No. 12-8561

In the Supreme Court of the United States

DOYLE RANDALL PAROLINE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
SONJA M. RALSTON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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
Statement 2
Summary of argument 10
Argument 13
A. Section 2259's causation requirements must be interpreted in light of two critical principles 15
B. The victim's harm and losses must factually and proximately result from the defendant's offense when considered in the aggregate 17
1. The defendant's offense must be a cause in fact of the victim's harm and losses under an aggregate-causation theory 19
2. The defendant's offense must also proximately cause the victim's harm and losses 27
C. The case-specific arguments raised by petitioner are without merit 38
D. Questions involving the allocation of aggregate losses should be left to the district court's discretion 40
1. The restitution award must be greater than zero 41
2. Joint and several liability for all of the victim's aggregate losses is not appropriate 42
3. The district court should have discretion to allocate a victim's aggregate losses 47
Conclusion 50
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Anza v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) 29
Ashcroft v. *Free Speech Coal.*, 535 U.S. 234 (2002).....17
Associated Gen. Contractors v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 29, 30, 31
Barnhart v. *Thomas*, 540 U.S. 20 (2003).....34
Bridge v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) 29
Brown v. *Gardner*, 513 U.S. 115 (1994).....13
CSX Transp., Inc. v. *McBride*, 131 S. Ct. 2630 (2011) 18, 27, 28, 29, 30
Dolan v. *United States*, 130 S. Ct. 2533 (2010).....16
Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996) 27, 29
Federal Mar. Comm'n v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973) 31
Gross v. *FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) 20
Hemi Group, LLC v. *City of N.Y.*, 559 U.S. 1 (2010) 28, 29, 31
Holmes v. *Securities Investor Prot. Corp.*, 503 U.S. 258 (1992) 28, 29, 30, 32
Hughey v. *United States*, 495 U.S. 411 (1990).....47
Jackson v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) 31
Jama v. *Immigration & Customs Enforcement*, 543 U.S 335 (2005) 34
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 34
Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., In re, 379 F. Supp. 348 (S.D.N.Y. 2005) 22
Miller v. *Union Pac. R. Co.*, 290 U.S. 227 (1933).....28

Cases—Continued: Page

Musick, Peeler & Garrett v. *Employers Ins.*, 508 U.S. 286 (1993) 45
New York v. *Ferber*, 458 U.S. 747 (1982)....17
Nobelman v. *American Sav. Bank*, 508 U.S. 324 (1993)....34
Norfolk S. Ry. v. *Sorrell*, 549 U.S. 158 (2007) 30
Northwest Airlines, Inc. v. *Transport Workers Union of Am.*, 451 U.S. 77 (1981)....45
Osborne v. *Ohio*, 495 U.S. 103 (1990)....17
Pacific Operators Offshore, LLP v. *Valladolid*, 132 S. Ct. 680 (2012) 13, 28, 29, 30, 31
Palsgraf v. *Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928)....28
Porto Rico Ry., Light & Power Co. v. *Mor*, 253 U.S. 345 (1920) 34
Texas Indus., Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 45
United States v. *Aumais*, 656 F.3d 147 (2d Cir. 2011)....43
United States v. *Bass*, 404 U.S. 336 (1971) 34
United States v. *Benoit*, 713 F.3d 1 (10th Cir. 2013) 14, 18, 48, 49
United States v. *Burgess*, 684 F.3d 445 (4th Cir.), cert. denied, 133 S. Ct. 490 (2012) 14, 18, 23, 33
United States v. *Crandon*, 173 F.3d 122 (3d Cir.), cert. denied, 528 U.S. 855 (1999)....14, 18
United States v. *Fast*, 709 F.3d 712 (8th Cir. 2013), petition for cert. pending, No. 13-69 (filed July 10, 2013) 14, 18, 32, 43
United States v. *Gamble*, 709 F.3d 541 (6th Cir. 2013) ....*passim*
United States v. *Hargrove,* 714 F.3d 371 (6th Cir. 2013) 23, 24, 33, 48, 50

Cases—Continued: Page

United States v. *Hayes*, 555 U.S. 415 (2009) 34
United States v. *Hayes*, 135 F.3d 133 (2d Cir. 1998).....31
United States v. *Kearney*, 672 F.3d 81 (1st Cir. 2012), cert. dismissed, 133 S. Ct. 1521 (2013).....*passim*
United States v. *Kennedy*, 643 F.3d 1251 (9th Cir. 2011) 14, 18, 25, 26, 40
United States v. *Laraneta*, 700 F.3d 983 (7th Cir. 2012), petition for cert. pending, No. 13-5132 (filed June 1, 2013).....*passim*
United States v. *Lundquist*, No. 11-5379, 2013 WL 4779644 (2d Cir. Sept. 9, 2013).....*passim*
United States v. *McDaniel*, 631 F.3d 1204 (11th Cir. 2011).....14, 18
United States v. *Monzel*, 641 F.3d 528 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011) 14, 18, 32, 33, 43, 48
United States v. *Williams*, 553 U.S. 285 (2008) 17
University of Tex. Sw. Med. Ctr. v. *Nassar*, 133 S. Ct. 2517 (2013) 20

Constitution and statutes:

U.S. Const. Amend. VIII (Excessive Fines Clause).....9, 47
Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 571:
§ 501(1)(A), 120 Stat. 623.....16
§ 501(2)(D), 120 Stat. 624 17
Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26:
§ 121(1), 110 Stat. 3009-26.....17
§ 121(2), 110 Stat. 3009-26.....17
Clayton Act, 15 U.S.C. 15 29

Statutes—Continued: Page

Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2261 (18 U.S.C. 3771) 10, 35
18 U.S.C. 3771(a)(6) 3
18 U.S.C. 3771(d)(1) 3
18 U.S.C. 3771(d)(3) (§ 102(a), 118 Stat. 2261) 2, 3, 7
18 U.S.C. 3771(e) 3, 35
Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(3), 122 Stat. 4001 17
Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* 30
45 U.S.C. 51 30
Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b) 29
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c) 29
Sexual Exploitation and Other Abuse of Children Act, 18 U.S.C. 2251-2259:
Ch. 110 ..... *passim*
18 U.S.C. 2251 *et seq.* 15
18 U.S.C. 2252(a)(4) 2, 15
18 U.S.C. 2252(a)(4)(B) 2, 4
18 U.S.C. 2252A(a)(5) 2, 15
18 U.S.C. 2259 ..... *passim*
18 U.S.C. 2259(a) 2, 15, 42
18 U.S.C. 2259(b)(1) 2, 42
18 U.S.C. 2259(b)(2) 3, 13, 31
18 U.S.C. 2259(b)(3) 3, 10, 13, 36, 43
18 U.S.C. 2259(b)(3)(A) 33
18 U.S.C. 2259(b)(3)(A)-(E) 31
18 U.S.C. 2259(b)(3)(C) 33

Statutes—Continued: Page

18 U.S.C. 2259(b)(3)(E) 49
18 U.S.C. 2259(b)(3)(F) 9, 31, 32
18 U.S.C. 2259(b)(4)(A) 2, 15
18 U.S.C. 2259(c) 2, 8, 13, 30, 31, 43
18 U.S.C.A. 2252(b)(2) (2012) 47
18 U.S.C. 1593(c) 35
18 U.S.C. 2248(c) 35
18 U.S.C. 2264(b)(3) 31
18 U.S.C. 2264(c) 35
18 U.S.C. 3571(b)(3) 47
18 U.S.C. 3663(a)(1)(B)(ii) 42
18 U.S.C. 3663A(a)(2) 35
18 U.S.C. 3663A(c)(3) 42
18 U.S.C. 3664 ....3, 45
18 U.S.C. 3664(d)(5) 16
18 U.S.C. 3664(e) 3, 13, 31
18 U.S.C. 3664(g)(1) 40
18 U.S.C. 3664(h) 3, 9, 42, 44

Miscellaneous:

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Miscellaneous—Continued: Page

Office for Victims of Crime, U.S. Dep't of Justice, *Crime Victims' Rights*, http://www.ojp.usdoj.gov/ovc/rights/notification_VNS.html (last visited Sept. 26, 2013) 5

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S. Rep. No. 138, 103d Cong., 1st Sess. (1993) 32

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OPINIONS BELOW

The amended opinion of the en banc court of appeals (J.A. 425-499) is reported at 701 F.3d 749. The original opinion of the en banc court of appeals (J.A. 349-424) is reported at 697 F.3d 306. The panel opinions (J.A. 298-310, 325-348) are reported at 636 F.3d 190 and 591 F.3d 792. The district court opinion (J.A. 271-297) is reported at 672 F. Supp. 2d 781.

JURISDICTION

The amended judgment of the en banc court of appeals was entered on November 19, 2012. The petition for a writ of certiorari was filed on January 31, 2013, and was granted on June 27, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Texas, petitioner was convicted of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). The government sought restitution under 18 U.S.C. 2259 on behalf of the respondent victim ("Amy") who was depicted in some of the images possessed by petitioner. The district court declined to order any restitution. Amy filed a petition for a writ of mandamus under the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, § 102(a), 118 Stat. 2262 (18 U.S.C. 3771(d)(3)), and a notice of appeal. The court of appeals initially denied the mandamus petition, but on rehearing the panel issued a writ of mandamus. On rehearing en banc, the court again granted Amy's mandamus petition and remanded for further proceedings. See J.A. 271-310, 325-499.

1. When sentencing a defendant "for any offense" under Chapter 110 of Title 18, which generally covers sexual-exploitation offenses related to child pornography, a court is to order restitution in "the full amount of the victim's losses." 18 U.S.C. 2259(a) and (b)(1); see 18 U.S.C. 2259(b)(4)(A) ("The issuance of a restitution order under this section is mandatory."). The possession of child pornography is a Chapter 110 offense. See 18 U.S.C. 2252(a)(4), 2252A(a)(5). A "victim," in turn, is defined as an "individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. 2259(c). And the "full amount of the victim's losses" is defined to include "any costs incurred by the victim for" medical services (including psychiatric and psychological care); physical and occupational therapy or rehabilitation; necessary trans-

portation, temporary housing, and child care expenses; lost income; attorneys' fees and other litigation costs; and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3).

Section 2259 further provides that the order of restitution "shall be issued and enforced in accordance with [18 U.S.C.] 3664." 18 U.S.C. 2259(b)(2). Section 3664(e) places on the government the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" and provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. 3664(e). Section 3664(h) provides that, "[i]f 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." 18 U.S.C. 3664(h).

Although not a party to the criminal prosecution, a "crime victim," or the government on the victim's behalf, may seek to enforce the victim's rights by filing a motion in the district court. See 18 U.S.C. 3771(d)(1) and (3). A "crime victim" is defined as "a person directly and proximately harmed as a result of the commission" of a federal offense. 18 U.S.C. 3771(e). One of the crime victim's rights is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. 3771(a)(6). If the district court "denies the relief sought, the movant" (*i.e.*, the crime victim or the government) "may petition the court of appeals for a writ of mandamus." 18 U.S.C. 3771(d)(3).

2. a. On July 11, 2008, Federal Bureau of Investigation (FBI) agents in Tyler, Texas, met with petitioner after an employee at a computer company discovered that petitioner's laptop contained numerous images of children posing nude and engaging in various sexual acts with adults and animals. Petitioner admitted that he had downloaded the images from the Internet and that he had downloaded and viewed child pornography for the last two years. A forensic analysis of petitioner's laptop uncovered 280 such images. Presentence Investigation Report (PSR) ¶¶ 9-12; J.A. 146.

On January 9, 2009, petitioner was arrested. J.A. 1. The government filed an information in the Eastern District of Texas charging petitioner with possessing images of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). PSR ¶ 1. Petitioner pleaded guilty, pursuant to a plea agreement, and the district court sentenced him to 24 months of imprisonment, to be followed by ten years of supervised release. See *id.* ¶ 2; J.A. 312-314.

b. The victim respondent, identified by the pseudonym "Amy" to protect her privacy, was depicted in two of the images possessed by petitioner. J.A. 146, 272 n.1, 273. The images were part of the "Misty" series—a widely distributed child-pornography series that depicts Amy, at the ages of eight and nine, being sexually abused and raped by her uncle. J.A. 272 & n.1, 273 n.3, 428. On April 17, 2009, the Department of Justice Victim Notification System (VNS) notified Amy's attorney of petitioner's guilty plea. J.A. 22-26; see J.A. 117-120 (notification of petitioner's sentence).[1]

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[1] VNS is a cooperative effort between the Department of Justice, the FBI, the United States Postal Inspection Service, and the

And, on May 1, 2009, Amy submitted a request for restitution in the amount of approximately $3.4 million, which included a lifetime of psychological counseling starting on January 1, 2009, lost income (also beginning on January 1, 2009), and expert witness and attorneys' fees. J.A. 27-58, 92-93, 164-165. Along with the request, Amy submitted a victim-impact statement created in 2008 (J.A. 59-66, 153), a psychological report dated November 21, 2008 (J.A. 67-87),[2] and an economic analysis dated September 15, 2008 (J.A. 88-116).

At the time of her victim-impact statement, Amy was 19 years old. J.A. 59. Amy explained that "[e]very day of [her] life [she] live[s] in constant fear that someone will see [her] pictures and recognize [her] and that [she] will be humiliated all over again." J.A. 60. She "know[s] that at any moment, anywhere, someone is looking at pictures of [her] as a little girl being abused by [her] uncle and is getting some kind of sick enjoyment from it." J.A. 61. That knowledge, Amy explained, is like "being abused over and over and over again." *Ibid.* "[K]nowing that the pictures

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Federal Bureau of Prisons. It is a computer-based system that provides information about important events in a federal criminal case to the victims of the federal crime. See Office for Victims of Crime, U.S. Dep't of Justice, *Crime Victims' Rights*, http://www.ojp.usdoj.gov/ovc/rights/notification_VNS.html (last visited Sept. 26, 2013). Child-pornography victims who have been linked to the images in a particular case will receive notifications about that case. Crime victims can choose not to receive such notifications and they can designate a third party to receive notifications on their behalf. See U.S. Dep't of Justice, *Victim Notification System*, http://www.notify.usdoj.gov (last visited Sept. 26, 2013).

[2] The psychological report was based in part on four evaluations of Amy between June 11 and November 10, 2008. J.A. 67.

of [her abuse] are still out there," she continued, makes everything "worse" and prevents her from "get[ting] over" her uncle's abuse. J.A. 63, 64. "[B]ecause the disgusting images of what he did to [her] are still out there on the Internet," she cannot "forget." J.A. 60.

According to the psychological report prepared by Dr. Joyanna Silberg, Amy began therapy in October 1998 at the age of nine. J.A. 70. That treatment ended the following year when the therapist concluded that Amy was "back to normal." *Ibid.* Despite that "optimistic assessment," Dr. Silberg noted that "Amy's functioning appeared to decline" during her teenage years. J.A. 71. "Most significantly, at the age of 17, Amy was informed through legal notifications about the widespread presence of her picture on the internet, illustrating to her that in some ways the sexual abuse of her has never really ended." *Ibid.* That knowledge, Dr. Silberg explained, "further exacerbated her symptoms" and "interfered with her ability to overcome the increasing symptoms of post traumatic stress, and impeded her ability to move on with her life." *Ibid.* Dr. Silberg reported, based on Amy's account, that "each discovery of another defendant that has traded her image re-traumatizes her again" and triggers "a resurgence of the trauma" based on "her ongoing realization that her image is being traded on the internet." J.A. 71-72, 73. Dr. Silberg explained that such re-victimization makes it difficult to treat Amy's "post-traumatic stress" because the "trauma" is never "over," the "past" is repeatedly "replayed," and the "existence of the pictures" and "knowledge of new defendants being arrested" are "constant" and "ongoing triggers." J.A.

83-84. Dr. Silberg concluded that Amy requires "weekly therapy" and may require "more intensive inpatient or rehabilitation services * * * over the course of her lifetime." J.A. 86.

c. The government submitted Amy's restitution request to the district court. J.A. 273-274. Petitioner submitted competing psychological and economic expert reports, J.A. 172-229, and the parties stipulated that Amy "does not know who" petitioner is and that none of her damages "flow from anyone telling her specifically" about petitioner or his offense conduct, J.A. 230. After extensive briefing and two hearings, the district court ultimately declined to order any restitution. See J.A. 271-297.

The district court agreed that Amy qualified as a "victim" under Section 2259 because she had been "harmed as a result of [petitioner's] possession of her images." J.A. 277-283. The court concluded, however, that the government needed to demonstrate proximate cause and that it failed to make that necessary showing. J.A. 283-296. In the court's view, the evidence submitted failed to establish "any specific losses proximately caused by [petitioner's] conduct," as distinguished from the conduct of others who had also harmed Amy. J.A. 295-296.

3. a. Amy filed both a notice of appeal and a petition for a writ of mandamus under Section 3771(d)(3) of the CVRA. See J.A. 326. A divided panel of the court of appeals denied her mandamus petition. J.A. 298-310. Applying its precedent, the court reaffirmed that "[t]he standard of review [for a CVRA mandamus petition] is the usual standard for mandamus petitions," which meant that Amy, as the petitioner, had to show that the district court committed

"clear and indisputable" error. J.A. 299 (citation omitted). Because "[c]ourts across the country have followed and applied the proximate-cause requirement in imposing restitution under Section 2259," the court concluded that "it is neither clear nor indisputable that Amy's contentions regarding the statute are correct." J.A. 302. Judge Dennis dissented. J.A. 303-310.

b. Amy filed a petition for panel rehearing. A different panel was assigned the rehearing petition as well as Amy's pending appeal. J.A. 326. That panel granted Amy's petition for rehearing and held that the district court had in fact committed "clear and indisputable error" by "[i]ncorporating a proximate causation requirement [into Section 2259] where none exists." J.A. 347. Rather, the court explained, the only showing of causation necessary for the enumerated categories of losses is the "general causation" required for a claimant to qualify as a "victim" under Section 2259(c), *i.e.*, a showing that the claimant suffered harm "*as a result* of" the offense. J.A. 345. Applying that standard, the court concluded that Amy was a "victim" entitled to restitution. *Ibid.* Accordingly, it issued a writ of mandamus and remanded the case to the district court with instructions to calculate an appropriate restitution award. J.A. 347-348.

4. Petitioner sought rehearing en banc, which the court of appeals granted. After supplemental briefing and argument, the en banc court vacated the judgment and remanded for further proceedings. J.A. 425-499.[3]

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[3] The en banc court consolidated petitioner's case with that of another defendant, Michael Wright, for the limited purpose of argument and decision. The en banc court issued an amended opin-

a. As relevant here, the en banc court of appeals held that Section 2259 does not require a showing of proximate cause with respect to the enumerated categories of losses. J.A. 444-466. Relying primarily on the "rule of the last antecedent," the court concluded that a proximate-cause requirement exists only for the catch-all category of "other losses suffered by the victim." J.A. 451-466 (quoting 18 U.S.C. 2259(b)(3)(F)). The court acknowledged that every other circuit had held otherwise, but it found those decisions unpersuasive. J.A. 458-466.

The en banc court next addressed "how to allocate responsibility for a victim's harm to any single defendant," given that numerous defendants have possessed Amy's images. J.A. 466. The court explained that 18 U.S.C. 3664(h) permits a court to hold a defendant jointly and severally liable with other defendants which, it believed, included defendants in different cases. J.A. 467-470. Finally, the court dismissed concerns about overcompensation and the Eighth Amendment, noting (among other things) that a victim's total recovery would be capped at her losses and that district courts could "ameliorate the impact of joint and several liability on an individual defendant" through the use of a "payment schedule" corresponding to the defendant's ability to pay. J.A. 470-476.

Applying those principles, the en banc court held that the district court's refusal to award any restitu-

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ion on rehearing to alter the disposition in Wright's case. See J.A. 426 & n.2. Wright filed a separate petition for a writ of certiorari, which remains pending, see *Wright* v. *United States*, No. 12-8505 (filed Jan. 31, 2013), and he filed a brief as a respondent in support of petitioner at the merits stage of this case.

tion was "clear and indisputable" error. J.A. 478.[4] The court explained that "[b]ecause Amy is a victim, [Section] 2259 required the district court to award her restitution for the 'full amount of [her] losses' as defined under [Section] 2259(b)(3)." *Ibid.* (third pair of brackets in original). Accordingly, the court granted Amy's mandamus petition and remanded to the district court for a determination of the "full amount of [Amy's] losses." J.A. 479, 480 (brackets in original).

b. Judge Dennis concurred in part and concurred in the judgment, suggesting that the majority should have "le[ft] the decision as to how to proceed under these statutes to the district courts" in the first instance. J.A. 480-482. Judge Davis, joined by three other judges, concurred in part and dissented in part, concluding that proximate cause is required for all categories of losses, but that the required showing should focus on the aggregate harms caused by possessors of child pornography generally. J.A. 482-495. Judge Southwick filed a separate dissent. J.A. 496-499.

SUMMARY OF ARGUMENT

This Court should affirm the judgment below because, although the court of appeals adopted an incorrect causation standard and joint-and-several-liability approach, it properly remanded to the district court for an award of restitution.

A. Restitution is mandatory for all Chapter 110 offenses, including the possession of child pornography. And this Court and Congress have repeatedly recog-

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[4] The en banc court also held that crime victims do not have a right to appeal under the CVRA and, accordingly, only mandamus review is available. J.A. 433-444.

nized that possessors of child pornography cause serious and continuing harm to the children depicted in the images. Both propositions are critical to a proper interpretation of Section 2259's causation requirements, and any interpretation that would effectively render restitution unavailable for victims of child-pornography possession offenses must be rejected.

B. Section 2259 requires a showing of factual cause and of proximate cause. Factual causation can be demonstrated in different ways in different cases. The traditional "but-for" test is inappropriate here. It would absolve culpable defendants (like petitioner) and leave victims (like Amy) without restitution for losses indisputably caused by child-pornography possessors as a class. An "aggregate" causation standard should therefore govern restitution awards under Section 2259. An approach based on a defendant's contribution to a collectively caused harm effectuates Congress's clear intent that defendants convicted of child-pornography possession offenses pay restitution to child victims.

Section 2259 also requires a showing of proximate cause for all categories of a victim's losses. That additional limitation, however, will have little work to do in a restitution request of the sort at issue here. The link between the possession of child pornography and the typical losses (*e.g.*, therapy costs) incurred by a child whose sexual abuse is depicted in the images is proximate by any definition.

C. The case-specific arguments raised by petitioner are without merit. First, petitioner contends that a defendant cannot cause harm that occurred before the date of his offense. No such timing issue exists here.

Petitioner's possession of Amy's images predated her expert reports and all of the losses for which she seeks recovery were incurred after his offense conduct. In any event, the expert reports estimate future loss based on an ongoing (not a past) harm, and a district court could reasonably infer that the harm persisted after the defendant's offense or arrest. Second, petitioner contends that he could not have caused Amy harm because she had no knowledge of his particular conduct. That misunderstands the nature of Amy's injury, which results from the widespread circulation of images on the Internet to persons like petitioner.

D. Once the government establishes that a defendant has caused some of a victim's losses, the district court must still determine how much to award in restitution. Three answers are possible: (1) nothing (as found by the district court), (2) all of the victim's aggregate losses, jointly and severally (as held by the court of appeals), or (3) somewhere between all or nothing, through allocation by the district court (as held by every other circuit to consider the issue). The first two approaches are fatally flawed. A restitution award of zero cannot be squared with congressional intent. At the other extreme, imposing joint and several liability for all of the victim's aggregate losses has no statutory support, is practically unworkable, and may be fundamentally unfair. The third approach (allocation) is a pragmatic solution that fully effectuates the statutory purpose. A district court should have discretion to allocate a victim's losses in a reasonable manner.

ARGUMENT

The text of 18 U.S.C. 2259 makes clear that a defendant's child-pornography possession offense must have a causal relationship to the victim's harm and losses in order to support restitution. Section 2259(c) defines a "victim" as an "individual harmed *as a result of* a commission of a crime under [Chapter 110]." 18 U.S.C. 2259(c) (emphasis added). Section 2259(b)(3) defines the "full amount of the *victim's* losses" to include several enumerated categories, such as medical services related to psychological care and lost income, as well as "any other losses suffered by the victim as a *proximate result* of the offense." 18 U.S.C. 2259(b)(3) (emphases added). And Section 3664(e) provides that the government bears the "burden of demonstrating the amount of loss sustained by a victim *as a result of* the offense." 18 U.S.C. 3664(e) (emphasis added); 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."). Individually and collectively, that language requires a causal connection between the defendant's offense, on the one hand, and the victim's harm and losses, on the other. See *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 690 (2012) (*Pacific Operators*) ("as the result of" language "plainly suggests causation"); *Brown* v. *Gardner*, 513 U.S. 115, 119 (1994) ("as a result of" language "is naturally read * * * to impose the requirement of a causal connection").

Every court of appeals, including the Fifth Circuit, agrees that Section 2259 includes a causation requirement of some sort. See *United States* v. *Kearney*, 672 F.3d 81, 95-96 (1st Cir. 2012), cert. dismissed, 133 S. Ct. 1521 (2013); *United States* v.

Lundquist, No. 11-5379, 2013 WL 4779644, at *5 (2d Cir. Sept. 9, 2013); *United States* v. *Crandon*, 173 F.3d 122, 125-126 (3d Cir.), cert. denied, 528 U.S. 855 (1999); *United States* v. *Burgess*, 684 F.3d 445, 456-458 (4th Cir.), cert. denied, 133 S. Ct. 490 (2012); J.A. 474 (5th Cir.); *United States* v. *Gamble*, 709 F.3d 541, 546-549 (6th Cir. 2013); *United States* v. *Laraneta*, 700 F.3d 983, 989-990 (7th Cir. 2012), petition for cert. pending, No. 13-5132 (filed June 1, 2013); *United States* v. *Fast*, 709 F.3d 712, 720-722 (8th Cir. 2013), petition for cert. pending, No. 13-69 (filed July 10, 2013); *United States* v. *Kennedy*, 643 F.3d 1251, 1260-1261 (9th Cir. 2011); *United States* v. *Benoit*, 713 F.3d 1, 18-21 (10th Cir. 2013); *United States* v. *McDaniel*, 631 F.3d 1204, 1208-1209 (11th Cir. 2011); *United States* v. *Monzel*, 641 F.3d 528, 535-537 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011). Amy likewise concedes that restitution under Section 2259 requires some causal connection. See J.A. 244 ("[I]t would be folly for me to argue that we did not have to show harm caused by the commission of this crime."); J.A. 252 ("We need to show causation.").

The disagreement between the parties (and the courts) is over what causal relationship must exist; what constitutes sufficient evidence to prove the requisite connection; and how a court should calculate an appropriate restitution award. In petitioner's view, Amy (and victims like her) cannot establish the necessary causal connection absent evidence specifically linking the defendant's offense to particular losses incurred by the victim as a result of learning about the defendant's conduct. In Amy's view, defendants (like petitioner) should be jointly and severally liable for all of a victim's aggregate losses which, in this case, ex-

ceed $3 million. In the government's view, the answer lies in between. Amy (and victims like her) can establish the necessary causal connection based on an "aggregate" causation theory without showing a specific link to particular losses caused by an individual defendant's conduct. Once such a showing is made, district courts should allocate financial responsibility among the collective pool of similarly situated defendants, exercising discretion to impose a reasonable restitution award.

A. Section 2259's Causation Requirements Must Be Interpreted In Light Of Two Critical Principles

Section 2259 requires courts to order defendants to pay restitution to "victim[s]" of Chapter 110 offenses, such as the possession of child pornography, in the "full amount of the victim's losses." 18 U.S.C. 2259. Two (seemingly undisputed) propositions are critical to a proper interpretation of Section 2259.

First, restitution is mandatory for child-pornography possession offenses. See 18 U.S.C. 2259(a) and (b)(4)(A). Congress did not limit restitution to the production of child pornography or its distribution, and it did not exempt possession, receipt, or transportation offenses. See *Kearney*, 672 F.3d at 97. Section 2259(a) provides that a district court "shall" order restitution for "*any* offense" under Chapter 110, 18 U.S.C. 2259(a) (emphasis added), and possession of child pornography is a Chapter 110 offense, see 18 U.S.C. 2252(a)(4), 2252A(a)(5).[5]

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[5] Other Chapter 110 offenses include receipt, transportation, and distribution of child pornography, as well as other offenses involving the sexual exploitation of children. See 18 U.S.C. 2251 *et seq.*

That restitution is mandatory for child-pornography possession offenses does not mean that a court may ignore other statutory prerequisites to restitution—including causation. The causation requirements, however, must be interpreted in light of Congress's specific inclusion of child-pornography possession as one offense for which restitution is mandatory. Any interpretation that would effectively render restitution unavailable for victims of child-pornography possession offenses (or any other category of offenses set forth in Chapter 110) must therefore be rejected. See *Kearney*, 672 F.3d at 97 ("[A]ny construction" of a causation requirement "that would functionally preclude any award of restitution" for possession offenses cannot withstand scrutiny.); see Pet. Br. 48 (acknowledging that "[i]nterpretation and application" of Section 2259's causation standards "must be consistent with" Congress's purpose "of ensuring full compensation of losses for the victims of child pornography * * * possession"); cf. *Dolan* v. *United States*, 130 S. Ct. 2533, 2539 (2010) (interpreting 90-day time limit in 18 U.S.C. 3664(d)(5) in light of Congress's intent to "assure that victims of a crime receive full restitution").

Second, the possession of child pornography is not a victimless crime. Both this Court and Congress have repeatedly recognized that the "possession of child pornography * * * is harmful to the physiological, emotional, and mental health of the children depicted in child pornography." Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, § 501(1)(A), 120 Stat. 623. "[T]he materials produced are a permanent record of the children's participation and the harm to the child

is exacerbated by their circulation." *New York* v. *Ferber*, 458 U.S. 747, 759 (1982); see *id.* at 759 n.10 ("Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place.") (citation omitted); Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(3), 122 Stat. 4001 ("Child pornography is a permanent record of a child's abuse and the distribution of child pornography images revictimizes the child each time the image is viewed."); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1) and (2), 110 Stat. 3009-26 ("[C]hild pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years."); see also *United States* v. *Williams*, 553 U.S. 285, 303 (2008); *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990). "Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse." Adam Walsh Act § 501(2)(D), 120 Stat. 624; see *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 249 (2002) ("Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being."). Accordingly, possessors of child pornography unquestionably cause serious and continuing harm to the children depicted in the images they possess.

B. The Victim's Harm And Losses Must Factually And Proximately Result From The Defendant's Offense When Considered In The Aggregate

With the exception of the Fifth Circuit, every court of appeals has held that Section 2259 contains a "prox-

imate cause" requirement for all categories of a victim's losses.[6] As courts have used that phrase, however, it tends to obscure the analysis because it embodies two distinct concepts: factual causation (or cause in fact) and proximate (or legal) causation.[7] The crux of the issue here is "how to assess causation where a large number of individuals each contributed in some degree to an overall harm." *Kearney*, 672 F.3d at 100 n.16. And the answer to that question is found in the doctrines of factual causation, not proximate cause (which generally limits liability once cause in fact is shown). See *id.* at 98. Factual causation doctrines provide ample support for an "aggregate" causation theory, which best effectuates congressional intent

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[6] See *Kearney*, 672 F.3d at 95-96 (1st Cir.); *Lundquist*, 2013 WL 4779644, at *5 (2d Cir.); *Crandon*, 173 F.3d at 125-126 (3d Cir.); *Burgess*, 684 F.3d at 456-458 (4th Cir.); *Gamble*, 709 F.3d at 546-549 (6th Cir.); *Laraneta*, 700 F.3d at 989-990 (7th Cir.); *Fast*, 709 F.3d at 720-722 (8th Cir.); *Kennedy*, 643 F.3d at 1260-1261 (9th Cir.); *Benoit*, 713 F.3d at 18-21 (10th Cir.); *McDaniel*, 631 F.3d at 1208-1209 (11th Cir.); *Monzel*, 641 F.3d at 535-537 (D.C. Cir.).

[7] Although "proximate cause" has at times been used as an umbrella term to encompass both cause in fact and legal cause, clarity is enhanced by decoupling the two distinct concepts. See 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26, Reporters' Note cmt. a (2005) (Third Restatement). Relatedly, the term "proximate cause" has been described as "notoriously confusing." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011). While other terms, such as "legal cause," "responsible cause," or "scope of liability," may therefore be more fitting, this brief generally employs the familiar (if imprecise) "proximate cause" terminology to convey the same concept. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 42, p. 273 (5th ed. 1984); Third Restatement, ch. 6, Special Note on Proximate Cause.

and can readily be satisfied in child-pornography possession cases.

Section 2259 also requires a showing of proximate cause. That additional limitation on liability simply implements the well-accepted, common-sense notion that some putative victims and some injuries are too far removed from the wrongful act to warrant compensation. Proximate cause, however, will have little work to do in a restitution request of the sort at issue here (*i.e.*, a child victim seeking to recover enumerated losses resulting, at least in part, from the defendant's possession of images depicting her sexual abuse).

1. The defendant's offense must be a cause in fact of the victim's harm and losses under an aggregate-causation theory

Any "legal test" for causation "includes a requirement that the wrongful conduct must be a *cause in fact* of the harm." 2 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 20.1, p. 1108 (1956) (Harper & James). A defendant's wrongful conduct is a "cause in fact" of the plaintiff's injury if "the injury would not have occurred *but for* [the] defendant's" wrongful conduct. *Id.* § 20.2, p. 1110. Factual causation, however, can be demonstrated in other ways. Cf. Pet. Br. 25 (acknowledging that "cause in fact" only "usually" means "but for") (citation omitted). The traditional "but-for" test is inappropriate in cases like this one because it would absolve culpable defendants (like petitioner) and leave victims (like Amy) without restitution for losses indisputably caused by child-pornography possessors as a class. An "aggregate" causation standard should therefore govern restitution awards under Section 2259. An approach based on a defendant's contribution to a collectively

caused harm effectuates Congress's clear intent that defendants convicted of child-pornography possession offenses pay restitution to child victims.

a. It is well settled that a "but-for" standard cannot serve as an adequate measure of factual causation in all cases. See 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 cmt. c (2005) (Third Restatement) ("[W]hile the but-for standard * * * is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause."); see also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, p. 266 (5th ed. 1984) (*Prosser & Keeton*); 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(b), p. 468 (2d ed. 2003); Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1775 (Dec. 1985) (Wright).[8] In some cases, a "but-for" standard "results in a finding of no causation even though it is clear that the act in question contributed to the injury." Wright 1775. Where such a rule would produce unjust results by allowing admitted wrongdoers to escape responsibility and by leaving victims without any remedy, an alternative means of determining factual causation is needed. See Third Restatement § 27 cmt. c (A plaintiff should not be "worse off due to multiple tortfeasors than would have been the case if only one of the tortfeasors had existed.").

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[8] This Court adopted a "but-for" standard of factual causation in a recent employment discrimination case. See *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2525 (2013); see also *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-177 (2009). The Court in *Nassar*, however, explained that a "but-for" rule applies in the "usual" case; it did not suggest that it applies in *every* case. 133 S. Ct. at 2525.

Courts and scholars have devised different formulations of factual causation to address different categories of cases. Perhaps the most familiar are those involving "multiple sufficient causes," *i.e.*, two or more conditions that converge to cause a result when each would have been sufficient alone to cause the same result. Third Restatement § 27, Reporters' Note cmt. a ("There is near-universal recognition of the inappropriateness of the but-for standard for factual causation when multiple sufficient causes exist."). For example, two fires from separate sources combine to destroy a house. If the house would have been consumed completely by either fire alone, they are both considered a factual cause of the harm even though the "but-for" test is not satisfied for either. See *Prosser & Keeton* § 41, pp. 266-267.

The multiple causes, however, need not be *independently* sufficient to cause the injury. See Wright 1791-1792 ("The requirement that each factor have been sufficient by itself * * * is too restrictive" and "is not followed by the courts."). Wrongful conduct by one actor may be insufficient to cause the plaintiff's harm standing alone, but "when combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm." Third Restatement § 27 cmt. f. "When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Prosser & Keeton* § 41, p. 268; see 1 Dan B. Dobbs et al., *The Law of Torts* § 189, p. 635 (2d ed. 2011) (Dobbs) (Factual causation may be established

if, after the conduct of the "defendants as a group is aggregated," the "combined conduct is a but-for cause of the plaintiff's harm."); Third Restatement § 27, Reporters' Note cmt. g (Even though "none of the alternative causes is sufficient by itself, * * * together they are sufficient and perhaps necessary elements of multiple sufficient causal chains.").[9]

Such an "aggregate" causation rule is appropriate if "the defendants bear[] a like relationship" to the harm and if "[e]ach seeks to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group, thus leaving the plaintiff without a remedy in the face of the fact that had none of them acted improperly the plaintiff would not have suffered the harm." *Prosser & Keeton* § 41, pp. 268-269 (internal footnote omitted); see *id.* § 41, p. 268 n.40 (noting that the results reached by courts are "almost uniformly consistent" with this principle). In pollution cases, for example, each property owner who contributed to the injury is held liable "even though none of the defendants' individual contributions was either necessary or sufficient by itself for the occurrence of the injury." Wright 1792; see Dobbs § 189, p. 633; see also *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 377-379 (S.D.N.Y. 2005) (adopting theory of collective liability when it was "known that the commingled

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[9] Some scholars have adopted somewhat different terminology to describe a similar test. See, *e.g.*, Wright 1774, 1788-1803 (advocating a "necessary element of a sufficient set" test under which a particular condition is considered a cause in fact of a particular harm "if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence").

product caused the harm" and that the product of each supplier was "present" in the "commingled product," but it was "*not known* * * * what percentage of each supplier's goods [wa]s present in the blended product that caused the harm").[10]

b. As several courts of appeals have recognized, applying an aggregate causation standard to Section 2259 restitution requests best effectuates Congress's intent. See *Kearney*, 672 F.3d at 98-99; *Burgess*, 684 F.3d at 459-460; *United States* v. *Hargrove*, 714 F.3d 371, 374-375 (6th Cir. 2013); *Gamble*, 709 F.3d at 556 (Kethledge, J., concurring in part and concurring in the judgment); J.A. 489-491 (Davis, J., concurring in part and dissenting in part). Section 2259 requires defendants convicted of possessing child pornography to pay restitution to children (like Amy) whose sexual abuse is depicted in the images and who have suffered harm as a result. Unfortunately, defendants like petitioner are not alone. Thousands of individuals have viewed or will view pornographic images memorializing Amy's sexual abuse. And Amy has suffered, and will continue to suffer, harm as a result of their collective, illegal acts. See *Hargrove*, 714 F.3d at 376 (Clay, J., concurring in part and concurring in the judgment) (Possession of child pornography is "a crime whereby

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[10] Indeed, a defendant may be held liable even if the injury he inflicted was "negligible and harmless" standing alone, if the "cumulative effect of the many similar small injuries is some appreciable, serious damage." Harper & James § 20.3, p. 1126 n.17; see *Prosser & Keeton* § 52, p. 355 (noting that such treatment may be appropriate if "the individual knows, or is at least negligent in failing to discover, that the conduct may concur with that of others to cause damage").

individual victims are harmed by the ongoing conduct of numerous independent perpetrators.").

The individuals who have (or will) possess Amy's images are similarly situated to one another and they bear a "like relationship" to Amy's harm. *Prosser & Keeton* § 41, pp. 268-269. Each defendant has contributed (or will contribute) to her harm and, together, they are more than sufficient to cause her losses. See *Hargrove*, 714 F.3d at 377 (Clay, J., concurring in part and concurring in the judgment) ("[E]ven if conduct is insufficient by itself to cause a given harm, liability attaches when the conduct is sufficient to cause the harm when combined with the wrongful conduct of others."); *Kearney*, 672 F.3d at 98 (Aggregate cause "exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort."). If no one had viewed Amy's images, she would not suffer from the same psychological and emotional harm that she endures today. See *ibid.* ("[The defendant's] conduct contributed to a state of affairs in which [the victim's] emotional harm was worse than would have otherwise been the case."); see also *Prosser & Keeton* § 41, pp. 268-269 & n.40; Dobbs § 189, p. 635; Third Restatement § 27 cmts. a, f and g. Because cause in fact exists at "the aggregate level, * * * there is no reason to find it lacking on the individual level." *Kearney*, 672 F.3d at 98.

c. Petitioner, however, suggests that to satisfy Section 2259's causation requirements, the government must introduce evidence specifically linking him to some discrete and measurable loss that Amy would not have suffered "but for" his particular offense con-

duct. *E.g.*, Pet. Br. 8 & n.5, 14, 20. The district court adopted a similar rule. See J.A. 293 ("[T]he Government has the burden of proving the amount of Amy's losses directly produced by [petitioner] that would not have occurred without his possession of her images."). And at least one court of appeals vacated a restitution award because the government "fail[ed] to introduce evidence" of a loss specifically "attributable to [the defendant's] offense," such as evidence that his conduct caused the victims to need "additional therapy sessions or [caused them to] miss[] [additional] days at work." *Kennedy*, 643 F.3d at 1264-1265.

Such a stringent causation standard is inappropriate here. Amy's trauma cannot be subdivided in the way a traditional "but-for" standard would require. If petitioner had not possessed Amy's images, she still would have suffered substantial harm as a result of countless other defendants just like him. And it is practically impossible to know whether her losses would have been slightly lower if one were to subtract one defendant, or ten, or fifty. To require the government to produce evidence that petitioner's specific conduct caused Amy to miss an extra day of work, or to need an additional therapy session, is to impose an insurmountable burden that has no grounding in general causation principles or in reality. See *Lundquist*, 2013 WL 4779644, at *12.

Petitioner also briefly suggests (Br. 46) a "substantial factor" test that, as he describes it, would require the government to prove that his conduct was "alone sufficient" to cause Amy's harm. For much the same reason, that too is not a workable or appropriate standard in this context. The possession of child pornography by an individual defendant is *not* alone suf-

ficient to cause all of Amy's losses.[11] As the Seventh Circuit explained, "it is beyond implausible that the victims would have suffered the harm they did had [the defendant] been the only person in the world to view pornographic images of them." *Laraneta*, 700 F.3d at 991; see *id.* at 992 ("[O]ften 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 "had been viewed by one person, the defendant.").

"The 'logic' of [petitioner's] argument is that there would be no remedy for the harm suffered by [victims like Amy] as a result of" the "possession of [their] images." *Kearney*, 672 F.3d at 99. Petitioner does not confront that problem, though he also does not dispute that it exists. And courts that have applied a "but-for" causation standard to restitution awards under Section 2259 acknowledge that it erects an "impossible burden." J.A. 296; see *Kennedy*, 643 F.3d at 1266 ("[I]t is likely to be a rare case where the government can directly link one defendant's viewing of an image to a particular cost incurred by the victim."). Petitioner (and defendants like him) should not be relieved of their statutory obligation to pay restitution simply because Amy would continue to suffer harm if there were one less child-pornography consumer in the world. Traditional tort-law principles of causation

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[11] An individual defendant's possession of child pornography may be independently sufficient to cause *some* of Amy's losses but, as with an individualized "but-for" standard, difficulties of proof would seriously impede (or, more likely, prevent) the government from identifying precisely which losses are attributable to which defendant.

provide a workable solution short of gutting the statute Congress enacted.

2. The defendant's offense must also proximately cause the victim's harm and losses

Once factual causation has been established, "there remains the question whether the defendant should be legally responsible for the injury." *Prosser & Keeton* § 42, pp. 272-273. Those additional limitations on the scope of liability, often referred to as proximate cause, "operate[] as a bar to the imposition of liability if policy considerations dictate that the defendant should not be liable under the circumstances." 3 Stuart M. Speiser et al., *The American Law of Torts* § 11:1, p. 380 (1986) (Speiser). A proximate-cause limitation is appropriately found in Section 2259, given its text and structure, and is applicable to all of a victim's losses. But the link between the possession of child pornography and the typical losses (*e.g.*, therapy costs) incurred by a child whose sexual abuse is depicted in the images is proximate by any definition. Accordingly, the proximate-cause limitation poses no difficulty in restitution requests of the sort at issue here.

a. The term "proximate cause" is "shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011); *id.* at 2637 ("Injuries have countless causes, and not all should give rise to legal liability."); *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996) (*Exxon*) ("In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.") (quoting *Prosser & Keeton* § 41,

p. 264). "[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *McBride*, 131 S. Ct. at 2637 (quoting *Palsgraf* v. *Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)) (brackets in original); *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (Proximate cause is a "generic[]" label for "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."). "To prevent 'infinite liability,' courts and legislatures appropriately place limits on the chain of causation that may support recovery on any particular claim." *McBride*, 131 S. Ct. at 2642 (internal citation omitted).

No "consensus" exists, however, "on any one definition of 'proximate cause.'" *McBride*, 131 S. Ct. at 2642. Some ask whether the injury was "foreseeable" or the "natural and probable" consequence of the defendant's wrongful act. See *ibid.*; *id.* at 2652 (Roberts, C.J., dissenting); *Hemi Group, LLC* v. *City of N.Y.*, 559 U.S. 1, 22-23 (2010) (Breyer, J., dissenting); see also Pet. Br. 45. Others require "'some direct relation between the injury asserted and the injurious conduct alleged'" and reject "link[s] that [are] 'too remote,' 'purely contingent,' or 'indirec[t].'" *Hemi Group*, 559 U.S. at 9 (quoting *Holmes*, 503 U.S. at 268, 271, 274) (third pair of brackets in original); see also Pet. Br. 47. Some look to whether there was an "intervening" or "superseding" cause. See *Exxon*, 517 U.S. at 837; *Miller* v. *Union Pac. R. Co.*, 290 U.S. 227, 235 (1933). And still others ask whether the injury was "within the scope of the risk" created by the defendant's injurious conduct. See *Pacific Operators*, 132 S. Ct. at 692 (Scalia, J., concurring in part and

concurring in the judgment) (quoting *McBride*, 131 S. Ct. at 2652 (Roberts, C.J., dissenting)); *Hemi Group*, 559 U.S. at 23-24 (Breyer, J., dissenting).

In the end, proximate cause remains a "flexible concept." *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008). The various tests simply "guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Associated Gen. Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 536-537 (1983). And the cases "furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." *Exxon*, 517 U.S. at 839 (quoting *Prosser & Keeton* § 42, p. 279).[12]

b. This Court has routinely read a proximate-cause limitation into statutes, even when no such limitation was express, when neither text nor context required otherwise. In *Associated General Contractors*, for example, the Court held that the "by reason of" language in the Clayton Act, 15 U.S.C. 15, incorporated a proximate-cause requirement. 459 U.S. at 529-535. And, in *Holmes*, this Court held that the same "by reason of" language in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c), similarly included a proximate-cause limitation. 503 U.S. at 265-268; see *Hemi Group*, 559 U.S. at 9; *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 453 (2006); see also *Pacific Operators*, 132 S. Ct. at 692 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the phrase "as the result of" in the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b),

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[12] Courts generally apply proximate-cause principles in a more liberal manner when the underlying tortious conduct was intentional. See Speiser § 11:23, pp. 458-459.

lends itself to a "proximate-cause standard"); cf. *id.* at 691 (majority opinion) (adopting a "substantial-nexus" test without discussing proximate cause).[13]

In those cases, the Court recognized that the statutory language could "of course" be read as requiring only cause in fact. *Holmes*, 503 U.S. at 265-266; see *Associated Gen. Contractors*, 459 U.S. at 529 ("A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation."). But it also recognized that such a reading was "hardly compelled." *Holmes*, 503 U.S. at 266. Because of "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover," the Court declined to give the statutes "such an expansive reading." *Ibid.*; see *Associated Gen. Contractors*, 459 U.S. at 529-535 (declining to give the statute "such an open-ended meaning" after considering congressional intent).

c. In Section 2259, Congress used language often associated with a proximate-cause standard. Section 2259(c) defines a "victim" as an "individual harmed *as a result of* a commission of a crime under [Chapter

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[13] In *McBride*, a case involving the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, the Court concluded that Congress had adopted a more relaxed "test for proximate causation applicable in FELA suits," but had not "eliminated the *concept* of proximate cause" altogether. 131 S. Ct. at 2641 (citation omitted); see *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 178 (2007) (Ginsburg, J., concurring in the judgment). FELA, moreover, includes "broad" causation language: it holds railroads liable for an employee's injury or death "*resulting in whole or in part*" from the carrier's negligence. *McBride*, 131 S. Ct. at 2636 (quoting 45 U.S.C. 51); see *id.* at 2644 n.14 (distinguishing other statutes with different language).

110]." 18 U.S.C. 2259(c) (emphasis added). And Section 3664(e) provides that the government bears the "burden of demonstrating the amount of the loss sustained by a victim *as a result of* the offense." 18 U.S.C. 3664(e) (emphasis added); see 18 U.S.C. 2259(b)(2). Such causal language has often been understood to incorporate basic principles of proximate cause. See *Hemi Group*, 559 U.S. at 9 ("by reason of"); *Associated Gen. Contractors*, 459 U.S. at 529-535 ("by reason of"); *Pacific Operators*, 132 S. Ct. at 692 (Scalia, J., concurring in part and concurring in the judgment) ("as the result of"). And it is reasonable to presume that Congress was aware of this Court's decisions at the time it enacted Section 2259. Cf. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005).

Congress reaffirmed its intent to incorporate traditional proximate-cause principles by specifically limiting recoverable losses to those "suffered by the victim as a *proximate* result of the offense." 18 U.S.C. 2259(b)(3)(F) (emphasis added). No one disputes that a proximate-cause standard applies to "other losses," *i.e.*, those not specifically enumerated. But the proximate-cause standard should not be limited to the "catchall" category. The losses enumerated in Subparagraphs (A) through (E) are "among the 'losses suffered by the victim as a proximate result of the offense.'" *United States* v. *Hayes*, 135 F.3d 133, 137-138 (2d Cir. 1998) (interpreting virtually identical language in 18 U.S.C. 2264(b)(3)); see *Federal Mar. Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("It is, of course, a familiar canon of statutory construction that [catchall] clauses are to be read as

bringing within a statute categories similar in type to those specifically enumerated.").

Congress simply enumerated certain losses "that [Chapter 110] restitution offenses *typically* proximately cause." *Fast*, 709 F.3d at 721; see *Kearney*, 672 F.3d at 97 (The "express inclusion" of certain losses "indicates that Congress believed such damages were sufficiently foreeseable to warrant their enumeration in the statute."). That does not, however, mean that Congress intended a victim's every medical expense, child care cost, or legal fee to be charged to the defendant—however far removed from his offense of conviction. See *Fast*, 709 F.3d at 721-722 ("Congress did not mean that a *specific* defendant *automatically* proximately causes those losses *in every case*."); *Monzel*, 641 F.3d at 536 ("[N]othing in the text or structure of [Section] 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause."). Inclusion of "proximate result" language in Subparagraph (F) should not negate the proximate-cause principles that would otherwise govern the remainder of the statute. "Had Congress meant to abrogate the traditional requirement for everything *but* the catch-all, surely it would have found a clearer way of doing so." *Monzel*, 641 F.3d at 536-537.

That reading accords with congressional intent. Section 2259 undoubtedly has a "broad restitutionary purpose." J.A. 446, 454 n.9, 456, 478. But it is highly unlikely "Congress meant to allow all factually injured" persons to recover for all "factually" caused losses. *Holmes*, 503 U.S. at 266; see S. Rep. No. 138, 103d Cong., 1st Sess. 56 (1993) (explaining that predecessor bill, which included the same causation lan-

guage as Section 2259, "requires sex offenders to pay costs incurred by victims as a *proximate* result of a sex crime") (emphasis added). Absent a proximate-cause requirement, even indirect or remote "victims" could seek restitution. Amy's future employer, for example, could seek restitution for "lost income," alleging that he suffered "harm" as a result of the defendant's child-pornography possession offense when Amy missed several days of work because of emotional trauma which, in turn, caused him to lose customers. Cf. *Gamble*, 709 F.3d at 550 (posing example of child-pornography collector's computer transmitting a computer virus that damages another person's computer). And, absent a proximate-cause limitation, direct victims (like Amy) could seek restitution for enumerated losses far removed from the defendant's offense. For example, Amy could seek restitution for medical expenses (an enumerated loss under Section 2259(b)(3)(A)), if she had a car accident on the way to her therapist's office. See *Monzel*, 641 F.3d at 537 n.7 (explaining that, without a proximate-cause requirement, such an "intervening" or "superseding" cause would have no impact on the analysis); *Burgess*, 684 F.3d at 458 n.9 (same); see also *Hargrove*, 714 F.3d at 375 ("[A]lthough [Section] 2259(b)(3)(C) allows restitution for necessary child care expenses, the 'loss of a sex offender as a babysitter' is not 'the sort of harm contemplated by the statute's drafters' and thus, proximate cause does not exist to justify restitution for child care costs incurred to replace that babysitter.") (quoting *Gamble*, 709 F.3d at 550).

d. In rejecting a proximate-cause standard, the Fifth Circuit relied heavily on the "rule of the last

antecedent," which provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." J.A. 451-460 (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003)); see *Jama* v. *Immigration & Customs Enforcement*, 543 U.S 335, 343-344 (2005). But another canon of construction counsels the opposite result: "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920) (*Porto Rico*); see *United States* v. *Bass*, 404 U.S. 336, 339-340 (1971). Stated in the abstract, the two canons appear to "contradict[]" each other. *Laraneta*, 700 F.3d at 989; see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 263 (1994) ("It is not uncommon to find 'apparent tension' between different canons of statutory construction.").

Neither canon, however, is "absolute" and both are "overcome by other indicia of meaning." *Barnhart*, 540 U.S. at 26; see *Porto Rico*, 253 U.S. at 348; see also, *e.g.*, *United States* v. *Hayes*, 555 U.S. 415, 425-426 (2009) (declining to apply the rule of the last antecedent when it would have required the Court "to accept two unlikely premises"); *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 330-332 (1993) (declining to apply the rule of the last antecedent when there was a "more reasonable" interpretation). For all the reasons set forth above, a technical application of the last-antecedent canon cannot overcome the reasons

for applying a proximate-cause limitation before ordering restitution for any of a victim's losses.[14]

e. The causal link between the possession of child pornography and the typical losses (*e.g.*, therapy costs) incurred by a child whose sexual abuse is memorialized in the images is proximate by any definition. Cf. Harper & James § 20.6, p. 1160 ("The fact is that in a great number of situations it makes very little difference what test is used.").

The harm endured and the losses incurred by victims (like Amy) as a result of individuals (like petitioner) possessing images depicting their sexual abuse is reasonably foreseeable. See *Gamble*, 709 F.3d at 547 (losses must be, *inter alia*, "reasonably foreseeable") (citation omitted). Section 2259 was "enacted against a body" of this Court's cases making "clear that injury to the child depicted in the child pornography, including injury that will require mental-health treatment, is a readily foreseeable result" of a child-pornography possession offense. *Kearney*, 672 F.3d at 97; see *Lundquist*, 2013 WL 4779644, at *10 ("[O]ne

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[14] The Fifth Circuit also briefly noted that "other restitution statutes contain more forceful causation requirements." J.A. 465 n.14 (noting that other restitution statutes define a "victim" as "a person directly and proximately harmed as a result of the commission" of a federal offense) (quoting 18 U.S.C. 3663A(a)(2)). That reads too much into too little. The CVRA also defines a "crime victim" as "a person directly and proximately harmed as a result of the commission" of a federal offense. 18 U.S.C. 3771(e). If the definition of "victim" in Section 2259 (and other restitution statutes, see, *e.g.*, 18 U.S.C. 1593(c), 2248(c), 2264(c)) were construed to be broader than the definition of "crime victim" in the CVRA, the rights the CVRA affords would be unavailable to some Section 2259 "victims." It is exceedingly unlikely Congress intended such an incongruous result.

of the foreseeable risks of possessing child pornography is that the victim may eventually learn about the crime in some manner."). It should go without saying that "every adult who watches videos of young girls being raped should reasonably foresee that he is inflicting great harm upon those victims." *Gamble*, 709 F.3d at 557.

Indeed, the losses for which Amy seeks recovery (*i.e.*, therapy, lost income, attorneys' fees and other litigation costs) "were sufficiently foreseeable to warrant their enumeration in the statute." *Kearney*, 672 F.3d at 97; see *Gamble*, 709 F.3d at 549 ("The express inclusion of costs like medical expenses and attorneys' fees indicates Congress's understanding that such losses were indeed foreseeable consequences of such crimes."). Although the enumeration of a specific loss in Section 2259(b)(3) does not definitively establish a sufficiently close relationship to warrant restitution, it is certainly suggestive of that result.

For much the same reason, a defendant's act of possessing child pornography depicting a particular victim has a sufficiently "direct relation" to the harm and losses suffered by that victim. *Gamble*, 709 F.3d at 547 (losses must be, *inter alia*, "directly attributable" to the defendant's offense) (citation omitted); see *Lundquist*, 2013 WL 4779644, at *5. The causal chain is short and uninterrupted: defendants possess pornographic images of a child's sexual abuse and that child is damaged as a result. The origin of the harm in the initial sexual abuse does not absolve a subsequent wrongdoer, like petitioner, of responsibility for aggra-

vating the victim's injury and inflicting additional damage. See Harper & James § 20.3, p. 1124.[15]

The harm and losses suffered by victims like Amy are also well within the scope of risk. See *Gamble*, 709 F.3d at 549 ("Generally if the injury is the type that the statute was intended to prohibit, it is more likely to be proximately caused."). For example, Amy seeks restitution for future therapy costs and lost wages, both caused by the anxiety, post-traumatic stress, and paranoia she suffers because thousands of people have viewed pictures of her being raped. *E.g.*, J.A. 52, 59-86, 90-93. That is precisely the sort of injury the criminal prohibition was designed to deter and the restitution statute to compensate. *Gamble*, 709 F.3d at 550 ("The harm endured by the subject of child pornography upon realizing that others are viewing her image is part of what the child pornography prohibitions are designed to deter.").

In the end, 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.

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[15] Whether Amy's restitution request in this case includes any losses incurred *solely* as a result of her uncle's sexual abuse (see Pet. Br. 13 (quoting J.A. 294)) is a question for the factfinder on remand. See *Lundquist*, 2013 WL 4779644, at *13-*14 (concluding that the record demonstrated that Amy's uncle "continued to be a proximate cause of some of Amy's losses" and remanding for the district court to "apportion some of Amy's total losses to her uncle").

C. The Case-Specific Arguments Raised By Petitioner Are Without Merit

Petitioner alludes to case-specific arguments that, if accepted, would preclude restitution in this case and others like it. To the extent the Court chooses to address those arguments, they are without merit.

1. Petitioner first contends (Br. 64-65) that "a defendant cannot cause harm prior to the date of his offense" and suggests that is what happened here. It is of course true that a person cannot cause an event that has already occurred. See Third Restatement § 26 cmts. c, k; *id.* § 27 cmt. h. But petitioner's offense was committed on or around July 11, 2008. PSR ¶¶ 1, 9-11. And Amy has not sought recovery for any losses before January 1, 2009. J.A. 92-93, 164-165. Although a person generally cannot be held responsible for losses incurred before their offense conduct, see *Lundquist*, 2013 WL 4779644, at *14, no such timing issue exists here.

The expert reports submitted in support of Amy's restitution request (prepared in late 2008) also postdate petitioner's offense. See p. 5, *supra*. Although they predate his January 9, 2009, *arrest*, the harm inflicted by defendants like petitioner is caused by their conduct (*i.e.*, the actual possession of child pornography), not only their arrest. But even if the arrest date were the relevant comparator (see Pet. Br. 6, 51 (relying on date of arrest); *Lundquist*, 2013 WL 4779644, at *8-*10 (same)), the requisite causal connection still exists. Amy's expert reports estimate future loss based on an ongoing (not a past) harm. They describe the harm that Amy has endured and will continue to endure from all the individuals who possess, view, and distribute Amy's images—past,

present, and future. Indeed, Dr. Silberg's report opined that Amy would need lifetime therapy as a result of the ongoing trauma. J.A. 86. Petitioner was certainly free to introduce evidence demonstrating that her projections are no longer accurate, see Pet. Br. 8-11 & n.9 (noting conflicting expert reports), and the district court was free to consider such evidence. But a court could also reasonably infer that, two months after Dr. Silberg's report, the harm inflicted by the large group of individuals possessing Amy's images (of which petitioner is a part) had not miraculously ceased.

A contrary rule would impose an unacceptable burden on victims. Unfortunately, thousands of individuals have viewed and continue to view the images depicting Amy's sexual abuse. And many have been or will be charged with a Chapter 110 offense for that conduct. A defendant whose arrest, by happenstance, falls after the latest evaluation and updated report should not escape restitution for a victim's losses going forward. Absent a significant temporal gap, Amy should not have to continually update her victim-impact statement and subject herself to constant psychological evaluations in order to keep up with the continual stream of offenders. The government can meet its burden without having to update the evidentiary support on a daily, weekly, or monthly basis.

2. Petitioner also appears to suggest (Br. 50, 66; see Michael Wright Br. 4, 18) that he could not have caused any harm to Amy and cannot be ordered to pay restitution for any of her losses because Amy had no knowledge of his particular conduct. See *Lundquist*, 2013 WL 4779644, at *9 (relying on district court's finding that Amy learned of the defendant's "posses-

sion of her image"). Amy's harm and her resulting losses, however, stem at least in part from "the knowledge that her image is being generally circulated" and that "a *group* of people [are] viewing her images." *Gamble*, 709 F.3d at 549 n.1, 551. That more general knowledge does not necessitate awareness of each and every defendant that has been arrested for (or convicted of) possessing her images. Moreover, by seeking restitution, Amy has manifested awareness of her plight. That should be enough.[16]

D. Questions Involving The Allocation Of Aggregate Losses Should Be Left To The District Court's Discretion

Once the government establishes that a defendant caused some of the victim's losses in the manner set forth above, the question remains: how much to award in restitution? That question, while related to causation, is distinct in certain respects. See *Gamble*, 709 F.3d at 550-551 (inquiries are "[c]losely intertwined" but "distinct"). And it has three potential

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[16] A victim who does not know that her image is being circulated and viewed on an ongoing basis would presumably be unable to demonstrate the requisite causal connection unless she had knowledge of the particular defendant's conduct. But, for victims like Amy, it would be quite perverse to condition restitution on her learning each and every time that a new person is viewing her image. "Congress was attempting to compensate the victims of child pornography, not to intensify the harm they have already suffered as a condition of obtaining restitution." *Kearney*, 672 F.3d at 99; see *Kennedy*, 643 F.3d at 1255 (noting another child victim's statement that "[p]ractically every time I've [gone] to get the mail, there have been two or three of these notifications," which are "constant reminders of the horrors of my childhood"); cf. 18 U.S.C. 3664(g)(1) ("No victim shall be required to participate in any phase of a restitution order.").

answers. The first, as found by the district court, is nothing. The second, adopted by the court of appeals and advanced by Amy, is all of a victim's aggregate losses, jointly and severally. And the third, adopted by every other court of appeals to have considered the issue, is somewhere between all or nothing, through allocation by the district court. The first two approaches are each fatally flawed in different respects; the third (allocation) best comports with the statutory scheme and with the relevant equities.

1. The restitution award must be greater than zero

The district court declined to award Amy any restitution and petitioner defends that judgment. The district court's decision, however, rested on an inappropriate causation standard that required a direct link between petitioner's particular offense and a specific and measurable quantum of Amy's losses. For the reasons explained above, that showing is not required to establish the requisite causal connection. See pp. 24-27, *supra*. And once it is established (under the proper standard) that the defendant caused at least some of the victim's losses, the restitution award must be something greater than zero.

That remains true regardless of the difficulties a district court may encounter in arriving at an appropriate restitution award. As petitioner acknowledges (Br. 49), courts need only make a reasonable estimate of loss. See *Lundquist*, 2013 WL 4779644, at *12. Any difficulties in making that estimate can be addressed through a reasonable exercise of discretion. And that is preferable to the "unlovely spectacle of turning a [victim] away without redress although [s]he has shown that [s]he has suffered some damage at the hands of *each* of several defendant wrongdoers and

what the aggregate amount of the damages comes to." Harper & James § 20.3, p. 1128. Unlike other restitution statutes, Section 2259 does not permit a district court to deny restitution if "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process." 18 U.S.C. 3663A(c)(3); see 18 U.S.C. 3663(a)(1)(B)(ii) (providing for similar exception); 18 U.S.C. 2259(a) (providing that the court must order restitution "[n]otwithstanding section 3663 or 3663A"). Rather, a court "shall" order restitution for child-pornography possession offenses, so long as the causation requirements have been satisfied in the manner set forth above. 18 U.S.C. 2259(a).

2. Joint and several liability for all of the victim's aggregate losses is not appropriate

The Fifth Circuit opted for the other extreme: it remanded for the district court to order restitution for all of Amy's aggregate losses (calculated to be approximately $3.4 million), on a joint and several basis. J.A. 479. That approach is not required by statute; it is practically unworkable in this context; and it may be unduly harsh.

a. The statute does not support engrafting a joint-and-several-liability regime onto Section 2259 restitution awards of the sort at issue here. The Fifth Circuit relied on two provisions: (1) Section 2259(b)(1), which requires the defendant to pay the victim "the full amount of the victim's losses," 18 U.S.C. 2259(b)(1); and (2) Section 3664(h), which permits a court to "make each defendant liable for payment of the full amount of restitution" if "the court finds that more than 1 defendant has contributed to the loss of a victim," 18 U.S.C. 3664(h). See J.A. 451, 466-470 &

n.16. Neither requires or supports joint and several liability in this case.

The court of appeals misconstrued the phrase "full amount of the victim's losses" to encompass losses caused by others. The only losses a defendant is responsible for are those of the "victim," *i.e.*, a person harmed "as a result of" *the defendant's* offense. 18 U.S.C. 2259(c); see 18 U.S.C. 2259(b)(3) (defining "full amount of the victim's losses" as certain enumerated and unenumerated "losses suffered by the victim as a proximate result of the offense"). Section 2259, therefore, does not *require* a district court to order a defendant to pay restitution for all losses incurred as a result of the cumulative impact of all similar offenders.

Section 3664(h) also fails to provide statutory support for the court of appeals' decision. That provision states in pertinent part: "[i]f 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." 18 U.S.C. 3664(h). Section 3664(h) applies to restitution awards only to the extent that multiple defendants are sentenced in the same proceeding (or charged under the same indictment). The text cannot reasonably be stretched to cover different defendants, in different cases, before different judges, in different jurisdictions throughout the country, over a course of many years. See *Lundquist*, 2013 WL 4779644, at *15; *Fast*, 709 F.3d at 723 n.6; *Laraneta*, 700 F.3d at 992-993; cf. *United States* v. *Aumais*, 656 F.3d 147, 156 (2d Cir. 2011); *Monzel*, 641 F.3d at 538-539. "[T]he" court only has jurisdiction over defendants before it. And while it could perhaps "find[]" that other defendants

(not before the court) "contributed to the loss of a victim," it could not "make" those other defendants "liable" for anything. See *Lundquist*, 2013 WL 4779644, at *15. Moreover, many individuals who have "contributed to the loss of a victim" are not "defendants," as that term is used in Section 3664(h). At best, the group of responsible parties includes many former "defendants" (*i.e.*, those previously convicted of a Chapter 110 offense involving the same victim) and many potential future "defendants" (*i.e.*, persons engaging in conduct in violation of Chapter 110 involving the same victim who have not been arrested for their conduct). In sum, the Fifth Circuit has not overcome the linguistic hurdles necessary to rely on Section 3664(h) to justify (let alone compel) a joint-and-several-liability award in the circumstances at issue here.[17]

b. Contrary to the Fifth Circuit's contention, "[t]he joint and several liability mechanism" does not

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[17] The court of appeals briefly alluded to the common law, suggesting that joint and several liability is appropriate because the injury is "indivisible." See J.A. 469 & n.17. The injury here, however, may not be "indivisible" in the relevant sense. An injury is "indivisible" if the harm is "not even theoretically apportionable, either because none of it would have happened but for defendant's negligence or because there would be no feasible way, even in the light of omniscience, to attribute any identifiable part of it to defendant's act rather than another cause." Harper & James § 20.3, p. 1123. The injury here may be better characterized as "divisible" because "each of several causes * * * produces *some* (but not *all* the) harm." *Id.* § 20.3, p. 1123. Even though it is admittedly "hard" or perhaps "impossible on the facts practically available to tell just how much of the harm each of these causes brought about," so long as "they are capable of separation," "at least in *theory* (i.e., to the eye of omniscience)," then some form of allocation is generally appropriate. *Id.* § 20.3, pp. 1123-1126.

"appl[y] well in these circumstances." J.A. 468-469; see *id.* at 470. Rather, imposing joint and several liability on hundreds of criminal defendants in different courts at different times would be "extraordinarily clumsy." *Laraneta*, 700 F.3d at 993.

Contribution is both legally and practically unavailable to Chapter 110 defendants. There is no "general federal right to contribution." *Northwest Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 96-97 (1981). "[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Id.* at 95. And, absent statutory authorization (express or clearly implied), this Court has declined to fashion a "right to contribution." *Id.* at 98-99 (declining to recognize a right to contribution under the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964); see *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646-647 (1981) (declining to recognize a right to contribution under the Sherman or Clayton Acts); cf. *Musick, Peeler & Garrett* v. *Employers Ins.*, 508 U.S. 286, 290-294 (1993) (distinguishing implied private rights of action modeled on related statutory actions affording contribution). Nothing in Sections 2259 or 3664 provides such a right and, without a statutory source, defendants are left with no federal cause of action.

In any event, as a practical matter, contribution would be at best clumsy and, at worst, counterproductive. "[T]here is no simple way for the defendants to discover who else has been convicted of possession or receipt [or distribution or transportation] of [Amy's] images." *Gamble*, 709 F.3d at 552. An individual defendant has no right to be informed when a new

case arises. *Ibid.* Defendants convicted of Chapter 110 offenses, moreover, are often prohibited from associating with other sex offenders. See *id.* at 553. Such special conditions of supervised release would make it difficult for defendants to seek contribution from others similarly convicted of Chapter 110 offenses involving the same victim. *Ibid.* But even if such interaction falls outside the scope of prohibited association, a restitution scheme designed to compensate child-pornography victims should not be read to incorporate a joint-and-several-liability mechanism that would incentivize sex offenders to network with others who share their predilection for child pornography. *Ibid.*

c. The approach adopted by the Fifth Circuit also may result in restitution awards that are wholly disproportionate to the harm inflicted by an individual defendant convicted of a child-pornography possession offense. See *Gamble*, 709 F.3d at 552 (joint and several liability "indefensibly hold[s] defendants responsible for losses they did not cause or only caused in a most attenuated sense"); see also J.A. 475 (acknowledging that "imposition of full restitution may appear harsh"); cf. 2 Restatement (Second) of Torts 2d § 433B(2) cmt. e (1963 & 1964) ("[T]here may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule [of joint and several liability] may cause disproportionate hardship to defendants."). For example, Amy is seeking approximately $3.4 million in restitution. Although petitioner's possession of two of Amy's images caused her harm, it did not cause losses exceeding $3 million. If petitioner had been the only person to possess Amy's

images, she would have been harmed—but not to the same degree. See *Laraneta*, 700 F.3d at 991, 992. That others have engaged in the same wrongful conduct, and that their collective actions have caused Amy to suffer losses far greater than she would have otherwise endured had the individual defendant's conduct stood alone, does not justify holding a defendant (like petitioner) responsible for losses he indisputably did not cause.[18]

3. The district court should have discretion to allocate a victim's aggregate losses

The district court should have discretion to allocate a victim's aggregate losses in a reasonable manner. Allocation is a pragmatic solution that fully effectuates the statutory purpose. It is a fair and administratively feasible way to provide full restitution to victims, to distribute responsibility among the entire group of defendants who collectively caused the victim's losses, and to ensure that an individual defendant is not held responsible for losses he could not possibly have caused.[19] With the exception of the

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[18] Petitioner's reliance on (Br. 58-66) the Eighth Amendment's Excessive Fines Clause is both unnecessary to conclude that allocation of restitution is appropriate and is, in any event, unfounded. A compensatory restitution award, under any reasonable formula, is not an excessive fine. And the size of the restitution award should not transform it into a constitutionally "excessive" penalty, especially given the other prescribed sanctions. See 18 U.S.C.A. 2252(b)(2) (2012), 18 U.S.C. 3571(b)(3) (statutory maximum of 10 years in prison (20 years if the images involved a prepubescent minor or a minor under the age of 12), fine of $250,000, or both).

[19] An allocation approach is consistent with this Court's decision in *Hughey* v. *United States*, 495 U.S. 411, 415-422 (1990), because a defendant's restitution obligation is based on his offense of conviction, *e.g.*, possession of images of child pornography depicting the

Fifth Circuit, every court of appeals to have considered the issue has adopted an allocation approach that affords district courts sufficient flexibility to arrive at a reasonable restitution award. See, *e.g.*, *Lundquist*, 2013 WL 4779644, at *12-*14 (2d Cir.); *Hargrove*, 714 F.3d at 375-376 (6th Cir.); *Benoit*, 713 F.3d at 22 n.8 (10th Cir.); *Kearney*, 672 F.3d at 100-101 (1st Cir.).

Allocation is not an exact science, and it does not have to be. "Absolute precision is not required" and a district court should have "leeway to resolve uncertainties with a view towards achieving fairness to the victim." *Kearney*, 672 F.3d at 100 (internal quotation marks and citations omitted); see *Lundquist*, 2013 WL 4779644, at *12-*13 (declining to impose an "exacting standard for calculating loss"); *Monzel*, 641 F.3d at 540 (Because "the harm is ongoing and the number of offenders impossible to pinpoint," calculating the appropriate award "will inevitably involve some degree of approximation.").

As a practical matter, in Section 2259 cases involving defendants like petitioner, the government will not be able to prove precisely which losses an individual defendant caused—with mathematical precision or otherwise. See pp. 24-27, *supra*. But those difficulties of proof should not relieve a defendant from paying any restitution to the known victims of his crimes. In this context, district courts should reasonably allocate a victim's aggregate losses based on the individual defendant's relative contribution to such losses.[20]

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victim's sexual abuse, not on uncharged conduct or conduct for which the defendant was charged but not convicted.

[20] That approach has been adopted by courts in other similar circumstances. See, *e.g.*, *Prosser & Keeton* §§ 41, 52, pp. 271-272, 350-352. For example, if a plaintiff has been injured by a drug, but

There are a variety of permissible ways to allocate a victim's aggregate losses among similarly situated defendants in order to arrive at a reasonable restitution award under Section 2259. Some losses, such as attorneys' fees, are easily divisible. See 18 U.S.C. 2259(b)(3)(E). To allocate other losses, courts may consider a number of factors including, for example, the number of criminal defendants who contributed to the victim's harm, as well as "whether the defendant produced or distributed images of the victim; how many images the defendant possessed; and any other fact relevant to measuring the defendant's culpability relative to the other relevant actors." *Gamble*, 709 F.3d at 557 (Kethledge, J., concurring in part and concurring in the judgment). Courts may apply a reasonable formula to arrive at a starting point for further analysis. See, *e.g.*, *Lundquist*, 2013 WL 4779644, at *12; *Hargrove*, 714 F.3d at 375-376; cf. *Benoit*, 713 F.3d at 22 n.8. And courts may look to the restitution orders issued in other similar cases. See, *e.g.*, *Kearney*, 672 F.3d at 100-101. In the end, district courts should be given significant leeway and appellate courts should defer to their reasonable exercise of that discretion. See *Lundquist*, 2013 WL 4779644, at *13 ("As the district court is the fact finder in disputes over the amount of restitution, its method of calculating loss" is "entitled to deference.").

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it is unknown which defendant manufactured the precise product ingested by the plaintiff, some courts have imposed liability upon "proof that the defendants were manufacturers of a substantial share of the drug on the market." *Id.* § 41, p. 271. Rather than deprive the plaintiff of any remedy, some courts have allocated damages based on market share. *Id.* § 52, pp. 351-352.

CONCLUSION

The judgment of the court of appeals, remanding the case for an award of restitution, should be affirmed consistent with the principles set forth in this brief.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
SONJA M. RALSTON
Attorney

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STATUTORY APPENDIX

18 U.S.C. 3771 provides in pertinent part:

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 sub-

section (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.

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