No. 13-69

In the Supreme Court of the United States

VICKY, CHILD PORNOGRAPHY VICTIM, PETITIONER

v.

ROBERT M. FAST, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. 2259?

2. Whether a "petition * * * for a writ of mandamus" filed under the Crime Victims' Rights Act, 18 U.S.C. 3771(d)(3), is subject to the traditional standard of review governing the issuance of a writ of mandamus.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 709 F.3d 712. The memorandum and order of the district court (Pet. App. 52-57) is reported at 876 F. Supp. 2d 1087. A prior district court memorandum and order (Pet. App. 58-62) is reported at 820 F. Supp. 2d 1008.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2013. On May 30, 2013, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 10, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks this Court's review of a judgment arising from a federal prosecution in the United States District Court for the District of Nebraska. Following a guilty plea, respondent Fast was convicted on one count of receiving and distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2). Fast was sentenced to 72 months of imprisonment, to be followed by five years of supervised release. The government sought restitution under 18 U.S.C. 2259 on behalf of petitioner, a victim depicted in some of the images Fast received, and the district court ordered Fast to pay $19,863.84. On appeal, the government conceded that the district court had erred in awarding restitution without requiring a showing of "proximate cause" and the court of appeals remanded for the district court to reconsider the restitution award. See Pet. App. 36-39, 52, 58-62.

On remand, the district court ordered Fast to pay $3333 to petitioner. Petitioner 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. 1-35.

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 receipt and distribution of child pornography is a Chapter 110 offense. See 18 U.S.C. 2252A(a)(2). 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 in-

clude 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).

The CVRA provides "crime victim[s]," *i.e.*, persons who have been "directly and proximately harmed as a result of the commission of a Federal offense" (18 U.S.C. 3771(e)), with various statutory rights. See 18 U.S.C. 3771(a). One such right is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. 3771(a)(6). Although the crime victim is not a party to the criminal prosecution, either the victim or the United States can seek to enforce the victim's CVRA rights by filing a motion in the district court. See 18 U.S.C. 3771(d)(1) and (3). The district court is required to "take up and decide" the motion "forthwith." 18 U.S.C. 3771(d)(3).

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 court of appeals must generally "take up and decide" any mandamus petition

within 72 hours after it is filed. *Ibid.* If the court of appeals denies mandamus relief, it must "clearly state[]" "the reasons for the denial * * * on the record in a written opinion." *Ibid.* 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. In November 2010, law enforcement officers seized Fast's computers pursuant to a search warrant. A forensic examination revealed 26 digital images and 23 videos of child pornography. The videos included images from the "Vicky" series—a widely distributed child-pornography series that depicts petitioner, at the age of ten, being raped by her father. See Gov't C.A. Br. 5.

A federal grand jury in the District of Nebraska returned an indictment charging Fast with one count of receiving and distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2), and one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Fast pleaded guilty to receiving and distributing child pornography, and the district court sentenced him to 72 months of imprisonment, to be followed by five years of supervised release. See Pet. App. 36-39; Indictment 1.

b. Before sentencing, the government received a request for restitution from petitioner, one of the identified victims depicted in the child-pornography images received by Fast. Petitioner, identified by the pseudonym "Vicky" to protect her privacy, requested restitution in the amount of $952,759.81. Pet. App. 58. The district court held that "any loss described in 18 U.S.C. § 2259(b)(3)(A)-(E) suffered by 'Vicky' must have been 'caused' (in whole or in part) by Fast alt-

hough it need not be the 'proximate' cause or the only cause." *Id.* at 60. As for the amount of restitution owed, the court concluded that $19,863.84 is a "reasonable estimate" and that "Fast's restitution obligation" should be "joint and several with all persons who have been convicted and sentenced for possessing, receiving, distributing or producing child pornography and who have been ordered to make restitution to 'Vicky.'" *Id.* at 62.

c. Fast appealed. On appeal, the government agreed that proximate cause was required for all losses. At the parties' request, and in light of that concession, the court of appeals remanded to the district court for reconsideration of the restitution award. Pet. App. 3-4.

3. On remand, the district court held that "proximate cause is required for each element of restitution under 18 U.S.C. § 2259" and that Fast "proximately caused injury to 'Vicky' and 'Vicky' suffered" $3333 in "damage as a direct and proximate result of Fast's actions." Pet. App. 53. The restitution award included $2500 for medical and psychiatric care, occupational therapy, and lost income, and $833 in attorney's fees and costs—all postdating Fast's offense conduct. *Id.* at 54.

4. Petitioner filed a notice of appeal and a petition for a writ of mandamus under Section 3771(d)(3) of the CVRA. Finding that petitioner "lack[ed] standing as a nonparty," the court of appeals dismissed the direct appeal. Pet. App. 2, 4-11. The court also denied mandamus relief. *Id.* at 11-24. The court first concluded that the traditional standard of mandamus review applies to mandamus petitions filed under Section 3771(d)(3) of the CVRA. *Id.* at 11-15. The

court also agreed with the district court, and the majority of circuits, that the government "has to prove that the defendant proximately caused" the enumerated "losses." *Id.* at 15-20. Finally, applying the mandamus standard, the court held that petitioner was not entitled to relief because the district court "did not clearly and indisputably err in ordering Fast to pay $3,333 restitution." *Id.* at 23.

Judge Shepherd concurred in part and dissented in part. Pet. App. 24-35. He would have held that "only damages awarded" under Section 2259's catchall provision "are subject to a proximate cause requirement" and that joint and several liability is appropriate. *Id.* at 25-33. Concluding that the district court had therefore "indisputably erred in the restitution amount it awarded," Judge Shepherd would have granted the mandamus petition and remanded for a recalculation of the restitution award. *Id.* at 33-35.

DISCUSSION

1. Petitioner first contends (Pet. 12-14) that 18 U.S.C. 2259 authorizes a court to order a defendant convicted of receiving and distributing images of child pornography to pay restitution to an exploited child victim for losses that did not proximately result from the defendant's offense. As petitioner acknowledges (Pet. 2, 10-11, 14), the resolution of that question is likely to be influenced by the Court's decision in *Paroline* v. *United States*, cert. granted, No. 12-8561 (June 27, 2013), in which the Court formulated the following question: "What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?" Accordingly, the petition for a writ of

certiorari should be held pending the Court's resolution of *Paroline*, and then disposed of as appropriate in light of the decision in that case.

2. Petitioner also argues (Pet. 3-4, 14-30) that the traditional mandamus standard of review does not apply to a mandamus petition filed under the CVRA and that the courts of appeals are divided on the proper standard of review in CVRA cases. The court of appeals' decision is correct. The disagreement among the courts of appeals is not implicated by this case and, in any event, does not warrant the Court's review. This Court has denied petitions for a writ of certiorari raising the same issue, see *Fisher* v. *United States Dist. Ct.*, 132 S. Ct. 798 (2011) (No. 10-1518); *Amy, Victim in Misty Child Pornography Series* v. *Monzel*, 132 S. Ct. 756 (2011) (No. 11-85), and the same result is warranted here.

a. As an initial matter, this petition is not a proper vehicle to consider the appropriate standard of review for a mandamus petition filed under the CVRA because the Court's resolution of the first question presented (in *Paroline*) will render the second question presented immaterial. As petitioner acknowledges (Pet. 11), if the Court affirms the Fifth Circuit's decision in *Paroline* and holds (contrary to the decision below) that proximate cause is not required, then it should grant this petition, vacate the judgment below, and remand for further proceedings. On remand, the court of appeals would then be required to grant the mandamus petition regardless of the standard of review. If, on the other hand, the Court reverses the Fifth Circuit's decision in *Paroline* and holds (consistent with the decision below) that proximate cause is required, then the Court should deny the petition

because petitioner would not be entitled to mandamus relief—again, regardless of the standard of review. Although petitioner contends (Pet. 25-26) that the standard of review was outcome-determinative *below*, she fails to explain why (or how) the standard of review would matter after this Court decides the first question presented in *Paroline*. Because the difference in standards would have no impact in this case, the petition is not an appropriate vehicle to consider that question.

b. The CVRA provides that, if a district court denies a motion by a putative crime victim, "the movant [*i.e.*, the putative victim] may petition the court of appeals for a writ of mandamus." 18 U.S.C. 3771(d)(3). When Congress uses a term of art like "mandamus," it is presumed to "adopt[] the cluster of ideas that were attached to [it] in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); see *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 (2011) ("[W]here Congress uses a common-law term in a statute, we assume the 'term . . . comes with a common law meaning, absent anything pointing another way.'") (citation omitted); *United States* v. *Monzel*, 641 F.3d 528, 533 (D.C. Cir.) ("That Congress called for 'mandamus' strongly suggests it wanted 'mandamus.'"), cert. denied, 132 S. Ct. 756 (2011); Pet. App. 12 (same); *In re Antrobus*, 519 F.3d 1123, 1124-1125, 1127-1128 (10th Cir. 2008) (per curiam) (same). One of the "cluster of ideas" attached to the writ of mandamus is that relief will be granted only if the petitioner's right to the writ is "clear and indisputable." *Cheney* v. *United States Dist. Ct.*, 542

U.S. 367, 381 (2004) (quoting *Kerr* v. *United States Dist. Ct.*, 426 U.S. 394, 403 (1976)). Nothing in the CVRA overcomes that presumption.

Indeed, whereas Section 3771(d)(3) authorizes a crime victim (or the government) to petition for "a writ of mandamus," the very next subsection authorizes "the Government" to challenge a "district court's denial of any crime victim's right" through an "appeal," 18 U.S.C. 3771(d)(4). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets in original; citation omitted); see *Monzel*, 641 F.3d at 533; *Antrobus*, 519 F.3d at 1129; Pet. App. 12-13. Congress could have allowed nonparty crime victims to obtain ordinary appellate review by authorizing "immediate appellate review" or "interlocutory appellate review," as it has in a number of other statutes.[1] See *Antrobus*, 519 F.3d at 1124, 1128-1129. Instead, Congress authorized another established form of judicial review—a petition for "a writ of mandamus"—and that authorization carries with it the traditional mandamus standard of review.

That Congress required courts of appeals to "take up and decide" the mandamus petition within 72 hours, see 18 U.S.C. 3771(d)(3), reinforces the conclusion that the traditional mandamus standard of review

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[1] See, *e.g.*, 8 U.S.C. 1535(b); 9 U.S.C. 16(a)(2); 10 U.S.C. 950d(a); 18 U.S.C. 1835, 2518(10)(b), 3731; 18 U.S.C. App. 7 (2006 & Supp. V 2011) (Classified Information Procedures Act); 28 U.S.C. 798(b), 1292(b); 42 U.S.C. 247d-6d(e)(10); Fed. R. Civ. P. 23(f).

applies.[2] Congress could reasonably expect a court of appeals to decide within that short interval whether a district judge has committed the sort of obvious error that would traditionally afford a basis for mandamus relief. It is far less reasonable to expect an appellate court to determine within that limited time frame whether the district court correctly applied (for example) proximate-cause principles to a potentially complicated factual record. See *Monzel*, 641 F.3d at 533 ("full briefing and plenary appellate review within the 72-hour deadline will almost always be impossible"); *Antrobus*, 519 F.3d at 1130 ("It seems unlikely that Congress would have intended *de novo* review in 72 hours of novel and complex legal questions."); Pet. App. 12 (same); see also *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010) (per curiam).

c. Petitioner contends (Pet. 27-30) that, unlike traditional "mandamus" review, "mandamus" review under the CVRA should be conducted under the standards usually associated with an ordinary appeal. Petitioner's arguments lack merit.

Petitioner first suggests (Pet. 27-28) that, if a court of appeals applies the traditional mandamus standard, it would breach its obligation to "take up and decide"

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[2] Some of the rights conferred on crime victims by the CVRA must, by their nature, be exercised during the criminal trial itself. See, *e.g.*, 18 U.S.C. 3771(a)(3) (providing, subject to a specified exception, that a crime victim has "[t]he right not to be excluded from any * * * public court proceeding" involving the crime). When a petition for mandamus asserts that the district court has denied a right of that character, prompt disposition of the petition by the court of appeals is essential to ensure that the trial is not disrupted or unduly delayed. See 18 U.S.C. 3771(d)(3) ("In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing [the CVRA].").

the mandamus petition, as required by 18 U.S.C. 3771(d)(3). That is incorrect. "A court that denies relief under the traditional mandamus standard has most certainly 'take[n] up and decide[d]' the petition." *Monzel*, 641 F.3d at 533-534 (brackets in original). Similarly, a requirement that the court "ensure" that a crime victim is afforded certain rights (Pet. 28-29) "says nothing about the standard of review." *Monzel*, 641 F.3d at 533.

Petitioner's reliance (Pet. 29-30) on the CVRA's legislative history is also misplaced for two reasons. First, Congress's use of a traditional term of legal art unambiguously conveys its intent to incorporate the "clear and indisputable error" standard historically associated with mandamus review, and "reference to legislative history is inappropriate when the text of the statute is unambiguous." *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 132 (2002). Second, the floor statements on which petitioner relies do not speak to the appropriate standard of review. Petitioner was afforded "immediate" review of the purported denial of her rights; the court of appeals did "review" petitioner's arguments; and the appellate court would have granted relief if it had found that the district court had committed a "clear and indisputable" error. See *Monzel*, 641 F.3d at 534 & n.4 (rejecting reliance on legislative history). Congress expressly provided for "mandamus" review, and the court of appeals correctly held that the traditional mandamus standard of review therefore applies.

d. The courts of appeals are divided over the proper standard of review to apply to a mandamus petition filed under the CVRA. As explained above (see pp. 7-8, *supra*), however, this case is not a proper

vehicle to review that disagreement. In any event, petitioner overstates the extent of the conflict and the actual disagreement does not warrant the Court's review. This Court has already denied review of that conflict in at least two prior cases, see *Fisher*, *supra* (No. 10-1518); *Monzel*, *supra* (No. 11-85), and the same result is warranted here.

Five courts of appeals, including the Eighth Circuit, have held (correctly) that mandamus petitions filed under the CVRA are subject to the traditional mandamus standard of review. See Pet. App. 14-15; *Monzel*, 641 F.3d at 532-534 (D.C. Cir.); *Acker*, 596 F.3d at 372 (6th Cir.); *In re Dean*, 527 F.3d 391, 394 (5th Cir.), stay denied, 128 S. Ct. 2996 (2008); *Antrobus*, 519 F.3d at 1124-1125, 1127-1130 (10th Cir.). Consistent with the court of appeals' decision here, those circuits generally require crime victims to demonstrate that the district court has "clear[ly] and indisputabl[y]" erred in denying them relief. *E.g.*, *Monzel*, 641 F.3d at 534; *Dean*, 527 F.3d at 394; *Antrobus*, 519 F.3d at 1125, 1130.

In contrast, the Second Circuit has held that "a district court's determination under the CVRA should be reviewed for abuse of discretion." *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2005) (*Huff*). The Ninth Circuit has similarly held that the writ should issue whenever "the district court's order reflects an abuse of discretion or legal error." *Kenna* v. *United States Dist. Ct.*, 435 F.3d 1011, 1017 (2006). As the Tenth Circuit observed, both opinions were decided under "time pressure[]" and include only a "brief passage" that fails to explain "why Congress chose to use the word *mandamus* rather than the word appeal." *Antrobus*, 519 F.3d at 1128. Moreover, both

cases were decided before the Fifth, Sixth, Eighth, Tenth, and D.C. Circuits held that traditional mandamus standards apply, and neither the Second nor the Ninth Circuit confronted the statutory-interpretation arguments underlying those decisions. Cf. *Kenna*, 435 F.3d at 1017 (noting that it was "aware of no court of appeals that has held to the contrary").

In the seven years since *Kenna* was decided, every court of appeals to consider the issue in a published opinion has agreed that the traditional mandamus standard of review should apply. And the Second and Ninth Circuits have generally failed to acknowledge or address that intervening (and competing) case law. The one exception is *In re Andrich*, 668 F.3d 1050 (9th Cir. 2011). In that case, the Ninth Circuit acknowledged the conflict between *Kenna* and *Monzel*, but it ultimately concluded that mandamus was not warranted under either standard. See *id.* at 1051 (holding that "[t]he trial judge did not clearly err as a matter of law, nor did he abuse his discretion").[3]

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[3] Petitioner contends that the Third and Eleventh Circuits have also "given crime victims broad protection by extending ordinary appellate review." Pet. 18. But the Third Circuit decision on which she relies is unpublished and nonprecedential, and it has never been cited by that court. See *In re Walsh*, 229 Fed. Appx. 58 (2007) (per curiam). Moreover, the court in *Walsh* relied exclusively on *Huff* and *Kenna*—the only pertinent court of appeals' decisions that had been issued at that time. *Id.* at 60. In *In re Stewart*, 552 F.3d 1285 (2008) (per curiam), the Eleventh Circuit did not address the standard of review. Indeed, in a second petition for a writ of mandamus in the same case, the court of appeals cited the competing authorities, noted that it "did not explicitly indicate the standard [it] used" in the earlier case, and declined to decide the issue because "it ma[d]e[] no difference." *In re Stewart*, 641 F.3d 1271, 1273-1275 (11th Cir. 2011) (per curiam). In an unpublished decision that did not involve the CVRA, the Eleventh Circuit

The disagreement among the courts of appeals is also of little practical importance because any difference between the articulated standards is unlikely to produce divergent outcomes in any significant number of cases. Indeed, several courts of appeals have declined to determine the appropriate standard of review because the choice among competing standards would not have affected the outcomes of the particular cases before them. *E.g.*, *In re Stewart*, 641 F.3d 1271, 1274-1275 (11th Cir. 2011) (per curiam) (concluding that the court need not resolve the issue because the mandamus petitioner was not entitled to relief under either standard); *In re Zackey*, No. 10-3772, 2010 WL 3766474, at *1 (3d Cir. Sept. 22, 2010) (same); *United States* v. *Aguirre-González*, 597 F.3d 46, 56 (1st Cir. 2010) (same); *In re Brock*, 262 Fed. Appx. 510, 512 (4th Cir. 2008) (per curiam) (same); *In re Doe*, 264 Fed. Appx. 260, 262 (4th Cir. 2007) (per curiam) (same); see *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009) (per curiam) (finding it unnecessary to resolve the issue because the mandamus petitioner was entitled to relief under either standard).

In the Second and Ninth Circuit cases applying the "abuse of discretion" standard, the mandamus petition was denied in all but two cases. See *In re Stake Ctr. Locating, Inc.*, 717 F.3d 1089, 1090 (9th Cir. 2013); *In re Amy*, 714 F.3d 1165, 1168 (9th Cir. 2013); *In re*

(incorrectly) cited the second *Stewart* decision to support an abuse-of-discretion standard, see *United States* v. *Collins*, No. 12-14140, 2013 WL 3939906, at *1 (July 31, 2013), but it also stated that "[t]he party seeking the writ of mandamus must establish that his or her right to the writ's issuance is 'clear and indisputable,'" *ibid.* (quoting *Will* v. *United States*, 389 U.S. 90, 96 (1967)). Thus, the issue remains open in the Third and Eleventh Circuits.

Amy, 698 F.3d 1151, 1153 (9th Cir. 2012), petition for cert. pending, No. 12-651 (filed Nov. 20, 2012); *In re Local No. 46 Metallic Lathers Union*, 568 F.3d 81, 88 (2d Cir. 2009) (per curiam), cert. denied, 559 U.S. 938 (2010); *In re Rendón Galvis*, 564 F.3d 170, 176 (2d Cir. 2009) (per curiam); *Huff*, 409 F.3d at 564; cf. *Antrobus*, 519 F.3d at 1131 (finding it far from "obvious * * * that the outcome would change" under the ordinary appellate standard of review). And although the Ninth Circuit granted the mandamus petitions in *In re Morning Star Packing Co.*, 711 F.3d 1142, 1144 (2013) and *Kenna*, it is unlikely that the standard of review was outcome-determinative. In *Morning Star Packing*, the district court relied on impermissible factors (*i.e.*, the defendant's financial status and the potential availability of civil remedies) to deny the victims restitution, see 18 U.S.C. 3664(f)(1)(A) and (B). 711 F.3d at 1144. In *Kenna*, the district court refused to allow acknowledged victims to allocute, as required by 18 U.S.C. 3771(a)(4). 435 F.3d at 1017. Those sorts of stark deviations from statutory mandates might well have been remediable under the traditional mandamus standard. See *ibid.* (noting that relief might well be warranted under traditional mandamus standard); see also *Monzel*, 641 F.3d at 534 n.4 (noting that "a court applying the traditional mandamus standard can still remedy errors of law, provided the errors were clear and the petitioner has a right to relief").

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the Court's decision in *Paroline* v. *United States*, cert. granted, No. 12-8561 (June 27, 2013), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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