

No. 12-8561

In The Supreme Court Of The United States

DOYLE RANDALL PAROLINE,

PETITIONER,

v.

AMY UNKNOWN AND UNITED STATES,

RESPONDENT.

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

**BRIEF FOR THE STATES OF WASHINGTON, ALABAMA,
ALASKA, COLORADO, DELAWARE, FLORIDA, GEORGIA,
HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS,
KENTUCKY, MASSACHUSETTS, MICHIGAN, MINNESOTA,
MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA,
NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON,
SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT,
WEST VIRGINIA, WISCONSIN, AND WYOMING, AND THE
TERRITORY OF UNITED STATES VIRGIN ISLANDS AS
AMICI CURIAE IN SUPPORT OF RESPONDENT
AMY UNKNOWN**

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Other Authorities

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(Frank Schmallegger & Michael
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Debra D. Burke,
*The Criminalization Of Virtual
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on Legis. 439 (Summer 1997).....2

National Center For Missing &
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Arrested in Internet-Related Crimes:
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[http://www.missingkids.com/en_US/p
ublications/NC144.pdf](http://www.missingkids.com/en_US/publications/NC144.pdf) (last visited
Nov. 1, 2013)5

- Richard Wortley & Stephen Smallbone,
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 (rev. 2012),
www.cops.usdoj.gov/Publications/e04062000.pdf (last visited
 Nov. 1, 2013)2
- U.S. Dep't of Justice,
Child Exploitation & Obscenity
Section,
http://www.justice.gov/criminal/ceos/subject_areas/childporn.html (last
 visited Nov. 1, 2013)4, 5, 6
- U.S. Dep't of Justice,
The National Strategy for Child
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Interdiction: A Report To Congress
 (Aug. 2010)
<http://www.justice.gov/psc/docs/natsstrategyreport.pdf> (last visited Nov.
 1, 2013)2, 3, 4
- U.S. Sentencing Comm'n,
2012 Sourcebook of Federal
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http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm
 (last visited Nov. 1, 2013)3

U.S. Sentencing Comm'n,
*Report to the Congress: Federal Child
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INTEREST OF AMICI CURIAE

The amici States have a strong interest in the outcome of this case. States have taken many steps to stamp out the sexual exploitation of children and the trafficking of children, but the expansion of the Internet has brought a surge in the marketing, trading, and possession of child pornography. This has led to victimization of more children and increased trafficking of children to meet the demand for new graphic depictions of sexual assault. The States have an interest in stamping out the sexual exploitation of children and in ensuring that their citizens receive full compensation for the recurring harm caused by ongoing marketing and possession of images of acts of sexual assault.

SUMMARY OF ARGUMENT

Child pornography is a rapidly growing problem for the States. The images and video portray sadistic acts of sexual violence against ever younger children. The use of the Internet to rapidly transmit this material nationwide requires not only a dedicated response by States, but also a robust federal framework to ensure full restitution to victims.

In enacting 18 U.S.C. § 2259, Congress directed the courts to order defendants to provide “full recovery” for the damages suffered by victims of child pornography. Allowing full recovery provides incentive to victims to undergo the pain of coming forward and identifying themselves as the individuals who suffered the sexual assault recorded in the images. This is a logical means of addressing the unique problem of providing restitution for each

victim who was harmed by the actions of defendants acting independently, in different locations across the country.

ARGUMENT

A. Child Pornography Is A Growing Problem That States Cannot Fully Address On Their Own

By the mid-1980s, law enforcement was successfully limiting the trafficking of hard-copy forms of child pornography. Richard Wortley & Stephen Smallbone, *Child Pornography on the Internet* (rev. 2012), www.cops.usdoj.gov/Publications/e04062000.pdf (last visited Nov. 1, 2013). But with the advent of the Internet, the creation and circulation of child pornography throughout the nation has exploded and has become a problem that states cannot possibly address on their own. Debra D. Burke, *The Criminalization Of Virtual Child Pornography: A Constitutional Question*, 34 Harv. J. on Legis. 439, 440 (Summer 1997). No longer are the images retained exclusively by an individual or shared within a limited geographical area. Instead, graphic images of sexual assault and live-rape video generated in one state can be viewed immediately nationwide. U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report To Congress* (Aug. 2010) <http://www.justice.gov/psc/docs/natstrategyreport.pdf> (last visited Nov. 1, 2013) (*Strategy Report*). The Internet has thus increased production and distribution of child pornography and is “utilized extensively by pornographers to help avoid being caught.” *Strategy Report* at 23.

Although it is impossible to quantify the number of images available, state and federal investigators have seen a rapid rise in cases involving child pornography. In 2004, there were 624 cases prosecuted of possession, distribution, receipt, and transportation of child pornography. By 2012, the number of cases had increased to 2,014. U.S. Sentencing Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, http://www.usss.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm (see Table 11) (last visited Nov. 1, 2013).

The term “child pornography” fails to adequately describe the extraordinarily heinous nature of the acts depicted. *Strategy Report* at 8. Child pornography involves depiction of criminal acts, and most of the images are homemade and record the image producer’s ongoing sexual assault of a family member or neighbor. *Crimes of the Internet* 51 (Frank Schmallegger & Michael Pittaro eds., 2009).

The Internet has made it cheaper and easier to anonymously access and share child pornography. Although some of the images are marketed by criminal organizations, a significant amount of the images are traded by non-commercial networks of individuals who share a sexual interest in child abuse. *Strategy Report* at 25-26. Members trade images across state lines and internationally by contributing to group discussions, posting photographs, and transmitting live video during the sexual abuse of a child. *Strategy Report* at 23. These online communities promote communication between pedophiles by “normalizing their interest in children and desensitizing them to the physical and

psychological damages inflicted” on their victims. U.S. Dep’t of Justice, *Child Exploitation & Obscenity Section*, http://www.justice.gov/criminal/ceos/subject_areas/childporn.html (last visited Nov. 1, 2013). In this way, defendants accessing the pictures independently cause an indivisible harm to the victim portrayed.

Network members are not simply passive viewers of the images. Rather, they are participants in the abuse, driving the demand for fresh material. To gain entry into a network, potential members often are required to demonstrate a genuine interest in sexual contact with minors by transmitting new child pornography images to the group. *Strategy Report* at 26. Once in the network, posting new images allows members to climb in the group hierarchy. U.S. Sentencing Comm’n, *Report to the Congress: Federal Child Pornography Offenses* 96 (Dec. 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/ (last visited Nov. 1, 2013).

To lure new victims and create images to share with the network, pedophiles use child pornography to “groom” new prey. The images are shown to children in an effort “to desensitize them to a degree that the child feels everyone is doing these things, and there is nothing wrong with taking these kinds of sexually graphic pictures.” *Crimes of the Internet* 34 (Frank Schmalleger & Michael Pittaro eds., 2009) (*Crimes*).

Easy access and repeated exposure to child pornography desensitizes the viewers, creating a desire for depictions of younger children and greater

levels of violence. *Crimes* at 54. “[T]he younger the victim and the more bizarre the sexual act is, the higher the value of the image is for exchange in the network.” *Crimes* at 54.

Emerging trends reveal that images of sadistic abuse of younger children, including toddlers and infants, are increasingly being produced. U.S. Dep’t of Justice, *Child Exploitation & Obscenity Section*, <http://www.justice.gov/criminal/ceos/subjectareas/childporn.html> (last visited Nov. 1, 2013). In 2005, eighty percent of the child pornography possessors arrested were found to have graphic pictures showing sexual penetration of a child, including oral sex. National Center For Missing & Exploited Children, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study 4-5* (2005), http://www.missingkids.com/en_US/publications/NC144.pdf (last visited Nov. 1, 2013). Eighty-three percent of those arrested had pictures of children between the ages of six and twelve, thirty-nine percent had images of three- to five-year-old children, and nineteen percent had images of toddlers and infants younger than three years. *Id.*

States are devoting many resources to combatting child pornography and the sexual trafficking of minors. But the Internet has changed the nature of the problem. Because the images are rapidly distributed throughout the nation, it is essential that federal law ensure a realistic means of restitution for victims.

B. Allowing Full Recovery Will Provide Victims With Incentive To Come Forward

As the ease of Internet access to child pornography increases the demand for new and increasingly sadistic images of abuse, the number of State victims in need of restitution is rapidly increasing. Although federal law requires courts to order restitution for victims, such an order is impossible when the victim's identity is unknown. 18 U.S.C. § 2259(b)(2), (4). The U.S. Department of Justice estimates that there are over five million unique child pornography images on the internet. U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography Offenses* 96 (Dec. 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/ (last visited Nov. 1, 2013). Yet just 4,103 of the individuals portrayed have been identified. *Id.*

Forcing victims to participate in numerous cases throughout the country would benefit creators of child pornography by deterring victims from seeking restitution. Knowledge that the images of their rape and molestation will be perpetually available for others to view on the internet causes victims to “suffer from feelings of helplessness, fear, humiliation, and lack of control[.]” U.S. Dep’t of Justice, *Child Exploitation & Obscenity Section*, http://www.justice.gov/criminal/ceos/subjectareas/chil_dporn.html (last visited Nov. 1, 2013). When courts deny full restitution, and instead attempt to determine the percent of the victim's harm caused by each defendant, it creates a need for the victim to repeatedly revisit memories of rape and sexual

abuse, and recount the humiliation and psychological torment caused by knowing images of the crimes are being viewed for sexual gratification.

In measuring the mental and physical cost of participating in multiple cases against the economic benefit of a modest partial recovery of damages, victims may well determine that the potential gain is grossly insufficient to overcome the negative impacts. As the Seventh Circuit found, requiring victims of abuse to participate in actions across the country as they incur treatment costs was not Congress's intent. *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). If victims were assured that courts would grant restitution for the full amount of their losses, they would likely be more willing to undergo the trauma of coming forward in a single proceeding.

Giving full effect to 18 U.S.C. § 2259 will assist the States by ensuring that the growing numbers of victims are willing and able to fully recover the costs and economic losses caused by child pornography.

CONCLUSION

The Court should enforce the plain language of 18 U.S.C. § 2259 and allow full recovery for victims of child pornography.

RESPECTFULLY SUBMITTED.

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