No. 12-8561

In The Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT MICHAEL WRIGHT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

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STATEMENT OF THE CASE

The *en banc* Fifth Circuit decision under review resolved two cases. J.A. 425-26, 428. One was respondent Amy Unknown's petition for a writ of mandamus to review a decision of the District Court for the Eastern District of Texas denying her request for restitution from petitioner Doyle Randall Paroline. J.A. 429-30. The other was respondent Michael Wright's appeal from a judgment of the District Court of the Eastern District of Louisiana ordering Wright to pay $529,661 in restitution to Amy. Both defendants had pleaded guilty to a single count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). J.A. 430-33. The *en banc* Fifth Circuit granted Amy's mandamus petition in Paroline's case and remanded for entry of an order to pay the full amount of restitution that Amy requested: $3.4 million. J.A. 478-79. Initially, the Fifth Circuit also vacated the judgment in Wright's case and remanded because the restitution award was less than $3.4 million. J.A. 403-04; *see* J.A. 426-27 n.1. On reconsideration, however, it affirmed the $529,661 award because the Government had not appealed. J.A. 426 n.1, 479-80.

This Court granted Paroline's petition for certiorari but did not rule on Wright's. *See* Dkt. No. 12-8505. Wright, however, was a party to the *en banc* proceeding in the Fifth Circuit, which gave rise to the

judgment now under review.[1] As a respondent under Supreme Court Rule 12.6, Wright files this brief in support of petitioner Paroline.

SUMMARY OF ARGUMENT

Restitution under 18 U.S.C. § 2259 is limited to those harms which are factually and proximately caused by the offense conduct of the particular defendant before the court. The proximate-cause requirement is contained in the definition of "the full amount of the victim's losses" at § 2259(b)(3). The definition is comprised of a six-part list. The list consists of five specific types of losses, which are examples of the sixth item, "any other losses suffered by the victim as a proximate result of the offense." The word "other" is key because it indicates that the enumerated losses are part of the general set of losses described in the sixth subparagraph, that is, they are instances of "losses suffered by the victim as a proximate result of the offense." This is the teaching of the

[1] Letter from Geralyn A. Maher, Calendar Clerk, U.S. Court of Appeals for the Fifth Circuit, to Paul G. Cassell, Robin E. Schulberg, and Michael A. Rotker, Esqs. (Feb. 6, 2012) ("[T]he court has directed that 45 minutes 'per side' of argument time will be allotted, rather than scheduling two separate, full arguments."), available at https://ecf.ca5.uscourts.gov/docs1/00501749252 (PACER login required); Windows Media File: *En Banc* Oral Argument Recording, *In re Amy Unknown*, Nos. 09-41238, 09-41254, & 09-31215 (5th Cir. May 3, 2012), http://www.ca5.uscourts.gov/OralArgRecordings/09/09-41238_5-3-2012.wma.

Court's interpretation of the word "otherwise" in the residual clause of the definition of "violent felony" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), in *Begay v. United States*, 553 U.S. 137 (2008).

It should go without saying that compensable harms are limited to those caused by the offense conduct of the particular defendant before the Court. This limitation is contained in the definition of compensable losses at § 2259(b)(3), but it also is the holding of *Hughey v. United States*, 495 U.S. 411 (1990). Although an interpretation of the Victim and Witness Protection Act (VWPA), *Hughey* has become a key principle of restitution law. It applies to § 2259 because § 2259, like the VWPA, is offense-centric.

The Fifth Circuit, however, relies on the phrase "the full amount of the victim's losses" to reject both a proximate-cause requirement and the *Hughey* principle. The Fifth Circuit's interpretation of that phrase is incorrect. Several years before the enactment of § 2259, "the full amount of the victim's losses" was incorporated in three bills aimed at enacting what ultimately became the Mandatory Victims Restitution Act (MVRA). As originally proposed, the phrase would have replaced the section in the VWPA that gave courts the option of reducing a restitution award to take account of a defendant's indigence. "The full amount of the victim's losses" rejected this manner of calculating restitution awards. The MVRA put that same language into 18 U.S.C. § 3664, which provides the mechanism for issuing and enforcing restitution

orders under §§ 2259, 3663 and 3663A. Given the connection between §§ 2259 and 3664, it is unlikely that Congress intended the same phrase to mean different things in the two statutes.

Amy is seeking restitution for losses flowing from the emotional distress she suffered as a result of the distribution of her images on the internet. She stipulated, however, that she never knew of Paroline's offense conduct. Therefore, Paroline's possession of the images could not, as a factual matter, have caused her emotional distress. The district court's order denying restitution should be reinstated.

ARGUMENT

I. Restitution under § 2259 is limited by the language of § 2259(b)(3) to losses proximately resulting from the defendant's offense conduct.

The plain language of § 2259 allows restitution only for losses proximately caused by the defendant's offense conduct. This is because the enumerated losses listed at § 2259(b)(3)(A)-(E) fall within the set of losses defined by the catch-all category, § 2259(b)(3)(F), and hence are subject to its proximate-cause limitation.

The catch-all category of losses at 18 U.S.C. § 2259(b)(3)(F) resembles the residual clause in the Armed Career Criminal Act's definition of "violent felony," 18 U.S.C. § 924(e)(2)(B)(ii), which this Court

has interpreted numerous times. The ACCA residual clause states:

> or *otherwise* involves conduct that presents a serious potential risk of physical injury to another.[2]

(Emphasis added). The catch-all category of losses at § 2259(b)(3)(F) consists of:

> any *other* losses suffered by the victim as a proximate result of the offense.[3]

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[2] 18 U.S.C. § 924(e)(2)(B) provides in pertinent part:

[T]he term "violent felony" means any crime . . . that

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious risk of physical injury to another.

[3] 18 U.S.C. § 2259(b)(3) provides:

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) attorney's fees, as well as other costs incurred; and

(Continued on following page)

(Emphasis added). "Otherwise" connects the enumerated categories of violent felonies with the ACCA residual clause, while "other" connects the enumerated types of losses with the catch-all phrase in the § 2259 definition of loss. This Court's decision in *Begay v. United States*, 553 U.S. 137 (2008), provides guidance in how to interpret "other."

In *Begay*, this Court recognized that "otherwise" denoted a similarity between the general category described in the residual clause and the specific examples that preceded it. *Id.* at 150-51 (Scalia, J., concurring). Although there was disagreement on the Court about what that similarity was, there was agreement that it meant *at least* the similarity identified by Justice Scalia in his concurrence: "the particular similarity specified after the 'otherwise' – *i.e.*, that they all pose a serious potential risk of physical injury to another." *Id.* at 150-51 (Scalia, J., concurring) (emphasis omitted); *see id.* at 144 (majority).

> [B]y using the word "otherwise" the writer draws a substantive connection between two sets . . . on one specific dimension – *i.e.*, whatever follows "otherwise." What that means here is that committing one of the enumerated crimes is *one way* to commit a crime "involving a serious potential risk of physical injury to another"; and that *other*

(F) any other losses suffered by the victim as a proximate result of the offense.

> *ways* of committing a crime of that character similarly constitute "violent felonies."

Id. at 151 (Scalia, J., concurring) (emphasis in original) (internal quotation marks and citations omitted).

Similarly in the instant context, by using the word "other," Congress drew a substantive connection between the specific category of losses listed at § 2259(b)(3)(A)-(E) – medical services, physical and occupational therapy or rehabilitation, etc. – and the residual category, described as "other losses suffered by the victim as a proximate result of the offense." What that means is that any one of the enumerated losses is a type of loss "suffered by the victim as a proximate result of the offense." Therefore, the enumerated losses listed in subparagraphs § 2259(b)(3)(A) through (E) must be losses that proximately result from the offense. Congress did not make the proximate-cause requirement explicit in each of the enumerated types of losses because it viewed them as examples of the general category of losses described in § 2259(b)(3)(F).

Admittedly there are distinctions between the instant case and *Begay*. These distinctions, however, show why the disagreement between the majority and Justice Scalia in *Begay* does not arise in the instant case. *Begay* involved the interpretation of the ACCA residual clause. The disagreement was about whether the specific examples limited the residual clause in a manner beyond the common denominator ("conduct that presents a serious potential risk of physical injury to another"). By contrast the instant

case involves the interpretation of the specifically enumerated items. The only issue is whether they must share the characteristics that define the residual category ("losses suffered by the victim as a proximate result of the offense"). The reasoning applied in *Begay* says they must.

II. The only compensable losses under § 2259 are those resulting from the offense conduct of the particular defendant to whom the restitution order applies.

In *Hughey v. United States*, 495 U.S. 411, 413 (1990), this Court interpreted the Victim and Witness Protection Act (VWPA), then 18 U.S.C. §§ 3579-80, now § 3663, "to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." Although the defendant pleaded guilty to only one of the charges brought against him, the district court entered a restitution award which included compensation for the other offenses. This Court reversed the award. It relied on the scope of the authorization (to order restitution "to any victim of such offense"), and on the statutory description of possible losses ("in the case of an offense resulting in . . . ."). *Hughey*, 495 U.S. at 416. "Given that the ordinary meaning of 'restitution' is restoring someone to a position he occupied before a particular event, the repeated focus in § 3579 on the offense of which the defendant was convicted suggests strongly that restitution as authorized by the statute is intended to compensate victims only for losses

caused by the conduct underlying the offense of conviction." *Id.*[4]

Although *Hughey* was a case of statutory interpretation, it has come to stand for "a key principle of restitution law." Catherine M. Goodwin, FEDERAL CRIMINAL RESTITUTION § 7.27, at 322 (2012 ed.). The circuits have broadly applied it to § 3663A. *See, e.g.*, *United States v. Oladimeji*, 463 F.3d 152, 157-58 & n.1 (2d Cir. 2006); *Singh v. Attorney General of U.S.*, 677 F.3d 503, 513 (3d Cir. 2012); *United States v. Squirrel*, 588 F.3d 207, 215 (4th Cir. 2009); *United States v. Mancillas*, 172 F.3d 341, 343 (5th Cir. 1999); *United States v. Jones*, 641 F.3d 706, 714 (6th Cir. 2011); *United States v. Randle*, 324 F.3d 550, 555-56 & n.3 (7th Cir. 2003); *United States v. DeRosier*, 501 F.3d 888, 896 & n.13 (8th Cir. 2007); *United States v.*

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[4] In reaction to *Hughey*, Congress modified the definition of "victim" in § 3663 in 1990 to include "a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." Crime Control Act of 1990, Pub. L. No. 101-647, § 2509, 104 Stat. 4789, 4863. Similar language was incorporated in the Mandatory Victims' Restitution Act of 1996, Pub. L. No. 104-132, §§ 204(a), 205(a)(1)(E), 110 Stat. 1227, 1228, 1230. This addition does not undermine the *Hughey* principle that restitution is limited to losses caused by the defendant's offense conduct because the "scheme, conspiracy, or pattern of criminal activity" must be "an element" of the offense of conviction, and the defendant's conduct must be the cause of the harm. In any event, the offense at issue in the instant case, 18 U.S.C. § 2252(a)(4)(B), does not involve a scheme, conspiracy, or pattern of criminal activity as an element of the offense.

Griffith, 584 F.3d 1004, 1019 (10th Cir. 2009). The plain language of § 2259 calls for application of *Hughey* to that statute as well.

Section 2259(a) directs a court to order restitution "for any *offense* under this subchapter." (Emphasis added). This section imposes both a duty – to order restitution for an offense – and a limitation on authority. Since a court has no power to order restitution beyond the scope of statutory authorization, *see, e.g.*, *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012); *United States v. Love*, 431 F.3d 477, 479 (5th Cir. 2005), subsection (a) limits a court's authority to order restitution under § 2259 to compensation for losses resulting from the offense of conviction. Likewise, § 2259(b)(3) defines compensable losses as those suffered "as a proximate result of the offense," and § 2259(c) defines "victim" as "the individual harmed as a result of a commission of a crime." The repeated references to the "offense" call for the same limitation as the *Hughey* Court found in the VWPA: § 2259 restitution is limited to compensation for losses caused by the specific conduct underlying the offense of conviction.

The instant dispute has a different focus from *Hughey*: the Fifth Circuit requires defendants to pay for losses caused by the conduct of other people, while the district court in *Hughey* ordered restitution for conduct of which the defendant was not convicted. Still, the principle is the same. If a defendant cannot be ordered to pay restitution for conduct of which he

was not convicted, then he certainly cannot be ordered to pay restitution for other people's conduct.

The Fifth Circuit's interpretation of § 2259 is directly contrary to this principle. It requires a defendant to compensate a victim for losses caused by others. The $3.4 million that Amy sought represented losses caused by the original sexual abuse and the dissemination of the resultant images on the internet.[5] A defendant who merely views Amy's image on the internet causes at most a *de minimis* portion of these losses. Nevertheless, the Fifth Circuit requires that he be ordered to pay for all of them.

Of note, the Government made two unsuccessful arguments in *Hughey* similar to those which arose below in the instant case. One was that the offense-of-conviction limitation concerned who was eligible for restitution, not how much restitution was due. *Id.* at 416. That in fact is the Fifth Circuit's *de facto* position: once a defendant's offense satisfies the statutory definition of "victim," then he is liable for the losses caused by everyone who has "victimized" the same person. J.A. 451. This Court rejected that position in *Hughey*, as it should here. 495 U.S. at 417-20. The other argument is that the VWPA should be interpreted expansively to serve the statutory purpose

[5] *See* J.A. 81, Report of Psychological Consultation by Joyanna Silberg, Ph.D. (Nov. 21, 2008) ("The sexual assault perpetrated against Amy, and its continued memorialization in pictures which continue to be traded and used[,] affect her in a variety of ways . . . .").

of compensating victims. *Id.* at 420. Similarly here, Amy has used Congress's intent to help the victims of child pornography to oppose limiting § 2259 restitution to losses caused by the specific defendant. Although this Court in *Hughey* recognized that "[t]hese concerns are not insignificant ones," *id.* at 421, this Court nevertheless interpreted the statute as written, *id.* at 421-22. This Court should do the same here.

In support of its holding in *Hughey*, this Court quoted a House report accompanying an amended version of the VWPA which stated, "To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law." 495 U.S. at 421 n.5 (quoting H.R. Rep. No. 98-1017, at 83 n.43 (1983)). So too here, ordering a defendant to make restitution for losses resulting from offenses that he did not commit likewise offends due process. This Court should reject the Fifth Circuit's position to avoid the serious constitutional problems that otherwise would arise.

III. Contrary to the Fifth Circuit's interpretation, "the full amount of the victim's losses" means losses proximately caused by the offense conduct of the particular defendant.

The Fifth Circuit's opinion relies heavily on the directive in § 2259(b)(1) that "[t]he order of restitution under this section shall direct the defendant to

pay . . . the full amount of the victim's losses." The Fifth Circuit reasoned that this language required restitution in the amount of the full $3.4 million that Amy requested upon proof that a defendant's offense conduct harmed Amy, regardless of the extent of the harm. J.A. 428, 465-72, 477. In other words, "in for a penny, in for a pound." The Fifth Circuit's conclusion rests on an incorrect interpretation of "the full amount of the victim's losses."

"The full amount of the victim's losses" does not mean whatever losses the victim incurred, regardless of who caused them. "Losses" are defined in § 2259(b)(3)(F) in terms of the losses "suffered by the victim as a proximate result of the offense," including (as argued above) the specific types of losses listed at § 2259(b)(3)(A)-(E). Even accepting *arguendo* the Fifth Circuit's position that the enumerated losses do not have a proximate-cause requirement, the definition of "victim" at § 2259(c) limits compensable losses to those caused by harms suffered "as a result of the commission of a crime." The Fifth Circuit's award of $3.4 million to cover all Amy's losses from her sexual abuse and its distribution on the internet consists almost entirely (and in Paroline's case, entirely, J.A. 230) of losses caused by persons other than the individual defendant convicted of possessing her image. *See United States v. Laraneta*, 700 F.3d 983, 991 (7th Cir. 2012) (Posner, J.) ("[I]t is beyond implausible that the victims would have suffered the harm they did had [the defendant] been the only person in the world to view pornographic images of them.").

The phrase "full amount of the losses" is not unique to § 2259. It is also found in 18 U.S.C. § 3664, which governs the issuance and enforcement of restitution orders, including those under 18 U.S.C. §§ 2259, 3663 and 3663A. Section 3664(f)(1)(A) states:

> In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

The circuits overwhelmingly recognize that restitution under § 3663A is limited to losses caused by the defendant's offense conduct.[6] Indeed, 18 U.S.C. § 3663A(a)(2) defines "victim" as "a person directly and proximately harmed as a result of the commission of an offense." In light of the limits on restitution under § 3663A, the directive that the court order restitution in the "full amount of each victim's losses" in § 3664(f)(1)(A) could not require restitution for

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[6] *United States v. Janosko*, 642 F.3d 40, 41-42 (1st Cir. 2011) (applying *Hughey*, 495 U.S. at 412-22, to the MVRA, § 3663A); *United States v. Oladimeji*, 463 F.3d 152, 157-58 & n.1 (2d Cir. 2006) (same); *Singh v. Attorney General of U.S.*, 677 F.3d 503, 513 & n.12 (3d Cir. 2012) (same); *United States v. Newsome*, 322 F.3d 328, 340-41 (4th Cir. 2003) (same); *United States v. Maturin*, 488 F.3d 657, 660-61 & n.2 (5th Cir. 2007) (same); *United States v. Jones*, 641 F.3d 706, 714 (6th Cir. 2011) (same); *United States v. Randle*, 324 F.3d 550, 555-56 & n.3 (7th Cir. 2003) (same); *United States v. DeRosier*, 501 F.3d 888, 896 & n.13 (8th Cir. 2007) (same); *United States v. Griffith*, 584 F.3d 1004, 1019 (10th Cir. 2009) (same); *United States v. Fair*, 699 F.3d 508, 512 (D.C. Cir. 2012) (same).

losses beyond those caused by the offense conduct of the defendant in the criminal proceeding in which the restitution is being ordered.

Congress surely intended the phrase "full amount of the victim's losses" to mean the same thing in § 2259(b)(3) and § 3664(f)(1)(A). As originally enacted in 1994, § 2259(b)(1) directed courts to order restitution "in the full amount of the victim's losses." Pub. L. No. 103-322, § 40113(b), 108 Stat. 1902, 1907. It was not the first time, however, Congress had used that phrase. The language of what is now § 3664(f)(1)(A) was proposed as § 4(d)(1)(A) of the Victims' Rights and Restitution Act of 1990, H.R. 5368, 101st Cong. (1990),[7] and again as § 2(d)(1)(A) of the Crime Victims' Restitution Act of 1991, H.R. 1809, 102d Cong. (1991),[8] and S. 566, 102d Cong. (1991).[9] The bills provided:

> The court shall order restitution to a victim in the full amount of the victim's losses as determined by the court and without consideration of –
>
> (A) the economic circumstances of the offender . . . .

None of these bills became law, but they establish two things. First, the phrase "in the full amount of the victim's losses" was familiar to Congress at least four

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[7] *Available at* http://tinyurl.com/hr5368101.

[8] *Available at* http://tinyurl.com/hr1809102.

[9] *Available at* http://tinyurl.com/s566102C.

years before Congress included it in § 2259. Second, the phrase reflected congressional dissatisfaction with the VWPA, § 3663, which allowed a court to award less than the full amount of the victim's losses or no restitution at all if it thought the defendant could not pay. The directive to order restitution in "the full amount of the victim's losses" was intended to reject the more limited scope of restitution in the VWPA. Indeed, these same bills proposed to substitute "the court shall order" for "the court may order" in § 3663(a)(1)(A). *See also* S. Rep. No. 103-138, at 56 (1993) (explaining that § 2248 and § 2259 were intended to "reverse" the "assumption" under § 3663 that restitution should not be ordered because the defendant lacked the resources to pay); Goodwin, *supra*, § 2.18, at 37 (stating that "full amount" means that the amount of restitution "cannot be based on a consideration of the defendant's financial circumstances"). The phrase had nothing to do with whether the victim's compensable losses were limited by the rule of *Hughey* or by principles of proximate causation.

The push for mandatory restitution (other than in sex abuse cases such as § 2259) culminated in the enactment of the Mandatory Victims' Restitution Act (MVRA), Pub. L. No. 104-132, 110 Stat. 1227, 1227-41, in 1996. The MVRA did three things of relevance here. First, it enacted § 3663A, the mandatory restitution statute. *See id.* at § 204, 110 Stat. at 1227-29. Second, it added the "full amount of the losses" language at § 3664(f)(1)(A) as part of a larger revision of

that statute. *See id.* at § 206, 110 Stat. at 1234. Third, it added a requirement at § 2259(b)(2) that restitution orders under § 2259 "shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." *See id.* at § 205(a)(1)(E), 110 Stat. at 1231. With the 1996 amendment, § 2259(b) now states that "(1) [t]he order of restitution . . . shall direct the defendant to pay the victim . . . the full amount of the victim's losses . . . (2) in accordance with section 3664 . . . ." In this context, it is unlikely that Congress intended "the full amount of the victim's losses" to mean different things in § 2259 and § 3664.

In sum, "the full amount of the victim's losses" for purposes of § 2259 means the same thing as "the full amount of the victim's losses" in § 3664(f)(1)(A), which does not extend compensable losses beyond those allowed under § 3663A, that is, losses proximately caused by the defendant's offense conduct.

IV. Paroline did not cause the emotional distress which led to Amy's need for mental health counseling and reduced her earning potential because Amy stipulated that she never knew of his offense conduct.

Limiting § 2259 restitution to losses proximately caused by the particular defendant's offense conduct makes resolution of this case straight-forward. The main losses that Amy claims – the cost of mental health counseling and reduced earning potential –

flow from her emotional distress. But as a factual matter Paroline did not cause Amy emotional distress because she stipulated in the district court that she did not know of his offense conduct. J.A. 230. Therefore, he did not cause the losses that Amy claims as a result of her emotional distress.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Fifth Circuit with instructions to affirm the district court's judgment in Paroline's case.

Respectfully submitted,

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