

No. 12-8561

In The
Supreme Court of the United States

————— ◆ —————
DOYLE RANDALL PAROLINE,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondent.

————— ◆ —————
ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

————— ◆ —————
MOTION FOR LEAVE TO FILE AMICUS BRIEF
AND BRIEF OF AMICI CURIAE WOMEN'S AND
CHILDREN'S ADVOCACY PROJECT AND
JUSTICE FOR CHILDREN IN SUPPORT OF
RESPONDENTS

————— ◆ —————
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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Now come the Women’s and Children’s Advocacy Project and Justice for Children and hereby seek leave from this Court to file an amicus brief in above-entitled matter. As reason therefore, movants state as follows:

The Women’s and Children’s Advocacy Project (WCAP) at New England Law | Boston is a project of the school’s Center for Law and Social Responsibility (CLSR). The WCAP produces the Sexual Violence Legal News (SVLN) project and the Judicial Language Project and provides pro bono advocacy services, including the preparation and submission of amicus briefs, on a variety of legal matters related to violence against women and children.

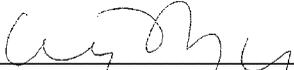
The issues before this Court in the instant case are of great concern to victimized women and children. This brief is offered to provide this Court with relevant research and policy-based arguments to influence this Court’s decision-making process in a manner consistent with the best interests of victimized women and children whose lives are affected by child pornography crimes.

Justice for Children (“JFC”) is a national child advocacy organization headquartered in Houston, Texas. Formed in 1987, JFC advocates for the interests of abused and neglected children in the child welfare, family court, and/or criminal justice

systems. JFC has an interest in ensuring that governmental entities and individuals are held accountable for intentionally or negligently allowing criminal child abuse to occur and works for changes in the law to protect the rights and safety of children.

Respectfully submitted,

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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. Sec. 2259?

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INTEREST OF AMICI CURIAE

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The issues before this Court in the instant case are of great concern to victimized women and children. This brief is offered to provide this Court with relevant research and policy-based arguments to influence this Court’s decision-making process in a manner consistent with the best interests of victimized women and children whose lives are affected by child pornography crimes.¹

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¹ No party or counsel for a party authored this brief in whole or in part. No one other than amici or counsel for amici made any monetary contribution to fund the preparation or submission of this brief.

in the law to protect the rights and safety of children.

Amici adopt and incorporate by reference the Statement of the Case as set forth in Respondents' Brief.

SUMMARY OF ARGUMENT

Restitution is appropriate irrespective of individualized proof of proximate causation because all possessors of child pornography cause harm to all victims by creating and fueling the demand that produces the market that requires supply, and so on. The cyclical nature of the industry's supply and demand process makes precise judicial assessments of individualized causation of harm virtually impossible. Furthermore, requiring individualized proof of proximate causation will lead to unfair results and inadequate compensation for injured victims.

Restitution should be assessed under a joint and several liability theory because the crime causes indivisible injuries. It is not a particular possessor's act of possession, alone, that causes harm, it is also the victim's knowledge that there is an unlimited supply of unknown possessors. Holding each possessor fully responsible increases the likelihood that victims will be compensated while ensuring that possessors are made to appreciate that their actions hurt real victims.

Finally, there should be no requirement that victims be specifically apprised of the identities of

each individual possessor as a precondition to restitution. The detrimental effect of child pornography, though often misunderstood as inconsequential because of its inchoate nature, violates the most fundamental notions of what it means to be a free human being with authority over the intimate self. Unwanted invasions of the self, especially when accompanied by knowledge that images of those invasions will be perpetuated by incessant dissemination, harm victims in their very humanity. While being apprised of a particular offender's identity could cause a victim to endure even more suffering, a victim's primary harm is unrelated to her knowledge of who the possessor is or what his intentions are with regard to the victim's images. Thus, requiring a victim to prove that she knows the identity of a particular possessor would undermine Congress's purpose in enacting the Crime Victim's Rights Act, which was intended to provide restitution to all injured victims, not just those with particularized awareness of offenders' identities. Allowing restitution without requiring notice of offender identity is reasonable and consistent with long-standing precedent that recognizes children depicted in child pornography as "victims" irrespective of whether they ever become personally aware of any particular user's identity.

ARGUMENT

I. RESTITUTION FOR POSSESSION OF CHILD PORNOGRAPHY CRIMES SHOULD BE ACCORDED VICTIMS DEPICTED IN THE MATERIAL IRRESPECTIVE OF INDIVIDUALIZED PROOF OF PROXIMATE CAUSATION, AND SUBJECT TO JOINT AND SEVERAL LIABILITY.

A. Restitution is appropriate irrespective of individualized proof of proximate causation.

It is axiomatic that one cannot commit the crime of possession of child pornography unless child pornography has been produced, which, in turn, requires the hands-on sexual victimization of children. Thus, all possessors of child pornography cause harm to all children depicted in the material by creating and fueling the demand that produces the market. Jennifer Rothman, Note, *Getting What They Are Owed: Restitution for Victims of Child Pornography*, 17 *Cardozo J.L. & Gender* 333, 349 (2011).

The market for child pornography is enormous, producing an estimated 21 billion dollars annually. *Deleting Commercial Pornography Websites from The Internet: The U.S. Financial Industry's Efforts to Combat the Problem: Hearing Before the Subcommittee on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 109th Cong. 86 (2006) (statement of Hon.

Stupak) (“Child pornography is estimated to be \$21 billion [annually].”) See also Adam D. Lewis, *Dollars and Sense: Restitution Orders for Possession of Child Pornography Under 18 U.S.C. § 2259*, 37 New Eng. J. on Crim. & Civ. Confinement 413, 415 (2011) (child pornography is a “multi-billion” dollar a-year industry). Not all demand is driven by monetary gain, however, because many users participate in the distribution of child pornography for personal use. U.S. Sentencing Comm’n, Report to the Congress: Federal Child Pornography Offenses 98 (2012). The Internet has exacerbated the problem and expanded the market for the trading as well as the selling of images. *Id.* at 94. On-line communities use technology to view and share images, *id.*, and they utilize very sophisticated methods to evade detection such as imposing on members the requirement of producing new images as a “payment” for continued access. *Id.* at 94-96, 99. Some reports put the “price” of access at ten-thousand new images and note that members often exploit their own children as the source of new material. Max Taylor & Ethel Quayle, *Child Pornography: An Internet Crime* 161 (2003). One study found that parents of victims are the most common creators of child pornography. Michelle K. Collins, *Child Pornography: A Closer Look*, The Police Chief (Mar. 2007), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1139&issue_id=32007 (parents of victims comprised 35% of creators in cases where victims had been identified by law enforcement).

Technology has made child pornography more accessible and more difficult to police than ever before, as well as more prevalent with at least five

million images available on the Internet at any given time. Federal Child Pornography Offenses, *supra*, at 107; P. Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 3 (2001 NYU Press). While viewing child pornography does not necessarily cause people to become sexual offenders, “there exists a complex and reciprocal interaction” between possession and action. Michael L. Bourke & Andres E. Hernandez, *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Child Victimization By Child Pornography Offenders*, 24 J. Fam. Viol. 183, 189 (2009). The well-known *Butner Study* demonstrated this correlation when it found that 62 sexual offenders who possessed child pornography confessed to committing over 1,379 sexual crimes. Bourke and Hernandez, *supra*, at 185. Other studies produced similar results. See, e.g., J. Wolak et al, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study* 16 (2005) (55% of persons arrested for possession of child pornography had been convicted of actual or attempted sexual assault of a child.)

Related research shows that the relationship between possession and action may be explained by the theory that viewers of child pornography “develop distorted attitudes about the sexuality of children” which may subsequently lead to sexual contact with children. Martin C. Calder, *The Internet: Potential, Problems, and Pathways to Hands-on Sexual Offending in Child Sexual Abuse & The Internet: Tackling The New Frontier* 2 (Martin C. Calder ed., 2004); Ethel Quayle & Max Taylor, *Child Pornography and the Internet: Perpetuating a*

Cycle of Abuse, 23 *Deviant Behav.* 331, 335 (2002). Some offenders may become confused as to the appropriateness of children as sexual partners. Caoilte Ó Ciardha, *A Theoretical Framework for Understanding Deviant Sexual Interest and Cognitive Distortions as Overlapping Constructs Contributing to Sexual Offending Against Children*, 16 *Aggression & Violent Behav.* 493, 494–500 (2011).

In addition to viewing children as appropriate sexual partners, offenders use the normative power of child pornography to justify their actions;

One such rhetorical tactic is a denial of the victim, or rather a denial of victimization: children are commonly assumed to have consented to the actions or directly to have sought sex, so the experience is consensual. Even if the child is three or five, she was still asking for it. Linked to this is the denial of injury, since the sexual activity is seen as rewarding and even educational for the child, rather than selfish or exploitive.

Jenkins, *supra*, at 117. Alternatively, they may confess to the crime of possession, and claim that their possession was merely driven by curiosity. Bourke & Hernandez, *supra*, at 189. In reality, possessors of child pornography are commonly sexually aroused by children and often act on those feelings. *Id.*

Among the most frequently viewed and traded images are those depicting especially violent activities such as children being forced to endure sexual abuse involving themselves, other children, adults and even animals. Federal Child Pornography Offenses, *supra*, at 90. Some children even appear compliant or smiling, which is far from the true reflection of their suffering, *Id.* at 109-10, and often the result of drugs used to sedate and incapacitate victims into submission. *Id.* Images of seemingly compliant children are desirable for producers and users because they facilitate the “grooming process,” and make the behavior appear “normal” so that children are less resistant. *Id.* The images are also used as a guide to “teach” children how to act. Quayle & Taylor, *supra*, at 340. Amy’s abuse followed this pattern—her uncle showed her pornographic movies and told her that he loved her. He then escalated his actions to sexual abuse and attempted to insert his penis into Amy’s vagina, despite the pain it was causing Amy, while he took photographs. Joint Appendix, at 59.

A significant portion of child pornography images constitutes “hard core” material involving extreme acts of cruelty, and is created by “the worst of the breed, because [the images] depict ongoing acts of rape and molestation by culprits who are still active and presumably still exploiting victims.” Jenkins, *supra*, at 82. In a recent Massachusetts case, for example, a man was charged with sexually abusing and making pornography with toddlers and babies as young as eight days-old. Brian Ballou, *List of Charges Against Sex Offender Grows*, Boston Globe (May 2, 2013).

To satisfy users' demand for new and different material, child pornography must be constantly changing and depicting increasingly graphic and more violent images. Jenkins, *supra*, at 4. In Amy's case, after being abused by her uncle, she was forced to respond to demand for more material and was made "to perform sex acts telephonically and over the computer, soliciting friends for sexual acts, and planned meetings with other potential abusers." Joint Appendix, at 70. One admitted child pornography user explained his need for variety: "...we get bored after a while with the usual and we risk a bit to get new stuff or get actual experience. It's a natural progression. Like stealing. You start small. Get bored. Go for bigger stuff." Jenkins, *supra*, at 109. This insatiable demand for new material necessarily leads to the constant abuse of children in society. *See id.* Even if the industry did not produce a constant demand for new product, studies show that possessors are highly likely to be direct abusers of children. *See A. Hernandez, Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders*, Federal Bureau of Prisons, November 2000.

The sexual abuse of children without the involvement of pornography causes substantial harm, but the harm is exacerbated exponentially by the creation of "a permanent record[ing] of the children's participation and the circulation..." of that record forever. *New York v. Ferber*, 458 U.S. 747, 759 (1982). In a very real sense, the crime of child pornography possession never ends because

there is simply no way for a victim to move on, put the harm behind her, and obtain closure. See Ulrich Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psychiatry 289, 292 (1980). Thus, because the crime is both relentless and profoundly harmful to society's most defenseless members, restitution should be generously awarded because reducing the profitability of the crime will reduce children's suffering. Rothman, *supra*, at 342. By reducing profit margins, some suppliers will leave the market, which will reduce the industry's incentives to create new product. Rothman, *supra*, at 339; *Child Sexual Abuse: What Parents Should Know*, American Psychological Association, <https://www.apa.org/pi/families/resources/child-sexual-abuse.aspx> (last visited Oct. 8, 2013).

B. Restitution should be assessed under a joint and several liability theory.

Restitution should be assessed under a joint and several liability theory because the crime causes indivisible injuries. Vicky's Brief in Defense of the Judgment Below at 31; *United States v. Burgess*, 684 F.3d 445 (4th Cir. 2012) (No. 09-4584), 2012 WL 554002. As Amy explained, it is not her awareness of the fact that there are many unknown possessors out there. She lives "in constant fear that someone will see [her] pictures and recognize [her] and that [she] will be humiliated all over again." Joint Appendix, at 60. Amy has explained that this has had a profound affect on every aspect of her life: "I had to quit a job I had as a waitress because there was a guy who I

thought was always staring at me. I couldn't stop thinking, did he recognize me? Did he see my pictures somewhere? I was simply too uncomfortable to keep working there." Joint Appendix, at 63.

The damage caused by possession of child pornography results in a collective injury that should be subjected to restitution subject to the civil law standard² of joint and several liability because it is impossible for a court to assign a more precise damage assessment to each individual defendant. Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation in Child Pornography*

² In a case currently before this Court, *Burrage v. United States*, No. 12-7515, the state criminal defendant, Petitioner there, pointed out a key difference between civil and criminal cases and noted that "[i]n the civil context . . . the courts are more concerned about restitution to the injured plaintiff, rather than imposing criminal penalties . . ." Reply Br. of Petitioner at 6. By extension, he makes the point that restitution decisions made in the aftermath of criminal convictions are akin to civil matters, thus properly can be assessed under civil law standards. Petitioner's point in *Burrage* that civil law standards are inapplicable in that case rests on the proposition that that case involved a question of whether a criminal defendant, convicted on distribution of a controlled substance charge, should face a mandatory minimum of twenty years incarceration when "death or serious bodily injury results from the use of such substance." Reply Br. of Petitioner at 15, n.5. Burrage reasonably notes that without proof that the drug proximately caused such "death or serious bodily injury," the jury's function in determining guilt on the enhanced charge is nullified as every death that occurs from the ingestion of a distributed substance would automatically require imposition of the mandatory minimum term. *Id.* Here, unlike in *Burrage*, the issue involves restitution for an injured crime victim; an issue unrelated to proof of the charges or punishment for the crime itself, and a determination of which requires no involvement of a jury.

Possession Cases Where Restitution Is Sought, 33 Cardozo L. Rev. 297, 322 (2011). Indeed, applying an apportionment theory based on proof of individualized proximate causation, as urged by Paroline, was described as unworkable in a recent dissenting opinion from the Fourth Circuit. *United States v. Burgess*, 684 F.3d 445, 461 (4th Cir. 2012) Gregory, J., concurring in the judgment, dissenting in part, and noting: “I do not believe that a fact finder could meaningfully say precisely x amount of Vicky’s psychological injuries were caused by Burgess’s watching the video, that y amount was caused by Defendant # 2’s watching the same video, and so on.” In an analogous California case, the court ordered each defendant in a criminal case involving manufacturing of a controlled substance to pay penalties for the cost of removal of the hazardous substance jointly and severally because such distribution of the financial burden is a more efficient use of resources and prevents duplication of court proceedings. *People v. Madrana*, 55 Cal. App. 4th 1044, 1049-52 (Cal. Ct. App. 1997). The *Madrana* court rejected the defendants’ argument that the extent of their individual financial responsibility should be assessed on an individual basis in accordance in each offender’s culpability, noting that such a requirement would thwart the legislative purpose, and likely cause the victims to receive only partial restitution for the harm endured. *Id.*, at 1050. The court concluded that joint and several liability increases the likelihood that victims will be compensated for their suffering and “causes the criminal to understand his actions have harmed a real victim. . . .” *Id.* The court also noted the accused’s due process rights were protected because

each defendant had notice and an opportunity to be heard to address liability and the effect of contributions by other responsible defendants, thus lessening the chance of “double recovery by a victim.” *Id.*

In *Madrana*, as here, joint and several liability theory makes sense because child pornography is the product of indivisible group activity and, as in *Madrana*, holding each possessor fully responsible increases the likelihood that victims will be compensated while those who possess child pornography are made to appreciate that their actions caused harm to real victims. Likewise, restitution hearings afford defendants ample due process rights to address liability and the effect of contributions by other responsible defendants.

The crime of child pornography is not unlike the crime of gang rape, which is governed by a restitution statute almost identical to that of possession of child pornography. *See* 18 U.S.C. § 2248 (2006). If restitution for victims of gang rape were subjected to apportionment theory, a judge would be obligated to undertake the impossible task of assessing restitution based on the idea that each perpetrator caused only a certain percentage of the victim’s harm. Such an approach would not be feasible in terms of reliable measurements of harm, nor would it be fair to the victim or consistent with Congress’ express mandate that restitution be granted for “the full amount of the victim’s losses.” 18 U.S.C. §§ 2248, 2259 (2006). Furthermore, each rapist’s share of the harm would be inversely proportional to the number of rapists involved. In

other words, gang rapists would effectively get a volume discount. Such a result would be morally unacceptable and dangerous to public safety, especially considering that gang rape is a significant social problem. See, e.g., Barnini Chakraborty, *Disabled Ga. Girl Gang Raped*, ABCNews (Nov. 2, 2013), <http://abcnews.go.com/US/story?id=95129>; Tiffany Craig, *Cleveland Police Investigate Reported Gang Rape of Teen Girl*, KHOU.com (Oct. 2, 2013), <http://www.khou.com/news/crime/Cleveland-police-investigate-reported-gang-rape-of-teen-girl—226225281.html>; David Chang, Dan Stamm, and AP, *2 Boys Rape 2 Women in Park: Police*, NBC Washington (Sept. 4, 2013), <http://www.nbcwashington.com/news/national-international/Gang-Rape-Boys-Wilmington-221813231.html>; Lloyd Vogelman & Sharon Lewis, *Gang Rape and the Culture of Violence in South Africa*, CVRS.org, <http://www.csvr.org.za/index.php/publications/1631-gang-rape-and-the-culture-of-violence-in-south-africa.html> (last visited Nov. 10, 2013). Although not the most common form of rape, some studies estimate that twenty-five percent of all rapes are gang rapes. Chang and Stamm, *supra*. Disturbingly, gang rape is often seen as socially acceptable because of the group mentality involved. Kimberly M. Trebon, Note, *There Is No “I” In Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 DePaul J. Sports L. & Contemp. Probs. 65, 66 (2007).

II. AMY'S KNOWLEDGE THAT UNIDENTIFIED CONSUMERS OF CHILD PORNOGRAPHY ARE VIEWING HER NAKED AND ABUSED BODY IS SUFFICIENT TO WARRANT RESTITUTION WITHOUT PROOF THAT AMY KNOWS THE IDENTITIES OF SPECIFIC POSSESSORS.

The detrimental effect of child pornography on its victims is well recognized. *See* S. REP. NO. 95-438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5, 42. As early as 1980, psychological studies have shown that victims suffer tremendous psychological and emotional harm. Ulrich Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psychiatry 289, 296-97 (1980). Specific injuries can occur immediately and last for years and include: low self esteem driven by guilt, shame, and embarrassment, generalized fear, irritability, panic/anxiety attacks, nightmares or sleep disorders, depression, suicidal thoughts, dissociation, loss of memory, inability to concentrate, academic problems, body image problems, and post-traumatic stress. *Fact Sheet: Child Sexual Abuse in Custody Disputes*, Child Abuse Solutions, Inc., http://www.childabusesolutions.com/page_07.html (last visited Sept. 30, 2013). Behavioral harms include: withdrawal, behavior regression, aggressive behavior, defensive avoidance, sleepwalking, loss of control over bowels, difficulty forming or maintaining healthy relationships, age-inappropriate sexual behavior, substance abuse, and eating disorders. *Id.* Physical harms include: genital injuries or trauma, sexually transmitted diseases,

bleeding, infections, bladder dysfunction, irritable bowel syndrome, abdominal pain, penile/urethral inflammation, and sexual dysfunction. *Id.*

Victims are usually able to cope with the harm with the help of psychotherapy, but the very existence of images that will exist for eternity has a crippling affect on victims' psyche. *Hardy, supra*, at 600. "Because the child's actions are reduced to a recording, the photography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." David P. Shouplin, Note, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981). In one case involving Amy and her images in the widely circulated "Misty Series," the District Court for the Western District of Pennsylvania acknowledged:

Amy now lives every day in fear that she will be recognized because of her images, and the knowledge that her images are being continually viewed has made her feel continually victimized since her discovery. She reports difficulty functioning on a day to day basis, plagued by flashbacks, nightmares, and an inability to focus. Amy cannot drive, has dropped out of school, lives with her parents, and has at times resorted to substance abuse to cope with her memories.

Id. Even though Amy has been in therapy, she still feels “dirty” and lives in fear that others will discover her pictures. She dreads the day when friends discover her secret and “fears the unknown and unnamed people who continued to be looking at these pictures of her for their own perverse interests or to ‘groom’ other children into these acts. She feels continually violated when she contemplates these possibilities.” Joint Appendix, at 74-75.

While the sexual abuse itself is harmful in a number of ways, images of the abuse have an insidious impact on victims’ lives because of their awareness that the abuse has been recorded and is being shared among strangers in a manner that cannot be controlled and will likely grow exponentially as distribution networks expand. *Showlin, supra*, at 545; *Schoettle, supra*, at 292. This has had a profound affect on every aspect of Amy’s life including how she feels about her very existence: “I am humiliated and ashamed that there are pictures of me doing horrible things with my uncle. Everywhere I go I feel judged. Am I the kind of person who does this? Is there something wrong with me? Is there something sickening and disgusting about who I am?” Joint Appendix, at 62. Amy’s sentiments reflect those of other victims who feel inextricably tied to their abusive past *because* the images are out there. *Id.* at 63.

Injury from depiction is often misunderstood as inconsequential because of its inchoate nature, however, harm to the individual via the constant awareness that images of one’s sexually abused body are being disseminated violates the most

fundamental ideas of what it means to be a free human being with authority over the intimate self. Charles Fried, *Privacy*, 77 Yale L.J., 475, 489 (1967-68). Professor Fried notes that fundamental liberty includes protection from unwanted invasions of privacy, and “is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves. . . .” *Id.* at 484. The loss of control over who has access to intimate information about ourselves is “the ultimate assault on liberty,” *id.*, and is “profoundly humiliating.” *Id.* at 485. Indeed, “invasions of privacy injure us in our very humanity.” *Id.* at 486.

The Restatement (Second) of Torts § 652B on privacy violations likewise reflects concern for the loss of control over the intimate self: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” A similar sentiment was expressed by a California judge presiding over an invasion of privacy case involving the dissemination of photographs taken by police at the scene of an accident depicting a young woman who had been decapitated. *Catsouras v. Dep’t of Cal. Highway Patrol*, 104 Cal. Rptr.3d 352, 359 (Cal. Ct. App. 2010). The photographs were distributed by police officers to friends and family and later published on over 2,500 websites. *Id.* The court ruled that this activity constituted an actionable invasion of privacy, *id.* at 366, and a concurring opinion described it as a valid claim for the tort of “intrusion

upon seclusion.” *Id.* at 902. The distribution of images of a child’s sexually abused body similarly intrudes upon the seclusion of the depicted child. Privacy tort actions are allowed even where such photographs have been collected but have not yet been publicized. Restatement (Second) of Torts § 652B cmt. b (1965). In a notable Minnesota case, a valid intrusion upon seclusion claim was made when a woman attempted to develop nude shower photographs at a Wal-Mart and the developer kept the photographs for personal use but told the woman that he could not develop them because of their nature. There was no distribution beyond the developer but he was subject to suit nonetheless because he intruded upon the plaintiff’s fundamental interest in “seclusion,” privacy and personal autonomy. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 232 (Minn. 1998). Although there was no express ruling on the merits, the court poignantly noted that “[o]ne’s naked body is a very private part of one’s person and generally known to others only by choice. This is a type of privacy interest worthy of protection.” *Id.* at 235.

The possession of child pornography is similarly a violation of the depicted victim’s autonomy, privacy, self-determination and humanity, irrespective of whether the individual victim is aware of the precise moment when an intrusion occurs. Indeed, an image of a sexually abused child is worthy of even greater protection because children have less capacity and opportunity to protect themselves or even to understand the nature of pornography, or control the circumstances under which such material is produced and

disclosed. As Amy stated in her Victim Impact statement:

Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle.

Joint Appendix, at 60.

Amy suffers chronically from the thought that the images of her abused body will probably never completely disappear and they may be used to “groom” other children to submit to similar acts. *Id.* at 57-58. This emotional pain renders her “unable to do the simple things that other teenagers handle easily.” *Id.* at 61. For example, she has been unable to get her driver’s license, she has been unable to retain a job, and she was forced to drop out of college because she stopped attending class after seeing a video about child abuse in her psychology class. *Id.* Amy feels as though she is being forced to live a double life because she is harboring the secret of past abuse, as her identity has largely remained anonymous. *Id.* at 65. Amy feels it is only a matter of time until her secret is revealed—“It’s like my life is

on hold for that day and I am frozen in time waiting. I know those disgusting pictures of me are stuck in time and are there forever for everyone to see.” *Id.* at 62.

Amy suffers because of the constancy of intrusions and threatened intrusions and while being apprised of a particular offender’s identity could add to Amy’s suffering, the baseline harm occurs irrespective of who the possessor is, or what his intentions or motivations are with regard to the images in his possession. Requiring Amy to prove that she knows the identity of a particular possessor would undermine Congress’s purpose in enacting the Crime Victim’s Rights Act (CVRA), which was intended to provide restitution for all injured victims, not just those who could prove that a specific individual committed engaged in a particular act at a given time. *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). Such a knowledge requirement would effectively preclude restitution in criminal cases involving mentally retarded crime victims who, because of a disability, may never fully understand whether a crime happened, much less who committed it. Furthermore, a knowledge requirement would traumatize victims by requiring that they be told specific details about the identity of each user who was looking at their images at a given time. The CVRA nowhere suggests that victims endure such harm as a prerequisite to restitution, or that restitution be denied in cases where victims cannot personally identify their perpetrators.

In any event, the record reflects that Amy was kept generally informed of the situation regarding the nature of child pornography, and the distribution of her images in particular. Joint Appendix at 72-78; Transcript of Oral Argument at 22-23; *see also*, *In re Amy Unknown*, 701 F.3d 749 (2012). Victims who have already suffered terribly should have the right to choose not to be notified of the specific identities of individual possessors as this would force victims to choose between requesting desperately needed restitution and enduring potentially significant amounts of new harm given that victims of child pornography are often involved in hundreds or thousands of cases at the same time. Federal Child Pornography Offenses, *supra*, at 116-17. Allowing restitution without such notification is reasonable and consistent with precedent that has long recognized children depicted in pornography as “victims” irrespective of whether they are personally aware of any particular possessor’s identity. *New York v. Ferber*, 458 U.S. 747 (1982); *U.S. v. Kearney*, 672 F.3d 81 (1st Cir. 2012); *U.S. v. Aumais*, 656 F.3d 147 (2d Cir. 2011); *U.S. v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011); *U.S. v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011); *U.S. v. Fast*, 820 F. Supp. 2d 1008 (D. Neb. 2011); *U.S. v. Lundquist*, 847 F. Supp. 2d 364 (N.D. N.Y. 2011); *U.S. v. Klein*, 829 F. Supp. 2d 597 (S.D. Ohio 2011); *U.S. v. Hardy*, 707 F. Supp. 2d 597 (W.D. Pa. 2010); *U.S. v. Church*, 701 F. Supp. 2d 814 (W.D. Va. 2010).

Child pornography fosters the exploitation of innocent and vulnerable children all over the world. It causes irreparable harm to some of the

weakest members of our society. Child pornography is a permanent photographic record of the victim's sexual abuse, and the distribution and circulation of the pornographic images forever exacerbates the harm to these child victims.

Joint Appendix, at 278.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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