No. 12-8561

In The
Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES AND AMY UNKNOWN,

Respondents.

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

BRIEF OF AMICI CURIAE NATIONAL CRIME VICTIM BAR ASSOCIATION, ARIZONA ASSOCIATION FOR JUSTICE, CONNECTICUT TRIAL LAWYERS ASSOCIATION, FLORIDA JUSTICE ASSOCIATION, AND OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT AMY UNKNOWN

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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?

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STATEMENT OF INTEREST[1]

The National Crime Victim Bar Association ("NCVBA") is an affiliate and program of the National Center for Victims of Crime. NCVBA is a specialty practice bar for attorneys who represent victims of crime in civil claims against intentional and negligent tortfeasors and in related criminal cases. NCVBA's membership consists of approximately 300 attorneys in 43 states and the District of Columbia who are committed to civil justice for victims of crime. The organization maintains a case law and pleadings database, and offers continuing legal education programs to improve the quality of legal practice in this area of the law. The NCVBA also works to increase awareness of the civil and criminal remedies available to victims of crime.

The Arizona Association for Justice, also known as the Arizona Trial Lawyers Association, was founded in 1963 and is dedicated to helping those who are injured through no fault of their own. The mission of the Arizona Association for Justice is to help any person injured by the misconduct or negligence of others to obtain justice in the courts of Arizona. The organization has a strong interest in ensuring that innocent victims of child pornography crimes are fully

[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

compensated for the life-altering damages they have suffered at the hands of convicted criminals.

The Connecticut Trial Lawyers Association ("CTLA"), formed in 1954, is a non-profit professional association dedicated to creating and maintaining a more decent and just society by preserving and promoting individual rights within the justice system. CTLA and its Connecticut members have a strong interest in supporting the rights of innocent victims of child pornography to pursue full and fair compensation through the justice system for the devastating damages they have suffered at the hands of criminals convicted of exploiting them for personal profit and self-gratification. Crimes against victims of child pornography present a significant societal problem that cause real and permanent harm to victims. CTLA believes perpetrators of these crimes should be held jointly responsible for paying full restitution for the serious harm they cause, pursuant to 18 U.S.C. § 2259, so that victims can pursue fair and just compensation for their injuries and perpetrators are held accountable for their wrongdoing.

The Florida Justice Association ("FJA") is a voluntary statewide association of approximately 3,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts.

The Oregon Trial Lawyers Association ("OTLA") is an organization of attorneys committed to the constitutional principles of access to the courts and trial by jury, and to a fair and efficient civil justice system. Its members represent plaintiffs or claimants in personal injury, civil rights, consumer, employment, workers compensation, and business tort litigation. OTLA members often represent individuals who have been the victims of crimes, including those who have suffered child sexual exploitation.

Amici are interested in this issue because of the organizations' commitment to victims of child sex abuse and child pornography. In particular, amici's members recognize that criminal restitution is often child pornography victims' sole means of obtaining compensation because these victims are incapable of pursuing civil remedies against those who have victimized them due to the likelihood of opportunities for re-victimization in the civil discovery process.

SUMMARY OF ARGUMENTS

This Court recognized more than 30 years ago that "the exploitive use of children in the production of pornography has become a serious national problem." *New York v. Ferber*, 458 U.S. 747, 749 (1982). Since that time, the Court has also recognized that the distributors, possessors, and viewers of child pornography are also responsible for the proliferation of the child pornography problem, and that the tools

needed to attack the problem must include preventative, enforcement, and remedial laws. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (in proscribing the possession and viewing of child pornography, Ohio sought "to destroy a market for the exploitative use of children."); *Jacobson v. United States*, 503 U.S. 540, 548 (1992) ("There can be no dispute about the evils of child pornography or the difficulties that laws and law enforcement have encountered in eliminating it."); *see also United States v. Williams*, 553 U.S. 285 (2008) (rejecting a First Amendment challenge to a law that criminalized offers to provide or requests to obtain child pornography).

Restitution has historically served a variety of penal purposes in the criminal justice system. *See*, *e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986) (concluding that restitution in criminal proceedings "focus[es] on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation). However, beginning with the passage of the Victim and Witness Protection Act of 1982,[2] the policy reasons for ordering restitution have shifted

[2] Pub. L. No. 97-291, 96 Stat. 1248 (1982). The restitution provisions were codified at 18 U.S.C. §§ 3579-3580 (1982). Before the passage of the Victim and Witness Protection Act, the authority to order restitution in federal criminal cases was found in 18 U.S.C. § 3651 (1982), the federal probation statute.

from rehabilitation and punishment of the defendant to compensation of the victim.[3]

In 1994 as part of the Violence Against Women Act, Congress enacted 18 U.S.C. § 2259 as a broad remedial tool to assist victims of child sexual exploitation and abuse in recovering the full financial losses resulting from the crimes perpetrated against them. That the primary purpose of § 2259 is to compensate victims of child sexual exploitation is apparent from its legislative history and express terms.

Tort law principles have often been applied by courts analyzing restitution questions, including the circuit courts that have attempted to construe § 2259. However, with the exception of the Fifth Circuit in this case, few of these courts have acknowledged that child pornography crimes are akin to intentional torts.[4] As such, legal principles applicable to intentional torts should guide the court in construing § 2259. These principles include the lenient causation requirements historically applied to intentional torts, and

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[3] According to the Senate Judiciary Committee, "[W]hatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." S. Rep. No. 532, 97th Cong., 2d Sess. 1, 30, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2515, 2536.

[4] Child pornography crimes require knowing acts, and are general intent crimes. *United States v. Matthews*, 209 F.3d 338, 350-52 (4th Cir. 2000) (ruling in child pornography case that criminalization of knowing conduct without proof of specific intent or willfulness does not violate due process).

the application of joint and several liability to intentional tortfeasors who have harmed the same victim.

All perpetrators of child pornography crimes share the common purpose and effect of encouraging child sexual abuse, whether by producing, distributing, possessing, or viewing images depicting child sexual abuse. Each is dependent upon the actions of the others, and therefore, principles of joint enterprise are appropriately and fairly applied to those who produce, distribute, possess, and view images of the same child being sexually abused.

The only fair and feasible way to allocate the restitution obligation among more than a few perpetrators of child pornography crimes against a particular victim is to find each of the perpetrators jointly and severally liable to pay that victim the full amount of the victim's proven restitution. The other allocation methods used by the courts do not reflect the indivisibility of the victim's injuries, nor do they comply with § 2259's mandate that courts order restitution "in the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1).

Amici urge this Court to affirm the Fifth Court's holding, including its analysis of the causation required by § 2259 and its application of joint and several liability to the producers, distributors, possessors, and viewers of child pornography, so that Congress's goal of full restitution to these victims can be achieved.

ARGUMENTS

I. Child Pornography Encourages and Perpetuates the Sexual Abuse of Children, and Broad Preventative, Enforcement, and Remedial Tools are Needed to Address the Problem.

> "Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet."

United States v. Williams, 553 U.S. 285, 307 (2008).

Indeed, the Internet has created both a worldwide market and a permanent repository for images of children being sexually abused and tortured, and both legislatures and courts have recognized that powerful preventative, enforcement, and remedial tools are needed to attack the problem. *E.g.*, *United States v. American Library Assn., Inc.*, 539 U.S. 194 (2003) (rejecting a First Amendment challenge to the Children's Internet Protection Act, which required public libraries' use of Internet filtering software in order to qualify for certain federal funding); *United States v. Williams*, 553 U.S. 285 (2008) (finding a federal law that criminalized offers to provide or requests to obtain child pornography to be constitutional against a First Amendment challenge).

Well before the explosive growth of the Internet,[5] this Court unequivocally acknowledged the importance of preventing and attacking the problem of child pornography, recognizing that its production requires that children be sexually abused: "[T]he exploitative use of children in the production of pornography has become a serious national problem[,]" and "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. at 749, 757.

Recognizing the need for strong medicine against a virulent crime, state legislatures, Congress, and this Court have stripped First Amendment protection from the distribution, possession, and viewing of child pornography, and even from offers to provide or requests to obtain child pornography. *New York v. Ferber*, *supra* (distributing); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (possessing and viewing); *United States v. Williams*, 553 U.S. 285 (2008) (offers to provide or requests to obtain child pornography).

The effects of child pornography crimes on the victims are long lasting and devastating, and go well beyond the abuse and torture that occurred in the creation of the images:

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[5] The origins, operation, and expansion of the Internet, and its use as a means of distribution of pornography, were first described by this Court in *Reno v. ACLU*, 521 U.S. 844 (1997).

> Child pornography victims are harmed initially during the production of images, and the perpetual nature of child pornography distribution on the Internet causes significant additional harm to victims. Many victims live with persistent concern over who has seen images of their sexual abuse and suffer by knowing that their images are being used by offenders for sexual gratification and potentially for "grooming" new victims of child sexual abuse.
>
> Child pornography offenses are international crimes. Images depicting the abuse of children are transmitted both domestically and internationally to offenders across the world, each of whom may continue to redistribute the same images. Once an image is distributed via the Internet, it is impossible to eradicate all copies of it. The harm to victims thus is lifelong.

U.S. Sentencing Commission, *Federal Child Pornography Offenses: Report to the Congress* vii (2012).

In passing the legislation that included § 2259, Congress explicitly recognized the type and scope of harms that victims of child pornography suffer, and gave federal courts the broad tools needed to compensate them.

II. Restitution for Victims of Child Pornography Serves a Number of Functions, but Its Primary Purpose is to Compensate the Victims.

Much has changed since 1986 when this Court first discussed the purposes of restitution in the American criminal justice system in *Kelly v. Robinson*. In construing the Connecticut restitution statute at issue in that case, the Court wrote, "The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole." *Kelly v. Robinson*, 479 U.S. 36, 52 (1986). That was, said the Court, "[b]ecause criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation. . . ."[6] *Id.* at 53. *See also* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 939, 941 (1984) ("When determining the amount of a restitution order, most courts consider not only the amount of the victim's loss, but also the rehabilitative, deterrent, and retributive

[6] The Court's comments reflected the common view at the time, i.e. that the compensatory effect of criminal restitution – to the extent restitution was even available in a jurisdiction – was incidental to its penal purposes. *See*, *e.g.*, W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* 7 (5th ed. 1984) ("Although restitution is sometimes a stated condition of probation of a convicted offender, a criminal prosecution is not concerned directly with compensation of the injured individual against whom the crime is committed, and the victim's only formal part in it is that of an accuser and a witness for the state. So far as the criminal law is concerned, the victim will leave the court empty-handed.").

effects of the order. . . . [R]estitution is an appropriate and effective criminal sanction that promotes the criminal law's goals of rehabilitation, deterrence, and retribution.").[7]

Kelly v. Robinson was decided eight years before § 2259 was enacted as part of the Violence Against Women Act ("VAWA"),[8] ten years before the Mandatory Victim Restitution Act ("MVRA")[9] was passed, and nearly twenty years before the Crime Victims' Rights Act ("CVRA")[10] unequivocally set forth Congress's intent that crime victims recover "full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6). In that 20-year period, the rights of crime victims

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[7] *See also* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. Rev. 52 (1982); Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 Yale L. J. 505 (1984).

[8] VAWA was part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 40113, 108 Stat. 1907 (1994).

[9] Pub. L. No. 104-132, 110 Stat. 1214 (1996), codified as 18 U.S.C. § 3663A. As the Ninth Circuit has noted, the "primary and overarching goal" of the MVRA "is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being." *United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004) (internal quotations, citations, and emphasis omitted).

[10] CVRA is shorthand for the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, passed as part of the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004), codified as 18 U.S.C. § 3771.

acquired constitutional status in most states,[11] and the mandates of the CVRA gave victims a meaningful role in the federal criminal justice system, which had up until then "functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard." *Kenna v. U.S. Dist. Court for C.D.Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). *See generally*, Hon. Jon Kyl, *et al.*, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581 (2005) (describing the historical background of the CVRA and its legislative history).

The primary goal of § 2259 is to fully compensate victims of child sexual exploitation. 18 U.S.C. § 2259(b)(4) (courts "shall direct the defendant to pay the victim . . . the full amount of the victim's losses . . . " regardless of the defendant's ability to pay and regardless of whether the victim has been or may be compensated for the same injuries from another source). While restitution imposed under § 2259 may also have rehabilitative, deterrent, and/or retributive effects on criminal defendants, § 2259 restitution orders must be calculated and enforced based on Congress's directive that victims of child sexual exploitation be compensated for "the full amount of [their] losses." *Id.*

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[11] Thirty-three states have amended their constitutions to provide rights to crime victims. Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis of the Proposal*, 5 Phoenix L. Rev. 301, 304 n.16 (2012).

III. Intentional Tort Principles Should Guide Courts in Fashioning Restitution Orders in Child Pornography Cases.

Child pornography crimes require knowing or intentional conduct. Therefore, any tort law principles to which the Court looks for guidance in interpreting and applying § 2259 should be principles that apply to intentional tortfeasors.

Joint and several liability is the rule for intentional tortfeasors. Even jurisdictions in which it has been abolished or modified by statute or court decisions, joint and several liability remains the rule for intentional tortfeasors. *See Restatement (Third) of Torts: Apportionment of Liability* § 12 at p. 110 (2000) ("Each person who commits a tort that requires intent is jointly and severally liable for any indivisible injury legally caused by the tortious conduct."). *See also Uniform Apportionment of Tort Responsibility Act* § 6(1) (2003 Rev.) ("If two or more parties adjudged liable acted in concert or with an intent to cause personal injury to . . . the claimant, the court shall enter judgment jointly and severally against the parties for their joint share.").

Although the "tort reform" movement has resulted in the adoption by many states of some form of comparative fault, nine states continue to adhere to the traditional and pure sense of joint and several liability: Alabama, *see Keibler-Thompson Corp. v. Steading*, 907 So. 2d 435 (Ala. 2005); Delaware, 10 Del. Code § 6301 (1953); Maine, 14 Me. Stat. § 156 (1965);

Maryland, Md. Code § 3-1401 (1973); Massachusetts, *see O'Connor v. Raymark Indus.*, 518 N.E.2d 510 (Mass. 1988) and Mass. Gen. Laws 231B, § 1 (1962); North Carolina, N.C. Stat. § 1B-2 (1967); Rhode Island, R.I. Gen. Laws § 10-6-2 (1956); and Virginia. Va. Code § 8.01-443 (1977). A plaintiff recovering under the laws of any of these eight states is able to recover the entire amount from any particular defendant. West Virginia also follows a pure joint and several liability rule, with limited exceptions. W.V. Code § 55-7-24 (2005). In these nine states, wrongdoers are jointly and severally liable regardless of whether they acted intentionally or negligently to cause harm. That is, if the wrongdoer concurs or combines with another wrongdoer, and together they produce injury or damage, each wrongdoer is liable for the resulting injury or damage and the negligence of each will be deemed the proximate cause of the injury. *E.g.*, *Keibler-Thompson Corp. v. Steading*, 907 So. 2d at 444. In this case, if Amy were to bring a civil suit arising from the child pornography crimes perpetrated against her in any of these nine states, she would be entitled to recover from any and all of the defendants.

In the rest of the states, some variation of comparative fault exists, but even in those states, the liability of intentional tortfeasors remains joint and several. Some states have accomplished this by excepting intentional acts from their comparative fault statutes, thereby holding negligent tortfeasors

severally liable while retaining joint and several liability for intentional tortfeasors.[12]

In a few other states that have enacted statutes limiting the application of joint and several liability, courts applying those statutes have excluded intentional torts from their reach. For example, Oregon's comparative fault legislation has been interpreted to apply to actions based on negligence and gross negligence, but not to intentional torts. *Shin v. Sunriver Preparatory Sch., Inc.*, 111 P.3d 762 (Or. App.), *rev. denied*, 122 P.3d 64 (Or. 2005). Washington's comparative fault statute has been determined not to apply at all to intentional torts. *Welch v. Southland Corp.*, 952 P.2d 162 (Wash. 1998). In these two states,

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[12] For example, Pennsylvania's comparative fault statute, the Fair Share Act, contains an exception for intentional tortfeasors, stating that they are still to be held jointly and severally liable. 42 Pa. Stat. § 7102 (2011). Similarly, in Minnesota, persons who commit intentional torts are held jointly and severally liable. Minn. Stat. § 604.02 (2003), *see Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012) (discussing exception that subjects intentional tortfeasors to traditional joint and several liability). New York's statute follows the same trend, putting limitations on joint and several liability except for "actions requiring proof of intent." N.Y. C.P.L.R. 1602 (McKinney 1986), *see Chianese v. Meier*, 774 N.E.2d 722 (N.Y. 2002). Other states holding intentional actors jointly and severally liable for the harm caused include: Connecticut, Conn. Stat. § 52-572h (1986), *see Allard v. Liberty Oil Equip. Co. Inc.*, 756 A.2d 237 (Conn. 2000); Florida, Fla. Stat. § 768.81 (2006), *see Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987); Hawaii, Haw. Stat. § 663-10.9 (1999); New Mexico, N.M. Stat. § 41-3A-1 (1987); and Ohio, Ohio Code 2307.22 (2003).

as in every state, in actions involving a fault-free plaintiff and multiple intentional tortfeasors, the intentional tortfeasors against whom judgment has been entered are jointly and severally liable for the plaintiff's total damages. *Maguire v. Teuber*, 85 P.3d 939, 940-41 (2004), *overruled on other grounds by Barton v. State, Dep't of Transp.*, 308 P.3d 597 (2013).

Similarly, although Utah[13] has entirely abolished joint and several liability as defined by traditional common law, their comparative fault statute defines fault in such a way that it *excludes* intentional wrongs – "fault" only includes "any actionable breach of legal duty, act, or omission . . . including negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product." *Egbert v. Nissan Motor Co., Ltd.*, 228 P.3d 737, 746 (Utah 2010).

As noted by the Reporter of the *Restatement (Third) of Torts: Apportionment of Liability*, "Not a single appellate decision has been found that stands for the proposition that joint and several liability of intentional tortfeasors has been abrogated or modified." *Id.* § 12, Reporters' Note, cmt. b.[14]

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[13] Utah Code Ann. § 78B-5-818 (1986).

[14] The Reporter's Note also observes that "[i]ntentional tortfeasors have been held jointly and severally liable since at least the decision in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799)[.]" *Id.*

With more than 200 years of unwavering precedent, the Fifth Circuit was correct to apply joint and several liability to those whose intentional production, distribution, possession, and viewing of photographs of Amy being horrifically sexually assaulted caused her permanent and unimaginable harm.

IV. Causation Requirements for Intentional Tortfeasors are More Lenient than for Negligent Tortfeasors.

Like most of the circuit courts that have applied § 2259, the parties discuss at some length whether there is a proximate cause requirement for all categories of restitution in § 2259, or just for the catch-all category in subparagraph (b)(3)(F) for "all other losses suffered by the victim as a proximate result of the offense." This focus on proximate causation is misplaced in the context of intentional torts:

> [C]ourts have generally held that where the acts of a defendant constitute an intentional tort or reckless misconduct, as distinguished from mere negligence, the aggravated nature of his action is a matter which should be taken into account in determining whether there is a sufficient relationship between the wrong and the plaintiff's harm to render the actor liable. Specifically, the factors to be taken into account are the tortfeasor's intention to commit a wrongful act, the degree of his moral wrong in so acting, and the seriousness of the harm intended.

Johnson v. Greer, 477 F.2d 101, 106-07 (5th Cir. 1973). *See also Seidel v. Greenberg*, 260 A.2d 863, 871, 873 (N.J. Super. 1969) ("[I]n a case involving [intentional or reckless misconduct] a fact finder may be permitted to find that the actor's conduct bears a sufficient causal relation to a plaintiff's harm so as to make him liable, although no such finding would be permissible if defendant's conduct were merely negligent. . . . Indeed, it appears that many of the limitations upon liability under the doctrine of 'proximate cause,' as usually expounded in negligence cases do not apply to intentional torts."); *United Food & Commercial Workers Unions, Employers Health & Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1274 (11th Cir. 2000) ("[T]he usual common law rule seems to be that the strictures of proximate cause are applied more loosely in intentional tort cases."). The rationale behind this reduced causation requirement is simple equity – someone who intentionally harms another person is more culpable than someone whose carelessness harms another person. "A higher degree of responsibility is imposed upon a wrongdoer whose conduct was intended to cause harm than upon one whose conduct was negligent." *State for Use & Benefit of Richardson v. Edgeworth*, 214 So. 2d 579, 587 (Miss. 1968).

A lenient causation requirement for intentional bad actors is also consistent with the historical consensus that intentional wrongdoers rather than their innocent victims should be financially responsible for the harm to the victim arising from the wrong.

E.g. Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortg. Co., 390 So. 2d 601, 609 (Ala. 1980) ("This trend is dictated by the policy that liability even though potentially tremendous should be imposed on the wrongdoer rather than the victim be uncompensated. Hence, even very remote causation may be found where the defendant acted intentionally."); *see also* John Henry Wigmore, *Joint-Tortfeasors and Severance of Damages*, 17 Ill. L. Rev. 458, 459 (1923) ("[W]herever there is any doubt at all as to how much [harm] each [tortfeasor] caused, take the burden of proof off the innocent sufferer[.]").

V. The Perpetrators of Child Pornography Crimes are Participants in a Common Enterprise.

Each producer, purveyor, possessor, and viewer of the photos of Amy's sexual abuse has knowingly taken part in the larger, grotesque enterprise of her sexual torture for profit, and principles of joint enterprise are appropriately and fairly applied to them.

The tort liability of participants in a common or joint enterprise is described by the leading expert as follows:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 46, at 323 (5th ed. 1984). Another leading scholar has described liability for concerted tortious acts as follows:

> Those who cooperate, tacitly or expressly, in particular conduct to pursue a common illegal design (or a legal design by illegal acts) are said to be acting in concert. Each of those acting in concert is liable jointly and severally for all of the intended or foreseeable resulting harm.

Dan B. Dobbs, *The Law of Torts* § 340, at 936 (2000). These definitions of concerted action apply squarely to those who record acts of child abuse, acquire the recordings from the recorder and distribute them to others, obtain and redistribute the recordings to others, or simply view them.

One decades-old example of an appropriate application of joint and several liability for concerted action comes from a case cited by Dobbs, *Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972), which involved a suit against a group of manufacturers of dynamite blasting caps and their industry trade association for injuries caused by their product. In finding the entities jointly and severally liable for injuries to several children who had found and played with the blasting caps, the Eastern District of New York wrote:

> Joint liability has historically been imposed in four distinguishable kinds of situations:

> (1) the actors knowingly join in the performance of the tortious act or acts; (2) the actors fail to perform a common duty owed to the plaintiff; (3) there is a special relationship between the parties (e.g., master and servant or joint entrepreneurs); (4) *although there is no concerted action nevertheless the independent acts of several actors concur to produce indivisible harmful consequences*. 1 Harper & James, *The Law of Torts* § 10.1 at 697-98 (1956).
>
> *See also* Prosser, *Joint Torts and Several Liability*, 25 Calif. L. Rev. 413, 429 *et seq*. (1937).
>
> These categories reflect three overlapping but distinguishable problems with which the law of joint liability has been concerned. The first is the problem of joint or group control of risk: the need to deter hazardous behavior by groups or multiple defendants as well as by individuals. The second is the problem of enterprise liability: the policy of assigning the foreseeable costs of an activity to those in the most strategic position to reduce them. The third is the problem of fairness with respect to burden of proof: the desire to avoid denying recovery to an innocent injured plaintiff because proof of causation may be within defendants' control or entirely unavailable.

Id. at 371 (emphasis added). The court found the defendants jointly and severally liable even though the identity of the particular company whose blasting cap caused each child's injury could not be proven in

several of the cases. *Accord*, *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) (analyzing and applying concerted action theories to hold the "passive but compliant partner" of a serial burglar jointly and severally liable for the burglar's murder of the plaintiff's decedent during a burglary even though there was no evidence the partner took part in, or knew of, the burglary or murder of the decedent; her involvement was some record keeping for, and benefitting financially from, the serial burglaries); *see generally* Wigmore, *Joint-Tortfeasors and Severance of Damages*, *supra* at 459 ("Wherever two or more persons by culpable acts, whether concerted or not, cause a single general harm, not obviously assignable in parts to the respective wrongdoers, the injured party may recover from each for the whole.").

The principle of joint enterprise liability has more recently been applied to terrorist organizations and their financial supporters. *See*, *e.g.*, *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 558 U.S. 981 (2009) (financial donors to terrorist organization held jointly and severally liable for treble damages for the act of international terrorism which resulted in plaintiff-decedent's death).

While one circuit has rejected the application of joint enterprise liability to child pornographers prosecuted in different cases in a footnote, that court undertook no meaningful analysis to arrive at its out-of-hand rejection. *United States v. Monzel*, 641 F.3d 528, 539 n.10 (D.C. Cir.), *cert. denied sub nom. Amy*

v. Monzel, 132 S.Ct. 756 (2011). Amici submit that child pornographers whose sadistic desires target the same victim are engaged in concerted action – they are tacitly cooperating in particular conduct to exploit the sexual abuse of a child. Accordingly, they should be jointly and severally liable for the harm they collectively cause that victim.[15]

VI. There is No Workable Alternative to Joint and Several Liability in This Case or in Cases Like It.

The United States and the petitioner argue that the law does not provide for the application of joint and several liability to different defendants in different cases in different jurisdictions. While it is true that § 2259 does not explicitly authorize a district court to order a child pornography perpetrator to pay restitution jointly and severally with perpetrators convicted of victimizing the same child in other jurisdictions, neither § 2259 nor the other statutes incorporated by reference into § 2259, including 18 U.S.C. § 3664(h) (authorizing apportionment of liability for restitution among defendants in the same case), forbid it.

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[15] The *Restatement (Third) of Torts: Apportionment of Liability* (2000) "takes no position on whether a concerted-action tortfeasor is also jointly and severally liable for the share of comparative responsibility assigned to an independent tortfeasor who is also liable for the same indivisible injury." *Id.* at § 15, cmt. a.

Notably, none of the parties offers a workable means of apportionment of restitution among child pornography perpetrators in different jurisdictions who targeted the same victim. That is because apportionment is not workable except in cases in which there is limited and finite distribution and possession of the images. This is a common problem in cases involving multiple tortfeasors who cause indivisible injuries,[16] to which the common-sense solution is as follows:

> Where a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant's conduct has been a cause in fact, it is likely that the apportionment will be made. Where no such basis can be found, the courts generally hold the defendant for the entire loss,

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[16] No party makes a meaningful argument that Amy's injuries are divisible, and the unchallenged evidence before the district court was that Amy's damages were not divisible. The most recent *Restatement* acknowledges that damages should be treated as divisible only if there truly are separable injuries that can be attributed to different persons based on causation:

> Damages can be divided by causation when the evidence provides a reasonable basis for the factfinder to determine: (1) that any legally culpable conduct of a party or other relevant person to whom the factfinder assigns a percentage of responsibility was a legal cause of less than the entire damages for which the plaintiff seeks recovery and (2) the amount of damages separately caused by that conduct.

Restatement (Third) of Torts: Apportionment of Liability § 26(b) (2000). No such evidence was presented to the trial court.

> notwithstanding the fact that other causes have contributed to it.
>
> The distinction is one between injuries which are reasonably capable of being separated and injuries which are not.

W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 52, at 345 (5th ed. 1984).

This is not a case in which apportionment is possible. The record below, created several years and thousands of downloads ago, indicates that the National Center for Missing and Exploited Children had identified 35,570 of Amy's child sexual abuse images among the evidence in more than 3,200 cases. The anguish experienced by Amy is not from the knowledge that any one of the thousands of individuals has viewed the images, but from the knowledge that thousands have done so, and continue to do so, and will continue to do so for the rest of her life. Every person who views her image causes her harm, and the apportionment methods discussed and applied by the other circuits in their efforts to calculate and award restitution to Amy, as described below, demonstrate the impossibility of reasoned apportionment.

The Second, Ninth, and Tenth Circuits' approach has been to require particularized harm by individual defendants. *United States v. Aumais*, 656 F.3d 147, 154-55 (2d Cir. 2011) (no basis for restitution award against Aumais where no evidence that victim had any direct contact with Aumais or knew of his existence; under these circumstances, Aumais was not a

proximate cause of the victim's loss); *United States v. Kennedy*, 643 F.3d 1251, 1263 (9th Cir. 2011) (evidence that Kennedy "participated in the audience of persons" who viewed the victims' images was sufficient to establish that Kennedy was "one cause of the generalized harm" suffered by the victims but "not sufficient to show that they [Kennedy's actions] were a proximate cause of any particular losses."); *United States v. Benoit*, 713 F.3d 1, 21 (10th Cir. 2013) ("The evidence presented at Benoit's sentencing hearing suggests that Vicky has suffered various losses based on her knowledge that individuals receive and possess visual depictions of her exploitation. However, the evidence that Benoit was specifically responsible for any of these losses was relatively thin.").

Limiting restitution to defendant-specific harm does not provide any compensation for the harm caused by the aggregate pattern of viewing the victim's images. As this Court acknowledged over thirty years ago in *New York v. Ferber*, "the materials produced are a permanent record of the children's participation and harm to the child is exacerbated by their circulation." 458 U.S. at 759. In the vast majority of cases, as in this one, the harm caused by the aggregate pattern of viewing will dwarf any identifiable case-specific harm, and restitution limited only to case-specific or defendant-specific harms will fall far short of the "full" restitution commanded by § 2259.

The First Circuit has awarded restitution based on averaging of awards. In *United States v. Kearney*, 672 F.3d 81, 100-01 (1st Cir. 2012), *cert. dismissed*,

133 S.Ct. 1521 (2013), the court approved entry of an award that averaged thirty-three prior restitution awards, discarding the highest and lowest awards. This approach lacks a principled basis and is therefore arbitrary for several reasons: First, the approaches used by courts in the other benchmark cases may themselves vary widely or be inconsistent with each other. Second, awards in those courts declining to impose joint and several liability (the majority of courts to date) will be a tiny fraction of a "full" award for the victim's harm, because average awards in most courts rejecting joint and several liability have been in the thousands of dollars rather than the over three million dollars calculated as Amy's total harm to date. Third, an average of restitution awards in federal child pornography cases fails to capture the contributions of perpetrators prosecuted for child pornography under state rather than federal law, not to mention the contribution of perpetrators not yet detected or for some reason not yet prosecuted in any jurisdiction. Fourth, the viewing of a victim's images is inherently an open ended phenomenon, because the images remain in various locations on the Internet, or in various computers used for distribution, and are continually being accessed by new or additional viewers. Even if a court could determine an accurate head count of perpetrators at one moment, that figure would become obsolete the next day. For all these reasons, an attempt to base a § 2259 restitution award on some average derived from awards in other federal cases will lead to arbitrary and unreasonable results,

again falling far short of the required "full" restitution award.

The Sixth Circuit adopted the United States' previously-recommended means of calculating restitution awards under § 2259 – on a per capita basis calculated from the number of defendants previously convicted of crimes involving the same victim. *United States v. Gamble*, 709 F.3d 541, 554 (6th Cir. 2013), approved a formula based on first calculating a "pool of a victim's provable losses that are not traceable to a single defendant" and then dividing this total loss by "the number of convicted possessors" as a "reasonable divisor." This per capita division is inherently arbitrary. It is not based on any finding that the particular defendant caused any particularized portion of the victim's harm. *See United States v. Benoit*, 713 F.3d at 22 (calculating portion of restitution award against Benoit by "implicit" per capita division of Vicky's total losses by the 222 restitution judgments Vicky had received to date was "not sufficient to show" that Benoit was " a proximate cause of any particular losses," at least in the absence of a specific finding that the victim's losses were "roughly equally" caused by each defendant). A per capita division of the victim's total loss among the hundreds or thousands of federal defendants would likely result in each award being a tiny fraction of "full" compensation, amounting in this case to thousands rather than millions of dollars. A per capita award based on that figure or figures of a similar order of magnitude would result in an award per case less than a thousandth of

Amy's "full" restitution, which is surely not what the drafters of § 2259 intended.

The per capita approach shares other problems with the average-of-awards approach. Calculation of a per capita share of the "full" harm based on the nationwide number of federal defendants would not capture the harms caused by perpetrators being prosecuted only in state courts. Even if defendants prosecuted in state courts could be added to the mix, there would still be harm from the aggregate viewing of perpetrators never caught or not yet prosecuted in any court. Because the offense is open ended and new perpetrators participate daily, any attempt to calculate an individual defendant's fractional per capita share of the total harm, whether based on federal defendants alone or on both state and federal defendants, would be obsolete immediately after it was made. The per capita approach is just as arbitrary as the average of awards approach, and just as much in violation of the statutory command of § 2259 to award full restitution.

The Eighth Circuit's approach has been to limit restitution awards on the basis of the date a particular defendant is found to have begun viewing prohibited images. *United States v. Fast*, 709 F.3d 712, 715, 723 (8th Cir. 2012) (affirming award of $3,333 in restitution based on finding that Fast began viewing victim's images on June 25, 2010). This approach, like the others mentioned above, does not take into account the open ended nature of the offense and the constant addition of additional perpetrators

participating in the aggregate harm caused by the collective viewing of the victims' images. It is also unclear from the *Fast* opinion exactly how the temporal allocation was or could be made. Arbitrarily tying restitution awards to expenses incurred after a certain date, if that indeed was the approach taken by the *Fast* court, would result in a failure to compensate the victim for a large part of the aggregately-caused harm, thus again falling far short of "full" compensation.

The Fourth, Eleventh, and D.C. Circuits have simply directed the trial courts to use some allocation method within their discretion, other than joint and several liability, without providing meaningful guidance on what that method might be. *United States v. Burgess*, 684 F.3d 445, 460 (4th Cir.), *cert. denied*, 133 S.Ct. 490 (2012) (noting that the "culpability of any one defendant regarding Vicky's loss is dependent at least in part on the role that defendant played with respect to her exploitation" but otherwise remanding for a redetermination of the restitution amount without suggesting a formula or calculation procedure); *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011) (affirming award of $12,700 in restitution without explanation of calculation method); *United States v. Monzel*, 641 F.3d at 540 ("on remand, the district court should consider anew the amount of Amy's losses attributable to Monzel's offense and order restitution equal to that amount," while acknowledging that "there is relatively little in the present record to guide its decisionmaking on this. . . ."); *see also United*

States v. Benoit, 713 F.3d at 22-23 ("we remand for a redetermination of the portion of damages allocable to Benoit, if any"); *cf. United States v. Gamble*, 709 F.3d at 554 (approving per capita allocation, but acknowledging that "different divisors may be reasonable" and that per capita apportionment "is not necessarily the only way to calculate restitution."); *United States v. Hargrove*, 714 F.3d 371 (6th Cir. 2013) (following *Gamble*).

As is apparent from these cases, leaving matters to the discretion of trial courts, without specifying guidelines or an appropriate approach to calculating an award under § 2259, invites arbitrary, unreasonable, and inconsistent results. Whatever else may be true about § 2259 restitution awards, the trial courts require clear guidance as to how they should be calculated.

VII. There is Nothing Fundamentally Unfair or Unworkable About Imposing Joint and Several Liability on Child Pornography Perpetrators Who Victimize the Same Child.

The primary argument against joint and several liability for all purveyors and possessors of child abuse images involving the same child is that it is not fair – that it would mean the producer of a child abuse image is ordered to pay the same amount of restitution as someone who merely downloads and views the image. Congress rejected the fairness argument in

1994 when it made all perpetrators of child pornography crimes liable for their victims' full losses.

Moreover, Congress's intent to treat child sexual exploitation restitution different from restitution awarded for other crimes is apparent in the express language of § 2259, which states that such restitution is to be calculated and enforced "[n]otwithstanding section 3663 or 3663A," in which the definition of "victim" and awardable losses are different. It is notable that despite this clear congressional intent to fully compensate victims of child sexual exploitation, several of the circuits that have held that joint and several liability for intentional tortfeasors is not available under § 2259 have upheld restitution orders holding multiple defendants jointly and severally liable to pay restitution for financial crimes. *E.g. United States v. Aumais*, 656 F.3d at 156 (no joint and several liability under 18 U.S.C. § 2259); *United States v. Tzakis*, 736 F.2d 867, 870-71 (2d Cir. 1984) (joint and several liability under 18 U.S.C. § 3651, probation, wire and travel fraud).[17]

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[17] *See also* Sixth Circuit: *United States v. Gamble*, 709 F.3d at 550-55 (no joint and several liability under 18 U.S.C. § 2259) and *United States v. Hunt*, 521 F.3d 636, 649 (6th Cir. 2008) (joint and several liability under 18 U.S.C. § 3664, health care fraud); Seventh Circuit: *United States v Laraneta*, 700 F.3d 983, 991-93 (7th Cir. 2012), *reh. denied en banc*, – F.3d – (7th Cir. 2013), *cert. denied*, 187 L. Ed. 2d 175 (2013) (no joint and several liability under 18 U.S.C. § 2259) and *United States v. Sensmeier*, 361 F.3d 982, 990-91 (7th Cir. 2004) (joint and several liability under 18 U.S.C. § 3663A, conspiracy and mail fraud); Eighth

(Continued on following page)

Additionally, in contrast to its express preemption of §§ 3663 and 3663A, Congress expressly incorporated § 3664 into § 2259. Section 3664 allows the court to consider a defendant's ability to pay when determining the manner in which the defendants must pay restitution. The fact is that most federally-convicted child pornographers are indigent. U.S. Sentencing Commission, *Federal Child Pornography Offenses: Report to the Congress* 192 (2012) (citing data from fiscal year 2010, Commission reported that 47.5% of child pornography distributors and possessors reported a negative net worth during the presentence investigation, and another 24.7% reported net worth of less than $10,000). Shifting the burden of paying restitution to convicted offenders who do have the ability to pay it in order to make the victim whole is far more equitable than leaving the victim uncompensated.

The Petitioner also warns of the possibility of overcompensation of the victim if convicted defendants are jointly and severally liable for paying restitution. This is a red herring. The only person in a position to track restitution in cases such as this is the victim,

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Circuit: *United States v. Fast*, 709 F.3d at 723 n.6 (no joint and several liability under 18 U.S.C. § 2259); and *United States v. Moten*, 551 F.3d 763 (8th Cir. 2008) (joint and several liability under 18 U.S.C. § 3664, aiding and abetting theft of public funds); Ninth Circuit: *Amy v. United States* (*In re Amy*), 714 F.3d 1165, 1167-68 (9th Cir. 2013) (no joint and several liability under 18 U.S.C. § 2259) and *United States v. Angelica*, 951 F.2d 1007, 1010 (9th Cir. 1991) (joint and several liability under 18 U.S.C. § 3663, mail fraud).

because restitution is awarded to her in both federal and state cases. While the federal government may well have access to restitution awarded to victims in different federal cases around the country, they cannot reasonably be expected to know what restitution has been awarded or collected by the victims in state cases. As Amy has done in this case, the answer to the remote possibility of overcompensation is to require victims to disclose what they have received to date at the time of each sentencing. Indeed, such a requirement is contemplated by § 3664(j), which requires the court to reduce restitution award if a victim has received compensation from other sources.

Finally, in the very hypothetical circumstance that the victim ever approaches "full" payment of the aggregate restitution awarded, the government and victim would be obligated to cease enforcement efforts. *See* 18 U.S.C. § 3664(j)(2) (restitution order must be reduced by amounts recovered by victim in civil suits) and 3664(m) (restitution order enforceable in the manner provided for in 18 U.S.C. §§ 3571-3574 and 3611-3615); 18 U.S.C. § 3613(3)(c) ("order of restitution made pursuant to sections . . . 2259 . . . or 3664 of this title is a lien in favor of the United States . . . and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated. . . .").

CONCLUSION

This Court recently commented on the foresight of the Framers of our Constitution in drafting a

document "capable of such resilience through time." *United States v. Comstock*, 560 U.S. 126, 130 S.Ct. 1949, 1965 (2010). Much of that resilience comes from the Necessary and Proper Clause, which permits Congress to legislate in a manner that is "reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement." *Id.* at 1957 (internal quotations omitted). While the Framers could not have conceived of the horrific, destructive scourge that child pornography has become, Congress has recognized the problem, and has given the federal courts broad authority and specific tools to address it. Those tools include 18 U.S.C. §§ 2259 and 3664, which give the courts the ability to order producers, distributors, and possessors of images depicting the sexual abuse of a child to pay restitution in the full amount of the child's losses, and to hold them jointly and severally liable for full payment.

This Court should affirm the Fifth Circuit's restitution award, which applied the tools provided and intended by Congress to give victims of child pornography crimes a chance at being fully compensated for their losses.

Respectfully submitted,

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