No. 12-8561

IN THE

Supreme Court of the United States

DOYLE RANDALL PAROLINE,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

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

BRIEF FOR THE NATIONAL CRIME VICTIM LAW INSTITUTE, ARIZONA VOICE FOR CRIME VICTIMS, CHILD JUSTICE, INC., MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC., NATIONAL CENTER FOR VICTIMS OF CRIME, AND NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE AS AMICI CURIAE SUPPORTING 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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INTEREST OF AMICI CURIAE[1]

Amici Curiae National Crime Victim Law Institute, Arizona Voice for Crime Victims, Child Justice, Inc., Maryland Crime Victims' Resource Center, Inc., National Center for Victims of Crime, and National Organization for Victim Assistance are nonprofit organizations whose missions are to promote the interests of crime victims and other victims of abuse in the justice system through victim services, public resources, legal advocacy, and education.[2] Each amicus has previously participated in cases involving crime victims' rights. This case involves fundamental rights and interests of crime victims across the country because it concerns the standard for victims, most specifically victims of child abuse images, to receive restitution under federal law.[3]

SUMMARY OF ARGUMENT

Congress has enacted a comprehensive, mandatory restitution scheme whose "primary and overarching goal … is to make victims of crime whole [and] to fully compensate these victims for their losses." *United States* v. *Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004) (internal quotation marks and emphasis omitted). This

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[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, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The mission of each organization is more fully described in an appendix to this brief.

[3] Although the term "child pornography" is commonly used to describe an image that depicts a child being sexually abused, its use dilutes the reality of the victimization the image depicts. Consequently, throughout this brief, the term "child abuse image" is used instead of "child pornography."

statutory scheme represents an important development in the protection of crime victims, and reflects Congress's recognition of the harms crime victims suffer and the need to compensate victims for their losses.

Section 2259 is a key component of this congressional scheme, requiring restitution for victims of sexual-exploitation offenses related to child pornography. Section 2259 provides, for such offenses, that a restitution order "shall direct the defendant to pay the victim … the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). Despite that broad remedial mandate, lower courts have often failed to award victims of child abuse images full restitution for their losses. In fact, some courts have declined to award any restitution at all because they could not tie the victim's harm to the particular conduct of an individual defendant. That approach is wrong as a matter of law, misunderstands the nature of a victim's harm, and erects insurmountable hurdles to a victim's full recovery of her losses.

The failure of many courts to award restitution for all of a victim's losses stems in part from misapplication of the common law tort principles that must be presumed to have informed Congress's crafting of § 2259 and which effectuate Congress's purpose of full and mandatory restitution for crime victims. Those common law principles compel two conclusions: (1) to establish that a particular perpetrator was a cause of the psychological trauma she suffers and the losses she has incurred due to the circulation of images of her abuse, a victim need not establish that the perpetrator's conduct was a necessary or independently sufficient condition; and (2) criminal defendants who create, traffic in, possess, and view images of a victim's sexual abuse are jointly and severally liable for the full amount of the victim's losses.

Tort law has long recognized that, where multiple perpetrators engage in separate but related conduct causing injury, an individual perpetrator does not escape responsibility for causing the injury simply because, due to others' wrongful conduct, his conduct was neither necessary nor sufficient to cause the harm. *See* Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 268 (5th ed. 1984) (*Prosser & Keeton*). If the law were otherwise, no individual could be held responsible for the harms perpetrators collectively inflict on a victim, no matter how substantial. That result would be inconsistent with established tort principles and would fundamentally undermine Congress's purposes in enacting § 2259.

Further, tort law generally holds multiple tortfeasors—and especially *intentional* criminal actors—jointly and severally liable for any indivisible injury they cause. *See Restatement (Third) of Torts* § A18 (2000) (*Restatement*). Petitioner and others who traffic in and view sex abuse images cause victims such as Amy an indivisible injury; the psychological harm she suffers and the losses she has incurred due to the circulation of images of her abuse cannot be parceled out and assigned to individual perpetrators. Under established tort principles that properly inform the Court's reading of § 2259, criminal defendants who deal in and view images of Amy's abuse should be held jointly and severally liable.

The Government would have the Court follow the first rule but abandon the second, arguing that § 2259 does not expressly *require* joint and several liability and that a victim's harm is "theoretically" divisible. *See* U.S. Br. 21-22, 42. But even if Amy's injury were divisible in theory (and it is not), joint and several liability generally applies where, as here, *practical* division

is impossible. Congress understood the unique harm suffered by victims such as Amy. By enacting § 2259's mandate of full restitution, Congress decided that, between Amy and Petitioner, Petitioner must bear the burden of Amy's losses. Further, the Government's proposal of ad hoc apportionment determinations provides no practical guidance to district courts calculating restitution awards and scant assurance that Congress's purpose of ensuring restitution for the "full amount" of a victim's losses will be effectuated. 18 U.S.C. § 2259(b)(1).

ARGUMENT

I. Section 2259 Does Not Require A Victim To Trace Her Harm To The Particular Conduct Of An Individual Defendant

The victims of child abuse images suffer grave harm at the hands of those who create, traffic in, possess, and view those images. They live with fear, humiliation, and pain, haunted by the knowledge that images of their abuse are continuously available to be passed from perpetrator to perpetrator and that anyone they encounter may have seen the images or may see the images in the future. This harm produces economic losses and pecuniary damages for which Congress has mandated full restitution. The injury and resulting economic harm cannot be neatly parceled out and traced to particular individual perpetrators, and Section 2259 imposes no such requirement. Each perpetrator causes the injury, whether the perpetrator is the 1,000th or 10,000th person to view the images. Under common law principles—in light of which Congress is presumed to have enacted § 2259, *see Samantar* v. *Yousuf*, 560 U.S. 305, 320 n.13 (2010)—an individual, intentional victimizer is no less the cause of the victim's

injuries because others have also caused the injury by participating in the same crime.

A. Victims of Child Abuse Images Suffer Grave Harm Caused by All Who Create, Possess, Distribute, and View Those Images

The acute harms caused to victims of child abuse images are well established. As this Court has recognized, "the materials produced by child pornographers permanently record the victim's abuse," and the images' "continued existence causes the child victims continuing harm by haunting the children in years to come." *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990). "It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *New York* v. *Ferber*, 458 U.S. 747, 759 n.10 (1982) (internal quotation marks and brackets omitted). Victims must go through life knowing that the images of their trauma are uncontainable, and will likely circulate forever.

Congress has expressly recognized these harms in proscribing the possession of child abuse images. *See United States* v. *Kearney*, 672 F.3d 81, 94 (1st Cir. 2012). It has "repeatedly emphasized, in legislation amending the laws governing child pornography, the continuing harm the distribution and possession of child pornography inflicts." *Id.*; *see, e.g.*, Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, tit. I, § 102(3), 122 Stat. 4001, 4001 ("Child pornography is a permanent record of a child's abuse and the distribution of child pornography images revictimizes the child each time the image is viewed."); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 ("Every instance of viewing images of child pornography represents a

renewed violation of the privacy of the victims and a repetition of their abuse.").

Both the Government and the Petitioner acknowledge the extent and nature of the harm and the resulting economic losses that victims like Amy suffer. *See* U.S. Br. 40 ("Amy's harm and her resulting losses … stem at least in part from the knowledge that her image is being generally circulated and that a *group* of people are viewing her images." (internal quotation marks and brackets omitted)); Pet. Br. 50 ("Amy's profound suffering is due in large part to her knowledge that each day, untold numbers of people across the world are viewing and distributing images of her sexual abuse.").

B. Every Person Who Creates, Distributes, Possesses or Views Abuse Images Causes The Victim's Harm

The trauma, fear, humiliation, psychological injury, and the resulting financial losses suffered by victims like Amy cannot be divided up and attributed piece-by-piece to particular defendants. Yet there can be no question that *all* who have produced, possessed, distributed, and viewed images of Amy's abuse caused her harm.[4] *See Kearney*, 672 F.3d at 94-95 ("The Supreme

[4] As the Government notes, causation is typically described as involving two issues: factual causation and proximate causation. *See* U.S. Br. 18. Factual causation asks whether the defendant's conduct caused the victim's harm, an inquiry for which there is more than one test. *See* Dobbs et al., *The Law of Torts* § 185, at 621 (2d ed. 2011). Proximate causation delineates the "appropriate scope of the defendant's legal liability," an analysis that rests on considerations such as the foreseeability of the victim's harm. *See id.* Respondent Amy aptly describes why Section 2259 lacks a proximate cause requirement, *see* Resp't Amy Br. 17-37, and the Government persuasively explains why any proximate cause requirement would be met in this case in any event, *see* U.S. Br. 35-

Court has repeatedly explained, for thirty years, that individuals depicted in child pornography are harmed by the continuing dissemination and possession of such pornography containing their image." (citing *Ferber*, 458 U.S. at 759; *United States* v. *Williams*, 553 U.S. 284, 303 (2008); *Osborne*, 495 U.S. at 111)).

Several lower courts have misapprehended the nature of victims' harm, and have erroneously required a specific link between an identifiable portion of the victim's harm and the conduct of a particular defendant. They have thus denied or limited restitution to victims on the ground that a particular defendant's "possession of a single image of [a victim] was neither a necessary nor a sufficient cause of all of her losses." *United States* v. *Monzel*, 641 F.3d 528, 538 (D.C. Cir. 2011); *see also, e.g.*, *United States* v. *Benoit*, 713 F.3d 1, 20, 23 (10th Cir. 2013); *United States* v. *Fast*, 709 F.3d 712, 722-723 (8th Cir. 2013); *United States* v. *Aumais*, 656 F.3d 147, 153-155 (2d Cir. 2011). Petitioner's argument invites this Court to impose a similar restriction. He contends that "some evidence must be presented that shows that 'but for' a defendant's conduct, the losses or damages would not have occurred." Pet. Br. 49; *see also id.* at 49-50 (Amy has made "no showing" that her losses are traceable to Paroline's conduct; Amy has "suffered tremendously" from her abuse "regardless of what Pa-

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40. Because any proximate cause standard would be met here in any event, this Brief focuses on closely related questions that fall within the question presented as formulated by this Court (and are also addressed by the parties): (1) whether the victim of a harm that was caused by multiple persons must trace her harm to the particular conduct of an individual defendant in order to establish her right to restitution from that defendant, and (2) whether a defendant who, along with others, caused the harm to the victim may be held jointly and severally liable for the victim's losses.

roline did"); *id.* at 50 (Petitioner's "possession of two images of Amy was neither a necessary nor a sufficient cause of all of her losses").

The law requires no such showing. Not only would Petitioner's standard make recovery by victims practically impossible, contrary to the explicit mandate of § 2259, it also ignores the well-established common law background of tort liability principles, against which Congress is presumed to have legislated. *See Samantar*, 560 U.S. at 320 n.13 ("Congress is understood to legislate against a background of common-law principles." (ellipsis and internal quotation marks omitted)); *see also United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts"). As many courts have recognized, the common law backdrop applicable here is that of the law of torts because, like tort law, Section 2259's purpose is "'to afford compensation for injuries sustained by one person as the result of the conduct of another.'" *Prosser & Keeton* § 1, at 6 (quoting Wright, *Introduction to the Law of Torts*, 8 Cambridge L.J. 238 (1944)); *see United States* v. *Burgess*, 684 F.3d 445, 457 (4th Cir. 2012) ("A plurality of circuits have employed an overlay of traditional tort principles to the statutory language [of § 2259]."); *Monzel*, 641 F.3d at 535 n.5 ("Although § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party." (citing *United States* v. *Bach*, 172 F.3d 520, 523 (7th Cir. 1999) ("Functionally, the Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier era of An-

glo-American law, when criminal and tort proceedings were not clearly distinguished."))).[5]

Traditional tort law principles effectuate Congress's purposes in enacting § 2259 to provide victims restitution for the "full amount" of their losses. Under those principles, where the conduct of multiple wrongdoers causes a victim harm, the act of *each individual wrongdoer* is a cause of that harm, even if the individual's conduct was neither necessary nor independently sufficient to cause the harm. *See Prosser & Keeton* § 41, at 268 ("When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event."). As the *Restatement* explains: "In some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff's harm. Nevertheless, when combined with conduct by other persons, the conduct overdetermines the harm, *i.e.*, is more than sufficient to cause the harm." *Restatement* § 27 cmt. f. In this circumstance, "the fact that the other person's [or persons'] conduct is sufficient to cause the harm does not prevent the actor's conduct from being a factual cause of harm." *Id.* Instead, it is enough that the conduct at issue contrib-

[5] The relevance of traditional tort principles distinguishes § 2259 from 21 U.S.C. § 841(b)(1)(C), the statute the Court is considering in *Burrage* v. *United States*, No. 12-7515. Section 841(b)(1)(C) does not function like a tort statute, but rather like a typical criminal liability provision: it imposes a sentence of imprisonment ranging from twenty years to life upon a determination that use of the drugs sold by the defendant "result[ed]" in death or serious bodily injury. 21 U.S.C. § 841(b)(1)(C). Traditional tort principles have little bearing on the proper interpretation of that provision.

utes to a set of conditions that causes the harm to occur (*i.e.*, the individual's conduct is part of a sufficient causal set). *See id.*

In other words, tort law provides a straightforward and sensible answer to the causation problem that has troubled some lower courts in the criminal restitution context: there is no safety in numbers. A perpetrator cannot avoid responsibility for causing a victim's injuries simply because other perpetrators' related conduct was, collectively, necessary and sufficient to cause the victim's indivisible harm. If the law were otherwise—*i.e.*, if a defendant were relieved of responsibility in such circumstances—then no individual could be held responsible for the harms perpetrators collectively inflict, no matter how substantial. Tort law avoids that inequitable result by recognizing that each participant caused the victim's indivisible harm.

The common law is replete with cases applying this principle. For example, twenty-six mill owners who polluted a creek were enjoined and held liable for damages even though the discharge by each "single party would not cause any material change to the plaintiff." *Warren* v. *Parkhurst*, 92 N.Y.S. 725, 727 (N.Y. Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906). Although "[n]o one defendant caused that injury[,] [a]ll of the defendants did cause it." *Id.* at 728; *see also Anderson* v. *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45, 49 (1920) (railway company that caused a fire that merged with other fires to destroy plaintiff's property could be held liable for the entire damage), *overruled in part on other grounds*, *Borsheim* v. *Great N. Ry. Co.*, 183 N.W. 519 (Minn. 1921). Similarly, a court saw no difficulty in holding a defendant to have caused flood damage to plaintiff's basement even though another person con-

tributed to the flooding. *Slater* v. *Mersereau*, 64 N.Y. 138, 147 (N.Y. 1876) ("It is no defence for a person against whom negligence which caused damage is proved, to prove that without fault on his part the same damages would have resulted from the act of another."). In short, tort law has rejected the notion that an individual perpetrator does not cause a victim's harm in these circumstances.

Lower courts determining restitution under § 2259 have often missed this fundamental principle. Notable is the D.C. Circuit's *Monzel* decision, which erroneously required that restitution be based on the amount of a victim's harm traceable to a particular defendant, where the defendant's conduct "was neither a necessary nor a sufficient cause of all of [the victim's] losses." *Monzel*, 641 F.3d at 538. The court's reasoning conflated apportionment of damages principles (discussed below) with causation, *see id.*, and failed to recognize that in these circumstances tort law deems each perpetrator's act to be a cause of a victim's injuries even where any particular individual's conduct is not necessary or sufficient by itself to cause the injury.

In addition, the *Monzel* rule produces precisely the inequitable result the common law rule is designed to avoid: it leaves a victim with essentially no recovery even where the victim was clearly harmed by the aggregate conduct of multiple perpetrators. On remand in *Monzel*, the district court attempted to apply the D.C. Circuit's traceability requirement and ultimately *declined to award Amy any restitution at all.* The court found it "impossible to fashion a formula that pinpoints [the defendant's] degree of responsibility for Amy's suffering." Mem. Order, *United States* v. *Monzel*, No. 1:09-CR-243 (GK), at 8 (D.D.C. Nov. 6, 2012), EFC #70. Other circuits following *Monzel*'s reasoning have left vic-

tims similarly empty-handed, *see, e.g.*, *Aumais*, 656 F.3d at 155; Minute Entry, *United States* v. *Kennedy*, No. 2:08-CR-00354-RAJ (W.D. Wash. Aug. 24, 2012), ECF #181, or have suggested that restitution may be unavailable unless a victim can provide evidence tracing her harm to the specific defendant, *see, e.g.*, *Benoit*, 713 F.3d at 22-23 (remanding to the district court "for a redetermination of the portion of damages allocable to Benoit, *if any*" (emphasis added)).

That result is fundamentally at odds with § 2259 and its purpose. The "primary and overarching goal" of Congress's statutory restitution scheme for crime victims is "to fully compensate these victims for their losses and to restore these victims to their original state of well-being." *United States* v. *Simmonds*, 235 F.3d 826, 831 (3d Cir. 2000). Restitution can be a pivotal step in a victim's recovery. *See, e.g.*, Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person under the Trafficking Victims Protection Act*, 80 Fordham L. Rev. 403, 438 (2011). To that end, § 2259 provides that courts "*shall* order restitution for any offense under this chapter" and that such restitution order "*shall* direct the defendant to pay the victim … the *full amount of the victim's losses*." 18 U.S.C. § 2259(a) & (b)(1) (emphasis added). That language leaves no room for courts to leave victims empty-handed on the ground that no individual defendant's conduct by itself was necessary or sufficient to cause the victim's harm. *See Corley* v. *United States*, 556 U.S. 303, 314 (2009) (statutes must be interpreted "so that no part will be inoperative or superfluous, void or insignificant" (internal quotation marks omitted)).

II. THE TRADITIONAL TORT LAW PRINCIPLES THAT INFORM THIS COURT'S ANALYSIS REQUIRE THAT PERPETRATORS BE HELD JOINTLY AND SEVERALLY LIABLE FOR RESTITUTION UNDER SECTION 2259

Determining whether a defendant caused a victim's injury and apportioning damages for that injury are distinct issues. Once causation is established, "a further question may arise as to the portion of the total damages sustained which may properly be assigned to the defendant, as distinguished from other causes." *Prosser & Keeton* § 52, at 345. That apportionment question turns, under traditional tort principles, on whether the victim's harm can practically be divided and attributed to various perpetrators. If the victim's harm is divisible, each defendant is liable for damages for his portion of the harm; if not, defendants are held jointly and severally liable. *See* 3 Harper et al., *Harper, James and Gray on Torts* § 10.1, at 6-7 (3d ed. 2006) (Harper). These principles inform the Court's interpretation of § 2259 here, *see Samantar*, 560 U.S. at 320, n.13, and mandate that those who deal in and view images of Amy's abuse be held jointly and severally liable for all of her harm.

A. Tort Law Imposes Joint And Several Liability Where Multiple Persons Cause An Indivisible Injury

Traditional tort principles apply joint and several liability where multiple tortfeasors cause a victim an indivisible injury. *See Restatement* § A18. If the tortious conduct by multiple persons is the cause of an indivisible injury, "each person is jointly and severally liable for the recoverable damages caused by the tortious conduct." *Id.*; *see also Prosser & Keeton* § 52, at 347 ("Where two or more causes combine to produce

such a single result, incapable of any reasonable division, each may be a substantial factor in bringing about the loss, and if so, each is charged with all of it.").

This Court has recognized these principles, explaining that the common law "allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1979) (citations omitted). *Edmonds* elaborated on the scope of the rule:

> A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury. Nor are the damages against him diminished.... A concurrent tortfeasor generally may seek contribution from another, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability. These principles, of course, are inapplicable where the injury is divisible and the causation of each part can be separately assigned to each tortfeasor.

Id. at 260 n.8 (internal quotation marks and citations omitted).[6]

Common law courts have long applied joint and several liability in a variety of contexts where multiple perpetrators cause indivisible harm. *See Restatement* § A18, Reporters' Note cmt. a ("Many courts, even be-

[6] The discussion of contribution in *Edmonds* was relevant in the context of the negligence issue in that case; contribution actions are generally unavailable to intentional tortfeasors. *See infra* p. 26.

fore the 20th century, imposed joint and several liability on independent tortfeasors when their acts caused truly indivisible harm."). For example, where several entities emptied crude oil into a creek, which thereafter ignited and burned plaintiff's farm, each was jointly and severally liable for the entire damage. *See Northup* v. *Eakes*, 178 P. 266, 268 (Okla. 1918). Where two motorcyclists independently and simultaneously scared plaintiff's horse, resulting in injury to plaintiff, each was jointly and severally liable for the entire injury. *See Corey* v. *Havener*, 65 N.E. 69, 69 (Mass. 1902) ("It makes no difference that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both."). Similarly, multiple defendants who independently discharged pollutants into the air thereby creating a nuisance to plaintiffs were held jointly and severally liable for the entire damages claimed. *See Michie* v. *Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213, 218 (6th Cir. 1974).

The rule has continuing vitality. Defendants in suits under 42 U.S.C. § 1983 are generally held jointly and severally liable for indivisible injuries. *See Thomas* v. *Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 311 (7th Cir. 2009) (en banc) (where "defendants were jointly and severally liable, … allocating damages between the parties for the single indivisible injury alleged in this case was improper"); *Weeks* v. *Chaboudy*, 984 F.2d 185, 188-189 (6th Cir. 1993) (holding based on *Edmonds* that the rule of joint and several liability constituted "federal rule" of damages allowing recovery of "full damages" from defendant regardless of "the actions of concurrent tortfeasors"). And many courts applying state law continue to impose joint and several liability for indivisible

injuries.[7] *See, e.g.*, *Bass* v. *General Motors Corp.*, 150 F.3d 842, 850 (8th Cir. 1998) (applying indivisible injury rule under Missouri law to hold car manufacturer jointly and severally liable with negligent driver who struck plaintiff); *Carrozza* v. *Greenbaum*, 916 A.2d 553, 565 (Pa. 2007) ("Joint and several liability as a principle of recovery for an indivisible injury caused by multiple tortfeasors lies at the very heart of the common law of tort, and also has a solid foundation in Pennsylvania's statutory law.").

The harm Amy suffers is plainly indivisible. There is no practical way to divide up the trauma of a victim of child abuse images and to assign aspects of her trauma to various defendants. Nor is it possible to divide pecuniary losses resulting from that trauma. Amy does not spend the first five minutes of psychological therapy on individual x who might have viewed her images and the next five discussing individual y. *Cf. Burgess*, 684 F.3d at 461 (Gregory, J., concurring and dissenting in part, concurring in the judgment) ("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 vid-

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[7] As the Court noted in *Norfolk & Western Railway Co.* v. *Ayers*, 538 U.S. 135 (2003), although some states have come to favor apportionment schemes based on comparative fault, "many States retain full joint and several liability, even more retain it in certain circumstances, and most of the recent changes away from the traditional rule have come through legislative enactments rather than judicial development of common-law principles." *Id.* at 164-165 (citing *Restatement* § 17, Reporters' Note, tables, at 151-152, 153-159, § B18, Reporters' Note). In *Norfolk*, the Court held that the Federal Employers Liability Act, 42 U.S.C. §§ 51-60, did not mandate apportionment among multiple defendants in part because joint and several liability is "the traditional rule." 538 U.S. at 163.

eo, and so on."). Traditional tort principles thus provide for Amy to recover her full damages from any defendants who viewed or traded in images of her abuse, for they are jointly and severally liable for her harm.

The Government's principal contention (U.S. Br. 43) is that § 2259 does not *require* this approach—even though this Court generally presumes that Congress has legislated against the backdrop of relevant common law principles. *See Samantar*, 560 U.S. at 320 n.13. But the Government also contends that joint and several liability does not apply because a victim's harm is divisible "in *theory* (i.e., to the eye of omniscience)," though it may be "hard or perhaps impossible on the facts" to actually perform the division. U.S. Br. 44 n.17 (internal quotation marks omitted).

The Government's contention that the harm is divisible "in theory" is not a ground to reject joint and several liability. Tort law authorities make clear that an injury must be *practically* divisible for individual allocation of liability. *See* Dobbs et al., *The Law of Torts* § 192, at 643 (2d ed. 2011) (Dobbs) (indivisible injuries are those that cannot be "separated in any practical way"); Harper § 10.1, at 6 ("[T]he harm caused here must be of an indivisible nature that is not practically apportionable."); *Prosser & Keeton* § 52, at 347 (indivisible injuries are those "incapable of any reasonable or practical division"). The possibility of division "in *theory*" (U.S. Br. 44 n.17) is simply irrelevant. *See Restatement* § A18, Reporters' Note cmt. a (historically joint and several liability has been imposed "whether the injury was one that was truly indivisible (such as two vehicles colliding and breaking the plaintiff's leg) or was theoretically divisible, but, because of problems of proof, could not be apportioned based on the causal roles of

each defendant (e.g., marauding cattle belonging to several defendants who destroy a field of crops)").

In any event, Amy's injuries cannot be reduced—even theoretically—to atoms of psychological trauma. Her harm is not an agglomeration of various discrete injuries, piled one upon another by successive perpetrators. The injury Amy has suffered, caused by the knowledge that images of her abuse are impossible to contain and continue to be viewed again and again, and the significant losses she has sustained as a result are no more theoretically "divisible" than death, brain damage, or the total destruction of a building. *Cf. Richardson* v. *Volkswagenwerk, A.G.*, 552 F. Supp. 73, 84 (W.D. Mo. 1982) (finding brain damage, broken bones and paraplegia indivisible as a matter of law); Harper § 10.1, at 22 (Indivisibility "can mean that the harm is not even theoretically divisible (as death or total destruction of a building)"); *Prosser & Keeton* § 52, at 347 (describing death, "a broken leg or any single wound," and "the destruction of a house by fire" as indivisible injuries). Here, as in those cases, "[n]o ingenuity can suggest anything more than a purely arbitrary apportionment of such harm." *Prosser & Keeton* § 52, at 347. The Government's argument invites just such arbitrariness, and offers no practical mechanism to tie the (theoretical) elements of a victim's harm to particular defendants. Any rule that relies on the courts' "omniscience" is unworkable.

B. Joint And Several Liability Is Appropriate Given The Harm A Defendant Causes A Victim of Abuse Images

The Government and Petitioner also suggest that joint and several liability is inappropriate because Petitioner did not cause the *entirety* of Amy's harm. *See*

U.S. Br. 46 (defendant should not be held "responsible for losses he indisputably did not cause"); Pet. Br. 50.

This argument erroneously conflates whether a defendant has *caused* a victim's injury with whether the victim's damages can be *allocated* to particular defendants. As explained *supra* pp. 5-13, under basic tort law principles, each perpetrator, by viewing these abuse images of Amy, has caused her injuries. And when a victim suffers such an indivisible injury, "each tortfeasor is treated as a cause of the *entire* indivisible injury." Dobbs § 192, at 643 (emphasis added); *see also Prosser & Keeton* § 52, at 345 (where there is no basis for division, "courts generally hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it").[8] Joint and several liability is thus appropriate precisely *because* the law deems each perpetrator a cause of the *entire* injury.

The Government nevertheless claims that the fact that "others have engaged in the same wrongful conduct" as the defendant "does not justify holding a defendant (like petitioner) responsible for losses he indisputably did not cause." U.S. Br. 47; *see also* Pet. Br. 50

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[8] Judge Gregory of the United States Court of Appeals for the Fourth Circuit appropriately captured the distinction between causation and apportionment of damages:

> The common law holds joint tortfeasors jointly and severally liable for indivisible damages. … Thus, the restitution question is resolved by asking whether Burgess proximately caused Vicky harm. Assuming that he did, the court must then consider whether those injuries are divisible from the injuries caused by the other offenders who also proximately harmed Vicky. If they are indivisible, then Burgess must be held jointly and severally liable for those injuries.

Burgess, 684 F.3d at 461.

(Amy has not shown that "her losses or damages result from her knowledge of Paroline's conduct"). As an initial matter, the Government's claim is difficult to reconcile with its other arguments—namely, that causation should be analyzed based on the defendants' aggregate conduct because "Amy's trauma cannot be subdivided in the way a traditional 'but-for' standard would require" and because "it is practically impossible to know whether her losses would have been slightly lower if one were to subtract one defendant, or ten, or fifty." U.S. Br. 25.

But even so, the Government (and Petitioner) get the issue exactly backward. Of course a tortfeasor may be held responsible only for injuries he or she has caused. But "[a] defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior is not diminished if some other person's tortious behavior also was an actual and proximate cause of the injury." Wright, *The Logic and Fairness of Joint and Several Liability*, 23 Memphis St. U. L. Rev. 45, 54-55 (Dec. 1992); *see also* Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 432 (1937) ("Where the acts of two defendants combine to produce a single result, which is incapable of being divided or apportioned—such as the death of the plaintiff—each may be the proximate cause of the loss, and each may be held liable for the entire damage."). The contrary rule—suggested by the Government—could "subject plaintiffs to a perverse 'tortfest,' in which the more tortfeasors there were, the less liable each would be, although the tortious behavior of each defendant remained constant and was an actual and proximate cause of the plaintiff's entire injury." Wright, 23 Memphis St. U. L. Rev. at 57.

That is not the law. Rather, courts regularly apply joint and several liability where multiple tortfeasors cause an indivisible injury. *See, e.g.*, *Bass*, 150 F.3d at 850 (holding car manufacturer jointly and severally liable for plaintiff's "total injuries" with unidentified driver who hit plaintiff because manufacturer's defective design contributed to plaintiff's damages); *Kudlacek* v. *Fiat S.p.A*, 509 N.W.2d 603, 612 (Neb. 1994) ("[I]f the separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone could not have caused the result."); *Northup*, 178 P. at 268 ("Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." (internal quotation marks omitted)); *Warren*, 92 N.Y.S. at 728 (holding defendants jointly and severally liable even though "no one defendant caused" the entire injury).

C. The Rule of Joint and Several Liability Applies With Even Greater Force Here Because Perpetrators of Child Abuse Images Intentionally Engage In Wrongful Conduct

Generally, "[a]n actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently." *Restatement* § 33(b). The rationale for broader liability for intentional tortfeasors is straightforward: because proximate cause is in part "employed to prevent a defendant's liability from being out of proportion with the tortfeasor's culpability, the scope of liability for intentional and reckless tortfeasors should be broader than for negligent or

strictly liable tortfeasors." *Id.* § 33 cmt. a.[9]; *see also Shades Ridge Holding Co.* v. *Cobbs, Allen & Hall Mortg. Co.*, 390 So. 2d 601, 609 (Ala. 1980) ("This trend [toward extended liability for intentional torts] 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."); *Seidel* v. *Greenberg*, 260 A.2d 863, 873 (N.J. Super. Ct. Law. Div. 1969) ("many of the limitations upon liability … under the doctrine of 'proximate cause,' as usually expounded in negligence cases *do not apply to intentional torts*." (emphasis added)); *State for Use & Benefit of Richardson* v. *Edgeworth*, 214 So. 2d 579, 587 (Miss. 1968) ("A higher degree of responsibility is imposed upon a wrongdoer whose conduct was intended to cause harm than upon one whose conduct was negligent.").

Similarly, it is appropriate and reasonable to hold an intentional tortfeasor jointly and severally liable for the consequences of his conduct. *See Restatement* § 12 ("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 id.* ("Intentional tortfeasors have been held jointly and severally liable since at least the decision in *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (1799)"). This principle applies even where a jurisdiction has modified the tradi-

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[9] Factors influencing this broadened scope of liability may include "the moral culpability of the actor, as reflected in the reasons for and intent in committing the tortious acts, the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care." *Restatement* § 33(b). Petitioner's moral culpability is substantial, and the seriousness of the harm he caused is undeniable.

tional rule for *nonintentional* tortfeasors. *See id.* § 12 cmt. a. Indeed, the *Restatement* observes that "[n]ot 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.* Reporters' Note cmt. b.

D. Joint And Several Liability Properly Requires The Defendants, Rather Than The Victim, To Bear The Burden Of Defendants' Wrongdoing

The traditional rule of joint and several liability for indivisible injuries properly "places any hardship resulting from the difficulty of apportionment on the proven wrongdoer and not on the innocent plaintiff." *Lovely* v. *Allstate Ins. Co.*, 658 A.2d 1091, 1093 (Me. 1995). The multiple perpetrators who jointly (and intentionally) create the conditions that injure the victim must bear the burden of absolving themselves of any portion of responsibility. *Cf. Summers* v. *Tice*, 199 P.2d 1, 4 (Cal. 1948) (Defendants "brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless.")

These principles apply with particular force in light of Amy's statutory entitlement to restitution. Congress passed § 2259 to ensure that victims such as Amy recover "the full amount" of their losses. 18 U.S.C. § 2259(b)(1). "The historical policy decision to shift the burden of insolvency from tort plaintiffs to defendants fits perfectly with the statutory goal of fully compensating victims of child pornography." *United States* v. *Hargrove*, 714 F.3d 371, 378 (6th Cir. 2013) (Clay, J.,

concurring in part and in the judgment). It is the congressional policy of § 2259, understood in light of background common law principles, that as between Amy and Petitioner, Petitioner must bear the risk of shouldering Amy's losses. Amy has shown, in this case, that her damages amount to $3,367,854, and she should be entitled to collect that sum from any and all defendants with the ability to pay. *See* Resp't Amy Br. 63. As between the victim and the intentional criminal actor, it is perfectly appropriate to impose the burden of bearing those damages on Petitioner and on any other defendants who participate in trafficking and viewing images of Amy's abuse.

The Petitioner's proposal is unworkable, and the Government's proposed alternative of ad-hoc apportionment would almost certainly result in Amy and other victims recovering much less than the "full amount" of their losses. 18 U.S.C. § 2259(b)(1). Victims could be consigned, endlessly, to seeking to collect small-dollar amounts from potentially hundreds of defendants, many of whom may have no ability to pay. The ad-hoc approach also invites unpredictable, disparate, and arbitrary restitution orders. Lower courts have already struggled mightily to adopt consistent restitution formulas under § 2259, to little avail. *Compare, e.g.*, *Benoit*, 713 F.3d at 22 (rejecting approach of dividing victim's total claimed losses by the number of outstanding restitution judgments) *with United States* v. *Lundquist*, 731 F.3d 124, 138-140 (2d Cir. 2013) (affirming in part district court's order dividing Amy's losses by the number of persons convicted of possessing her images); *Hargrove*, 714 F.3d at 375 (indicating that dividing losses by convicted possessors is acceptable in some cases).

These alternatives are also sure to produce capricious results divorced from any actual losses incurred by victims. In at least one case, the Government urged the district court to multiply the number of images in the defendant's possession by an arbitrary dollar value—a calculation that bears no apparent connection to a victim's harm. *See United States* v. *Kennedy*, 643 F.3d 1251, 1264 (9th Cir. 2011). Nor is it an easy matter to allocate, as the Government suggests, restitution "based on the individual defendant's *relative* contribution" to a victim's losses. U.S. Br. 48 (emphasis added). Determining in any meaningful sense a defendant's "relative" contribution is impossible for indivisible injuries such as Amy's. Even in theory, determining a "relative" contribution would require knowledge of other perpetrators' 'contribution' to a victim's harm. But all of Amy's victimizers have not been identified, and the network of perpetrators grows each day. Since January 2006 alone Amy has received more than 1,800 notices of a new federal criminal case involving images of her sexual exploitation. *See* Resp't Amy Br. 57.

The Government suggests that joint and several liability is inappropriate because contribution actions may be unavailable and would be "clumsy" in any event. U.S. Br. 45. But contribution actions are *normally* unavailable to intentional tortfeasors, and yet joint and several liability remains the general rule. *See Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 297 (1993) ("The course of tort law in this century has been to reverse the old rule against contribution, but this movement has been confined in large part to actions in negligence." (citing Harper § 10.2, at 42 and n.10)). In any event, the potential unavailability of contribution does not vitiate joint and several liability, which is designed to ensure a vic-

tim's full recovery and to shift the burden of any shortfall to the tortfeasor. *See Edmonds*, 443 U.S. at 260 n.8 ("A concurrent tortfeasor generally may seek contribution from another, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability.") (citation omitted); *Rivera* v. *Gerner*, 446 A.2d 508, 535 (N.J. 1982) ("If one defendant were insolvent or bankrupt, a second joint tortfeasor might be liable for the total amount of the judgment.... [T]his rule operates to provide the injured person with full recovery.").

Finally, despite the Government's and Petitioner's claims to the contrary, *see* U.S. Br. 45; Pet. Br. 54, any complications of joint and several liability pale in comparison to the administrative difficulties of an ad hoc restitution scheme. The rule of joint and several liability is anchored in common law tradition, and courts are no stranger to the rule in other contexts. *See, e.g.*, 42 U.S.C. § 9607(a) (imposing joint and several liability under CERCLA). Petitioner's approach, on the other hand, could leave victims without any recovery. And the Government's approach would require district courts to continue to feel their way blindly through the pitfalls of improvised allocation schemes. Both approaches would leave victims like Amy without the "full" restitution mandated by § 2259.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

LIST OF AMICI CURIAE

The **National Crime Victim Law Institute** (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide.

Arizona Voice for Crime Victims (AVCV) is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement. AVCV seeks to foster a fair justice system which provides crime victims with resources and information to help them seek immediate crises intervention; informs crime victims of their rights under the laws of the United States and Arizona; ensures that crime victims fully understand their rights; and promotes meaningful ways for crime victims to enforce their rights, including through direct legal representation.

Child Justice is a national organization that advocates for the safety, dignity and self-hood of abused, neglected and at-risk children. The mission of Child Justice, Inc. is to protect and serve children in cases where child sexual, physical abuse or domestic violence is present. It works with local, state and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, community service referrals, court watching services, research and education. Child Justice also serves important public interests by securing pro bono representation for protective parents in financial distress and by seeking appropriate judicial solutions to the threats facing abused, neglected and at-risk children. Child Justice is keenly aware of the financial impact of childhood victimization, particularly when that victimization continues through images, and recognizes full financial restitution from perpetrators is critical to victim recovery.

The **Maryland Crime Victims' Resource Center, Inc.** (MCVRC) is a nonprofit organization dedicated to serving the interests of crime victims. Its mission is to ensure that victims of crime receive justice and that they are treated with dignity and compassion. Its diversified services include criminal justice education, court accompaniment, counseling, support groups, legal information and representation, and policy advocacy. MCVRC has represented crime victims regarding restitution and other victims' rights in Maryland and federal courts.

The **National Center for Victims of Crime** (National Center), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center, among other efforts, advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center is particularly interested in this case because of its commitment to victims of childhood sexual abuse and child pornography.

The **National Organization for Victim Assistance** (NOVA) is the oldest organization of its kind in the United States and quite possibly in the world. Since 1975, NOVA has been dedicated to championing dignity and compassion for those harmed by crime and crisis. NOVA is a node in a network of 14,000 allied professional and volunteer victim advocates and crisis responders and also receives 6,000 victim assistance calls through a nationwide toll-free victim assistance line. NOVA recognizes the harm done by criminal offenders and affirms the enforcement of accountability and responsibility through court-ordered restitution provided to the victim by the convicted perpetrator.