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

REPLY BRIEF FOR THE UNITED STATES

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Amy and the government agree that a defendant convicted of a child-pornography possession offense is a cause in fact of the victim's harms under an aggregate-causation theory (Amy Br. 13, 42) and that proximate-causation principles pose no obstacle to restitution in this case (Br. 44). Amy and the government nonetheless part company on several analytical premises—and, most significantly, on whether apportionment of restitution, rather than joint and several liability, is appropriate. For the reasons discussed below, a reasonable apportionment of restitution—the approach taken in the overwhelming majority of lower court decisions that have awarded restitution—is fair and feasible and provides the proper approach for determining a reasonable restitution award in this case.

A. Factual Causation Is Required And Is Satisfied By A Showing Of Aggregate Harm

On factual causation, Amy and the government fully agree. Amy Br. 42 (citing U.S. Br. 19-27). Amy agrees (Br. 7, 13, 17, 39-40) that factual causation is required. She explains (Br. 7, 13) that the necessary causal connection does not require proof of a specific link between a victim's particular losses and the defendant's conduct. She shows (Br. 21-22) why the individualized "but for" standard (advocated by petitioner and adopted by the district court) would impose an insurmountable burden and thwart Congress's clear intent to provide restitution to child victims. And she advocates (Br. 42-43) an "aggregate" causation standard that is readily met here.

B. Proximate Causation Is Also Required But It Presents No Obstacle Here

Amy and the government also agree that petitioner (and others like him) cannot "hide behind proximate cause principles to avoid responsibility." Amy Br. 43. 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. U.S. Br. 35-37; see Amy Br. 16-17, 60. And the answer to the proximate-cause question fails to resolve the ultimate issue: how much to award in restitution. See Parts C and D, *infra*.

Although Amy reaches the "same destination" as the government on this issue (Br. 43-44), she rejects any proximate-cause requirement for victim status and for the enumerated categories of losses. Every court of appeals with criminal jurisdiction (but one) disagrees. U.S. Br. 17-18 & n.6. The majority view is correct.

1. A proximate-cause standard serves two purposes in Section 2259. U.S. Br. 33. First, it prevents restitution for remote losses, such as those incurred in a car accident on the way to a therapist's office. Amy concedes—as did the Fifth Circuit (J.A. 385 n.12)—that "Congress did not intend to cover" such losses. Amy Br. 45. But costs incurred for "medical services" are an enumerated loss, 18 U.S.C. 2259(b)(3)(A), and neither Amy nor the court of appeals explains why such losses would not be covered absent a proximate-cause limitation.

Second, a proximate-cause requirement prevents remote victims (like a child victim's future employer) from obtaining restitution. Amy does not dispute that Congress would not have intended restitution for such victims under Section 2259. Instead, she notes (Br. 40 n.14) that "corporate employers" are not eligible for restitution because Section 2259 applies only to "individuals." And she observes (Br. 41 n.15) that "remote" victims whose losses fall within "Subsection F's 'any other' category" would still "have to prove proximate causation." But without a proximate-cause requirement, an *individual* "victim" (like a child victim's individual employer, or spouse, or friend) can seek restitution under Amy's approach for *enumerated* losses (like lost income, or medical expenses, or attorneys' fees). Amy does not explain why Congress would enact a statute that provides restitution to such remote victims.

2. Amy does not address the causal language in the restitution statute's text that this Court has long understood to incorporate proximate-cause principles. See U.S. Br. 29-31. Instead, Amy focuses (Br. 18-20, 22-28) on the inclusion of the phrase "proximate re-

sult" in Section 2259(b)(3)(F). She argues (Br. 20) that such "restrictive language" cannot be "read back" to limit "Section 2259(b)(1)." But even if that were so, it would not negate proximate-cause limitations inherent in other relevant provisions, such as Section 2259(c) (defining "victim" as an "individual harmed as a result of" the offense) and 3664(e) (government's burden is to show victim's loss "as a result of the offense"), that use phrases traditionally importing proximate cause. U.S. Br. 29-31.

In any event, the proximate-cause reference in Subparagraph (F) is not limited to that subparagraph. Amy contends (Br. 24-26) that "[r]eading the postpositive modifier through each of the six [subparagraphs]" would make the statute "awkward[] and ungrammatical[]." To demonstrate that, Amy simply takes the entire phrase "suffered by the victim as a proximate result of the offense" and places it in each subparagraph. But the right way to understand the text is to recognize that its introductory phrase—"any costs incurred by the victim"—also applies to each subparagraph. Properly understood, the statute thus covers "*any costs incurred by the victim for* medical services relating to physical, psychiatric, or psychological care *as a proximate result of the offense*," "*any costs incurred by the victim for* physical and occupational therapy or rehabilitation *as a proximate result of the offense*," and so forth. See 18 U.S.C. 2259(b)(3). That construction contains no "glaring" or "jarring" "incongruity." Amy Br. 25-26.[1]

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[1] Amy is also wrong to suggest (Br. 20) that Subparagraph (F) is grammatically "separate" from the remainder of Section 2259(b)(3). The introductory language applies to each of the subparagraphs that follow, including (F). Congress did not suddenly

3. Amy argues (Br. 14-15, 28-32) that other restitution statutes reveal that Congress made a "conscious decision" to "depart from" the background "tradition" of "proximate cause." Br. 31-32 (quoting J.A. 390). Her sources support no such conclusion.

a. Amy first compares (Br. 28-30) Section 2259 to 18 U.S.C. 2327, the restitution statute for victims of telemarketing fraud. The telemarketing fraud statute provides that the "full amount of the victim's losses" are "all losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2327(b)(3). Amy argues (Br. 28, 29) that Congress could have adopted the same proximate-cause requirement in Section 2259. But Section 2259(b)(3)(F) *does* explicitly provide that "the term 'full amount of the victim's losses' includes any costs incurred by the victim for * * * any other losses suffered by the victim as a proximate result of the offense." The only difference is that Section 2259 also enumerates *specific* losses, while Section 2327 does not. But "[t]he express inclusion of costs like medical expenses and attorneys' fees indicates Congress's understanding that such losses were * * * foreseeable consequences of" Chapter 110 offenses. *United States* v. *Gamble*, 709 F.3d 541, 549 (6th Cir. 2013). Congress's delineation of specific categories of losses did not disavow a proximate-cause requirement for such losses.[2]

"shift[] gears" (*ibid.*); it simply added a catchall category for "other losses" (not previously enumerated) that were also incurred "as a proximate result of the offense."

[2] Amy's explanation (Br. 26-27, 44-45) why a "proximate result" qualifier was needed for Subparagraph (F), but not for the other subparagraphs, similarly fails. "[A]ny other losses" is intrinsically "more expansive" than the enumerated losses, Amy Br. 26, and

b. Amy next notes (Br. 14-15 & n.4, 29-30) that the general restitution statutes define "victim" as an individual "directly and proximately harmed as a result" of the commission of a particular offense, whereas Section 2259 (and other specific restitution statutes) omit the "directly and proximately" language. Compare 18 U.S.C. 1593(c), 2248(c), 2259(c), and 2264(c), with 18 U.S.C. 3663(a)(2), 3663A(a)(2); see also 18 U.S.C. 2327(c) (incorporating the definition of victim in 18 U.S.C. 3663A(a)(2)). As the government has explained (Br. 35 n.14), the Crime Victims' Rights Act (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). Thus, in Amy's view, the definition of "crime victim" in the CVRA is "narrow[er]" (Br. 14) than the definition of "victim" in Section 2259 and other specific restitution statutes. Accordingly, on her view, some "victims" would not qualify for rights under the CVRA. Amy provides no reason why Congress would have intended that incongruous result.

In any event, when Congress enacted Section 2259 in 1994, *no* restitution statute defined "victim" as a person "directly and proximately" harmed as a result of the commission of an offense. Consistent with this Court's case law, the term-of-art phrase "as a result of" was more than sufficient to import basic principles of proximate cause. U.S. Br. 29-31. The "directly and proximately" language first appeared two years later when Congress enacted Section 3663A and amended

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some will not be a proximate result of the offense. But that does not mean that Congress intended a victim's every medical expense, child-care cost, or legal fee to be eligible for restitution—however far removed from the offense of conviction. U.S. Br. 32.

Section 3663. Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, §§ 204(a), 205(a), 110 Stat. 1227-1228, 1229-1230. Amy's contention thus rests on the (faulty) premise that the subsequent adoption of a different definition of "victim" in other restitution statutes, and a failure to correspondingly amend the definition of "victim" in Section 2259, *broadened* the scope of Section 2259. Although Congress made "conforming amendments" to Section 2259 in the MVRA (Amy Br. 14), it made "[n]o change * * * to the scope of restitution required under" that statute (Amy Br. 15 (quoting S. Rep. No. 179, 104th Cong., 1st Sess. 14 (1996)).[3]

4. Finally, Amy suggests (Br. 8, 35-37) that construing Section 2259 to dispense with ordinary proximate-cause limitations would be "consistent" with the traditionally more liberal causation principles applied to intentional torts. U.S. Br. 29 n.12. But Amy asks this Court to dispose of *any* proximate-cause requirement (with the exception of the catchall category of losses). Nothing in "conventional tort law" supports such a categorical approach, as Amy's own sources attest. Br. 35-36 (citing sources sup-

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[3] Amy also points to (Br. 29-30) the telemarketing fraud restitution statute, which now incorporates the definition of "victim" from Section 3663A(a)(2), but that cross-reference was added in 1998. See Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, § 5(2), 112 Stat. 520. And her reliance (Br. 30-32) on a bill introduced in the Senate in 1990 to provide restitution for victims of sexual assault and domestic violence sheds no light on the meaning of the later-enacted Section 2259 for victims of child-pornography offenses.

porting "liability for a broader range of harms," not unlimited liability) (citation omitted).[4]

5. Amy and the government agree that proximate cause poses no barrier to restitution here.[5] The real question is whether, having concluded that factual and

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[4] Amy's reliance (Br. 38-39) on this Court's decision in *CSX Transportation, Inc.* v. *McBride*, 131 S. Ct. 2630 (2011), similarly overreads that decision. U.S. Br. 30 n.13. *McBride* concluded that Congress had adopted a more relaxed "test for proximate causation applicable in [Federal Employers' Liability Act] 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).

[5] The Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence contends (Amicus Br. 6-12) that applying proximate-cause principles to Section 2259 would violate the United States' obligations under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol), *adopted* May 25, 2000, T.I.A.S. No. 13,095. See also ECPAT Int'l Amicus Br. 33-38. That is incorrect. The Optional Protocol requires member States to "take all feasible measures" to ensure "all appropriate assistance to victims" and to "ensure that all child victims" of child-pornography offenses "have access to adequate procedures to seek * * * compensation for damages from those legally responsible." Optional Protocol, art. 9. The government's position on proximate cause ensures that child victims receive compensation "from those legally responsible," and is entirely consistent with the United States' obligations under that Protocol. And, as the reports submitted by the United States on implementation of the Protocol make clear, child victims may seek compensation through means other than restitution under Section 2259. See, *e.g.*, Department of State, *Periodic Report of the United States of America to the United Nations Committee on the Rights of the Child* 93-94, www.state.gov/documents/organization/136023.pdf (Jan. 22, 2010) (citing 18 U.S.C. 2255, which provides child-exploitation victims a civil cause of action for damages).

proximate causation exist, a court must impose all of Amy's aggregate losses on each defendant. On that issue, Amy and the government take different views.

C. Joint And Several Liability For All Of The Victim's Aggregate Losses Is Not Appropriate Here

Amy argues (Br. 13) that a district court is required to award her the entire amount of her aggregate losses from each individual defendant convicted of possessing a single image depicting her sexual abuse. She contends (Br. 8, 46-47) that the award should be joint and several with other defendants convicted at other times in other cases. Neither the statute nor tort principles require that approach, and several factors unique to this criminal restitution statute counsel against it.

1. The Fifth Circuit found support for joint and several liability in 18 U.S.C. 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 [one] defendant has contributed to the loss of a victim." See J.A. 467-470. Amy now concedes (Br. 49-50) that the court of appeals' reliance was misplaced and that no statute mandates or expressly authorizes joint and several liability. As the government previously explained (Br. 43-44), that concession is sound.[6]

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[6] Amy seemingly endorses (Br. 48-49) the Fifth Circuit's reliance on 18 U.S.C. 3664(m), but Section 3664(m) provides that "the United States"—not a "district court"—may enforce an "order of restitution" "by all other available or reasonable means." 18 U.S.C. 3664(m)(1)(A). Because a restitution order must be entered before the United States has anything to "enforce[]," Section 3664(m) says nothing about the district court's authority to order restitution for the entire amount of Amy's aggregate losses.

2. Amy instead relies on tort law. Br. 8, 51-59. But, contrary to Amy's assertion (Br. 53-54), joint and several liability is not now and has never been the norm in all tort cases. Courts have generally imposed joint and several liability in four categories of cases—those involving: (1) concert of action or a common plan; (2) a common duty; (3) vicarious liability; or (4) "a single indivisible harm * * * sustained as a result of the independent, separate, but concurring tortious acts of two or more persons." 1 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 10.1, pp. 692-693 (1956) (Harper & James) (footnote omitted); see 4 Restatement (Second) of Torts §§ 875-879 (1979) (Second Restatement); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 52, pp. 346-348 (5th ed. 1984) (*Prosser & Keeton*).[7] Amy does not argue that a common duty exists here. Nor does she suggest any basis for vicarious liability. Instead, she attempts to fit within the first (concerted action) and fourth (indivisible injury) categories—and suggests a fifth for "intentional torts." But no "concert of action" exists here; intentional torts do not automatically result in joint and several liability; and the harm alleged is not "indivisible" in the relevant sense. Accordingly, ordinary tort principles do not support (let alone compel) engrafting joint and several liability onto Section 2259.

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[7] The "tort reform" movement to which Amy refers (Br. 53) aims to narrow these categories further, such that some "indivisible" injuries would be subject to apportionment. See Restatement (Third) of Torts: Apportionment of Liability § 17 cmt. a (2000); cf. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 164-165 (2003) (discussing "modern trend").

a. Amy first contends (Br. 55-56) that petitioner should be held jointly and severally liable for all of her aggregate losses because he "has joined a de facto joint criminal enterprise which connects child pornography producers, distributors, and possessors." Certainly, petitioner participated in the vast marketplace for child pornography and such participation drives demand for the creation of child pornography. Amy Br. 10-13. But Amy's repeated use of the "de facto" qualifier (Br. 12, 13, 16 n.5, 55) is telling. Participating in an illegal marketplace is insufficient to create a joint enterprise. Petitioner had no contact, and formed no plan, with the vast bulk of other offenders. Nor is this a case in which, despite the lack of a "prearranged plan," "one person acts to produce injury with full knowledge that others are acting in a similar manner and that his conduct will contribute to produce a single harm," thus creating a "joint tort." Amy Br. 56 (quoting 1 Harper & James § 10.1, p. 699). The relatively sparse authority for this view generally involves coordinated activity or incitement of others—which is not at issue here. See 1 Harper & James § 10.1, p. 699 n.42 (citing, *inter alia*, *Sourbier* v. *Brown*, 123 N.E. 802 (Ind. 1919) (author of libelous letter acted in concert with publisher of letter); *Hilmes* v. *Stroebel*, 17 N.W. 539 (Wis. 1883) (co-defendants encouraged and incited assault)). Petitioner is not legally responsible for the possession and distribution activity of the entire pool of unknown others (past, present, and future) with whom he did not coordinate and whom he did not incite.

The examples of joint and several liability on which Amy relies (Br. 54-55) are therefore inapt. When "several ruffians set upon a man and beat him, each

inflicting separate wounds," they are "intentional[ly] aiding or abetting * * * a wrong" and "coming [together] to do an unlawful act." 2 Harper & James § 20.3, p. 1124 (citation omitted; second brackets in original). The same is true of Amy's "gang rape" hypothetical. Br. 55. The defendants there would be jointly and severally liable for the victim's injuries because they joined together to accomplish a shared goal. That is not the case here.

b. Amy next asserts (Br. 8, 53-54) that, for "intentional torts," the common law "imposed broad joint and several liability." But that approach flowed from the more basic principle that imposed joint and several liability on tortfeasers for "any indivisible injury legally caused by the tortious conduct." Restatement (Third) of Torts: Apportionment of Liability § 12 & cmt. c (2000) (Third Restatement). Thus, an intentional act is not enough. For joint and several liability, the injury must still be "indivisible" and "legally caused" by the defendant's tortious conduct.[8]

c. Amy's reliance on tort law thus rests on whether her losses are "indivisible" and the extent to which they were "legally caused" by petitioner's conduct. Properly understood, Amy's losses are not "indivisible," petitioner did not legally cause *all* of her losses, and joint and several liability is not appropriate, let alone required.

i. An "indivisible" loss has a specialized meaning in tort law. Many harms are "indivisible" because they are not "even theoretically divisible," such as

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[8] The sources Amy cites (Br. 53-54) stand only for the proposition that the modern movement away from joint and several liability for indivisible injuries has excepted intentional-tort claims. See, *e.g.*, Third Restatement § 17; note 7, *supra*.

"death," a "broken leg," "the destruction of a house by fire, or the sinking of a barge." 1 Harper & James § 10.1, p. 701; *Prosser & Keeton* § 52, p. 347; see Amy Br. 61 (discussing the "well-known two fires example"); Nat'l Crime Victim Law Inst. Amicus Br. (NCVLI Amicus Br.) 15-16 (citing cases). In those cases, courts "almost uniformly * * * permit entire recovery from any or all defendants." 1 Harper & James § 10.1, p. 702; see *Prosser & Keeton* § 52, p. 347.

Other harms are "theoretically" divisible, even though it is "hard or even impossible on the facts practically available to tell just how much of the harm each of the[] causes brought about." 1 Harper & James § 10.1, p. 702; 2 Harper & James § 20.3, p. 1123; see *Prosser & Keeton* § 52, pp. 348-349. Common examples include the pollution of a stream by several factories, separate repetitions of the same defamatory statement, and "dogs which together kill sheep." *Ibid.*; see 1 Harper & James § 10.1, p. 704; 2 Second Restatement § 433A cmt. d (1963 & 1964). In those cases, the courts are "conflict[ed]," but the "prevailing rule" is that each defendant "is liable" for the part of the injury he caused. 2 Harper & James § 20.3, p. 1125; 1 Harper & James § 10.1, p. 702; see *Prosser & Keeton* § 52, pp. 348-349.

ii. Determining whether a loss is "indivisible" (and thus subject to joint and several liability) is also influenced by the theory of factual causation at issue. See Third Restatement § 26, Reporters' Note cmts. f, g. The propriety of holding a defendant liable for the plaintiff's entire injury can thus depend on whether he caused "the entire damage," "none of the damage," or "some but not all of the damage." 1 Harper & James

§ 10.1, p. 702. Here, petitioner caused "some but not all of the damage." He therefore stands in a different position from a defendant who caused the entire loss or whose actions were necessary to cause all of the loss.

"Joint and several liability has been readily imposed on independent concurring tort-feasors where the act of either alone would have caused the entire damage." 1 Harper & James § 10.1, p. 702. In such cases, the defendant's actions are an "independently sufficient" cause of the plaintiff's entire harm. U.S. Br. 21 (emphasis omitted); see *Prosser & Keeton* § 52, p. 347 (appropriate to impose "entire liability" when "either cause would have been sufficient in itself to bring about the result"); cf. NCVLI Amicus Br. 13-14 (citing cases that require, as a prerequisite to joint and several liability, that the defendant's act be a "substantial factor" in causing the loss). Similarly, if "none of the damage" would have occurred "but for" the defendant's conduct, courts have also generally imposed joint and several liability. 1 Harper & James § 10.1, pp. 702, 705-706; see *Prosser & Keeton* § 52, pp. 347-348 (appropriate to impose "entire liability" when both causes are "essential to the injury"). In those circumstances, it makes sense to require the defendant to pay for the plaintiff's entire harm.

The same is not true when the "acts of a single tort-feasor alone would have been sufficient to cause * * * some but not all of the damage." 1 Harper & James § 10.1, p. 702. In those cases, courts apportion damages (rather than impose liability on one defendant for the aggregate harm) whenever "reasonably possible." *Id.* at 707; see *Burlington N. & Santa Fe Ry.* v. *United States*, 556 U.S. 599, 614 (2009) (*Bur-*

lington Northern) ("[A]pportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'") (quoting 2 Second Restatement § 433A(1)(b)). That is so even when "the harm inflicted by the separate torts has been almost incapable of any definite and satisfactory proof, and has been left merely to the jury's estimate." *Prosser & Keeton* § 52, p. 348. "The difficulty of any complete and exact proof in assessing * * * separate damages has been noted frequently in these cases, but it has not been regarded as sufficient justification for entire liability. *The emphasis is placed upon the possibility of reasonable apportionment." Id.* at 350 (emphasis added). Courts "quite reasonably have been very liberal in permitting the jury to award damages where the uncertainty as to their extent arises from the nature of the wrong itself, for which the defendant, and not the plaintiff, is responsible." *Ibid.* And courts have devised a number of "techniques" to address difficulties of proof. 2 Harper & James § 20.3, pp. 1128-1131; see Third Restatement § 26, Reporters' Note cmt. h. In short, courts have balanced the interests of plaintiffs and defendants and "attempt[ed] some rough division"—rather than "hold one defendant liable for the entire harm, including damage inflicted solely by" others. *Prosser & Keeton* § 52, pp. 345, 348.

iii. The harm suffered by Amy is at least theoretically divisible and petitioner caused some, but not all, of Amy's harm. Her "financial losses" would *not* "remain the same" if petitioner had been the only person to view her images. Amy Br. 63. Indeed, "it is beyond implausible" that Amy "would have suffered the harm [she] did had [petitioner] been the only person in the

world to view pornographic images of [her]." *United States* v. *Laraneta*, 700 F.3d 983, 991 (7th Cir. 2012), cert. denied, 134 S. Ct. 235 (2013). That makes this case fundamentally different than the two fires that concurrently destroy a house. If only one fire had been set, the house still would have been destroyed. If petitioner had been the only possessor of Amy's images, she still would have been injured—but not as much. See J.A. 59-66, 81-86. Traditional tort-law principles do not support imposition of joint and several liability in these circumstances.

That is especially true in the unique circumstances presented here. This is not a case involving two or three or even a dozen tortfeasors. Potentially thousands of actors (past, present, and future) have engaged or will engage in intentional and criminal conduct that caused and will continue to cause harm to Amy. The difference between Amy's aggregate losses and an individual defendant's relative contribution to those losses is therefore quite stark. In those circumstances, a rule of joint and several liability—holding each defendant liable for all of her losses—would be "disproportionate." 2 Second Restatement § 433B(2) cmt. e; cf. *ibid.* ("[I]f a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable for the entire damage because he cannot show the amount of his contribution may perhaps be unjust.").

3. Amy suggests two ways in which any disproportionate liability could be mitigated. Neither withstands scrutiny.

First, Amy asserts (Br. 57) that "an unhappy wealthy criminal can always seek contribution from other solvent offenders." For the reasons set forth in the

government's opening brief (at 45-46), that is incorrect. Contribution is an independent claim and requires a separate cause of action. Amy does not identify any statute granting convicted sex offenders a federal cause of action to seek contribution from other convicted sex offenders. Amy suggests (Br. 58) that a federal court could imply such a private right of action from Section 2259, but she makes no attempt to square that assertion with this Court's implied-right-of-action jurisprudence. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001). Section 2259, for one, is "expressly directed against" defendants, not enacted for their benefit. See *Northwest Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 92 (1981). Amy alternatively suggests (Br. 57-58) that joint and several liability would nonetheless be appropriate because the common law did not allow intentional tortfeasors to pursue contribution. Accordingly, an "unhappy wealthy criminal" convicted of possessing even a single image of child pornography will have to pay millions of dollars in restitution to cover all of a victim's losses, even though those losses were caused in large part by a myriad of others—while those other defendants pay nothing. That does not seem proportionate.

Second, Amy contends (Br. 41-42) that "no defendant will be required to pay more than" what is "reasonable" because "the majority of child pornography defendants" are "indigent" and the district court can establish a payment schedule based on the defendant's ability to pay. A defendant of course will not have to pay restitution with money he does not have. But if a defendant has financial resources or later gets himself back on his feet, he will have to pay Amy any portion

of the approximately $3 million restitution award that remains outstanding. Accordingly, a payment schedule can mitigate enormous restitution orders only to the extent a defendant is indigent and remains so.

That highlights a significant flaw in Amy's approach: it allows victims to recover restitution from a handful of "wealthy" defendants and absolves hundreds of equally culpable defendants from their statutory obligation to pay restitution. The primary goal of restitution is to compensate victims for their losses. But Section 2259 is part of a criminal statute and restitution is imposed as part of a criminal sentence. See *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005). The ultimate goals of drying up the child-pornography market and discouraging individuals from participating in that market are served by requiring individuals (like petitioner) to pay restitution to victims (like Amy). Restitution awards tell "mere" possessors that their crimes cause concrete harms to real, identifiable children. A regime of joint and several liability that results in a handful of wealthy defendants paying virtually all of the restitution, while most other offenders pay virtually none, defeats that purpose.

D. Restitution Can Reasonably Be Apportioned In The Exercise Of The District Court's Sound Discretion

This Court need not choose between holding one defendant liable for all aggregate losses caused by hundreds of criminals (as Amy would do) or turning away a victim who has indisputably suffered losses as a result of the collective actions of many criminals (as petitioner would do). Instead, the district court should have discretion to apportion a victim's aggregate losses in a reasonable manner. Apportionment is

a fair way to provide full restitution to victims, to distribute responsibility among the 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.

1. Amy contends (Br. 64-65) that this Court should reject apportionment because the government "cannot devise a reasonable basis for apportionment."[9] Amy appears to misunderstand the government's position. The government is not advocating a "market share" approach. There would be no litigation "about the size" of the child-pornography market. Amy Br. 64-65. And petitioner's restitution obligation would not be reduced to "$47" based on his "market share." Amy Br. 65.

Courts have relied on a variety of methods to achieve reasonable apportionment, rather than reflexively impose joint and several liability. See 2 Harper & James § 20.3, pp. 1128-1131; Third Restatement § 26, Reporters' Note cmt. h; see also *Burlington Northern*, 556 U.S. at 615-619 (reversing court of appeals' imposition of joint and several liability and reinstating district court's reasonable apportionment). They have "steer[ed] a careful course between the Scylla of denying the plaintiff any remedy and the Charybdis of imposing on one defendant all the dam-

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[9] Amy briefly suggests (Br. 50) that Section 3664(h) forbids a court from apportioning a restitution award among defendants in different cases. That suggestion cannot be reconciled with her assertion (*ibid.*) that Section 3664(h) does not "forbid[]" joint and several liability in similar circumstances. Amy does not explain how the same provision could be silent about the availability of joint and several liability where "multiple defendants [are] sentenced before different courts at different times" (Br. 49-50), but expressly forbid apportionment in those same circumstances.

ages, at least some of which [were not legally caused by the defendant]." Third Restatement § 26, Reporters' Note cmt. h (citation omitted).

2. The government has set forth a reasonable basis for apportioning a victim's losses among defendants convicted of Chapter 110 offenses. U.S. Br. 49. As Judge Kethledge has explained, to apportion losses, courts should consider a number of factors including the number of criminal defendants who contributed to the victim's harm; "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.*, *United States* v. *Lundquist*, 731 F.3d 124, 138-141 (2d Cir. 2013); *United States* v. *Hargrove*, 714 F.3d 371, 375-376 (6th Cir. 2013); *United States* v. *Benoit*, 713 F.3d 1, 22 n.8 (10th Cir. 2013). And they may look to restitution orders issued in other similar cases. See, *e.g.*, *United States* v. *Kearney*, 672 F.3d 81, 100-101 (1st Cir. 2012), cert. dismissed, 133 S. Ct. 1521 (2013).

These determinations will be subject to appeal. 18 U.S.C. 3742. And, as in other contexts in which reasonableness determinations turn on recurring but fact-sensitive questions, "appellate review [will] tend to iron out sentencing differences," *United States* v. *Booker*, 543 U.S. 220, 263 (2005), fostering generally consistent approaches and results and overturning unreasonable ones.

That approach is not unsound simply because it considers multiple factors on particular records. The common law asked only for "some rough practical apportionment" of damages relative to the harm for which the *defendant* was a cause in fact. *Prosser & Keeton* § 52, p. 345. That is consistent with the criminal law principle that a court ordering restitution need only make a reasonable estimate of loss. U.S. Br. 41, 48.

And it would not result in "trivial" restitution for Amy or other child victims. Amy Br. 65. One of the factors courts must consider in determining an appropriate restitution amount is the statutory purpose of affording a victim full restitution for all of her losses. See also 18 U.S.C. 3553(a)(7) (requiring sentencing courts to consider "the need to provide restitution to any victims of the offense"). Although Amy is harmed by offenders who have not been apprehended (Amy Br. 65), a district court should not diminish restitution by focusing on defendants who may never be held liable for it.

3. Every court of appeals (except the Fifth Circuit) to have considered the issue has adopted an apportionment approach that affords district courts sufficient flexibility to arrive at a reasonable restitution award. See, *e.g.*, *Lundquist*, 731 F.3d at 138-141; *Hargrove*, 714 F.3d at 375-376; *Benoit*, 713 F.3d at 22 n.8; *Kearney*, 672 F.3d at 100-101. And district courts, when ordering restitution, have generally awarded a reasonably estimated portion of the aggregate amount of losses. See, *e.g.*, *United States* v. *Cantrelle*, No. 2:11-cr-00542, 2013 WL 1624824, at *4-*10 (E.D. Cal. Apr. 15, 2013); *United States* v. *Brunner*, No. 5:08-cr-00016, 2010 WL 148433, at *3-*5

(W.D.N.C. Jan. 12, 2010). In the relatively short time that such awards have been issued, the courts have not settled on a single approach. See Nat'l Crime Victim Bar Ass'n Amicus Br. 26-31. But that has not led to wholly disparate or unreasonable awards. To the contrary, the vast majority of district court orders awarding Amy restitution have been in the range of $1000 to $50,000.[10] A system that affords district courts the discretion to impose reasonable restitution awards based on common factors should—with time, experience, and appellate review—produce similar and fair results in comparable cases.

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Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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[10] Amy suggests (Br. 48) that the Department of Justice (DOJ) has a "database" that monitors restitution awards. More precisely, DOJ maintains a spreadsheet of orders awarding restitution under Section 2259 based on information provided by United States Attorneys' Offices. Although DOJ endeavors to make the spreadsheet comprehensive, it lacks any automated process for tracking restitution awards and relies instead on case-by-case reporting from prosecutors. Based on that information, to the best of DOJ's knowledge, approximately 85% of Amy's restitution awards (that is, 155 out of 182 awards) have been in the range of $1000 to $50,000. The average award in that range is approximately $5400. Those numbers include awards negotiated pursuant to plea agreements, and it includes orders in possession, receipt, distribution, advertising, and transportation cases. By separate letter, the government is offering to lodge a printout of this spreadsheet with the Clerk of the Court. See Sup. Ct. R. 32.3.