

In The  
**Supreme Court of the United States**

---

---

DOYLE RANDALL PAROLINE,

*Petitioner,*

vs.

AMY UNKNOWN and UNITED STATES,

*Respondents.*

---

---

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

---

---

**RESPONDENT AMY'S BRIEF ON THE MERITS**

---

---

JAMES R. MARSH  
MARSH LAW FIRM PLLC  
151 E. Post Road, Suite 102  
White Plains, NY 10601-5210  
(212) 372-3030

PAUL G. CASSELL  
*Counsel of Record*  
MICHAEL J. TETER  
APPELLATE LEGAL CLINIC  
S. J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH  
332 S. 1400 E., Room 101  
Salt Lake City, UT 84112-0730  
(801) 585-5202  
cassellp@law.utah.edu

*Counsel for Respondent Amy*

**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?

TABLE OF CONTENTS

	Page
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT .....	2
SUMMARY OF THE ARGUMENT.....	6
ARGUMENT.....	9
I. CHILD PORNOGRAPHY PRODUCERS, DISTRIBUTORS, AND POSSESSORS COLLECTIVELY CREATE A GLOBAL MARKET FOR THE SEXUAL ABUSE OF CHILDREN .....	9
II. IN ORDER TO RECEIVE RESTITU- TION, AMY MUST FIRST ESTABLISH A CAUSE-IN-FACT LINKAGE TO THE PETITIONER’S CRIME BY SHOWING SHE WAS “HARMED” BY HIS CRIME ....	13
III. ONCE SHE ESTABLISHES “VICTIM” STATUS, AMY DOES NOT NEED TO ESTABLISH WHAT PART OF HER LOSSES WERE THE “PROXIMATE” RESULT OF PETITIONER’S CRIME.....	17
A. Subsection 2259(b)(3)’s Plain Lan- guage Does Not Contain a General Proximate Cause Requirement .....	18

## TABLE OF CONTENTS – Continued

	Page
B. Reading a General Proximate Cause Requirement into Section 2259(b)(3) Would Frustrate Congress’s Express Purpose of Assuring Generous Restitution to Child Pornography Victims ...	21
C. Statutory Construction Principles Confirm that Subsection 2259(b)(3) Does Not Contain a General Proximate Cause Requirement.....	22
D. The Surrounding Statutory Context Confirms that Section 2259(b)(3) Does Not Contain a General Proximate Cause Requirement.....	28
E. The Drafting History Demonstrates that Congress Considered—and Rejected—the Idea of Placing a “Proximate Result” Limitation into Other Subsections of Parallel Restitution Statutes .....	30
F. Neither the Constitution’s Prohibition of Excessive “Fines” Nor the Rule of Lenity Provides Any Basis for Narrowly Construing Section 2259 .....	33
G. Conventional Tort Principles Exclude Intentional Tortfeasors from Standard Proximate Cause Protections.....	35
IV. AMY CAN RECOVER THE “FULL AMOUNT” OF HER LOSSES FROM PETITIONER UNDER A SYSTEM OF JOINT AND SEVERAL LIABILITY .....	37

## TABLE OF CONTENTS – Continued

	Page
A. The Fifth Circuit Properly Held that Section 2259 Creates a Three-Step Process for Determining Restitution in Child Pornography Cases.....	38
B. The Fifth Circuit Properly Held that Section 2259 Creates a Workable System of Joint and Several Liability for Child Pornography Criminals .....	46
C. The Fifth Circuit’s Interpretation Tracks Conventional Tort Principles by Imposing Joint and Several Liability on Intentional Tortfeasors Who Collectively Harm Amy .....	51
V. EVEN IF SECTION 2259 CONTAINS A GENERAL PROXIMATE RESULT REQUIREMENT, ALL OF AMY’S INVISIBLE LOSSES PROXIMATELY RESULTED FROM PETITIONER’S CRIME ...	59
CONCLUSION.....	66
STATUTORY APPENDIX.....	App. 1

## TABLE OF AUTHORITIES

Page

## CASES

<i>Ali v. Federal Bureau of Prisons</i> , 552 U.S. 214 (2008).....	46
<i>Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters</i> , 459 U.S. 519 (1983).....	36
<i>Baker v. Carr</i> , 369 U.S. 186 (1962) .....	22
<i>Barnhart v. Thomas</i> , 540 U.S. 20 (2003) .....	23
<i>Bloate v. United States</i> , 559 U.S. 196 (2010).....	19, 27
<i>Burlington Northern &amp; Santa Fe Ry. Co. v. United States</i> , 556 U.S. 599 (2009) .....	61, 64
<i>CSX Transp., Inc. v. McBride</i> , 131 S.Ct. 2630 (2011).....	35, 38, 39, 40, 44, 45
<i>Dean v. United States</i> , 556 U.S. 568 (2009).....	20
<i>Federal Maritime Commission v. Seatrain Lines, Inc.</i> , 411 U.S. 726 (1973).....	24
<i>Hardt v. Reliance Standard Life Ins. Co.</i> , 130 S.Ct. 2149 (2010).....	18
<i>Jama v. Immigration &amp; Customs Enforcement</i> , 543 U.S. 335 (2005).....	23
<i>Kelly v. Robinson</i> , 479 U.S. 36 (1986) .....	33
<i>Kosak v. United States</i> , 465 U.S. 848 (1984) .....	32
<i>Maracich v. Spears</i> , 133 S.Ct. 2191 (2013).....	34
<i>Mohamad v. Palestinian Authority</i> , 132 S.Ct. 1702 (2012).....	40

## TABLE OF AUTHORITIES – Continued

	Page
<i>Musick, Peeler &amp; Garrett v. Employers Ins. of Wausau</i> , 508 U.S. 286 (1993).....	58
<i>New York v. Ferber</i> , 458 U.S. 747 (1982) .....	10, 17
<i>Norfolk &amp; Western Ry. Co. v. Ayers</i> , 538 U.S. 135 (2003).....	53
<i>Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO</i> , 451 U.S. 77 (1981).....	58
<i>Osborne v. Ohio</i> , 495 U.S. 103 (1990) .....	10
<i>Porto Rico Ry., Light &amp; Power Co. v. Mor</i> , 253 U.S. 345 (1920).....	26
<i>Sebelius v. Cloer</i> , 133 S.Ct. 1886 (2013) .....	22
<i>Smith v. Islamic Emirate of Afghanistan</i> , 262 F. Supp. 2d 217 (S.D.N.Y. 2003) .....	54
<i>United States v. Arledge</i> , 553 F.3d 881 (5th Cir. 2008) .....	58
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998).....	33, 34
<i>United States v. Bass</i> , 404 U.S. 336 (1971).....	34
<i>United States v. Burgess</i> , 684 F.3d 445 (4th Cir. 2012) .....	64
<i>United States v. Burrage</i> , No. 12-715 .....	34
<i>United States v. Crandon</i> , 173 F.3d 122 (3d Cir. 1999).....	63
<i>United States v. Gamble</i> , 709 F.3d 541 (6th Cir. 2013) .....	40

## TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Goff</i> , 501 F.3d 250 (3d Cir. 2007) .....	21
<i>United States v. Hayes</i> , 555 U.S. 415 (2009) .....	21
<i>United States v. Kearney</i> , 672 F.3d 81 (1st Cir. 2012) .....	16, 60
<i>United States v. Kennedy</i> , 643 F.3d 1251 (9th Cir. 2011) .....	21
<i>United States v. Laney</i> , 189 F.3d 954 (9th Cir. 1999) .....	21
<i>United States v. Laraneta</i> , 700 F.3d 983 (7th Cir. 2012) .....	61, 62, 63
<i>United States v. Paroline</i> , 672 F.Supp.2d 781 (E.D. Tex. 2009) .....	1
<i>United States v. Paroline</i> , 591 F.3d 792 (5th Cir. 2009) .....	1
<i>United States v. Paroline</i> , 636 F.3d 190 (5th Cir. 2011) .....	1
<i>United States v. Paroline</i> , 701 F.3d 749 (5th Cir. 2012) .....	1
<i>United States v. Reingold</i> , 731 F.3d 204 (2d Cir. 2013) .....	12, 34
<i>United States v. Rigas</i> , 605 F.3d 194 (3d Cir. 2010) .....	27
<i>United States v. Schmidt</i> , 675 F.3d 1164 (8th Cir. 2012) .....	40
<i>United States v. Staples</i> , No. 2:09-CR-14017 (S.D. Fla. 2011) .....	57



## TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Zebroski</i> , No. 3:98-CR-00243 (M.D. Pa. 1999) .....	2
<i>Univ. of Texas Sw. Med. Ctr. v. Nassar</i> , 133 S.Ct. 2517 (2013).....	42
 CONSTITUTIONAL PROVISIONS	
Eighth Amendment .....	33
Fourteenth Amendment .....	24
 STATUTES	
1 U.S.C. 1 .....	40
18 U.S.C. 1593(c) .....	15
18 U.S.C. 2248 .....	15, 36, 54, 55
18 U.S.C. 2248(b)(3) .....	55
18 U.S.C. 2248(c) .....	15
18 U.S.C. 2251 .....	37
18 U.S.C. 2251A.....	37
18 U.S.C. 2251(a).....	2
18 U.S.C. 2252 .....	37
18 U.S.C. 2252A.....	37
18 U.S.C. 2252(a)(4) .....	10
18 U.S.C. 2252(a)(4)(B) .....	4, 37
18 U.S.C. 2252(b)(2) .....	4
18 U.S.C. 2252(b)(4)(B) .....	40

## TABLE OF AUTHORITIES – Continued

	Page
18 U.S.C. 2255 .....	65
18 U.S.C. 2259 .....	<i>passim</i>
18 U.S.C. 2259(a).....	62
18 U.S.C. 2259(b)(1) ...	5, 6, 13, 18, 20, 49, 50, 58, 60, 61
18 U.S.C. 2259(b)(2) .....	48
18 U.S.C. 2259(b)(3) .....	18, 19, 20, 21, 22, 24, 27, 28, 33, 46
18 U.S.C. 2259(b)(3)(A) & (D) .....	46
18 U.S.C. 2259(b)(3)(A) through (E) .....	45
18 U.S.C. 2259(b)(3)(F).....	20, 23, 26, 28, 41
18 U.S.C. 2259(b)(4) .....	5, 17, 61
18 U.S.C. 2259(b)(4)(B)(ii).....	51
18 U.S.C. 2259(c) .....	7, 13, 14, 15, 16, 39
18 U.S.C. 2264 .....	15, 36
18 U.S.C. 2264(c) .....	15
18 U.S.C. 2327 .....	29
18 U.S.C. 2327(b)(3) .....	29
18 U.S.C. 2327(c) .....	30
18 U.S.C. 3161(h)(1) .....	19
18 U.S.C. 3161(h)(7) .....	19
18 U.S.C. 3663(a)(1)(B)(i)(I) .....	49
18 U.S.C. 3663(a)(2) .....	14
18 U.S.C. 3663A.....	32

## TABLE OF AUTHORITIES – Continued

	Page
18 U.S.C. 3663A(a)(2).....	14, 29, 30
18 U.S.C. 3664.....	48, 49, 50
18 U.S.C. 3664(e).....	49
18 U.S.C. 3664(f).....	51
18 U.S.C. 3664(k).....	51
18 U.S.C. 3664(h).....	49, 50
18 U.S.C. 3664(m).....	48
18 U.S.C. 3771(a)(6).....	33
18 U.S.C. 3771(d)(3).....	5
28 U.S.C. 1254(1).....	1
42 U.S.C. 9607(a).....	59
Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 501(2)(D), 120 Stat. 623.....	9
Federal Employers' Liability Act.....	38, 39
Violent Crime Control and Law Enforcement Act of 1994	
Pub. L. No. 103-322, 40113, 108 Stat. 1907 (1994).....	28
Pub. L. No. 103-322, 250002(a)(2), 108 Stat. 2082 (1994).....	29
Pub. L. No. 104-208, 121(12), 110 Stat. 3009-27 (1996).....	11
Mandatory Victim Restitution Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).....	14

## TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
132 Cong. Rec. 33781 (1986) .....	11
S. Rep. No. 101-545 .....	31
S. Rep. No. 102-197 .....	31
S. Rep. No. 103-138 (1993) .....	31, 32
S. Rep. No. 104-179 (1996) .....	15, 26, 32
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2013) .....	23, 24, 28
<i>Black’s Law Dictionary</i> (8th ed. 2004) .....	33
Emily Bazelon, <i>The Price of a Stolen Childhood</i> , N.Y. Times Mag. (Jan. 24, 2013) .....	3
Fowler Harper & Fleming James, <i>The Law of Torts</i> (1956) .....	54, 56
Gov’t Post-Remand Br. Concerning Restitution, <i>United States v. Cantrelle</i> , No. 2:11-CR-542 (E.D. Cal. Apr. 3, 2013) .....	62, 63, 64, 66
J. Sutherland, <i>Statutes and Statutory Construction</i> 4908 (3d ed. 1943) .....	24
N. Singer, <i>Sutherland on Statutory Construction</i> 47.33 (7th ed. 2011) .....	23
Paul G. Cassell et al., <i>The Case for Full Restitution for Child Pornography Victims</i> , 82 Geo. Wash. L. Rev. 61 (2013) .....	35
Philip Jenkins, <i>Beyond Tolerance: Child Pornography on the Internet</i> (2001) .....	9

## TABLE OF AUTHORITIES – Continued

	Page
Rachel O’Connell, <i>Paedophiles Networking on the Internet, in Child Abuse on the Internet: Ending the Silence</i> (Carlos A. Arnaldo ed. 2001) .....	12
<i>Restatement (Second) of Torts</i> (1977) .....	37
<i>Restatement (Second) of Torts</i> (1979) .....	53
<i>Restatement (Third) of Torts: Apportionment of Liability</i> (2000) .....	53, 54, 56, 61, 64
<i>Restatement (Third) of Torts: Liability for Physical and Emotional Harm</i> (2010) .....	36, 37, 43, 45, 52
Richard W. Wright, <i>Causation in Tort Law</i> , 73 Calif. L. Rev. 1735 (1984) .....	43
Richard W. Wright, <i>The Logic and Fairness of Joint and Several Liability</i> , 23 Memphis U.L. Rev. 45 (1992) .....	53, 55
U.S. Dep’t of Justice, <i>The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress</i> (2010) .....	9, 11, 65
U.S. Sentencing Commission, <i>Report to the Congress: Federal Child Pornography Offenses</i> (2012) .....	11, 12, 41, 65
W. Page Keeton et al., <i>Prosser and Keeton on the Law of Torts</i> (5th ed. 1984) .....	35, 36, 42, 56, 57, 61
<i>Webster’s Third New International Dictionary</i> (1993) .....	20
William Strunk, Jr., & E.B. White, <i>The Elements of Style</i> (4th ed. 2000) .....	27

**BRIEF FOR RESPONDENT AMY**

---

**OPINIONS BELOW**

The en banc opinion of the court of appeals below is reported at 701 F.3d 749 (5th Cir. 2012) (en banc) (J.A. 349-424). The panel opinion is reported at 636 F.3d 190 (5th Cir. 2011) (J.A. 325-48), which granted mandamus on rehearing from 591 F.3d 792 (5th Cir. 2009) (J.A. 298-310), which in turn affirmed the district court's decision in *United States v. Paroline*, 672 F.Supp.2d 781 (E.D. Tex. 2009) (J.A. 271-310).

---

**JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

---

**STATUTORY PROVISIONS INVOLVED**

Relevant statutory provisions are set forth in App., *infra*, 1-41.

---

## STATEMENT

### Amy's Victimization

When she was eight and nine years old, respondent Amy<sup>1</sup> was repeatedly raped by her uncle in order to produce child pornography. The images of her abuse depict Amy being forced to endure vaginal and anal rape, cunnilingus, fellatio, and digital penetration. Amy was sexually abused specifically for the purpose of producing child sex abuse images; her uncle required her “to perform sex acts” requested by others who wanted her images for their own sexual gratification. J.A. 70. Amy’s abuser pleaded guilty to production of child pornography, in violation of 18 U.S.C. 2251(a), and in 1999 was sentenced to 121 months in prison. *United States v. Zebroski*, No. 3:98-CR-00243 (M.D. Pa. 1999). He was also ordered to pay the psychological counseling costs Amy had incurred up to that time, a total of \$6,325.

By the end of her treatment in 1999, Amy was (as reflected in her therapist’s notes) “back to normal” (J.A. 70) and engaged in age-appropriate activities such as dance. Sadly, eight years later, Amy’s condition drastically deteriorated when she learned that her child sex abuse images were widely traded on the Internet. J.A. 71. The “Misty” series depicting Amy is one of the most widely-circulated sets of child

---

<sup>1</sup> To protect her privacy, Amy proceeds here by way of a pseudonym.

sex abuse images in the world. According to her psychologist, the global trafficking of Amy's child sex abuse images has caused "long lasting and life changing impact[s] on her." J.A. 82. "Amy's awareness of these pictures [and] knowledge of new defendants being arrested become ongoing triggers to her." J.A. 84. As Amy explained in her own, personal 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." J.A. 60.

The ongoing victimization Amy suffers from the continued distribution and collection of her images will last throughout her entire life. She could not complete college and finds it difficult to engage in full-time employment because she fears encountering individuals who may have seen her being raped as a child. J.A. 77, 82. She will also require weekly psychological therapy and occasionally more intensive in-patient treatment throughout her life. J.A. 86.<sup>2</sup>

### **Petitioner's Crime and the District Court Proceedings**

One of the criminals who joined in the collective exploitation of Amy is petitioner Doyle Randall

---

<sup>2</sup> The *New York Times Magazine* recently published a cover story about the difficulties faced by Amy and other child pornography victims. Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. Times Mag. (Jan. 24, 2013), [http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html?\\_r=0](http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html?_r=0).



Paroline. In 2008, law enforcement agents discovered that he had downloaded several hundred images of young children (including toddlers) engaging in sexual acts with adults and animals. When the agents questioned him about the images, he admitted he had been downloading child pornography for two years. On January 9, 2009, he pleaded guilty to one count of possession of material involving the sexual exploitation of children in violation of 18 U.S.C. 2252(a)(4)(B), a ten-year felony. 18 U.S.C. 2252(b)(2).

The FBI then sent the images to the National Center for Missing and Exploited Children (NCMEC). Its analysis revealed that Amy was one of the children victimized in these images. Based on that information, the United States Attorney's Office notified Amy's trial counsel that Amy was an identified victim in petitioner's criminal case. J.A. 22-26. Amy's counsel then submitted a detailed restitution request on Amy's behalf, describing the harm she endures from knowing that she is powerless to stop the Internet trading of these images. J.A. 27-116. In her restitution request, Amy sought full restitution of \$3,367,854 from petitioner for lost wages and psychological counseling costs.

On June 10, 2009, the district court sentenced petitioner to 24 months in prison. During a later adversarial restitution hearing, Amy's counsel and the Government defended her full restitution request against petitioner's attacks. J.A. 145-71.

On December 7, 2009, the district court issued an opinion declining to award Amy any restitution even

though restitution for the “full amount” of a victim’s losses is “mandatory” under 18 U.S.C. 2259(b)(1) & (b)(4). The court began by making a factual finding that Amy was a “victim” of petitioner’s crime because of his gross invasion of her privacy. J.A. 279-80. Although the district court recognized that a “significant” part of Amy’s losses is “attribut[able] to the widespread dissemination and availability of her images and the possession of those images by many individuals such as [petitioner],” it nonetheless refused to award her any restitution because she could not prove exactly what losses proximately resulted from petitioner’s crime. *Id.* at 292-96. The district court acknowledged that its interpretation of the child pornography restitution statute rendered it “largely unworkable.” *Id.* at 296 n.12.

### **The Fifth Circuit Proceedings**

Amy promptly sought review of the district court’s denial of her restitution request, employing the appellate review provision found in the Crime Victims’ Rights Act (CVRA), 18 U.S.C. 3771(d)(3). Acting quickly, a divided panel of the Fifth Circuit declined to grant any relief, with Judge Dennis dissenting. J.A. 298-310.

Amy then petitioned for rehearing. On March 22, 2011, a unanimous panel of the Fifth Circuit granted Amy’s petition and concluded that the district court had “clearly and indisputably erred” in grafting a proximate result requirement onto the restitution

statute. J.A. 338-48. Petitioner successfully sought rehearing en banc.

On November 19, 2012, the Fifth Circuit en banc held 10 to 5 that 18 U.S.C. 2259 does not require a child pornography victim to establish that her losses were the proximate result of an individual defendant's crime in order to secure restitution. The Fifth Circuit concluded Section 2259 creates a system of joint and several liability which "applies well in these circumstances, where victims like Amy are harmed by defendants who have collectively caused her a single harm." J.A. 393. After resolving the statutory construction issue in Amy's favor, the Fifth Circuit remanded, directing that "the district court must enter a restitution order reflecting the 'full amount of [Amy's] losses' . . ." J.A. 403 (quoting 18 U.S.C. 2259(b)(1)).

Petitioner sought review in this Court. Amy agreed that review was appropriate. This Court then granted certiorari.



## **SUMMARY OF THE ARGUMENT**

Amy asks this Court to enforce a "mandatory" restitution statute that promises her that she will receive restitution for the "full amount" of her losses. 18 U.S.C. 2259(b)(1). The other parties to this case both agree with Amy that Congress enacted a broad restitution statute designed to "ensur[e] full compensation of the losses [suffered by] the victims of child

pornography distribution and possession.” Pet. Br. 48; *see also* Gov’t Br. 15. Yet remarkably petitioner asks this Court to affirm a district court decision that interpreted the statute to be “largely unworkable” and gave Amy no restitution at all. J.A. 296 n.12. The Government’s approach also results in far less than “full” restitution. While arguing that petitioner has factually and proximately caused all of Amy’s losses, the Government ultimately asks this Court to give district courts “significant leeway” to award Amy only a miniscule, fractional amount of the full restitution the statute mandates she be awarded. Gov’t Br. 49.

The Court should read Section 2259 to achieve Congress’s explicit compensatory aims, not to thwart them. As the Fifth Circuit en banc interpreted the statute, it does not require a child pornography victim to establish precisely what fraction of, for example, her psychological counseling costs are the proximate result of an individual defendant’s crime. Instead, victims like Amy must first establish that they suffered “harm” from a defendant’s child pornography crime. *See* 18 U.S.C. 2259(c). This cause-in-fact link or nexus between an individual’s harm and a defendant’s crime establishes a statutorily-recognized “victim” entitled to restitution for the “full amount” of her losses. 18 U.S.C. 2259(c) & (b)(1). This case comes to this Court on a factual finding that petitioner harmed Amy—a finding that was unchallenged below and is well-supported by the record.

Next, the victim establishes the “full amount” of her losses from child pornography. In this case Amy

provided detailed, expert evidence of, for example, the projected costs for psychological counseling she requires due to being a victim of child pornography. These costs are the losses Congress commanded must be awarded as restitution. Accordingly, as the Fifth Circuit held, the district court should have entered a restitution award in Amy's favor for this amount, thereby making petitioner jointly and severally liable for her full losses along with other defendants convicted in other cases.

The Fifth Circuit's practical interpretation of Section 2259 follows applicable tort law principles—i.e., the principles providing ample compensation to victims of intentional torts. Section 2259 applies to serious felonies with stringent mens rea requirements. For such intentional torts committed against vulnerable victims, the common law was never concerned about strict “proximate cause” limitations, but instead imposed broad joint and several liability. When choosing between equalizing the liability of intentional wrongdoers and fully compensating those harmed by wrongdoers, the common law has always sided with victims. Congress wisely did the same thing in enacting Section 2259. This Court should accordingly affirm the Fifth Circuit's decision in all respects.



## ARGUMENT

### I. CHILD PORNOGRAPHY PRODUCERS, DISTRIBUTORS, AND POSSESSORS COLLECTIVELY CREATE A GLOBAL MARKET FOR THE SEXUAL ABUSE OF CHILDREN

Amy agrees with the Government that Section 2259 must be interpreted in light of an important background principle (Gov't Br. 15-17), although she believes the principle extends further than the Government articulates. The Government contends that "the possession of child pornography is not a victimless crime." Gov't Br. 16.<sup>3</sup> This much is undeniably true. Congress found that "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and repetition of their abuse." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 501(2)(D), 120 Stat. 623, 624. As this Court has explained, "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. . . . It

---

<sup>3</sup> While Amy follows the other parties in using the legal term "child pornography," that term "contributes to a fundamental misunderstanding of the crime—one that . . . leaves the impression that what is depicted in the[se] photograph[s] is [adult] 'pornography' rather than images memorializing the sexual assault of children." U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* 8 (2010) (hereinafter "*DOJ Report to Congress*"). See generally Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 9 (2001).

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).

This important background principle, however, extends beyond recognizing the harms child pornography causes victims to understanding the vast criminal machinery that generates those harms. In enacting laws criminalizing all aspects of child pornography, Congress realized that it had to address every stage of this sordid joint enterprise—countless criminals who together create, distribute, and possess child pornography. As this Court explained, “it is difficult, if not impossible to halt” the sexual exploitation and abuse of children by pursuing only child pornography producers. *Ferber*, 458 U.S. at 759-60. It was therefore reasonable for Congress to conclude that “the production of child pornography [will decrease] if it penalizes those who possess and view the product, thereby decreasing demand.” *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990). Indeed, “[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties” on all persons in the distribution chain. *Ferber*, 458 U.S. at 760. Congress did just that by criminalizing child pornography possession. *See, e.g.*, 18 U.S.C. 2252(a)(4).

Congress properly recognized that child pornography possessors are inextricably linked to child pornography producers. Congressional findings concerning Chapter 110 explain that “prohibiting the

possession and viewing of child pornography will . . . [help] to eliminate the market for the sexual exploitative use of children. . . .” Pub. L. No. 104-208, 121(12), 110 Stat. 3009-27 (1996); *see also* 132 Cong. Rec. 33781 (1986) (statement of Sen. Roth) (“[M]y subcommittee’s investigation disclosed the existence of a seamy underground network of child molesters . . . and it showed that the very lifeblood of this loosely organized underground society is child pornography.”). A recent Justice Department analysis reported that “the growing and thriving market for child pornographic images is responsible for fresh child sexual abuse—because the high demand for child pornography drives some individuals to sexually abuse children and some to ‘commission’ the abuse for profit or status.” *DOJ Report to Congress, supra*, at 17.

The record in this case sadly demonstrates the manner in which collectors of child pornography directly cause the sexual abuse of children. Amy was forced to perform sex acts to satisfy the demands of criminals who wanted her child pornography images. J.A. 70. “Most if not all of this activity was for the purpose of producing the child pornography [ultimately] possessed . . . by [petitioner].” J.A. 29.

Once a child like Amy is sexually abused to produce digitized child pornography, the images can be disseminated exponentially. Peer-to-peer file sharing (commonly called “P2P”) is “widely used to download child pornography.” U.S. Sentencing Commission, *Report to the Congress: Federal Child Pornography Offenses* 51 (2012) (hereinafter “*Sentencing Comm’n*”).



*Report to Congress*”). Two recent law enforcement initiatives “identified over 20 million unique IP [Internet Protocol] addresses offering child pornography over P2P networks from 2006 to August 2010.” *Id.* at 51-52. The ease with which child pornography can now be downloaded creates “an expanding market for child pornography [that] fuels greater demand for perverse sexual depictions of children, making it more difficult for authorities to prevent their sexual exploitation and abuse.” *United States v. Reingold*, 731 F.3d 204, 217 (2d Cir. 2013).

In this case, petitioner downloaded several hundred images of toddlers and other children being sexually abused—including two depicting Amy. J.A. 146. Sadly, petitioner is not alone in exploiting Amy. “The National Center for Missing and Exploited Children . . . has found at least 35,000 images of Amy’s abuse among the evidence in over 3,200 child pornography cases since 1998 [and] . . . the content of these images [is] ‘extremely graphic.’” J.A. 352. Petitioner is just one of many cogs in the vast machinery that sexually abuses and exploits children through child pornography. See Rachel O’Connell, *Paedophiles Networking on the Internet, in Child Abuse on the Internet: Ending the Silence* 65, 77 (Carlos A. Arnaldo ed. 2001) (networks for sharing child pornography are “an example of a complex criminal conspiracy”). This Court should decide this case against the sobering reality that Congress needed to respond to a vast, de facto joint criminal

enterprise of child pornography producers, distributors, and possessors.

## **II. IN ORDER TO RECEIVE RESTITUTION, AMY MUST FIRST ESTABLISH A CAUSE-IN-FACT LINKAGE TO THE PETITIONER'S CRIME BY SHOWING SHE WAS "HARMED" BY HIS CRIME**

Reading Section 2259 against the backdrop of a de facto joint enterprise of thousands of child pornography offenders helps clarify why Congress reasonably determined that victims should collect "full" restitution from each convicted defendant. A victim of child pornography must establish a cause-in-fact linkage to an individual defendant's crime by proving that she is a victim who was "harmed" by his crime. 18 U.S.C. 2259(c). Once she establishes that link, however, she does not have to quantify precisely what part of her losses are attributable to a specific crime or criminal defendant. Instead, Congress required district courts to award restitution to a child pornography victim from each individual defendant for the "full amount of the victim's losses" from child pornography. 18 U.S.C. 2259(b)(1). The next three parts in this brief address each of these three aspects of restitution under Section 2259: the cause-in-fact nexus created through the statute's "victim" definition; the absence of a traditional "proximate result" requirement within the statute; and the statute's system of joint and several liability.

Turning to the first aspect—the “victim” definition issue—petitioner concedes that Amy “argued persuasively that possession of child pornography causes harm to the minors depicted.” Pet. Br. 49. Petitioner suggests, however, that Amy did not link any of her harm to him. *Id.* at 49-51, 61. This case undoubtedly presents a special circumstance where Amy is harmed by multiple wrongdoers. *See* J.A. 391 n.14 (“No other crime involves single victims harmed jointly by defendants” scattered across the country). Yet even though Amy was harmed by multiple criminals, she remains a “victim” of petitioner.

In Section 2259, Congress broadly defined the “victim” entitled to receive restitution from a child pornography defendant as “the individual *harmed* as a result of a commission of a crime under this chapter [i.e., Chapter 110, regarding child pornography crimes].” 18 U.S.C. 2259(c) (emphasis added). Importantly, in both the Mandatory Victim Restitution Act (MVRA) and the general federal restitution statute, Congress more narrowly defined “victim” as “a person *directly and proximately harmed* as the result of the commission of an offense. . . .” 18 U.S.C. 3663A(a)(2) (emphasis added); *see also* 18 U.S.C. 3663(a)(2) (same). In Section 2259, Congress consciously omitted the narrowing modifiers “directly” and “proximately” found in these more broadly-applicable restitution statutes. Indeed, when Congress enacted the MVRA, it made conforming amendments to other parts of the earlier-enacted Section 2259. *See* Pub. L. No. 104-132, 110 Stat. 1214,

1231 (1996). Yet Congress deliberately chose *not* to conform Section 2259's definition of "victim" to the more restrictive, proximately-harmed definition in the MVRA. *See* S. Rep. No. 104-179 at 14 (1996) ("No change is made to the scope of restitution required under the Violence Against Women Act provisions [e.g., Sections 2248, 2259, and 2264]"). This is because Congress intended that restitution be broadly available for child pornography victims and other particularly-vulnerable victims of certain serious crimes.<sup>4</sup>

Petitioner ignores the fact that the district court found that Amy was "harmed as a result of" his crime. 18 U.S.C. 2259(c). Petitioner criminally possessed Amy's images as part of his crime of conviction. J.A. 277-78. The district court specifically found that his possession "harmed" Amy (J.A. 282) in several ways, such as perpetuating the abuse perpetrated during the original production of the images, and continuing the invasion of her privacy. J.A. 279-80. Petitioner did not appeal from that finding and, indeed, in the court below, he specifically agreed that "Amy is a 'victim' for purposes of Section 2259 as a result of [his] conduct. . . ." Paroline's Br. on

---

<sup>4</sup> Congress used the broader "victim" formulation not only in the restitution statute for child pornography victims, but also in the restitution statutes for sexual assault victims, 18 U.S.C. 2248(c), and domestic violence victims, 18 U.S.C. 2264(c). In 2000, Congress applied this same broad formulation for human trafficking victims. 18 U.S.C. 1593(c).

Rehearing En Banc at 40 (5th Cir. March 26, 2012).<sup>5</sup> Amy and the Government also agreed with this finding, as has every court of appeals presented with this issue. *See, e.g., United States v. Kearney*, 672 F.3d 81, 94 (1st Cir. 2012) (“individuals depicted in child pornography are harmed by the continuing dissemination and possession of such pornography containing their image”).

This “victim” finding does not hinge on how stringently the “harmed as a result of” language in Section 2259(c) is interpreted. Amy believes that the causal connection or nexus must be something less demanding than “direct and proximate” in light of Congress’s deliberate omission of these terms from this particular provision. But Amy can satisfy

---

<sup>5</sup> At various points in his brief, petitioner now appears to take a different position, claiming that Amy stipulated that she suffered no harm from him. *See, e.g., Pet. Br.* 66. In fact, Amy’s position was—and remains—that petitioner and other criminals collectively harmed her through an ongoing de facto joint criminal enterprise, as the district court acknowledged in rejecting petitioner’s argument about the stipulation. J.A. 295 n.11.

Concluding that Amy was harmed by petitioner does not require a finding that she knew his name. If Amy discovered one night that a crowd was leering into her bedroom window watching her being raped, she would be harmed and could seek compensation from each participant without knowing any of their names. That is why Amy stipulated narrowly that none of the losses for which she is seeking restitution “flow from anyone telling her specifically about [petitioner] or telling her about his conduct which was the basis of the prosecution in this case.” J.A. 230.

whatever standard is imposed, as the unchallenged finding below demonstrates.

The requirement that Amy show she is a “victim” of petitioner establishes a cause-in-fact linkage between her restitution request and petitioner. Section 2259 requires an individual seeking restitution to show that she was harmed by a particular crime committed by the individual defendant from whom she is seeking restitution. This harm can be shown from the simple fact that child pornography possession “increases the emotional and psychic *harm* suffered by the child.” *Ferber*, 458 U.S. at 759 n.10 (emphasis added) (internal quotation omitted). This harm creates a nexus between Amy and petitioner, supporting the “mandatory” restitution obligation. 18 U.S.C. 2259(b)(4).

### **III. ONCE SHE ESTABLISHES “VICTIM” STATUS, AMY DOES NOT NEED TO ESTABLISH WHAT PART OF HER LOSSES WERE THE “PROXIMATE” RESULT OF PETITIONER’S CRIME**

Because petitioner “harmed” Amy, the remaining question is how much restitution Amy is entitled to receive from him under a mandatory restitution statute. Petitioner takes the position that Amy should receive nothing from him because restitution under Section 2259 “must be limited to harms a defendant proximately caused.” Pet. Br. 48. The Government also reads a general proximate cause limitation into

the statute, although it ultimately argues that “the proximate-cause limitation poses no difficulty in restitution requests of the sort at issue here.” Gov’t Br. 27. At least with respect to petitioner’s sweeping claim, Amy takes a different view. As the Fifth Circuit properly recognized below, courts lack any basis for inserting into Section 2259 limiting words that Congress chose not to place there.

### **A. Subsection 2259(b)(3)’s Plain Language Does Not Contain a General Proximate Cause Requirement**

Because this case revolves around a statute, the Court must “begin by analyzing the statutory language, assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.” *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2156 (2010) (internal quotation omitted). Section 2259 provides that the district court “*shall* direct the defendant to pay the victim (through the appropriate court mechanism) the *full amount* of the victim’s losses. . . .” 18 U.S.C. 2259(b)(1) (emphases added). The statute then goes on to list six categories that are included in these losses. Only the last of these six categories requires a victim to establish the loss was the “proximate result of the [defendant’s] offense”:

(3) Definition.—For purposes of this subsection, the term “full amount of the victim’s losses” includes **any** costs incurred by the victim for—

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys' fees, as well as other costs incurred; and
- (F) **any** other losses *suffered by the victim as a proximate result* of the offense.

18 U.S.C. 2259(b)(3) (emphases added).

The section unambiguously states that a victim must show that a loss was “suffered . . . as the proximate result” of a defendant’s offense only when seeking restitution for the “any other losses” covered by Subsection F. “Had Congress wished” to have a general proximate result limitation run throughout the section, “it could have said so.” *See Bloate v. United States*, 559 U.S. 196, 211 n.13 (2010) (refusing to apply limitation found in 18 U.S.C. 3161(h)(7) to 3161(h)(1)). Congress could have easily placed the phrase at the beginning of the list of losses or at the very end of the list in a stand-alone clause. Congress did neither. Following the statute’s clear text, the court below properly explained that “courts ‘ordinarily’ should ‘resist reading words or elements into a



statute that do not appear on its face.’” J.A. 388 (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)); see *Dean v. United States*, 556 U.S. 568, 573 (2009).

That Subsection F is indeed separate from Subsections A through E is confirmed not only by the use of separately-lettered subsections, but also by the double appearance of the word “any” (highlighted twice in boldface type above). The first “any” precedes the word “costs,” and then Subsections A through E enumerate specific types of recoverable costs. Next, Congress shifts gears, allowing restitution for any “losses,” producing a second appearance of “any” in Subsection F and confirming that Congress viewed that subsection as operating separately from the others.

In addition, Section 2259(b)(3) opens with the expansive word “includes,” making clear that what follows are simply illustrations of what falls within the “full amount” of restitution that Section 2259(b)(1) extends to child pornography victims. See *Webster’s Third New International Dictionary* 1143 (1993) (defining “include” as “to place, list, or rate as a part or component of a whole or of a larger group”). Petitioner overlooks this fact when arguing that restrictive language found in Subsection 2259(b)(3)(F) is then somehow also read back to limit an entirely different provision, Section 2259(b)(1). Congress’s restriction on one subsection is not a general restriction on the entire statute. In short, Section 2259(b)(3)’s unambiguous plain language contains a “proximate result” limitation only in Subsection F—end of story.

**B. Reading a General Proximate Cause Requirement into Section 2259(b)(3) Would Frustrate Congress’s Express Purpose of Assuring Generous Restitution to Child Pornography Victims**

Another fundamental reason for not reading a general proximate cause requirement into Section 2259 is that doing so would interfere with Congress’s express goals. This Court has repeatedly refused to construe statutes in ways that would “frustrate Congress’s manifest purpose.” *United States v. Hayes*, 555 U.S. 415, 427 (2009). It is clear that “Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.” *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999). Section 2259 thus interlocks with other laws addressing “a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms.” *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007).

Contrary to that express purpose to ensure “full” compensation, petitioner remarkably asks this Court to affirm a district court decision giving Amy no restitution whatsoever. Pet. Br. 67. Petitioner never even attempts to reconcile his interpretation with the statute’s goals. Perhaps this is because he is defending a district court decision that candidly conceded that reading a general proximate result requirement into the statute effectively renders it “unworkable.” J.A. 296 n.12; *see also United States v. Kennedy*, 643

F.3d 1251, 1266 (9th Cir. 2011) (“[W]e suspect that § 2259’s proximate [result] . . . requirement[] will continue to present serious obstacles for victims seeking restitution in these sorts of [child pornography] cases.”). What makes the statute unworkable, however, is not its text, but rather the additional requirement that courts (like the district court) have read into the statute. As the en banc court below explained in overturning the district court, “Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the statute.” J.A. 391 n.14 (internal quotation omitted).<sup>6</sup>

### **C. Statutory Construction Principles Confirm that Subsection 2259(b)(3) Does Not Contain a General Proximate Cause Requirement**

Because Subsection 2259(b)(3)’s unambiguous text and evident purpose fully coincide, the Court need not resort to other guides to statutory construction. *See Sebelius v. Cloer*, 133 S.Ct. 1886, 1895

---

<sup>6</sup> The other parties trumpet the fact that many other circuits have interpreted Section 2259 differently than the Fifth Circuit. But in five of the other circuits (the 1st, 2nd, 6th, 9th, and 11th Circuits), the crime victim was not represented by legal counsel, while the Justice Department joined the defendant in arguing for a general proximate cause requirement. This eliminated the adversarial posture “upon which the court[s] so largely depend[] for illumination of difficult” issues. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

(2013). But in any event, the relevant canons of construction all confirm the statute’s plain meaning.

Reading the qualifying language in Subsection F back through the five previous subsections plainly violates the well-known canon of statutory construction called “the rule of the last antecedent.” 2A N. Singer, *Sutherland on Statutory Construction* 47.33 (7th ed. 2011) (“Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.”). According to this venerable rule, “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it *immediately* follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (emphasis added); see also *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 345 (2005). Applying this rule here, the qualifying phrase “suffered by the victim as a proximate result of the offense” applies only to the immediately preceding phrase—“any other losses.”<sup>7</sup> Indeed, in *Barnhart*, this Court interpreted a statute containing a qualifying phrase starting with the same two words (“any other”) that Subsection 2259(b)(3)(F) contains. This Court should follow *Barnhart* in rejecting the argument that these words somehow imply

---

<sup>7</sup> A similar principle supporting this outcome is the “nearest-reasonable-referent canon,” which mandates that “[w]hen the syntax involves something other than a parallel series of nouns or verbs, a . . . postpositive modifier normally applies only to the nearest reasonable referent.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2013).

that the qualifying language that follows should be read throughout the section.<sup>8</sup>

To defeat this “commonsense principle of grammar” (J.A. 375), petitioner and the Government rely on the principle that “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.” Scalia & Garner, *supra*, at 147. For example, in construing the Fourteenth Amendment’s prohibition of depriving any person of “life, liberty, or property, without due process of law,” the postpositive modifier “without due process of law” can be straightforwardly read to apply, in parallel, to each of the three preceding nouns.

Turning to the statute in this case, no such “straightforward, parallel” construction is possible. Reading the postpositive modifier through each of the six subsections of Section 2259(b)(3) would make the statute read awkwardly and ungrammatically:

---

<sup>8</sup> The other parties cite *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733-34 (1973), as providing a competing rule of statutory construction. *Seatrain*, however, simply involved a debate about the meaning of particular words scattered throughout separate parts of a list. *Seatrain* thus properly cited 2 J. Sutherland, *Statutes and Statutory Construction* 4908 (3d ed. 1943), for the familiar canon that associated words bear on one another’s meaning (*noscitur a sociis*). 411 U.S. at 734. This canon has no application here, where the meaning of individual words is not in dispute. See J.A. 379-80.

(3) Definition.—For purposes of this subsection, the term “full amount of the victim’s losses” includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care *suffered by the victim as a proximate result of the offense;*

(B) physical and occupational therapy or rehabilitation *suffered by the victim as a proximate result of the offense;*

(C) necessary transportation, temporary housing, and child care expenses *suffered by the victim as a proximate result of the offense;*

(D) lost income *suffered by the victim as a proximate result of the offense;*

(E) attorneys’ fees, as well as other costs incurred *suffered [sic] by the victim as a proximate result of the offense;* and

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

18 U.S.C. 2259(b)(3) (italicized language inserted). This construction makes no sense. For example, the very first subsection would have a crime victim absurdly “suffering” medical services, while the second subsection would have a victim “suffering” therapy or rehabilitation. Similarly jarring is the problem that

comes in Subsection E. Under petitioner’s construction, a glaring incongruity develops because Subsection E is finished ungrammatically—i.e., “attorneys’ fees . . . incurred suffered [*sic*]. . . .”

In the primary case relied upon by petitioner, the Court could find no reason why certain qualifying language “should not be read as applying to the entire phrase” in the statute at issue. *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920). But in this case, Subsection F’s expansiveness provides good reason why Congress added qualifying words there rather than to the five earlier, more precisely-defined subsections:

As a general proposition, it makes sense that Congress would impose an additional restriction on the catch-all category of “other losses” that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.

J.A. 340. Congress had good reason for thinking Subsection F was potentially far more expansive than the other five subsections. Subsection F allows restitution not for defined, out-of-pocket costs (e.g., the cost of medical care), but rather for ill-defined “losses,” 18 U.S.C. 2259(b)(3)(F), including losses for “emotional damages.” See S. Rep. No. 104-179 at 927 (noting availability of emotional damages); see *also*

p. 20, *supra* (noting that Congress used the word “any” twice in the statute, differentiating the costs outlined in Subsections A through E from the “any” other losses in Subsection F).

The statute’s punctuation further confirms that the qualifying language found in Subsection F applies only to Subsection F. As the court below explained, “the meaning of a statute will typically heed the commands of its punctuation.” J.A. 454 (quoting *U.S. Nat’l Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993)). Here, Section 2259 “begins with an introductory phrase composed of a noun and verb . . . that feeds into a list of six items, each of which [is an] independent object[] that complete[s] the phrase.” J.A. 378. Each completed phrase is separated by semi-colons. As a matter of syntax, a semicolon is typically used to separate “two or more clauses” that are “grammatically complete.” William Strunk, Jr., & E.B. White, *The Elements of Style* 5 (4th ed. 2000). As in other parts of criminal law, Congress’s use of semi-colons indicates a clear break between each category, because Congress “typically utilizes multiple subsections or separates clauses with semi-colons to enumerate the separate crimes.” *United States v. Rigas*, 605 F.3d 194, 209 (3d Cir. 2010). Paralleling this approach signaling separate offenses, Congress signaled distinct restitution categories in Section 2259(b)(3) by individually enumerating six subsections and then further separating them with semi-colons. See *Bloate*, 559 U.S. at 204-08 (holding that, in interpreting statute with introductory clause



followed by a dash and then separately enumerated subsections followed by semi-colons, language in one subsection does not carry over into another).

Finally, another parallel principle of statutory construction—the scope of subparts canon—supports the same conclusion. Ordinarily statutory “[m]aterial within an indented subpart relates only to the subpart.” Scalia & Garner, *supra*, at 156. Here, Congress made Subsection F an indented subpart of a larger statute.<sup>9</sup> In other words, what happens in Subsection 2259(b)(3)(F) stays in Subsection 2259(b)(3)(F).

#### **D. The Surrounding Statutory Context Confirms that Section 2259(b)(3) Does Not Contain a General Proximate Cause Requirement**

When Congress wanted to include a general proximate cause requirement in a restitution statute, it knew how to draft such a requirement. The omnibus 1994 Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) contained not only the child pornography restitution provision at issue here—Section 2259 (found at Pub. L. No. 103-322, 40113, 108 Stat. 1907 (1994))<sup>10</sup>—but also a restitution provision for telemarketing fraud victims—18 U.S.C.

---

<sup>9</sup> This indentation was part of the text Congress enacted. *See* App. 41.

<sup>10</sup> The Violence Against Women Act (VAWA) containing Section 2259 was a separate title within the larger VCCLEA.

2327 (found at *id.*, 250002(a)(2), 108 Stat. 2082 (1994)). With striking similarity to Section 2259, Section 2327 mandates restitution in telemarketing fraud cases for the “full amount of the victim’s losses.” 18 U.S.C. 2327. But unlike the child pornography restitution statute, Section 2327 *does* contain a general proximate result requirement. The statute provides: “For purposes of this subsection, the term ‘full amount of the victim’s losses’ means *all losses suffered by the victim as a proximate result of the offense.*” 18 U.S.C. 2327(b)(3) (emphasis added).

This variation among statutes demonstrates that if Congress truly wanted to impose a general “proximate result” requirement on Section 2259, it could have drafted a much shorter version of the full-amount-of-the-victim’s-losses clause, exactly as it did when it simultaneously enacted the telemarketing fraud restitution provision. If Congress meant to limit child pornography victims to “losses suffered as a proximate result of the offense,” there was no need to delineate six different categories of losses in Subsections A through F. All that was necessary was the much shorter (27-word) formulation used in the telemarketing fraud provision.

Further underscoring the general proximate cause requirement in the telemarketing fraud statute, its definition of “victim” cross-references Subsection 3663A(a)(2), which in turn defines “victim” as an individual “*directly and proximately* harmed as a result of” the commission of a specified federal crime.

See 18 U.S.C. 2327(c) (emphasis added) (cross-referencing 18 U.S.C. 3663A(a)(2)). In contrast, as already explained (*see* pp. 14-15, *supra*), in Section 2259 Congress defined child pornography victims more broadly, omitting the limiting words “directly and proximately.” Unsurprisingly, Congress employed different words purposely: it wanted more generous restitution for victims of child pornography—a sex offense often directed against children—than for victims of telemarketing fraud—an economic offense often directed against adults.

#### **E. The Drafting History Demonstrates that Congress Considered—and Rejected—the Idea of Placing a “Proximate Result” Limitation into Other Subsections of Parallel Restitution Statutes**

Section 2259’s drafting history demonstrates that members of Congress specifically considered—and rejected—the idea of placing a “proximate result” limitation into other subsections of the statute. When the Senate began developing the Violence Against Women Act in 1990, it considered restitution statutes for sexual assault and domestic violence victims that would have provided a specific “proximate result” limitation in two of the subsections:

- (2) For purposes of this subsection, the term “full amount of the victim’s losses” includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) any income lost by the victim *as a proximate result of the offense*;

(D) attorneys' fees; and

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

S. Rep. No. 101-545 at 4, App. 33 (emphases added) (covering sexual assault restitution); *see also id.* at 16-17, App. 37 (an essentially identical provision for domestic violence).

During the legislative process the following year, 1991, the “proximate result” limitation was removed from Subsection C in the sexual assault and domestic violence provisions, but left in the last subsection. *See* S. Rep. No. 102-197 at 4, 18-19. As a result, when the Senate first considered a restitution provision for child pornography victims in 1993, it used as the model for Section 2259 the formulation from the sexual assault and domestic violence provisions then under active consideration. *See* S. Rep. No. 103-138 at 5-6 (1993). This sequence makes it clear that the Fifth Circuit was correct when it recognized that the “selective inclusion and omission of causal requirements in § 2259’s subsections” was no accident but rather suggestive of Congress’s conscious decision “to

depart from, rather than incorporate, a tradition of generalized proximate cause.” J.A. 389-90. In light of that history, this Court should respect Congress’s choice and apply a “proximate result” limitation only where Congress has provided one.<sup>11</sup>

---

<sup>11</sup> Other legislative history also supports Amy’s interpretation. *See, e.g.*, S. Rep. No. 103-138 at 56 (describing Section 2259 as a statute that “reverses those assumptions [that defendants lack resources to pay restitution], *requiring the court to order the defendant to pay the victim’s expenses*” (emphasis added)).

Petitioner, on the other hand, points to a single sentence (in a Senate Judiciary Committee report from an earlier session of Congress) that provides a shorthand overview of Section 2259’s provisions. Pet. Br. 38 (quoting S. Rep. No. 103-138 (1993) (“This section requires sex offenders to pay costs incurred by victims as a proximate result of a sex crime.”). In such a summary, “precision of meaning is naturally and knowingly sacrificed in the interest of brevity.” *Kosak v. United States*, 465 U.S. 848, 865 (1984) (Stevens, J., dissenting). Moreover, Amy’s position is (consistent with this sentence) that the statute requires defendants to pay costs victims incur as a proximate result of a sex crime—under Subsection F, the most expansive part of the statute. She simply believes that the statute provides for the recovery of other costs as well. The sentence simply does not discuss these additional costs.

Petitioner also mistakenly points to legislative history involving an entirely different statute. *See* Pet. Br. 38 (citing S. Rep. No. 104-179 at 29-30 [*sic*—should be 19] (mistakenly discussing the legislative history for 18 U.S.C. 3663A). Nothing in these snippets supports ignoring Section 2259’s plain language.

**F. Neither the Constitution’s Prohibition of Excessive “Fines” Nor the Rule of Lenity Provides Any Basis for Narrowly Construing Section 2259**

Unable to find much else to support his position, petitioner argues that it violates the Eighth Amendment’s prohibition of “excessive fines” to allow child pornography victims to recover full restitution. Petitioner concedes that this “Court has never actually applied the Excessive Fines Clause to criminal restitution.” Pet. Br. at 58. Presumably this is because a “fine” is a “pecuniary criminal punishment or civil penalty payable to the public treasury.” *Black’s Law Dictionary* 664 (8th ed. 2004); see *United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998). Conversely, a restitution award under Section 2259 is payable to the crime victim as compensation for her losses and thus is not a criminal penalty to which the Eighth Amendment even applies. J.A. 397.<sup>12</sup>

Even if the Constitution’s prohibition on excessive “fines” could somehow be contorted to apply to this case, a fine is only excessive if “it is grossly

---

<sup>12</sup> Petitioner relies on *Kelly v. Robinson*, 479 U.S. 36 (1986), for the proposition that restitution awards have penal aspects. But *Kelly* involved an older restitution statute that was not tailored to victims’ losses, *id.* at 53, and did not give the victim any right to restitution, *id.* at 52. Section 2259, in contrast, mandates an award calculated with reference to a victim’s losses, 18 U.S.C. 2259(b)(3), and the 2004 Crime Victims’ Rights Act now promises victims that they have the “right to full and timely restitution. . . .” 18 U.S.C. 3771(a)(6).

disproportional to the gravity of a defendant’s offense.” *Bajakajian*, 524 U.S. at 334. Given petitioner’s indigency, the district court will likely place him on a payment schedule which will only require him to pay (at most) a few hundred dollars a month—hardly an excessive payment for a serious felony involving harm to sexually abused children. See *United States v. Reingold*, 731 F.3d at 216-18.

Nor does the Court have any reason to apply the rule of lenity. That rule applies only when punishment is at stake—i.e., when an inaccurate statutory interpretation could result in “men languishing in prison” without congressional authorization, *United States v. Bass*, 404 U.S. 336, 348 (1971) (internal quotation omitted)—not when the issue is how to construe a compensatory restitution statute.<sup>13</sup> In any event, “the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.” *Maracich v. Spears*, 133 S.Ct. 2191, 2209 (2013) (internal quotation omitted). The Court has no reason to guess here: Congress clearly intended for child pornography victims to

---

<sup>13</sup> This case is thus unlike *United States v. Burrage*, No. 12-715, in which the Court is considering what evidence the Government must supply to prove a defendant guilty beyond a reasonable doubt under a statute creating criminal liability if death “results from the use of [a controlled] substance” trafficked by that defendant.

receive restitution for the “full amount” of their losses.

### **G. Conventional Tort Principles Exclude Intentional Tortfeasors from Standard Proximate Cause Protections**

Petitioner’s argument for reading a general proximate cause limitation into Section 2259 ultimately relies not on carefully reading the statute, but on applying tort theory. Of course, courts must enforce Congress’s chosen words, even when so doing breaks with past approaches. *See, e.g., CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2638 (2011). But here, no conflict exists, since the Fifth Circuit’s interpretation of the statute coincides perfectly with conventional tort law. Petitioner goes astray in looking to tort principles that limit liability for *negligent* tortfeasors while failing to recognize that Section 2259 imposes restitution obligations on *intentional* “tortfeasors”—i.e., guilty felons, for whom broad liability is always the rule. *See generally* Paul G. Cassell et al., *The Case for Full Restitution for Child Pornography Victims*, 82 *Geo. Wash. L. Rev.* 61 (2013).

In citing various tort law treatises, petitioner turns to the wrong pages. He recites passages about *negligent* tortfeasors, overlooking that for *intentional* tortfeasors “[m]ore liberal rules are applied as to the consequences for which the defendant will be held liable, the certainty of proof required, and the type of damage for which recovery is to be permitted. . . .” W. Page Keeton et al., *Prosser and Keeton on the Law of*



*Torts* 37 (5th ed. 1984) (hereinafter *Prosser & Keeton*). Victims of intentional torts generally do not have to establish a standard proximate cause nexus because “[a]n inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.” *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 547-48 (1983) (Marshall, J., dissenting) (citations omitted). Prosser and Keeton agree that “[f]or an intended injury the law is astute to discover even very remote causation.” *Prosser & Keeton, supra*, at 37 n.27 (internal quotation omitted). Reiterating these general principles, the *Restatement (Third) of Torts* explains that “[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 (Third) of Torts: Liability for Physical and Emotional Harm* 33 (2010) (hereinafter “*Restatement (Third): Harms*”). The comment to this section explains that the “standard provided in 29 [the section addressing what the other parties call ‘proximate cause’] is inadequate to provide appropriate limits on the scope of liability for intentional and reckless tortfeasors.” *Id.* 33 cmt. a.

To the extent this Court is going to construe Section 2259 as a tort-like statute, the applicable principles come from intentional torts, not negligent acts. Congress crafted Section 2259 by copying language directly from the restitution statutes for sexual assault (Section 2248) and domestic violence (Section 2264). *See* p. 31, *supra*. These statutes impose

restitution for violent crimes that involve physical invasions of their victims' bodily integrity—obvious intentional torts.

Section 2259 likewise provides restitution for intentional torts. It provides restitution for Chapter 110 offenses such as the sexual exploitation of children (Section 2251), selling children (Section 2251A), and distribution, receipt, and possession of child pornography (Section 2252 and Section 2252A). These crimes are all felonies containing mens rea requirements that a defendant must have acted (at least) “knowingly.” *See, e.g.*, 18 U.S.C. 2252(a)(4)(B) (forbidding “knowingly” possessing child pornography). These child pornography *crimes* are thus like intentional torts, including well-established invasion of privacy torts. *See, e.g.*, *Restatement (Second) of Torts* 652B (1977) (intentional invasion of seclusion); *id.* 652D (intentional invasion of privacy); *Restatement (Third): Harms* 46 (intentional infliction of emotional distress). Accordingly, construing Section 2259 as extending liability more broadly for child pornography crimes than standard proximate cause principles would for non-intentional acts is consistent with, not a departure from, conventional tort theory.

#### **IV. AMY CAN RECOVER THE “FULL AMOUNT” OF HER LOSSES FROM PETITIONER UNDER A SYSTEM OF JOINT AND SEVERAL LIABILITY**

Amy has spent considerable time explaining why Congress omitted a general proximate result

requirement from Section 2259 because this conclusion straightforwardly answers the causal question before the Court. As the Fifth Circuit recognized, with this conclusion in mind, the rest of the restitution statute falls neatly into place. Contrary to the petitioner's claims, Section 2259 does not impose infinite restitution liability on convicted criminals, but rather restricts liability through a three-step process. This process requires, first, a finding of "harm" caused by a defendant's crime, then a calculation of the "full amount" of the child pornography losses collectively caused by a defendant and other criminals, and finally a determination of the defendant's ability to pay. Such an approach creates joint and several liability for intentional wrongdoers (i.e., child pornography felons) that is entirely consistent with standard tort law.

**A. The Fifth Circuit Properly Held that Section 2259 Creates a Three-Step Process for Determining Restitution in Child Pornography Cases**

This Court recently considered a statute like Section 2259 in which Congress eschewed hard-to-define proximate cause principles. *CSX Transportation, Inc. v. McBride*, 131 S.Ct. 2630 (2011), held that the Federal Employers' Liability Act (FELA) does not incorporate traditional proximate cause standards developed in non-statutory, common-law tort actions. In enacting FELA, Congress had "remedial goals" in mind for addressing the serious injuries of railroad

workers, *id.* at 2636, and put in place a causation standard that was “relaxed” compared to common-law tort principles. *Id.* at 2636-37. Specifically, avoiding the “dialectical subtleties” (*id.* at 2641) that would be involved in requiring workers to prove that their injuries proximately resulted from a railroad’s negligence, Congress broadly allowed recovery where “the railroad’s negligence played a part—no matter how small—in bringing about the injury.” *Id.* at 2644.

As properly construed by the Fifth Circuit, Section 2259 operates much like FELA, although liability remains more restricted than for railroad employers. In rejecting a similar argument for reading a proximate result limitation into the FELA statute, this Court explained that limitless liability is avoided by “FELA’s limitations on *who* may sue, and *for what* . . .” 131 S.Ct. at 2644 (emphases added). Section 2259 has the same limitations; indeed, its limitations are even more stringent.

First, with regard to *who* can seek restitution, Section 2259 restricts a defendant’s liability to his particular victims—i.e., those whom he criminally harmed. Under the Fifth Circuit’s interpretation, “the district court must [initially] determine whether a person seeking restitution is a crime victim under § 2259—that is, ‘the individual harmed as a result of a commission of a crime under this chapter.’” J.A. 400 (quoting 18 U.S.C. 2259(c)). As Amy explained earlier (*see* pp. 13-17, *supra*), this limitation requires an

“individual”<sup>14</sup> seeking restitution to demonstrate a cause-in-fact connection between harm she suffered and an individual defendant’s crime.

This “victim” limitation establishes foreseeability, an important element that a proximate cause limitation would otherwise need to fulfill. *See CSX Transp.*, 131 S.Ct. at 2651 (Roberts, C.J., dissenting). Indeed, foreseeability here is far more obvious than in cases (such as FELA cases) involving mere negligence. Child pornography crimes cover defendants who act “knowingly” with regard to possessing images depicting the sexual abuse of children. *See, e.g.*, 18 U.S.C. 2252(b)(4)(B). And “every adult who watches videos of young girls being raped should reasonably foresee that he is inflicting great harm upon those victims.” *United States v. Gamble*, 709 F.3d 541, 557 (6th Cir. 2013).

Second, concerning *what* kinds of losses are recoverable as child pornography restitution, Congress

---

<sup>14</sup> Section 2259 limits those who can seek restitution to “individuals,” i.e., human beings who were harmed by the production, distribution, or possession of child pornography. *See Mohamad v. Palestinian Authority*, 132 S.Ct. 1702, 1707 (2012) (“individual” typically means a “natural person”). In contrast, in more broadly applicable restitution statutes, Congress defined a “victim” as a “person”—thereby opening up restitution to organizations and the Government itself. *See* 1 U.S.C. 1; *see, e.g., United States v. Schmidt*, 675 F.3d 1164, 1169 (8th Cir. 2012). The Government overlooks this point in suggesting that the Fifth Circuit’s interpretation might allow corporate employers to obtain restitution. *See* Gov’t Br. 33.

identified six categories. Five of these involve easily-quantifiable costs commonly awarded as restitution: e.g., expenses for psychological care and lost income. The sixth category is more open-ended: “any other losses.” This category (and only this category) is circumscribed by the limitation that the losses must be “suffered by the victim as a proximate result” of the defendant’s offense. 18 U.S.C. 2259(b)(3)(F). Amy has not requested restitution for losses under the open-ended Subsection F.<sup>15</sup>

Third and finally, it is important to remember that once the district court determines “victim” status and the full amount of the victim’s losses, it must then turn to “establishing a payment schedule that corresponds to the defendant’s ability to pay.” J.A. 399. For indigent defendants (who probably comprise the majority of child pornography defendants, see *Sentencing Comm’n Report to Congress, supra*, at 162), the payment schedule will be modest. For instance, the indigent defendant in the companion case (Michael Wright) was ordered to pay just \$200 per month in restitution upon release from prison.

---

<sup>15</sup> The Government claims that without a “proximate result” limitation, “remote” victims might seek restitution. Gov’t Br. 33. It offers the hypothetical of a child pornography collector’s computer transmitting a computer virus which damages another person’s computer. *Id.* (internal quotation omitted). But because such a restitution claim would involve losses falling within Subsection F’s “any other” category, any purported “victim” seeking restitution for such losses would already have to prove proximate causation.

J.A. 399. This final step ensures that no defendant will be required to pay more than is reasonable toward a victim's losses.

Petitioner fails to present any substantial argument that district courts are somehow unable to calculate restitution under this three-step approach. Instead, he relies on tort theory to argue that in order to receive any restitution, Amy must present "some evidence . . . that shows that 'but for' [his crime], the losses or damages would not have occurred." Pet. Br. 49. As the Government properly explains in some detail (Gov't Br. 19-27), petitioner takes too narrow a view of the kind of causation Congress required. *Cf. Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2546 (2013) (Ginsburg, J., dissenting) (noting that "[w]hen more than one factor contributes to a plaintiff's injury, but-for causation is problematic" and that in those instances "other causation formulations" are more appropriate).

The conundrum of multiple wrongdoers who jointly cause injury was solved long ago by American courts, which have looked to the harm caused by wrongdoers not individually but in the aggregate. As a leading tort treatise explains, "[w]hen 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." *Prosser & Keeton, supra*, at 268. American law generally takes this view because a victim should not be "worse off due to multiple tortfeasors than would

have been the case if only one of the tortfeasors had existed.” *Restatement (Third): Harms, supra*, 27 cmt. c, at 378; *see also id.* 27 Reporter’s Note cmt. i, at 395 (the position that multiple, minimal causes fail to create tort liability is “obviously untenable”); Richard W. Wright, *Causation in Tort Law*, 73 Calif. L. Rev. 1735, 1792 (1984) (in joint harm situations, courts have traditionally “allowed the plaintiff to recover from each defendant who contributed to the [harm] that caused the injury, even though none of the defendants’ individual contributions was either necessary or sufficient by itself for the occurrence of the injury”) (collecting cases). The standard solution to the problem of liability of multiple wrongdoers is asking whether a particular actor’s action was part of a “sufficient causal set” for the occurrence of the harm. *Restatement (Third): Harms* § 27 cmt. f; Wright, *supra*, at 1788-1803. Any wrongdoer who is part of such a “set” is a contributing cause and is liable.

Petitioner is part of such a set, as he appears to implicitly concede. Petitioner acknowledges that “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.” Pet. Br. 50. Of course, the “untold numbers” he is alluding to include him. Petitioner cannot escape his responsibility to pay restitution by hiding in a crowd.

Nor can petitioner hide behind proximate cause principles to avoid responsibility. On this point both



Amy and the Government agree, although they take different paths to the same destination. The Government reads a “proximate cause” limitation into Section 2259, but concludes that Amy meets it: “proximate cause is a policy judgment about where to draw the line in a potentially limitless causal chain. Whatever difficulties may arise at the margins, restitution requests like Amy’s fall comfortably within any reasonable causal limit.” Gov’t Br. 37. Amy’s conclusion is the same, but she takes a more straightforward route. Congress has simply identified five kinds of losses that it deems to be—automatically—the proximate result of a defendant’s child pornography crime.

Traditionally, a “proximate” connection requires a “causal connection between the wrong and the injury that is not so tenuous that what is claimed to be consequence is only fortuity.” *CSX Transp.*, 131 S.Ct. at 2645-46 (Roberts, C.J., dissenting). In Section 2259, Congress determined that, for child pornography victims, expenses for subsequent psychological care (for example) are not a fortuity, but rather an entirely predictable result—so predictable that argument about whether they “proximately” resulted from an individual defendant’s crime is unnecessary. At the end of the day, “the phrase ‘proximate cause’ is shorthand for the policy-based judgment” about where to draw a line on liability. *CSX Transp.*, 131 S.Ct. at 2642 (plurality opinion). For restitution purposes, Congress simply and expressly placed inside the liability line

all costs from child pornography enumerated in 18 U.S.C. 2259(b)(3)(A) through (E).

It is hardly surprising that Congress eschewed the phrase “proximate result” to accomplish its objective. The corollary phrase, “proximate cause,” is so “notoriously confusing” that “the drafters of the *Restatement (Third) of Torts* avoided the term altogether.” *CSX Transp.*, 131 S.Ct. at 2642 (plurality opinion). Instead of asking whether harms were proximately caused, the *Restatement* asks whether harms “result[ed] from the risks that made the actor’s conduct tortious.” *Restatement (Third): Harms, supra*, at 29. Here, psychological injury producing the need for psychological care is exactly the kind of harm that makes possessing child pornography not only tortious, but criminal.

The courts of appeals around the country have consistently identified the pool of child pornography losses for which Amy seeks “full” restitution (although they have debated how to divide these losses among various defendants). The Government, however, claims that unless proximate cause limits Amy’s losses, she might be able to recover such things as medical expenses for a car accident while driving to her therapist’s office. Gov’t Br. 33. Amy agrees with the Government that Congress did not intend to cover such losses. But it is unnecessary to read a “proximate result” limitation into the statute to exclude them. The Fifth Circuit specifically stated that it was *not* allowing restitution for such attenuated losses. J.A. 385 n.12.

As with “many questions of statutory interpretation, the issue here is not the meaning of the words. . . . Rather, the issue is the statute’s scope.” *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 243 (2008) (Breyer, J., dissenting). The scope of this restitution statute is child pornography crimes—the offenses covered by Chapter 110 into which Congress placed Section 2259. This limitation is made clear by the statute’s wording, which mandates restitution for such things as psychological “care” and “lost” income. 18 U.S.C. 2259(b)(3)(A) & (D). These words contextually and inferentially require a nexus for why “care” is needed or why income was “lost—i.e., child pornography crimes. As explained earlier, *see* p. 20, *supra*, the statute’s plain language makes clear that the items Congress specifically listed in Subsections A through E are simply illustrations of some larger pool of losses—they are “include[d]” in the “full amount” of losses that victims will recover. 18 U.S.C. 2259(b)(3). That full amount thus encompasses a victim’s losses from all child pornography crimes.

### **B. The Fifth Circuit Properly Held that Section 2259 Creates a Workable System of Joint and Several Liability for Child Pornography Criminals**

The Fifth Circuit’s three-step process effectively creates a system of joint and several liability for criminals convicted of child pornography production, distribution, and possession. They all become jointly

and severally liable for the losses that they collectively impose on victims such as Amy. This is what Congress meant by requiring each defendant to pay restitution for “the full amount” of a victim’s losses.

Petitioner contends that this commonsense approach will create a “procedural nightmare.” Pet. Br. 54. His argument, however, lacks any real world examples of problems that have arisen in the Fifth Circuit during the past year when joint and several liability has been in place. Instead, he can only posit that, theoretically, court administrators will have difficulty tracking restitution awards across multiple judicial districts. *Id.* This, however, will be an issue under *any* approach that awards Amy *any* restitution in multiple cases. Unless petitioner is suggesting that this Court should completely gut Section 2259 by preventing child pornography victims from receiving any recovery whatsoever, tracking restitution awards will be an issue.

If anything, petitioner’s interpretation would create more procedural problems than the Fifth Circuit’s. He is apparently proposing that district courts award restitution based on “each defendant’s proportional share of the harm.” Pet. Br. 57. This approach, however, has all the same accounting difficulties, with the added problem that the district court judge must somehow make an additional determination concerning each defendant’s “proportional share” of Amy’s losses.

In any event, petitioner overstates the accounting issue. As required by rules of professional conduct, Amy's attorney keeps meticulous records of the restitution payments he receives for Amy (and provides these records to defense counsel and judges upon request). Likewise, the Justice Department has a database monitoring restitution awards in child pornography cases. J.A. 396 n.19. Additionally, restitution judgments and payments are public records available in courthouses around the country. While accounting questions may arise, they hardly provide a reason to ignore Congress's command for "mandatory" restitution for the "full amount" of Amy's losses.

Joint and several liability is also supported by a separate procedural statute, 18 U.S.C. 3664. While Section 2259 is a stand-alone, substantive statute that describes the method for determining the amount of restitution owed to child pornography victims, it cross-references Section 3664 for procedures on how restitution orders are to be "issued and enforced." See 18 U.S.C. 2259(b)(2) ("An order of restitution under this section shall be *issued and enforced* in accordance with section 3664. . . ." (emphasis added)). A provision in Section 3664 allows a district court to enforce a restitution award "by all other available or reasonable means," 18 U.S.C. 3664(m) (discussed in J.A. 391-92), giving the district

courts the power to take whatever steps necessary to apply joint and several liability.<sup>16</sup>

Indeed, another provision in Section 3664—3664(h)—very specifically endorses joint and several liability when multiple defendants appear for sentencing at the same time before a district court: “If the court finds more than 1 defendant has contributed to the loss of a victim, the court *may make each defendant liable for payment of the full amount of restitution* or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant.” 18 U.S.C. 3664(h) (emphasis added). To be sure, Section 3664(h) does not, by itself, *require* joint and several liability for multiple defendants

---

<sup>16</sup> Because Section 2259 specifically directs that district courts are to use Section 3664 only on questions of “issu[ing] and enforce[ing]” child pornography restitution awards, it would be improper to interpret Section 3664 as somehow superseding Section 2259’s requirements on the antecedent question of calculating the size of such an award. Petitioner overlooks this fact when claiming that Section 3664(e)’s general requirement that the Government bears the “burden of demonstrating the amount of the loss sustained by a victim as a result of the offense” somehow reduces the size of Section 2259 awards. Pet. Br. 24. Moreover, Section 3664(e)’s reference to “amount of the loss” links directly to the general restitution statute, which requires a district court to consider, as part of a discretionary restitution decision, “the amount of the loss sustained by each victim as a result of the offense.” 18 U.S.C. 3663(a)(1)(B)(i)(I). This reference then does not link to the differently-worded provision in Subsection 2259(b)(1), which mandates restitution for the “full amount” of the victim’s losses.

sentenced before different courts at different times. *See* Gov't Br. 43-44 (noting that Section 3664(h) seemingly refers to multiple "defendants" before the court for sentencing at one time). But as the Fifth Circuit cogently recognized, "nothing in Section 3664 forbids [joint and several liability], either expressly or through implication; the fact that [joint and several liability] conforms well to this context supports its application." J.A. 394.

Even more important, Section 3664(h) directly confirms that Congress understood that apportioning liability among multiple defendants who "contributed to the loss of a victim" was different from awarding restitution for the "full amount" of a victim's losses. Congress permitted such apportionment only in the very narrow circumstance where a court had multiple defendants before it at sentencing and thus could make sure that, collectively, they made the victim whole. To allow district courts to apportion in other circumstances would radically shrink victims' restitution awards and eviscerate the congressional promise to child pornography victims that they will always receive restitution for the "full amount" of their losses. 18 U.S.C. 2259(b)(1).

If Amy succeeds in recovering all her losses, she will no longer spend time seeking new restitution orders. This fact alone is enough to reject petitioner's dubious claim that district courts will somehow still be obligated to enter duplicative restitution orders. *See* Pet. Br. 51-54. Moreover, if true, his claim would also apply to his own interpretation of Section 2259.

Perhaps petitioner's real point here is that, under his interpretation of the statute, the risk of possible overpayment can be avoided by always requiring underpayment—a strange way to interpret a statute promising victims restitution for the “full amount” of their losses. In any event, district courts are always authorized to establish or modify a restitution payment schedule. 18 U.S.C. 3664(f) & (k). For a restitution obligation that was previously satisfied, the appropriate schedule would be \$0, since the victim no longer has any compensable “losses.” J.A. 394-95.

If anything, the provision petitioner relies upon supports Amy's position. Section 2259(b)(4)(B)(ii) forbids courts from reducing a restitution award because a victim has “receive[d] compensation for his or her injuries from the proceeds of insurance or any other source.” Assuming (as petitioner does) that this language prevents district courts from considering restitution awards against other child pornography defendants, then “full” restitution for a victim can only come from the single defendant before the sentencing judge—and an award for full restitution is always appropriate.

### **C. The Fifth Circuit's Interpretation Tracks Conventional Tort Principles by Imposing Joint and Several Liability on Intentional Tortfeasors Who Collectively Harm Amy**

In rejecting joint and several liability, the other parties claim that conventional tort law principles



support an allocation of Amy's losses across some unspecified number of wrongdoers. Petitioner claims that this requirement comes from reading general tort law principles into the statute. Pet. Br. 49-50. The Government also supports apportionment, although the source of the Government's requirement is unclear. The Government declares tersely that joint and several liability "is not required by the statute" (Gov't Br. 42), without pointing to any language supporting its position. Ironically, while its prosecutors zealously pursue lengthy prison terms for child pornography defendants, when it comes to restitution the Government worries that ordering those same defendants to pay full compensation to their victims "may be unduly harsh." Gov't Br. 42.

The other parties' single-minded focus on apportionment seems to stem from the belief that full liability is somehow "disproportionate" to a defendant's crime. *See* Pet. Br. 66; Gov't Br. 46. But unlike punishment under the criminal law, compensation under tort law is never proportionate to culpability. A few seconds of inattentive driving can lead to a multi-million dollar wrongful death judgment. A small tap on an eggshell plaintiff can cause a skull to collapse with huge liability. The overarching tort rule is that a wrongdoer takes his victim as he finds her. *Restatement (Third): Harms, supra*, at 31. It would be perverse to deviate from that rule here where the alleged lack of "proportionality" stems from the fact that Amy has suffered large losses.

Apportionment has recently crept into some parts of tort law through a controversial “tort reform” movement, which has led some states to replace joint and several (i.e., full individual) liability for ordinary tortfeasors with individually allocated fractional liability for some types of harm caused by ordinary tortfeasors. See Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 *Memphis U.L. Rev.* 45, 49 (1992) (noting and criticizing these efforts); cf. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 163 (2003) (noting “this Court’s repeated statements that joint and several liability is the traditional rule”). When Congress drafted Section 2259 in the early 1990s, the *Restatement (Second) of Torts* described American tort law as not providing apportionment for joint and several (i.e., full individual) liability. *Restatement (Second) of Torts* 875 (1979). The current *Restatement* takes no position on this issue because “there is currently no majority rule.” *Restatement (Third) of Torts: Apportionment of Liability* 17 cmt. a (2000) (hereinafter *Restatement (Third): Apportionment*). But while some jurisdictions have recently made changes to reduce the liability of merely negligent tortfeasors, the new *Restatement* reports that “there is, so far as we are aware, *no authority whatsoever* for exempting *intentional* tortfeasors from joint and several liability.” *Id.* at 12, at 113 (emphases added). It is generally accepted that “[i]ntentional tortfeasors have been held jointly and severally liable since at least the decision in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799). . . .” *Restatement (Third): Apportionment*

12, Reporters' Note cmt. b at 111. This view continues today, as “[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.* at 113. *See, e.g., Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 233 (S.D.N.Y. 2003) (considering suit by surviving family members of victims of the 9/11 terrorist attacks against Al Qaeda, the Taliban, and Osama bin Laden; while New York’s new tort rule requires apportionment, “this rule is inapplicable where, as here, the [tortious] actions require intent”).

Conventional tort principles for intentional tortfeasors are well illustrated by Professors Harper and James, who give the example of “several ruffians [who] set upon a man and beat him, each inflicting separate wounds.” Under traditional tort doctrine, the ruffians—intentional tortfeasors—are each “liable for the whole injury.” 2 Fowler Harper & Fleming James, *The Law of Torts* 1124 (1956) (hereinafter *Harper & James*). Amy is the 21st century victim of these hypothetical attackers. She is “set upon” by digital “ruffians” who are all harming her. Even if her psychological wounds can somehow be viewed as “separate,” conventional tort law demands that all the ruffians be held liable for her “whole injury.”

The Harper and James hypothetical has a very clear real-world parallel, as this Court’s decision interpreting Section 2259 will apply to the almost word-for-word identical Section 2248. Enacted as part of the Violence Against Women Act on the same day

as Section 2259, *see* p. 28, *supra*, Section 2248 governs restitution for sexual assaults occurring within federal jurisdiction. The provision thus covers federal crimes involving multiple physical injuries: gang rapes and serial rapes. Consider the case of a victim gang raped by five men on one night or by five men on five sequential nights. The victim then requires medical and psychological care. If the other parties' allocation approach is applied to these crimes, courts will be limited to awarding restitution for each defendant's "proportional share of the harm" (Pet. Br. 57) or his "relative contribution" to the injuries (Gov't Br. 48). This would not only be highly impracticable and intrusive to the victim, but it would invite a "tortfest" because each man could reduce his restitution liability by encouraging other men to join in and rape the victim. *See* Wright, *The Logic and Fairness of Joint and Several Liability*, *supra*, at 57. Such an approach would be morally reprehensible. Moreover, what if law enforcement is able to apprehend only one of the five rapists? On an apportionment theory, the victim would only receive restitution for 20% of her losses, rather than the "full amount" promised by Congress. Congress avoided such difficulties by simply commanding that sexual abusers within federal jurisdiction must pay the "full amount" of their victim's losses. 18 U.S.C. 2248(b)(3).

Like the gang of ruffians or the gang rapists, petitioner here has joined a *de facto* joint criminal enterprise which connects child pornography producers, distributors, and possessors. *See* pp. 9-13, *supra*.

Under the common law approach for such joint enterprises, “the act of one is the act of all, and liability for all that is done is visited upon each.” *Prosser & Keeton, supra*, at 346. Petitioner does not need to formally conspire with other persons. Instead, “if one person acts to produce injury with full knowledge that others are acting in a similar manner and that his conduct will contribute to produce a single harm, a joint tort has been consummated even when there is no prearranged plan.” 1 *Harper & James, supra*, at 699. As a joint tortfeasor, petitioner is then liable to pay for “the entire harm,” *see id.* at 698 & 1124, or, as Section 2259 puts it, to pay for the “full amount of the victim’s losses.” As interpreted by the Fifth Circuit, Section 2259 perfectly follows the normal tort precept that intentional tortfeasors are jointly and severally liable for the entire harm they collectively cause.

The overriding goal for joint and several liability is compensating innocent victims, not spreading losses evenly across culpable defendants. In enacting Section 2259, Congress simply decided to place reimbursement ahead of other goals. Such an approach has the undeniable advantage that the risk of a wrongdoer’s insolvency “is placed on each jointly and severally liable defendant—the [victim] does not bear this risk.” *Restatement (Third): Apportionment, supra*, A18 cmt. a. This point is particularly important here because many child pornography criminals are indigent while innumerable others are beyond the reach of law enforcement. The only way for victims to actually obtain restitution for the “full amount” of

their losses is by collecting from a handful of solvent defendants. Amy, for instance, has received victim notices in more than 1800 cases since January 2006. She has received restitution awards in approximately 180 cases<sup>17</sup> and has now recovered slightly more than 40% of the full amount of her losses. Yet more than 75% of her collections have come from just a single defendant with substantial assets. See *United States v. Staples*, No. 2:09-CR-14017, doc. 32 (S.D. Fla. 2011). If Amy were remitted to piecemeal collection of tiny fractional shares of restitution, she would likely face decades of litigation that might never lead to full recovery.

Moreover, an unhappy wealthy criminal can always seek contribution from other solvent offenders, as even the dissenters below acknowledged. J.A. 492 & n.4. Attempting to deflect this sensible possibility, the other parties contend that contribution is unavailable to Section 2259 defendants. Pet. Br. 55-56; Gov't Br. 45-46. If their argument is correct, then Section 2259 simply tracks the traditional common law rule that contribution is unavailable between intentional tortfeasors. *Prosser & Keeton, supra*, at 336 (historically no contribution action was available

---

<sup>17</sup> Much of the difference between the number of notices and number of awards is due to the fact that Amy lacked legal counsel in 2006. In 2008, Amy obtained counsel. In 2009, that counsel began litigating selective test cases, initially withdrawing 80% of her restitution claims. J.A. 158. Because the case law has developed in the years since, Amy's counsel now generally pursues all of her restitution claims to their conclusion.

to an intentional tortfeasor because the claim would rest “entirely [on] the plaintiff’s own deliberate wrong”).

But were a well-heeled child pornography offender to ever actually file a contribution lawsuit against another well-to-do offender,<sup>18</sup> his action should succeed under more modern principles. *See, e.g., United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008) (a defendant held jointly and severally liable for a restitution award “may seek contribution from his co-conspirators to pay off the restitution award”). This Court has recognized that even if Congress has not expressly created a contribution remedy, “if its intent to do so may fairly be inferred from . . . [other] statutes, an implied cause of action for contribution could be recognized. . . .” *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90 (1981); *see, e.g., Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 297 (1993) (inferring a contribution action because no evidence suggested it would “frustrate the purposes of the statutory section from which it is derived”). Here, Congress requires that all defendants must pay the “full amount” of a victim’s losses, 18 U.S.C. 2259(b)(1), which itself is a recognition that some defendants might have to pay more than others. Against this backdrop, it is fair to infer Congress’s intent to create a system of joint and several liability

---

<sup>18</sup> Of course, such a lawsuit would proceed through legal counsel. As registered sex offenders, child pornography defendants should not have personal contact with each other.

combined with contribution. As the Fifth Circuit panel opinion explained below: “Holding wrongdoers jointly and severally liable is no innovation. *See, e.g.*, 42 U.S.C. 9607(a) (CERCLA). It will, however, enable [petitioner] to distribute ‘the full amount of the victim’s losses’ across other possessors of Amy’s images. Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.” J.A. 347. Congress properly created a regime in which innocent crime victims receive “full” restitution, leaving it to guilty defendants to sort out among themselves who will bear the financial burden.

**V. EVEN IF SECTION 2259 CONTAINS A GENERAL PROXIMATE RESULT REQUIREMENT, ALL OF AMY’S INDIVISIBLE LOSSES PROXIMATELY RESULTED FROM PETITIONER’S CRIME**

For all the reasons just explained, this Court should affirm the Fifth Circuit’s interpretation of Section 2259. If this Court disagrees, however, and imposes a general proximate result requirement onto the statute, Amy will have some difficulties but can still obtain full restitution. Specifically, Amy should still receive restitution for all her indivisible losses that were the proximate result of petitioner’s crime.

As the statute requires, Amy proved in the district court significant losses that she indisputably suffered, and will continue to suffer, as the proximate result of the child pornography crimes she endured.



On this point, all parties appear to agree. *See* Pet. Br. 49-50; Gov't Br. 47-49. Given this unchallenged evidence, any question of proximate cause essentially becomes irrelevant. "Proximate cause . . . exists on the aggregate level, and there is no reason to find it lacking on the individual level." *United States v. Kearney*, 672 F.3d 81, 98 (1st Cir. 2012). As the Government helpfully explains, "the link between the possession of child pornography and typical losses (e.g., therapy costs) incurred by [child pornography victims] is proximate by any definition." Gov't Br. 27.

Petitioner is one of the criminals from whose crime Amy's losses proximately resulted. The district court specifically found that "significant losses [by Amy] are attributed to . . . the possession of [Amy's] images by many individuals such as [petitioner]." J.A. 295. Where the district court went astray was in then failing to award any restitution on the ground that Amy had not shown what specific part of her losses proximately resulted from petitioner's crime. Amy did not need to make such a showing. She had carried her burden to show the "full amount" of her losses and was therefore entitled, under a mandatory statute, to a restitution award for that amount. 18 U.S.C. 2259(b)(1). If petitioner thought such restitution was too much, the burden shifted to him to show how to divide Amy's losses into some smaller, but nonetheless "full," amount.

Under conventional tort law, "a party alleging that damages are divisible has the burden to prove

they are divisible.” *Restatement (Third): Apportionment, supra*, 26 cmt. h; see, e.g., *Burlington Northern & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009). Petitioner presented no evidence and made no argument below regarding how to divide Amy’s “full” losses. Nor did the Government; to the contrary, the Government supported Amy’s position that she was entitled to recover all of her losses from petitioner. See, e.g., J.A. 149-50. Accordingly, in light of Congress’s command that “[t]he issuance of a restitution order under [section 2259] is mandatory,” 18 U.S.C. 2259(b)(4), the district court was required at sentencing to “direct the defendant to pay the victim . . . the full amount of the victim’s losses. . . .” 18 U.S.C. 2259(b)(1).

Amy was entitled to recover all her losses from petitioner because her losses are indivisible. The other parties concede she can recover all “indivisible” losses. Pet. Br. 50; Gov’t Br. 44 n.17. This is illustrated by the well-known two fires example—i.e., if two negligently set fires come together to burn down a house, the fire starters are both liable for the full value of the house because the loss cannot be reasonably divided. See *Prosser & Keeton, supra*, at 348.

Starting from this settled principle, the Seventh Circuit held that child pornography *distributors* are liable to pay restitution for all Amy’s child pornography losses because it is impossible to determine what part of her losses each distributor caused. *United States v. Laraneta*, 700 F.3d 983, 991-92 (7th Cir. 2012). A distributor of a child pornography image

“may upload it to the Internet; dozens or hundreds of consumers of child pornography on the Internet may download the uploaded image and many of them may then upload it to their favorite child-pornography web sites; and the chain of downloading and uploading and thus distributing might continue indefinitely. That would be like the joint-fire case.” *Id.* at 992. In various cases around the country, the Government has endorsed *Laraneta’s* well-founded holding that each convicted child pornography *distributor* proximately causes *all* of his victim’s losses. *See, e.g.*, Gov’t Post-Remand Br. Concerning Restitution, *United States v. Cantrelle*, No. 2:11-CR-542 (E.D. Cal. Apr. 3, 2013). Amy, of course, agrees.

But this holding raises the question of why the obligation to pay full restitution is limited to just child pornography distributors. Section 2259 draws no such distinction, since it applies expansively to “*any* offense under [chapter 110 of Title 18].” 18 U.S.C. 2259(a) (emphasis added). In *Laraneta*, the Seventh Circuit tried to distinguish between full restitution for distribution and fractional restitution for possession by arguing that Amy would have suffered slightly less harm if one less criminal had viewed (i.e., possessed) her images:

If separate fires join and burn down the house, the harm is indivisible: the house is gone, and all the fire makers are liable even though any one of the fires would have destroyed the house. And in our [child pornography] distribution example, the distributors

may be jointly liable though again the entire harm might have occurred had there been only a single distributor. But often psychological harm can be greater or less, and it would have been less in this case if instead of tens of thousands of images of Amy's . . . rapes being viewed on the Internet one image of each had been viewed by one person, the defendant.

*Laraneta*, 700 F.3d at 992. By focusing on the quantum of harm from each viewing of Amy's images, the Seventh Circuit missed a fundamental point: while Amy's psychological *harm* might in some theoretical sense be less if one fewer person had viewed her images, her *losses* would remain the same. Amy's full losses are documented to be \$3,367,854. That amount will not change if 9,999 criminals view her images instead of 10,000—she still will have, for example, the same number of psychological counseling sessions during the course of her lifetime. Thus, even if her emotional harm is somehow divisible “to the eye of omniscience” (Gov't Br. 44 n.17), her financial *losses* are indivisible.

Moreover, this Court should interpret Section 2259 so that it will work not for those who are omniscient, but rather for real world fact-finders—i.e., district judges who must frequently enter child pornography restitution orders. “There is nothing in [Section 2259] that provides for a proportionality analysis.” *United States v. Crandon*, 173 F.3d 122, 126 n.2 (3d Cir. 1999). On the contrary, rather than allowing a partial award, the statute mandates

restitution for the “full amount” of the victim’s losses. This is consistent with the principle that courts are not required “to make an arbitrary apportionment for its own sake.” *Burlington Northern*, 556 U.S. at 614. The normal tort inquiry is not whether damages are “theoretically” divisible (Gov’t Br. 44 n.17), but instead whether “the evidence provides a reasonable basis for the fact-finder to determine . . . the amount of damages separately caused by [a tortfeasor’s] conduct.” *Restatement (Third): Apportionment, supra*, at 26. No evidence providing a “reasonable basis” for apportionment exists in cases such as this one. When, for example, Amy attends her next counseling session, there is no way to say what fraction of her bill is attributable to petitioner’s crime as opposed to those committed by countless other criminals. *See United States v. Burgess*, 684 F.3d 445, 461 (4th Cir. 2012) (Gregory, J., concurring in part).

The indivisibility of Amy’s losses becomes even more apparent when one realizes that the other parties cannot devise a reasonable basis for apportionment. The petitioner has never even pretended that apportionment is theoretically possible. The Government, on the other hand—while arguing to the district court that Amy should receive restitution for all her losses—now advances the new position that restitution should be limited to petitioner’s “relative contribution” to Amy’s full losses—i.e., petitioner’s “market share.” Gov’t Br. 49 & n.20. Given the vast number of criminals who are injuring Amy, such an approach would relegate Amy (and the nation’s

district courts) to decades of litigation about the size of the constantly-changing, global child pornography “market.”

Such an approach would also mean trivial restitution for Amy. Amy’s images have been identified in 3,200 American federal and state criminal cases. J.A. 352. Unfortunately these cases represent just a few of the child pornography criminals who are harming Amy, because law enforcement can only apprehend a small fraction of those who distribute and possess Amy’s images. *See DOJ Report to Congress, supra*, at 23-25. Even ten percent is a generous assumption. *See id.* at 14 (9,793,430 domestic Internet Protocol addresses trading child pornography). Amy is harmed not only by child pornography crimes committed in this country, but also by those committed overseas. A fair estimate is that 45% of the child pornography criminals are American. *Id.* at 14 (table regarding domestic vs. international P2P file sharing of child pornography). Based on these figures, a ballpark estimate of petitioner’s “market share” of Amy’s harm is 1/71,000 and his restitution obligation to Amy would be a trifling amount: about \$47.<sup>19</sup> The Government’s suggestion that the district courts “should be given significant leeway” (Gov’t Br. 49) to use such

---

<sup>19</sup>  $\$3,367,854 \times 1/3,200 \times 1/10 \times 45/100 \approx \$47$ . Remarkably, this amount is several orders of magnitude below the presumed \$150,000 in minimum damages that Congress specified for child pornography victims in civil cases for a violation of the same statute that petitioner violated here. 18 U.S.C. 2255.

methods to calculate restitution would convert Congress's promise to child pornography victims into an empty gesture. This Court should instead enforce the law as Congress wrote it: Amy should receive restitution for "the full amount" of her losses.



## CONCLUSION

The decision of the Fifth Circuit should be affirmed in all respects.

Respectfully submitted,

JAMES R. MARSH  
MARSH LAW FIRM PLLC  
151 E. Post Road, Suite 102  
White Plains, NY 10601-5210  
(212) 372-3030

PAUL G. CASSELL  
*Counsel of Record*  
MICHAEL J. TETER  
APPELLATE LEGAL CLINIC  
S. J. QUINNEY COLLEGE OF LAW  
AT THE UNIVERSITY OF UTAH  
332 S. 1400 E., Room 101  
Salt Lake City, UT 84112-0730  
(801) 585-5202  
cassellp@law.utah.edu

*Counsel for Respondent Amy*

**STATUTORY PROVISIONS INVOLVED**

**18 U.S.C. § 2248 – Mandatory restitution**

**(a) In general.**—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

**(b) Scope and nature of order.**—

**(1) Directions.**—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to paragraph (2).

**(2) Enforcement.**—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

**(3) Definition.**—For purposes of this subsection, the term “full amount of the victim’s losses” includes any costs incurred by the victim for—

**(A)** medical services relating to physical, psychiatric, or psychological care;

**(B)** physical and occupational therapy or rehabilitation;

**(C)** necessary transportation, temporary housing, and child care expenses;

**(D)** lost income;



(E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

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

(4) **Order mandatory.**—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) **Definition.**—For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

---

**18 U.S.C. § 2259 – Mandatory restitution**

(a) **In general.**—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) **Scope and nature of order.**—

(1) **Directions.**—The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to paragraph (2).

(2) **Enforcement.**—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) **Definition.**—For purposes of this subsection, the term “full amount of the victim’s losses” includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys’ fees, as well as other costs incurred; and

## App. 4

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

(4) **Order mandatory.**—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) **Definition.**—For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

---

### 18 U.S.C. § 2264 – Restitution

(a) **In general.**—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

**(b) Scope and nature of order.—**

**(1) Directions.**—The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

**(2) Enforcement.**—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

**(3) Definition.**—For purposes of this subsection, the term “full amount of the victim's losses” includes any costs incurred by the victim for—

**(A)** medical services relating to physical, psychiatric, or psychological care;

**(B)** physical and occupational therapy or rehabilitation;

**(C)** necessary transportation, temporary housing, and child care expenses;

**(D)** lost income;

**(E)** attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

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

**(4) Order mandatory.**—**(A)** The issuance of a restitution order under this section is mandatory.

**(B)** A court may not decline to issue an order under this section because of—

**(i)** the economic circumstances of the defendant; or

**(ii)** the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

**(c) Victim defined.**—For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

---

### **18 U.S.C. 2327. Mandatory restitution**

**(a) In general.**—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution to all victims of any offense for which an enhanced penalty is provided under section 2326.

**(b) Scope and nature of order.—**

**(1) Directions.**—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to paragraph (2).

**(2) Enforcement.**—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

**(3) Definition.**—For purposes of this subsection, the term “full amount of the victim’s losses” means all losses suffered by the victim as a proximate result of the offense.

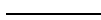
**(4) Order mandatory.—(A)** The issuance of a restitution order under this section is mandatory.

**(B)** A court may not decline to issue an order under this section because of—

**(i)** the economic circumstances of the defendant; or

**(ii)** the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

**(c) Victim defined.**—In this section, the term “victim” has the meaning given that term in section 3663A(a)(2).



**18 U.S.C. § 3663 – Order of restitution**

**(a)(1)(A)** The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

**(B)(i)** The court, in determining whether to order restitution under this section, shall consider—

**(I)** the amount of the loss sustained by each victim as a result of the offense; and

**(II)** the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

**(ii)** To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to

## App. 9

provide restitution to any victims, the court may decline to make such an order.

**(2)** For the purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, may assume the victim’s rights under this section, but in no event shall the defendant be named as such representative or guardian.

**(3)** The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

**(b)** The order may require that such defendant—

**(1)** in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

**(A)** return the property to the owner of the property or someone designated by the owner; or



App. 10

**(B)** if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

**(i)** the value of the property on the date of the damage, loss, or destruction, or

**(ii)** the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

**(2)** in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110—

**(A)** pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

**(B)** pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

**(C)** reimburse the victim for income lost by such victim as a result of such offense;

**(3)** in the case of an offense resulting in bodily injury also results in the death of a

victim, pay an amount equal to the cost of necessary funeral and related services;

**(4)** in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense;

**(5)** in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and

**(6)** in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

**(c)(1)** Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

**(2)(A)** An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in

accordance with guidelines promulgated by the United States Sentencing Commission.

**(B)** In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

**(3)** Restitution under this subsection shall be distributed as follows:

**(A)** 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

**(B)** 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

**(4)** The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

**(5)** Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

**(6)** Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

**(7)(A)** The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

**(B)** No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

**(d)** An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

---

**18 U.S.C. § 3663A – Mandatory restitution to victims of certain crimes**

**(a)(1)** Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

**(2)** For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct

in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

**(3)** The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

**(b)** The order of restitution shall require that such defendant—

**(1)** in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

**(A)** return the property to the owner of the property or someone designated by the owner; or

**(B)** if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

**(i)** the greater of—

**(I)** the value of the property on the date of the damage, loss, or destruction; or

**(II)** the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

**(A)** that is—

**(i)** a crime of violence, as defined in section 16;

**(ii)** an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

**(iii)** an offense described in section 1365 (relating to tampering with consumer products); or

**(iv)** an offense under section 670 (relating to theft of medical products); and

**(B)** in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

**(2)** In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

**(3)** This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

**(A)** the number of identifiable victims is so large as to make restitution impracticable; or

**(B)** determining complex issues of fact related to the cause or amount of the victim's losses

would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

---

**18 U.S.C. § 3664 – Procedure for issuance and enforcement of order of restitution.**

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.



**(c)** The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

**(d)(1)** Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

**(2)** The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

**(A)** provide notice to all identified victims of—

**(i)** the offense or offenses of which the defendant was convicted;

**(ii)** the amounts subject to restitution submitted to the probation officer;

**(iii)** the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

**(iv)** the scheduled date, time, and place of the sentencing hearing;

**(v)** the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall

have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

**(6)** The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

**(e)** Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

**(f)(1)(A)** In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

**(B)** In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source

be considered in determining the amount of restitution.

**(2)** Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

**(A)** the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

**(B)** projected earnings and other income of the defendant; and

**(C)** any financial obligations of the defendant; including obligations to dependents.

**(3)(A)** A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

**(B)** A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall

ensure that all other victims receive full restitution before the United States receives any restitution.

**(j)(1)** If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

**(2)** Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

**(A)** any Federal civil proceeding; and

**(B)** any State civil proceeding, to the extent provided by the law of the State.

**(k)** A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion

of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

**(l)** A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

**(m)(1)(A)(i)** An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

**(ii)** by all other available and reasonable means.

**(B)** At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

**(2)** An order of in-kind restitution in the form of services shall be enforced by the probation officer.

**(n)** If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

**(o)** A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

**(1)** such a sentence can subsequently be—

**(A)** corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

**(B)** appealed and modified under section 3742;

**(C)** amended under subsection (d)(5);  
or

**(D)** adjusted under section 3664(k), 3572, or 3613A; or

**(2)** the defendant may be resentenced under section 3565 or 3614.

**(p)** Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

---



**18 U.S.C. § 3771 – Crime victims’ rights**

**(a) Rights of crime victims.**—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.

**(b) Rights afforded.—**

**(1) In general.**—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

**(2) Habeas corpus proceedings.—**

**(A) In general.**—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

**(B) Enforcement.—**

**(i) In general.**—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

**(ii) Multiple victims.**—In a case involving multiple victims, subsection (d)(2) shall also apply.

**(C) Limitation.**—This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas

corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

**(D) Definition.**—For purposes of this paragraph, the term “crime victim” means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person’s family member or other lawful representative.

**(c) Best efforts to accord rights.**—

**(1) Government.**—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

**(2) Advice of attorney.**—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

**(3) Notice.**—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

**(d) Enforcement and limitations.**—

**(1) Rights.**—The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in

subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

**(2) Multiple crime victims.**—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

**(3) Motion for relief and writ of mandamus.**—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) **Error.**—In any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.

(5) **Limitation on relief.**—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim’s right to restitution as provided in title 18, United States Code.

(6) **No cause of action.**—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) **Definitions.**—For the purposes of this chapter, the term “crime victim” means a person

directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

\* \* \*



**Early Version of Restitution Provisions**

**S. Rep. 101-545 (October 19, 1990)**

**SEC. 113. MANDATORY RESTITUTION FOR SEX CRIMES.**

(a) In General.—Chapter 109A of title 18, United States Code, is amended by adding at the end thereof the following:

**“§ 2248. Mandatory restitution**

“(a) In General.—Notwithstanding the terms of section 3663 of this title, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

“(b) Scope and Nature of Order.—(1) The order of restitution under this section shall direct that—

“(A) the defendant pay to the victim the full amount of the victim’s losses as determined by the court, pursuant to paragraph (3); and

“(B) the United States Attorney enforce the restitution order by all available and reasonable means.

“(2) For purposes of this subsection, the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim for—

“(A) medical services relating to physical, psychiatric, or psychological care;

“(B) physical and occupational therapy or rehabilitation;

“(C) any income lost by the victim as a proximate result of the offense;

“(D) attorneys’ fees; and

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

“(3) Restitution orders under this section are mandatory. A court may not decline to issue an order under this section because of—

“(A) the economic circumstances of the defendant; or

“(B) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

“(4)(A) Notwithstanding the terms of paragraph (3), the court may take into account the economic circumstances of the defendant in determining the manner in which and the schedule according to which the restitution is to be paid.

“(B) For purposes of this paragraph, the term ‘economic circumstances’ includes—

“(i) the financial resources and other assets of the defendant;

“(ii) projected earnings, earning capacity, and other income of the defendant; and

“(iii) any financial obligations of the defendant, including obligations to dependents.



“(C) An order under this section may direct the defendant to make a single lump-sum payment or partial payments at specified intervals. The order shall also provide that the defendant’s restitutionary obligation takes priority over any criminal fine ordered.

“(D) In the event that the victim has recovered for any amount of loss through the proceeds of insurance or any other source, the order of restitution shall provide that restitution be paid to the person who provided the compensation, but that restitution shall be paid to the victim before any restitution is paid to any other provider of compensation.

“(5) Any amount paid to a victim under this section shall be set off against any amount later recovered as compensatory damages by the victim from the defendant in—

“(A) any Federal civil proceeding; and

“(B) any State civil proceeding, to the extent provided by the law of the State.

“(c) Proof of Claim.—(1) Within 60 days after conviction and, in any event, no later than 10 days prior to sentencing, the United States Attorney (or his delegee), after consulting with the victim, shall prepare and file an affidavit with the court listing the amounts subject to restitution under this section. The affidavit shall be signed by the United States Attorney (or his delegee) and the victim. Should the victim object to any of the information included in the

affidavit, the United States Attorney (or his delegee) shall advise the victim that the victim may file a separate affidavit.

“(2) If no objection is raised by the defendant, the amounts attested to in the affidavit filed pursuant to subsection (1) shall be entered in the court’s restitution order. If objection is raised, the court may require the victim or the United States Attorney (or his delegee) to submit further affidavits or other supporting documents, demonstrating the victim’s losses.

“(3) If the court concludes, after reviewing the supporting documentation and considering the defendant’s objections, that there is a substantial reason for doubting the authenticity or veracity of the records submitted, the court may require additional documentation or hear testimony on those questions. Any records filed, or testimony heard, pursuant to this section, shall be in camera in the judge’s chambers. Notwithstanding any other provision of law, this section does not entitle the defendant to discovery of the contents of, or related to, any supporting documentation, including medical, psychological, or psychiatric records.

“(d) Definitions.—For purposes of this section, the term ‘victim’ includes any person who has suffered direct physical, emotional, or pecuniary harm as a result of a commission of a crime under this chapter, including—

“(1) in the case of a victim who is under 18 years of age, incompetent or incapacitated,

the legal guardian of the victim or the victim's estate, another family member, or any other person designated by the court; and

“(2) in the case of a victim who is deceased, the representative of the victim's estate or another family member (including a child).”.

---

**“§ 2264. Restitution**

“(a) In General.—In addition to any fine or term of imprisonment provided under this chapter, and notwithstanding the terms of section 3663 of this title, the court shall order restitution to the victim of an offense under this chapter.

“(b) Scope and Nature of Order.—(1) The order of restitution under this section shall direct that—

“(A) the defendant pay to the victim the full amount of the victim's losses as determined by the court, pursuant to subsection (3); and

“(B) the United States Attorney enforce the restitution order by all available and reasonable means.

“(2) For purposes of this subsection, the term ‘full amount of the victim's losses’ includes any costs incurred by the victim for—

“(A) medical services relating to physical, psychiatric, or psychological care;

“(B) physical and occupational therapy or rehabilitation;

“(C) any income lost by the victim as a proximate result of the offense;

“(D) attorneys’ fees, plus any costs incurred in obtaining a civil protection order; and

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

“(3) Restitution orders under this section are mandatory. A court may not decline to issue an order under this section because of—

“(A) the economic circumstances of the defendant; or

“(B) the fact that victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance.

“(4)(A) Notwithstanding the terms of paragraph (3), the court may take into account the economic circumstances of the defendant in determining the manner in which and the schedule according to which the restitution is to be paid, including—

“(i) the financial resources and other assets of the defendant;

“(ii) projected earnings, earning capacity, and other income of the defendant; and

“(iii) any financial obligations of the offender, including obligations to dependents.

“(B) An order under this section may direct the defendant to make a single lump-sum payment, or partial payments at specified intervals. The order shall provide that the defendant’s restitutionary obligation takes priority over any criminal fine ordered.

“(C) In the event that the victim has recovered for any amount of loss through the proceeds of insurance or any other source, the order of restitution shall provide that restitution be paid to the person who provided the compensation, but that restitution shall be paid to the victim before any restitution is paid to any other provider of compensation.

“(5) Any amount paid to a victim under this section shall be set off against any amount later recovered as compensatory damages by the victim from the defendant in—

“(A) any Federal civil proceeding; and

“(B) any State civil proceeding, to the extent provided by the law of the State.

“(c) Proof of Claim.—(1) Within 60 days after conviction and, in any event, no later than 10 days prior to sentencing, the United States Attorney (or his delegee), after consulting with the victim, shall prepare and file an affidavit with the court listing the amounts subject to restitution under this section. The affidavit shall be signed by the United States Attorney (or his delegee) and the victim. Should the victim object to any of the information included in the affidavit, the United States Attorney (or his delegee)

shall advise the victim that the victim may file a separate affidavit.

“(2) If no objection is raised by the defendant, the amounts attested to in the affidavit filed pursuant to subsection (1) shall be entered in the court’s restitution order. If objection is raised, the court may require the victim or the United States Attorney (or his delegee) to submit further affidavits or other supporting documents, demonstrating the victim’s losses.

“(3) If the court concludes, after reviewing the supporting documentation and considering the defendant’s objections, that there is a substantial reason for doubting the authenticity or veracity of the records submitted, the court may require additional documentation or hear testimony on those questions. Any records filed, or testimony heard, pursuant to this section, shall be in camera in the judge’s chambers. Notwithstanding any other provision of law, this section does not entitle the defendant to discovery of the contents of, or related to, any supporting documentation, including medical, psychological, or psychiatric records.

“(d) Restitution and Criminal Penalties.—An award of restitution to the victim of an offense under this chapter shall not be a substitute for imposition of punishment under sections 2261 and 2262.

“(e) Definitions.—For purposes of this section, the term ‘victim’ includes any person who has suffered direct physical, emotional, or pecuniary harm as

a result of a commission of a crime under this chapter, including—

“(1) in the case of a victim who is under 18 years of age, incompetent or incapacitated, the legal guardian of the victim or the victim’s estate, another family member, or any other person designated by the court; and

“(2) in the case of a victim who is deceased, the representative of the victim’s estate or family member, including a child.

---

**Indentation of Section 2259 As Presented to Congress**

Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. 2d Sess. (1994)

Sec. 40113. Mandatory Restitution for Sex Crimes.

§ 2259(b)

...

“(3) DEFINITION.—For purposes of this subsection, the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim for—

“(A) medical services relating to physical, psychiatric, or psychological care;

“(B) physical and occupational therapy or rehabilitation;

“(C) necessary transportation, temporary housing, and child care expenses;

“(D) lost income;

“(E) attorneys’ fees, as well as other costs incurred; and

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

---