims depicted in the child-pornography images transported by Kennedy. Petitioners, identified by the pseudonyms "Amy" and "Vicky" to protect their privacy, submitted materials in support of their requests for restitution. Petitioner Amy requested restitution in the amount of roughly $3 million, which included the cost of future psychological counseling, future lost income, and attorney's fees. Petitioner Vicky requested restitution in the amount of $227,000, which included future psychological counseling. In support of her claim, Amy included a victim-impact statement, a psychological evaluation, and an economic analysis. Vicky included a victim-impact statement and a psychological evaluation. See Pet. App. 27-30.

The district court concluded that Amy and Vicky were both "victims" of Kennedy's offense conduct and were accordingly entitled to restitution. As for the amount of restitution owed, the court concluded that "$1,000 per image" was "reasonable" and, based on that formula, awarded restitution in the amount of $17,000 (for Amy) and $48,000 (for Vicky). Pet. App. 30-31.

c. Kennedy appealed. The court of appeals affirmed his conviction and sentence, but vacated the restitution awards and remanded for further proceedings. Pet. App. 22-56.

Relying on binding circuit precedent, the court of appeals concluded that "courts may order restitution under [Section] 2259 only for losses proximately caused by the defendant's offense." Pet. App. 43-44 & n.13 (citing *United States* v. *Laney*, 189 F.3d 954, 965 (9th Cir. 1999)). The court explained that, "for purposes of determining proximate cause, a court must identify a causal connection between the defendant's offense conduct and the victim's specific losses." *Id.* at 47. And the court identified "three determinations" that a district court must make "in order to award restitution" under Section 2259: "(1) that the individual seeking restitution is a 'victim' of the defendant's offense" under Section 2259(b)(1); "(2) that the defendant's offense was a proximate cause of the victim's losses"; and "(3) that the losses so caused can be calculated with 'some reasonable certainty.'" *Id.* at 48 (citations omitted).

Applying that framework, the court of appeals concluded that while Amy and Vicky were both victims of Kennedy's offense conduct, the government had failed to establish the requisite proximate cause and failed to demonstrate the losses with a reasonable degree of certainty. Pet. App. 48-54. The court distinguished the evidence in this case from other cases, where the victim had been notified that the defendant possessed her images and had suffered upon receiving such notice, necessitating further therapy. *Id.* at 50 (citing *United States* v. *McDaniel*, 631 F.3d 1204, 1207, 1209 (11th Cir. 2011)). And while the court predicted that Section 2259's "proximate cause and reasonable calculation requirements will continue to present serious obstacles for victims seeking restitution in these sorts of cases," it did not "rule out the possibility that the government could devise a formula by which a victim's aggregate

losses could be reasonably divided." *Id.* at 55-56. The court vacated the restitution order and remanded for further proceedings. *Id.* at 56.

3. On remand, petitioner Vicky submitted a revised restitution request for $1,327,166.24 with additional supporting materials. Pet. App. 12; 8/24/12 Resentencing Hr'g Tr. (Tr.) 15. Petitioner Amy did not submit any new information. Tr. 15, 34. Because "[t]he documentation [Amy] relie[d] upon [wa]s the exact same documentation provided" at the initial sentencing, and because that evidence was found insufficient by the court of appeals, the district court found that Amy failed to establish proximate cause and accordingly denied her request for restitution. *Id.* at 35. As for Vicky, the court found that she "provided ample evidence in her [new] submissions to support the necessary finding" of proximate cause. *Ibid.* To calculate the amount of restitution, the court divided Vicky's losses by the number of defendants who had been ordered to pay her restitution and ultimately awarded Vicky $4545.08. *Id.* at 36-37; Pet. App. 12. The court also ordered Kennedy to pay a fine of $40,000. Pet. App. 12.

4. Petitioners filed a petition for a writ of mandamus under Section 3771(d)(3) of the CVRA. Pet. App. 2. Petitioners urged the court of appeals to overrule its prior decision in this case (and in *Laney*) and hold that courts may order restitution under Section 2259 for losses that are not proximately caused by the defendant's offense conduct. *Id.* at 3. The court explained that its prior decisions in this case and in *Laney* "remain binding" and that the contrary Fifth Circuit decision relied on by petitioners does not provide reason to "abandon a prior panel opinion." *Id.* at 4. The court explained further that "[t]o change the law of this cir-

cuit, petitioners must raise this issue in a petition for rehearing en banc or in a petition for writ of certiorari." *Ibid.* The court accordingly denied mandamus relief.[1]

ARGUMENT

Petitioners seek this Court's review of a single threshold question: whether Section 2259 requires a showing that the defendant's offense conduct was a proximate cause of the victim's losses. The court of appeals' decision on that issue is correct and is consistent with the decisions of every other court of appeals, except one. The narrow disagreement that exists has little practical significance and does not independently warrant further review. In any event, the mandamus posture of this case makes it an unsuitable vehicle for the Court's review. Further review is therefore unwarranted.[2]

1. Petitioners contend that 18 U.S.C. 2259 does not require a showing that the defendant's offense conduct proximately caused the victim's losses, except for the catch-all category of "other losses." The court of appeals' rejection of that argument is correct and is consistent with the decisions of nearly every other court of appeals.

Section 2259 mandates an award of restitution to a victim, like Amy or Vicky, who was harmed "as a result of" a defendant's transportation of images depicting her sexual abuse. See 18 U.S.C. 2259(a), (b)(4) and (c). A

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[1] Petitioners did not seek rehearing en banc.

[2] The petitions in *Michael Wright* v. *United States*, No. 12-8505 (filed Jan. 31, 2013), and *Doyle Randall Paroline* v. *United States*, No. 12-8561 (filed Jan. 31, 2013), seek review of the same threshold question. The government is accordingly filing its brief in opposition in those cases at the same time. For the reasons discussed, those cases are also unsuitable vehicles to consider the question presented.

restitution order must cover "the full amount of the victim's losses." 18 U.S.C. 2259(b)(1). The statute defines that phrase to include five enumerated categories of losses (*e.g.*, medical services; physical therapy; necessary transportation, temporary housing, or child care; lost income; and attorney's fees), as well as "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3)(A)-(F). The question is whether the government must also prove that the defendant's offense conduct proximately caused the enumerated categories of losses.

Nearly every court of appeals (including the court below) has answered that question in the affirmative, holding that a showing of proximate cause is required. See *United States* v. *Kearney*, 672 F.3d 81, 95-96 (1st Cir. 2012), cert. dismissed, 133 S. Ct. 1521 (2013); *United States* v. *Aumais*, 656 F.3d 147, 152-154 (2d Cir. 2011); *United States* v. *Burgess*, 684 F.3d 445, 455-458 (4th Cir.), cert. denied, 133 S. Ct. 490 (2012); *United States* v. *Gamble*, 709 F.3d 541, 546-547 (6th Cir. 2013); *United States* v. *Laraneta*, 700 F.3d 983, 989-990 (7th Cir. 2012); *United States* v. *Fast*, 709 F.3d 712, 720-722 (8th Cir. 2013); *United States* v. *Kennedy*, 643 F.3d 1251, 1260-1261 (9th Cir. 2011) (Pet. App. 22-56); *United States* v. *Benoit*, No. 12-5013, 2013 WL 1298154, at *12-*16 (10th Cir. Apr. 2, 2013); *United States* v. *McDaniel*, 631 F.3d 1204, 1208-1209 (11th Cir. 2011); *United States* v. *Monzel*, 641 F.3d 528, 535-537 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011); cf. *United States* v. *Crandon*, 173 F.3d 122, 125-126 (3d Cir.) (applying proximate-cause requirement where defendant had personal contact with the victim), cert. denied, 528 U.S. 855 (1999). The Fifth Circuit is the lone outlier. See *In re Amy Unknown*, 701 F.3d 749, 762-773 (2012) (en banc), peti-

tions for cert. pending, Nos. 12-8505 and 12-8561 (filed Jan. 31, 2013).

The majority view is correct. As the courts of appeals have recognized, "Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor." *Monzel*, 641 F.3d at 536 (internal quotation marks omitted; brackets in original); accord *Benoit*, 2013 WL 1298154, at *15; *Burgess*, 684 F.3d at 457; *Kearney*, 672 F.3d at 96; *United States* v. *Evers*, 669 F.3d 645, 658-659 (6th Cir. 2012); *Aumais*, 656 F.3d at 153. By defining a "victim" as an individual harmed "as a result of" the defendant's offense, Congress incorporated the preexisting "bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused." *Monzel*, 641 F.3d at 535 (footnote omitted).

Moreover, Congress used express proximate-cause language to describe the types of losses that are compensable under Section 2259. Although the phrase "proximate result" appears at the end of the catch-all subsection, several courts of appeals have reasonably read it as applying equally to the other enumerated categories. See *Evers*, 669 F.3d at 658-659; *McDaniel*, 631 F.3d at 1208-1209; cf. *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."). Other courts have explained that while "Congress determined that these restitution offenses typically proximately cause the losses enumerated in subsections 2259(b)(3)(A) through (E)," that does not mean "that a specific defendant au-

tomatically proximately causes those losses in every case." *Fast*, 709 F.3d at 721 (emphases omitted). At the very least, Congress's inclusion of an express proximate-cause limitation in the catch-all provision should not be read to abrogate "the traditional [proximate-cause] requirement for everything *but* the catch-all." *Monzel*, 641 F.3d at 537. If that had been Congress's intent, "surely it would have found a clearer way of doing so." *Ibid.*

2. The circuit conflict that exists does not warrant further review. First, it is exceedingly narrow: the Fifth Circuit is the lone outlier. Second, it has little practical importance. The presence or absence of a proximate-cause requirement should affect only those cases where the victim seeks to recover for losses that are unforeseeable. Cf. *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2637 (2011) ("The *term* 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.") (citation omitted). The losses for which petitioners seek to recover—the costs of future psychological counseling, future lost income, already-incurred attorney's fees—are all foreseeable losses stemming from Kennedy's transportation of images of child pornography depicting their sexual abuse. See *Kearney*, 672 F.3d at 97 (victim's need for "substantial mental-health treatment" as a consequence of a defendant's possession of her images was "reasonably foreseeable at the time of [the defendant's] conduct"). The majority rule simply acknowledges that, in a hypothetical case, a victim would not be able to recover losses that are not foreseeable, such as medical expenses incurred by a victim as a result of a car accident on the way to her therapist's office. See *Monzel*, 641 F.3d at 537 n.7; *Burgess*, 684 F.3d at 458

n.9; see also *Laraneta*, 700 F.3d at 991 (identifying other unforeseeable harms that may not be compensable); *Evers*, 669 F.3d at 660 (finding link between child-care costs and the defendant's crime too attenuated where sex offender had previously provided free babysitting services). The Fifth Circuit apparently agrees that such losses should not be compensable, but suggests that any such limitation should come from the statutory definition of "victim." *Amy Unknown*, 701 F.3d at 766 n.13. Accordingly, the narrow disagreement that does exist would have little bearing on the outcome of this case or any other cases implicated by the circuit split, as all circuits agree that the statute places limits on the losses a victim may recover.

Petitioners contend (Pet. 22-24) that the disagreement among the courts of appeals has caused "wildly disparate results in factually identical cases." The divergence petitioners note, however, is not attributable to the threshold question of whether a proximate-cause requirement exists for all enumerated losses. Any difference in results has more to do with the "secondary" issues and "second circuit split" that petitioners identify (*i.e.*, "how to apply any such proximate result requirement"), but do not ask this Court to review.[3] Pet. 18 n.9,

[3] Petitioners' reliance (Pet. 16) on the sentiments expressed in *United States* v. *Aguirre*, 448 Fed. Appx. 670 (9th Cir. 2011), is misplaced for a similar reason. The special concurrence did not reject a proximate-cause requirement; it instead suggested that the causation standard adopted in *Kennedy* was "too narrow." *Id.* at 673. Moreover, the concern that the "causation standard" set forth in *Kennedy* "may insulate all but the producer and original distributor of child pornography from liability for the victims' damages," *id.* at 674, has not been realized. In this very case, the district court awarded restitution to Vicky under the causation standard set forth in *Kennedy*. See Pet. App. 3. And in another recent case involving

24. In fact, the difficulties courts have experienced in implementing Section 2259's causation requirement are better understood as an issue of "cause in fact," rather than proximate cause. As the Seventh Circuit explained, "[b]efore a judge gets to the issue of proximate cause, he has to determine *what* the defendant caused." *Laraneta*, 700 F.3d at 991. The fundamental question in nearly all of these cases is not whether harm caused by the offense conduct is too attenuated (*i.e.*, proximate cause), but "how to assess causation where a large number of individuals each contributed in some degree to an overall harm." *Kearney*, 672 F.3d at 100 n.16; see *id.* at 98 (noting that the defendant's "argument is in actuality an unsuccessful attempt to use a but-for causation standard to limit * * * reasonably foreseeable losses"). Petitioners have not sought this Court's review of that related issue. And the sole threshold question raised in the petition does not independently warrant further review.[4]

3. In any event, this petition is a poor vehicle for the Court to resolve the question presented. This case comes to the Court on review of the denial of a petition for a writ of mandamus. In the government's view, the

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Amy and Vicky, the Ninth Circuit found that the record included "sufficient evidence to establish a causal connection between [the] defendant's offense and [the victims'] losses," and it held that the district court had abused its discretion in refusing to order any restitution. *In re Amy*, 710 F.3d 985, 987 (2013). On remand, the district court awarded $17,307.44 in restitution to Amy and $2881.05 to Vicky. See *In re Amy & Vicky*, No. 13-71486, 2013 WL 1847557, at *1 (9th Cir. May 3, 2013). In short, restitution remains available to victims like Amy and Vicky in the Ninth Circuit.

[4] The petition in *Wright*, No. 12-8505, does seek review of such "secondary" issues. The government's brief in opposition in that case discusses the relevant case law in greater detail and explains why that petition is not an appropriate vehicle to resolve those questions.

only question presented is whether the district court's interpretation of Section 2259 was "clear[ly] and indisputab[ly]" wrong. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 381 (2004). Given that nearly every court of appeals has rejected petitioners' argument and imposed a proximate-cause requirement, petitioners would be unable to make such a heightened showing.

This case is further complicated by the fact that the court of appeals incorrectly reviewed the district court's decision under an abuse of discretion standard, rather than under the traditional mandamus standard of review. See Pet. App. 3. That approach implicates a conflict among the courts of appeals as to the proper standard of review to apply to a mandamus petition filed under the CVRA. Compare *Amy Unknown*, 701 F.3d at 756-758 (traditional mandamus standard); *Monzel*, 641 F.3d at 532-534 (same); *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010) (per curiam) (same); *In re Antrobus*, 519 F.3d 1123, 1124-1125, 1127-1130 (10th Cir. 2008) (per curiam) (same), with *Kenna* v. *United States District Court*, 435 F.3d 1011, 1017 (9th Cir. 2006) (abuse of discretion); *In re W.R. Huff Asset Management Co.*, 409 F.3d 555, 563 (2d Cir. 2005) (same). Accordingly, if the Court granted review in this case, it would first have to decide the appropriate standard of review.

Petitioners suggest (Pet. 24-26) that the mandamus posture of this case actually makes it a better vehicle because Amy and Vicky are parties and, accordingly, will provide an adversarial presentation of the issues. Petitioners, however, do not confront the impediments presented by the heightened standard of review. Nor do petitioners explain how they could establish "clear and indisputable" error in light of the overwhelming majority of circuits that have rejected their interpretation of

the statute. If the Court wishes to definitively resolve the question presented, it should do so in an appeal from a final judgment under a de novo standard of review.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2013

[5] The vast majority of restitution requests have come from Amy and Vicky. To date, only seven other victims have sought restitution from defendants convicted of child-pornography possession, receipt, distribution, or transportation offenses under Section 2259. In recognition of the concerns raised by some courts about the current statutory scheme, see, *e.g.*, *Burgess*, 684 F.3d at 460; *Kennedy*, 643 F.3d at 1266, the Department of Justice is exploring possible legislative amendments that would focus specifically on the proper approach to restitution for child-pornography offenses.