No. 09-31215

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL WRIGHT,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Louisiana

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REHEARING EN BANC

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STATEMENT REGARDING ORAL ARGUMENT

On January 25, 2012, this Court entered an order granting defendant Michael Wright's petition for rehearing en banc "with oral argument on a date hereafter to be fixed." The Clerk set the case for reargument on May 3, 2012. On February 6, 2012, the Clerk's Office sent a letter to counsel stating that the Court consolidated the reargument in this case with the reargument in the consolidated cases of *In re: Amy Unknown*, No. 09-41238, and *United States* v. *Paroline*; *Appeal of Amy Unknown*, No. 09-41254.

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STATEMENT OF JURISDICTION

This is a direct appeal by a defendant from the final judgment in a criminal case. The district court sentenced defendant Michael Wright on December 16, 2009, and entered final judgment on December 17, 2009. USCA5 87-94. Wright filed a notice of appeal on December 16, 2009, Dkt. 33, which was premature but timely. See Fed. R. App. P. 4(b)(1)(A)(i), (b)(2). The district court (Engelhardt, *J.*) had jurisdiction under 18 U.S.C.

§ 3231. This Court has jurisdiction under 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

On February 6, 2012, following the grant of rehearing en banc, the Clerk's Office sent a letter to counsel stating that some members of the Court were interested in briefing on certain questions relevant to this case and the related *Paroline* cases "[w]ithout foreclosing briefing" on other questions.[1/] Consistent with the questions in this letter and Wright's opening brief, this case presents the following issues:

1. Whether Amy, an exploited child depicted in pornographic images Wright possessed, was "harmed as a result of" Wright's possession of her images so as to be a "victim" of his offense within the meaning of 18 U.S.C. § 2259(c).

2. Whether 18 U.S.C. § 2259(b)(3) conditions all of a victim's recoverable losses on a showing that they proximately resulted from the

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[1/] The letter set forth three questions, but the third question is specific to the *Paroline* cases. The first two questions were:

> 1. 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]; [and]
>
> 2. How would the nexus standard you urge be applied to the facts in each of the above cases, irrespective of the standard of appellate review.

defendant's offense.

3. Whether Amy's claimed losses proximately resulted from Wright's possessory offense.

STATEMENT OF THE CASE

Following his guilty plea in the United States District Court for the Eastern District of Louisiana, defendant Michael Wright was convicted of possession of images of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). USCA5 24-27, 35-36, 46, 144-167. Wright was sentenced to 96 months of imprisonment, to be followed by a lifetime term of supervised release, and ordered to pay $529,661.00 in mandatory restitution to "Amy," one of the identified victims of his offense, pursuant to 18 U.S.C. § 2259. On Wright's appeal, this Court vacated the restitution award, see *United States* v. *Wright*, 639 F.3d 679 (5th Cir. 2011), but the full Court granted Wright's petition for rehearing en banc. 668 F.3d 776 (en banc) (per curiam).[2/]

[2/] On the same date, the Court granted rehearing en banc in *In re: Amy Unknown*, No. 09-41238, consolidated with *United States* v. *Paroline*, No. 09-41254. See 668 F.3d 776, 776 (5th Cir. 2012) (en banc) (per curiam).

STATEMENT OF FACTS

1. *The Offense Conduct*. In October 2005, agents from the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE), initiated an investigation into "Illegal.CP," a hard-core child pornography website. Through the investigation, agents obtained information that a credit card belonging to Michael Wright was being used to obtain access to a website that provided images of child pornography. PSR ¶ 9. On March 26, 2009, agents went to Wright's residence to execute a search warrant. After waiving his *Miranda* rights, Wright admitted that he had purchased two subscriptions to online child pornography websites, including Illegal.CP, and that he used his computer to search for, download, and save images of child pornography. USCA5 49.

A subsequent forensic examination of Wright's computer and related digital media disclosed roughly 30,000 images and videos depicting the sexual victimization of children (some under the age of twelve) engaged in sexually explicit conduct including "adult males vaginally and/or anally penetrating minor victims and minors performing oral sex on adults." USCA5 50. Agents also recovered e-mail receipts confirming Wright's statement that he had subscribed to child pornography websites, including

"Illegal.CP." *Id.*; PSR ¶¶ 9-10.

2. *Wright's Plea*. On June 17, 2009, Wright waived his right to indictment and pleaded guilty, pursuant to a plea agreement, to an information charging him with possession of images of child pornography, in violation of 18 U.S.C. § 2252A(a)(4)(B). USCA5 24-25 (information); USCA5 36 (waiver of indictment); USCA5 51-54 (plea agreement). Wright's plea agreement stated that "the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply," but made no mention of Section 2259, the mandatory restitution statute applicable to victims of child exploitation offenses. In exchange for Wright's guilty plea, the government agreed not to charge Wright with any other offenses arising from his possession and receipt of child pornography in March 2009, and to support a three-level acceptance-of-responsibility adjustment. USCA5 51-52, 160. As part of his plea agreement, Wright "expressly waived the right to appeal his sentence on any ground," but "reserve[d] the right to appeal any punishment imposed in excess of the statutory maximum." USCA5 52.

At the change-of-plea hearing, the district court reviewed the plea agreement and the appeal waiver with Wright, including the exception for

punishment in excess of the statutory maximum. The court asked Wright if he understood the rights he was waiving, including the right to appeal, and Wright stated that he did. USCA5 154. The district court also asked Wright if he understood that he "may be required to reimburse any victim for the amount of his or her loss under The Victim Restitution Law, if that [provision] is applicable," USCA5 157, and Wright stated that he did. USCA5 158. The court then accepted Wright's plea. USCA5 165-166.

3. "*Amy*." Copies of the visual depictions on Wright's seized computer and related media were sent to the National Center for Missing and Exploited Children (NCMEC) for further analysis. A private non-profit organization established in 1984, NCMEC provides services to families, law enforcement, and other professionals to help prevent the abduction, endangerment, and sexual exploitation of children. USCA5 150. NCMEC acts as a central repository for information relating to child pornography, and it assists law enforcement agencies by reviewing seized collections of pornography to determine whether the images found therein include any previously identified child victims. USCA5 149, 152, 227-228.

NCMEC analysts positively identified 21 children in the images found on Wright's computer, one of whom was a young girl known by the

pseudonym "Amy." USCA5 49-50; PSR ¶ 22. When Amy was eight and nine years old, a pedophile living in Seattle contacted Amy's uncle and asked him to sexually abuse Amy and visually record those acts. USCA5 261. Amy's uncle complied, and engaged in a series of sexual acts with Amy that included rape, cunnilingus, fellatio, and digital penetration. He also took images of these acts, thereby producing the child pornography requested by the pedophile, which were later distributed to third parties. A part of the so-called "Misty" series,[3/] these images have been traded over the Internet and collected and viewed by consumers of child pornography since their creation in 1998. USCA5 153. NCMEC has identified more than 35,000 copies of images of Amy's abuse from the Misty series among the evidence in more than 3,200 child pornography cases brought since 1998. *Id.*

In 2007, after Amy reached the age of majority, her attorney referred her to Dr. Joyanna L. Silberg, Ph.D, a forensic psychologist, for an evaluation. During the same time period, Amy, through her counsel, began submitting a victim impact statement to courts to use in sentencing

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[3/] A "series" is a collection of pornographic images or video files of a child taken over time. USCA5 153. A series may include non-pornographic images with the pornography. *Id.* Traders and collectors of child pornography often name the series. *Id.*

defendants convicted of child pornography offenses involving her images. VIS, at 3;[4/] see 18 U.S.C. § 3771(a)(4) (victims have the right to "be reasonably heard" at sentencing). Amy's three-page statement describes how "[e]very day of my life, I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them – at me – when I was just a little girl being abused for the camera. * * * I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle." VIS, at 1; see also *id*. at 2 ("I know those disgusting pictures of me are stuck in time and are there forever for everyone to see."). She explains her inability to describe the feeling that, "at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it." VIS, at 1; see also *id*. at 2 ("Thinking and knowing that the pictures of all this are still out there just makes it worse. It's like I can't escape from the abuse, now or ever."). She describes the pain associated with the fact that her "privacy

[4/] Amy's victim impact statement, along with Dr. Silberg's report, were submitted to the Probation Office in this case for use in preparing the presentence investigation report, and copies of these materials were attached as an exhibit to the government's sealed sentencing memorandum supporting Amy's restitution request. We cite them as "VIS" and "Silberg Report."

has been invaded," the feeling that she is "being exploited and used every day and every night," and the realization that her abuse "is a public fact." VIS, at 2. She has come to understand that she is "a real victim of child pornography," VIS, at 3, and that "the crime has never really stopped and will never really stop," VIS, at 2, because her images have been widely disseminated on the Internet.

Dr. Silberg evaluated Amy during the summer of 2008 and, on November 21, 2008, prepared a written report of her evaluation, the purpose of which was "to "determine the psychological effects of [Amy's] continuous re-victimization in the form of internet pornographic photographs of her being exchanged and viewed," and "to document the current effects on Amy of this re-victimization and describe the potential for long-standing future effects as a result of this victimization." Silberg Rep. at 1. Dr. Silberg opined that the initial assault against Amy, "and its continued memorialization in pictures which continue to be traded and used affect her in a variety of ways, and ha[ve] had long lasting and life changing impact on her." *Id.* at 8. According to Dr. Silberg, "each discovery of another defendant that has traded [Amy's] image re-traumatizes her again," *id.* at 3, and this knowledge has "exacerbated her

symptoms, interfered with her ability to overcome the increasing symptoms of post-traumatic stress, and impeded her ability to move on with her life." *Id*.; see also *id*. at 4 ("Amy is clear that there has been a resurgence of trauma with her ongoing realization that her image is being traded on the internet."); *id*. at 8 (Amy's "awareness of the continued existence of the pictures and their criminal use in a widespread way leads to an activation" in her symptoms); *id*. at 9 ("Amy's awareness of these pictures, knowledge of new defendants being arrested[,] become ongoing triggers to her."). Dr. Silberg also describes Amy's "feel[ing] that her privacy has been invaded on a fundamental level as these pictured acts in which she was an unwilling participant are there for other people to find against her will." *Id*. at 4. Dr. Silberg concluded that "the re-victimization of Amy through the trading of her image on the internet is the source of enduring trauma that will have lasting effects on her and the symptoms she displays." *Id*. at 10.

4. *The Restitution Litigation*. On July 15, 2009, prior to Wright's sentencing, Amy, through her attorney, submitted to the Victim and Witness Coordinator in the United States Attorney's Office a request for roughly $3.4 million in restitution from Wright pursuant to 18

U.S.C. § 2259.[5/] PSR ¶¶ 22-23. Attached to the request were copies of

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[5/] Title 18 of the United States Code, Section 2259, provides as follows:

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

(b) Scope and nature of order.–

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

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

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

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

(B) physical and occupational therapy or rehabilitation;

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

(D) lost income;

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

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

(4) Order mandatory.–

(A) The issuance of a restitution order under this section is mandatory.

(continued...)

Amy's victim impact statement, Dr. Silberg's report, and an economic analysis by the Smith Group of Amy's losses, including the present value of her expected future psychological counseling costs ($512,681.00), her expected lost future income ($2,855,173.00), and her expert witness fees ($16,980). The packet of materials was provided to the Probation Officer, who, in turn, recommended that the court award Amy the restitution she sought. PSR ¶ 83.[6/]

Wright opposed Amy's restitution request. He asserted that Section 2259 requires a showing that all of a victim's claimed losses proximately

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[5/](...continued)

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

(i) the economic circumstances of the defendant; or

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

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

[6/] NCMEC's forensic analysis identified another young sexual abuse victim, known as "Vicky," among the images Wright possessed. Vicky, her mother, and her stepfather each submitted a victim impact statement for use at sentencing, PSR ¶ 21, but Vicky did not request restitution.

resulted from the defendant's offense, and that there was no evidence that his specific possession of Amy's image proximately resulted in any of her claimed losses. See 18 U.S.C. § 3664(e) (burden of proof).[7/] The government supported Amy's request for restitution in a sealed sentencing memorandum. "[T]o the extent that a causal connection between commission of the offense and the resulting harm" is required, the government argued that this requirement "has been met in this case based on the submission by [Amy's] attorney." The government attached copies of Amy's victim impact statement, Dr. Silberg's report, and the economic report to its memorandum.

At the sentencing hearing, the district court addressed Wright's arguments that Section 2259 requires proof of proximate cause and that the record fails to establish such proof. "As for the first objection relating to any award of restitution, the defendant claims that his conduct is so far removed from the original harm done to the victim that the government cannot meet its burden of proving by a preponderance of the evidence the

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[7/] Section 2259 uses the term "proximate result," not "proximate cause," but the two concepts describe the same causal chain, but from different directions. Proximate "cause" is the forward-looking description (*i.e.*, the offense was the "proximate cause" of the loss), whereas proximate "result" is the backward-looking description (*i.e.*, the loss was the "proximate result" of the offense). We use the terms interchangeably.

specific amount of the victim's losses proximately caused by him. [¶] After considering the memorandum provided by the government in response to this argument and the attachment to that memorandum, the Court concludes that some award of restitution is appropriate, and thus will overrule the objection on behalf of the defendant." USCA5 104; see also USCA5 105 (noting Wright's objection).

The court sentenced Wright to 96 months' imprisonment and ordered him to pay Amy (through her attorney) "restitution * * * in the amount of $529,661.00," an amount, the court stated, that reflected the sum of "the estimated cost of the victim's future treatment and counseling at $512,681, and the cost of the victim's expert witness fees at $16,980." USCA5 111. The court further ruled that, because Amy had previously received an award of restitution in a federal criminal case from Florida, "[t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim." USCA5 111-112.[8/]

[8/] The court was referring to a then-recent decision in *United States* v. *Freeman*, No. 3:08-cr-22 (N.D. Fla.), where a defendant convicted of crimes involving the receipt and exchange of child pornography and conspiracy to advertise child pornography was ordered to pay Amy roughly $3.3 million in restitution for his conspiracy conviction. Freeman appealed, and his appeal was consolidated with the appeals of several of his coconspirators against whom restitution was not sought. The Eleventh Circuit vacated (continued...)

5. *The Appeal*. Wright appealed, challenging the restitution award. The government defended the restitution award, arguing that Wright's appeal was barred by his appeal waiver, and that the district court had not abused its discretion in ordering Wright to pay restitution to Amy in any event. With respect to the merits, the government assumed, as it had below, that Section 2259 requires proof that all of the victim's claimed losses were the proximate result of the offense, in light of the authorities supporting that conclusion that were cited in *In re: Amy*, 591 F.3d 792 (5th Cir. 2009) (*Amy I*), vacated, 636 F.3d 190 (2011) (*Amy II*), vacated, 668 F.3d 776 (2012) (en banc) (per curiam). The government argued that this proximate-cause requirement should be "interpreted generously to effectuate Congress's intent to fully compensate child victims," Gov't Br., *United States* v. *Wright* 33 n.11 (No. 09-31215), but also noted that "the Court need not reach the issue because under any standard, the district court did not abuse its discretion." *Id*.; see also *id*. at 33 ("[A]ssuming proximate cause was required between Wright's offense conduct and the concurrent restitution awarded by the district court for Amy's mental health

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[8/](...continued)
the restitution award against Freeman. See *United States* v. *McGarity*, 669 F.3d 1218, —, 2012 WL 370104, at *34-*39 (11th Cir. Feb. 6, 2012).

treatment and the costs of calculating it, the district court did not abuse its discretion in finding such cause."). In an opinion issued on April 20, 2011, this Court vacated the judgment awarding restitution and remanded for further proceedings. See *United States* v. *Wright*, 639 F.3d 679 (5th Cir. 2011) (per curiam).

a. The panel initially determined that Wright's appeal was not barred by his appeal waiver, for two reasons. First, the panel concluded that Wright did not "knowingly waive his right to appeal a restitution order that is unlimited by the principle of proximate causation." 639 F.3d at 683. According to the panel, when Wright pleaded guilty, he knew that he was subject to an order of restitution but he reasonably believed that the amount of restitution he owed would be determined in accordance with a proximate-cause limitation. That was because Wright's plea agreement referred to 18 U.S.C. §§ 3663 and 3663A, both of which "indisputably include proximate causation as a condition of restitution," and the district court's reference during the plea colloquy to "the Victim Restitution Law" would naturally have been understood as a reference to these statutes. *Id.* The Court concluded that the decision in *Amy II*, which was issued "long after Wright entered into the plea agreement," *id.*, and which dispensed

with a proximate-cause limitation for Section 2259, rendered Wright's appeal waiver unknowing. *Id.* Second, even if Wright's appeal waiver was valid, the panel held Wright could appeal the restitution order under the waiver's exception for "punishment in excess of the statutory maximum." In the panel's view, "[g]enerally, a restitution order under § 3663 that exceeds the losses caused by the defendant's offense exceeds the statutory maximum." *Id.* at 683.

b. Turning to the merits, the panel concluded that the then-recent decision in *Amy II* compelled rejection of Wright's argument that Section 2259 requires proof of proximate cause for all categories of losses. See *id.* at 684; see also *Amy II*, 636 F.3d at 198-199. Applying *Amy II*, the panel determined that the district court had correctly concluded that Amy was entitled to restitution because she was a "victim" of Wright's possessory offense, and her claimed losses did not depend on any additional proof that they were the proximate result of Wright's offense. *Id.* at 684-685. The Court nonetheless vacated the restitution award because of the district court's failure "to give a reasoned analysis of how it arrived at its award in a manner that allows for effective appellate review." *Id.* at 686; see also *id.* at 685 ("The record does not indicate why the court reduced the

government's requested award of $3,367,854 or how the court settled on the amount it chose to award."); *id.* ("[T]he district court did not explain its reasoning and the parties as well as this court are completely in the dark on why the district court settled on the amount of $529,661.").[9/]

c. Judge Davis wrote a special concurring opinion, which was joined by the other members of the panel, in which he expressed his "disagreement with the recent holding [in *Amy II*] that Section 2259 does not limit the victim's recoverable losses to those proximately caused by the defendant's offense and to urge the court to grant *en banc* review of that decision." *Id.* at 686 (Davis, J., concurring specially, joined by King & Southwick, JJ.).

As Judge Davis explained, Congress's use of the words "proximate result" in the catch-all category of losses in Section 2259(b)(3)(F) is "equally applicable to" the enumerated categories of losses in Section 2259(b)(3)(A)-(E), based on the "cardinal rule of statutory interpretation" that, "'[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

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[9/] The panel declined to affirm the restitution award on the alternative ground that the court's statement that the restitution award was to be "concurrent" with other restitution awards was effectively an order of joint and several liability. The panel deemed it "unclear" what the district court meant by its use of the word "concurrent" and stated that the district court in any event had "articulated no reason for holding Wright jointly and severally liable for Amy's future psychological costs." *Id.* at 685.

demands that the clause be read as applicable to all.'" *Id*. at 687 (quoting *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920)); see also *id*. at 687 n.1 (noting that the Eleventh Circuit adopted this interpretation of Section 2259(b)(3) in *United States* v. *McDaniel*, 631 F.3d 1204, 1209 (2011)).

Judge Davis further asserted that, contrary to *Amy II*, the differing definitions of "victim" in the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663(a) (VWPA) and Section 2259 do not imply that Section 2259 dispensed with a proximate cause requirement: as he explained, the VWPA's definition of a "victim" was not enacted until two years after Section 2259 was enacted, and not 14 years before it. *Id*. at 688 & n.4.[10/] In his view, *Amy II*'s holding that "Section 2259 does not limit the victim's recoverable losses to those proximately caused by defendant's offense is at odds with the conclusion of every other circuit court considering this issue." *Id*. at 688; see also *id*. at 688-691 (discussing the decisions so holding). Judge Davis concluded that the case should be remanded to the district

[10/] As originally enacted in 1982, the VWPA did not define the term "victim." Section 2259, which was enacted in 1994, defines a "victim" as a person harmed "as a result of" a crime. In 1996, Congress amended the VWPA (at the same time it enacted the MVRA) to define a "victim" as a person "directly and proximately harmed" as a result of an offense. 639 F.3d at 688 n.4 (Davis, J., concurring).

court with instructions to make findings regarding the causal connection between Amy's claimed losses and Wright's offense, *id*. at 691, and, if such findings merited an award of restitution, for the court to exercise its "wide discretion to craft a reasonable restitution order." *Id*.

6. *Amy's Stated Withdrawal of Her Restitution Request*. On May 19, 2011, Amy filed her court-ordered response to the petition for rehearing en banc filed by Doyle Paroline in the companion cases. Amy opposed Paroline's suggestion that the full Court reconsider the construction of Section 2259 adopted in the most recent decision in his case (*Amy II*) along with the decision in Wright's case by noting, among other things, that Wright's case "is now likely moot since Amy recently withdrew her request for restitution in that case." Resp. to Pet. for Reh'g En Banc 14 (5/19/11). Amy's filing did not elaborate further on this statement or indicate how or when she "withdrew her request for restitution."

On Friday, June 3, 2011, the due date for any petitions for further review of the decision in this case, Amy's counsel mailed a letter to the Clerk of Court in the Eastern District of Louisiana "withdraw[ing] with prejudice the request for criminal restitution filed in the above-named case on July 15, 2009 on behalf of Amy, the victim in the Misty child

pornography series." Dkt. 57. At 4:20 p.m. that afternoon, Amy's counsel emailed a copy of this letter to counsel for the parties and the Probation Officers.

Later that afternoon, the government filed a petition for rehearing in this case, in which the government noted Amy's counsel's letter withdrawing Amy's restitution request; suggested that the district court lacked jurisdiction to address this letter because the case was pending on appeal; and indicated that the significance of the purported withdrawal was unclear because other circuits disagreed about whether a sentencing court was permitted (or required) to order a defendant to pay mandatory restitution when the victim declines to assign their rights to such payments pursuant to the procedures in 18 U.S.C. § 3664(g). See Gov't Pet. for Reh'g 8 n.4 (6/3/11). Wright filed a petition for rehearing en banc the same day.

On June 9, 2011, Wright's counsel sent a letter to the Clerk of this Court requesting that the Clerk "advise the Court" of Amy's counsel's June 3, 2011, letter, and attaching a copy of Amy's counsel's letter to her letter. On June 16, 2011, the district court held a status conference regarding Amy's counsel's letter, but did not take any action in response to it. See *United States* v. *Cook*, 592 F.2d 877, 881 (5th Cir. 1979) ("This Court retains

jurisdiction over an appeal until it has issued a mandate to implement its disposition.").

On February 22, 2012, following the grant of rehearing en banc in this case, this Court granted Amy's counsel's motion for leave to file a brief as an *amicus curiae* in support of neither party in this case. In a footnote in her *amicus* brief, Amy acknowledges her June 3, 2011, letter withdrawing her restitution request; states that the district court lacks jurisdiction to address her letter because the case is pending on appeal; and concludes that, "[a]s a result, this appeal currently stands in the posture of Amy requesting substantial restitution, which the district court awarded to her; any further requests for action by the district court remain outstanding and undecided." Amy *Amicus* Br. 4-5 n.1.[11/]

[11/] The Court permitted Amy to adopt arguments from her supplemental en banc brief in the *Paroline* litigation into her *amicus* brief, and Amy has done so. Accordingly, "Amy *Paroline* Br." refers to Amy's brief in the *Paroline* cases; "Amy *Amicus* Br." refers to Amy's *amicus* brief in this case; and "Wright Br." refers to Wright's brief.

SUMMARY OF ARGUMENT

This appeal, like the related *Paroline* litigation, presents a series of interpretive questions regarding the mandatory restitution statute for exploited child victims, 18 U.S.C. § 2259. Unlike the *Paroline* litigation, however, this case arises in the context of a defendant's appeal from the final judgment ordering him to pay restitution, and not, as in *Paroline*, a victim's mandamus petition pursuant to the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (CVRA). In reviewing these interpretive questions in this case, the Court thus is not encumbered by the "clear and indisputable error" mandamus standard of review that applies in *Paroline*.

I. Wright's appeal of the restitution order is barred by his appeal waiver. Wright's appeal concerns an aspect of "his sentence," and does not implicate the exception for sentences above the "statutory maximum" because there is no statutory maximum governing restitution. And Wright's appeal waiver is enforceable because Section 2259 requires proof that all of a victim's losses were proximately caused by the offense, and therefore, Wright knowingly waived his right to appeal a restitution order bounded by a proximate-cause constraint. Accordingly, Wright's appeal must be dismissed. If, however, the Court concludes that Section 2259 does

not include a proximate-cause requirement for all categories of losses, then Wright would not have knowingly waived his right to appeal a sentence unbounded by a proximate-cause limitation. In that event, Wright's appeal would not be barred, and this Court should vacate the judgment and remand the case for further proceedings.

II. In enacting Section 2259, Congress embraced a two-step process governing restitution awards for exploited child victims.

A. The initial step focuses on the status of the person seeking restitution – *i.e.*, whether the person is a "victim" of the offense. See 18 U.S.C. § 2259(c). Amy meet this definition of a victim because she has been "harmed as a result of" Wright's possessory offense. As a result of those harms, and the fact that Amy has suffered identifiable losses attributable to Wright's conduct, the district court properly ordered Wright to pay restitution to Amy.

B. The second step concerns the amount of restitution that Amy is entitled to recover from Wright. Section 2259(b)(3) states that the defendant must pay the victim the "full amount of the victim's losses," and identifies six categories of compensable losses. But this provision leaves three subsidiary questions unresolved: (1) does Section 2259(b)(3)

condition a victim's recoverable losses on a showing that *all* six categories of losses proximately resulted from the offense?; (2) if so, what evidentiary showing must be made to satisfy this standard in possession cases?; and (3) if the requisite showing has been made, how does a court determine how much of the victim's provable losses are attributable to the defendant's conduct?

The Court should answer these three questions as follows. (1) Section 2259(b)(3) conditions a victim's recovery on a showing that all of the categories of compensable losses proximately resulted from the offense. Seven courts of appeals have so held, and that conclusion is correct. (2) The statutory proximate-cause standard in Section 2259 is satisfied by proof sufficient to permit a finding, by a preponderance of the evidence, that the losses for which the victim is seeking compensation were caused by the offense and were a reasonably foreseeable consequence of the offense conduct. (3) Upon finding that the victim's losses proximately resulted from the offense, the court must award the victim all of her proven losses that she incurred, and will continue to incur, that are attributable to the defendant's conduct.

ARGUMENT

I. Wright's Appeal Waiver Bars His Appeal.[12/]

A. The Appeal Waiver Applies To Wright's Challenge To The Restitution Order.

Wright waived his right to challenge the restitution order when he waived his right to appeal his "sentence." Restitution is "a criminal penalty and a component of the defendant's sentence," *United States* v. *Adams*, 363 F.3d 363, 365 (5th Cir. 2004), and therefore, a defendant's waiver of his right to appeal his sentence waives his right to challenge the restitutionary component of his sentence. See *United States* v. *Worden*, 646 F.3d 499, 502 (7th Cir. 2011) (enforcing an appeal waiver to dismiss a defendant's appeal of a Section 2259 restitution award in Amy's favor because "restitution is a part of a criminal sentence, and [defendant] agreed not to challenge his sentence, [so] he may not appeal the restitution order"); see also *United States* v. *Johnson*, 541 F.3d 1064, 1067 (11th Cir. 2008)

[12/] The government may invoke Wright's appeal waiver at this time because the government raised the waiver in its answering brief in the initial appeal. Compare *United States* v. *Story*, 439 F.3d 226, 231 (5th Cir. 2006) ("In the absence of the government's objection to Story's appeal based on his appeal waiver, the waiver is not binding because the government has waived the issue."). The panel found the waiver unenforceable, in part because a later panel in *Amy II* rejected a proximate-cause requirement. 639 F.3d at 683-684. The government's rehearing petition challenged *Amy II*'s holding, but did not specifically discuss the appeal waiver. See Gov't Pet. for Reh'g, *United States* v. *Wright* (No. 09-31215) 6 n.3. But when the Court granted further review in this case and the related *Paroline* cases, it did not limit its review to any specific issues.

(explaining that Congress intended for restitution orders "to be incorporated into the traditional sentencing structure" and that "a waiver of the right to appeal a sentence necessarily includes a waiver of the right to appeal the restitution imposed").

The waiver excepts claims that the sentence exceeds the "statutory maximum," but this exception does not apply here because, quite simply, "the restitution statutes do not contain a maximum penalty." *United States* v. *Sharp*, 442 F.3d 946, 952 (6th Cir. 2005); see also *Johnson*, 541 F.3d at 1069 ("The restitution statute at issue here, 18 U.S.C. § 3663, has no prescribed statutory maximum."); *United States* v. *Leahy*, 438 F.3d 328, 337 (3d Cir. 2006) (en banc) ("a restitution order does not punish a defendant beyond the 'statutory maximum'"). In concluding otherwise, the panel equated an erroneous restitution order with a sentence above the statutory maximum, but that was erroneous. And the two cases the panel cited – *United States* v. *Norris*, 217 F.3d 262 (5th Cir. 2000), and *United States* v. *Broughton-Jones*, 71 F.3d 1143 (4th Cir. 1995) – do not support its conclusion. The defendants in those cases were both convicted of perjury and the district courts awarded restitution to persons harmed by the larger criminal conduct of which the perjury was a part. The restitution awards

were vacated on appeal because the government had not proven that the beneficiaries of the awards suffered identifiable losses resulting from the perjury offense. See *Norris*, 217 F.3d at 272 (holding that Norris' former law partners "suffered no loss resulting from his false statements during the bankruptcy proceedings"); *Broughton-Jones*, 71 F.3d at 1148 ("The Government has identified no loss that flowed to anyone – much less specifically to [the victim] – as a result of this perjury before the grand jury."). Unlike the victims in those cases, the government has proven that Amy suffered identifiable losses. In addition, *Norris* did not involve an appeal waiver (he was convicted by a jury); and, though *Broughton-Jones* did involve an appeal waiver, the court's reasoning – that a restitution order that is not limited to the losses caused by the offense of conviction effectively exceeds the maximum permissible amount of restitution permitted by Section 3663, *id*. (citing *Hughey* v. *United States*, 494 U.S. 411 (1990)) – is incorrect. An erroneous restitution award cannot exceed a non-existent "statutory maximum." Indeed, if *Hughey*'s losses-caused-by-the-offense rule established a de facto "statutory maximum," then it is unclear how a defendant could agree, as part of plea agreement, to pay restitution for losses exceeding those caused by his offense. See 18

U.S.C. § 3663(a)(3); see also *United States* v. *Flaschberger*, 408 F.3d 941, 943 (7th Cir. 2005) (restitution is generally limited to the offense of conviction "[u]nless a defendant agrees to pay more"). And *Broughton-Jones*' reasoning does not aid Wright in any event because Wright's restitution award was limited to his offense of conviction.

B. The Appeal Waiver Is Valid As Long As The Court Concludes That Section 2259 Conditions Amy's Recovery On A Showing Of Proximate Cause.

Even if an appeal waiver applies the waiver cannot be enforced unless it represents a "knowing and voluntary" decision by the defendant to surrender his appellate rights. See *United States* v. *Bond*, 414 F.3d 542, 544 (5th Cir. 2005). In this case, the validity of Wright's appeal waiver rises or falls with whether Section 2259 requires proximate cause for all categories of losses. To decide whether the appeal waiver compels the dismissal of this appeal, in other words, the Court must first decide the merits. See, *e.g.*, *id.* at 545-546 (enforcing appeal waiver and dismissing appeal after considering the merits to decide if the claim was within the scope of the waiver); *United States* v. *Harris*, 434 F.3d 767, 770-772 (5th Cir. 2005) (to the same effect). As the panel explained, Wright waived his appellate rights with an understanding, based on his plea agreement and colloquy with the

court, that any order of restitution would be subject to a proximate-cause constraint. 639 F.3d at 683; see also USCA5 52. But because *Amy II* rejected a proximate-cause standard after Wright entered his plea, the panel concluded that Wright did not *knowingly* waive his right to appeal a restitution order "unlimited by the principle of proximate causation." 639 F.3d at 683.

If the Court agrees with the government – and seven other circuits – that proximate cause is required for all categories of losses, then Wright's appeal waiver would be enforceable: Wright would have knowingly waived his right to appeal a restitution order bounded by a proximate-cause limitation. In that event, the Court should dismiss his appeal.[13/] If, however, the Court rejects this conclusion and holds that there is no proximate-cause limitation for all categories of losses, then the government would agree with the panel that Wright's waiver was unknowing and unenforceable. In that case, Wright would be entitled to maintain his appeal; and, as discussed below, the Court should vacate the judgment and remand the case to the district court to allow it to apply the causation

[13/] Because the Court must decide the merits in order to decide the enforceability of the appeal waiver, the order granting rehearing en banc was not improvidently granted.

standard this Court adopts and provide a more thorough explanation for the amount of restitution it orders.

II. The District Court Properly Ordered Wright To Pay Restitution To Amy, But Its Analysis Is Erroneous And A Remand Is Therefore Required.

Whether the Court eventually dismisses Wright's appeal or entertains it, the Court must decide the merits of the case. In that regard, the Court requested briefing on "[w]hat, 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 Section 2259." In our view, the statute requires two different causal analyses, one corresponding to the initial victim-status determination and one corresponding to the secondary loss calculation. We discuss each of these causal requirements in detail below, but we begin with a brief summary of our position.

Section 2259 mandates restitution to a "victim," *i.e.*, a person "harmed as a result of" a commission of an offense. 18 U.S.C. § 2259(c). A claimant's status as a victim thus turns on the existence of a causal connection between the claimant's alleged "harms" and the offense. If the person seeking restitution qualifies as a "victim" – and Amy does – then

Section 2259 separately requires a causal analysis of the connection between the victim's "losses" and the offense. Section 2259 directs the court to order restitution to the victim in the full amount of the victim's losses, and lists six categories of losses, the sixth of which applies to any other losses that are the "proximate result of the offense." 18 U.S.C. § 2259(b)(3)(F). This "proximate result of the offense" language applies to all six categories of losses in Section 2259(b)(3), and requires a two-part causal showing that (1) the defendant's conduct was a cause in fact of the victim's losses, and (2) those losses a were reasonably foreseeable consequence of the defendant's conduct.

A. Amy Is A "Victim" Under 18 U.S.C. § 2259(c).

The various federal restitution statutes define a "victim" differently, but for exploited child victims, Congress broadly defineded a "victim" as a person "harmed as a result of a commission of a crime under this chapter." 18 U.S.C. § 2259(c). Under this definition, Amy is a "victim" of Wright's possessory offense because she was "harmed" "as a result of"

"a commission of a crime under this chapter."[14/] Every federal court to consider the issue has held that Amy, and other children "depicted by child pornography[,] are 'victims' of the crime[] of possession * * * within the meaning of Section 2259(c)." *United States* v. *Kearney*, — F.3d —, 2012 WL 639168, at *11 (1st Cir. Feb. 29, 2012). Indeed, Amy's status as a victim "is usually not a seriously contested issue," *Wright*, 639 F.3d at 688-689 (Davis, J., concurring), and it has not been contested by Wright in this case.

1. Amy Suffers "Harm" From The Possession Of Her Images.

Child pornography is not a victimless crime. See *United States* v. *Norris*, 159 F.3d 926, 929 (5th Cir. 1998) (rejecting the defendant's argument that "the criminal act of simply receiving child pornography is a victimless crime"). In *New York* v. *Ferber*, 458 U.S. 747 (1982), the Supreme Court held that the First Amendment did not prohibit the States from criminalizing the distribution of child pornography. *Id*. at 764. Drawing on medical and social science literature, see *id*. at 759-60 & nn. 9-10, the *Ferber* Court found that "[t]he use of children as subjects of pornographic

[14/] Section 2259 is codified in Chapter 110 of Title 18 of the United States Code, as is the crime of possessing child pornography. Possessory offenses, therefore, are subject to Section 2259's mandatory-restitution requirement. See, *e.g.*, *McDaniel*, 631 F.3d at 1208 ("It is undisputed that McDaniel's crime – the possession of material depicting the sexual exploitation of children – falls under this chapter.").

materials is very harmful to both children and the society as a whole" because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Id*. at 759; see also *id*. at 759 n.10 (discussing the "emotional and psychic" trauma to the child). The Supreme Court later extended *Ferber*'s logic and reasoning to permit States to proscribe the possession of child pornography, explaining that "[t]he pornography's continued existence," fueled by the demand for these images created by possessors, "causes the child victims continuing harm by haunting the children in years to come." *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990).

Possessors of images of child pornography harm the child in several ways. Initially, possessors "perpetuate the abuse initiated by the producer of the materials." *Norris*, 159 F.3d at 929; see also *United States* v. *Williams*, 553 U.S. 285, 303 (2008) (images of child pornography "constitute 'a permanent record' of the children's degradation whose dissemination increases the harm to the child"). Possessors also "inva[de] * * * the privacy of the child." *Norris*, 159 F.3d at 929-930; see also *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 249 (2002) ("Like a defamatory statement, each new publication [of the images] * * * cause[s] new injury to the child's

reputation and emotional well-being."). And possessors "instigate the original production of child pornography by providing an economic motive for creating and distributing the materials." *Norris*, 159 F.3d at 930.

The federal statute criminalizing the possession of child pornography was enacted in 1990 with these precedents as backdrop, see *Abuelhawa* v. *United States*, 556 U.S. 816, —, 129 S. Ct. 2102, 2106 (2009) ("[W]e presume legislatures act with case law in mind."), and in legislation amending this, and related federal statutes, Congress "repeatedly emphasized * * * the continuing harm the distribution and possession of child pornography inflicts." *Kearney*, 2012 WL 639168, at *12 (citing statutes). It thus "defies both law and fact" to suggest that a possessor of child pornography does not "harm" the child depicted therein. *Id*. at *11.

Furthermore, Amy's victim impact statement and Dr. Silberg's report confirm that Amy has suffered emotional and invasion-of-privacy harms as a result of her knowledge that persons, like Wright, are viewing her images. Amy describes the "constant fear," "hurt," and "humiliation" she suffers from knowing that she is "forever in pictures that people are using to do sick things" – pictures that can readily be viewed by anyone "on the internet." VIS, at 1. She describes the feeling of living with the knowledge

that, "at any moment, anywhere, someone is looking at" these images of her as equivalent to "being abused over and over and over again." VIS, at 1. And she explained that her "privacy ha[d] been invaded" and that she felt like she was being "exploited and used every day and every night." Dr. Silberg likewise concluded that the "continued memorialization in pictures" of Amy's abuse that "continue to be traded and used affect [Amy] in a variety of ways," Silberg Rep. 8, and that Amy's "re-victimization" through "the trading of her image on the internet" is a "source of enduring trauma." And Amy's course of treatment has been exacerbated by "her awareness of the continued existence of these pictures * * * in a widespread way * * * since she knows at any moment others might see these [images]," *id*. at 8, and Amy's "feel[ing] that her privacy has been invaded on a fundamental level." *Id*. at 4.

2. Amy's Harms Are "A Result Of" The Conduct Of Wright And Other Possessors.

To qualify as a "victim," it is not enough to prove that Amy was harmed; rather, the statute requires that her harms must have occurred "as a result of" the offense – here, the offense of possession of her images by Wright and others. In *Brown* v. *Gardner*, 513 U.S. 115 (1995), the Supreme Court explained that a statutory "as a result of" requirement is "naturally

read * * * to * * * require[] a causal connection." *Id*. at 119-120; see also *Black Hills Aviation, Inc.* v. *United States*, 34 F.3d 968, 975 (10th Cir. 1994) ("The use of the plain language – 'as a result of' – is logically interpreted to mean 'caused by.'"). The "natural[] read[ing]" of Section 2259(c), therefore, is that it requires "a causal connection" between the victim's "harms" and the "offense."

As in tort law, however, the criminal law differentiates between causation in fact and proximate, or legal, cause. See, *e.g.*, Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464-466 (2d ed. 2003); W. Page Keeton et al., *Prosser and Keeton on Law of Torts* §§ 41-42, at 263-280 (5th ed. 1984); see also *United States* v. *Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1985) (distinguishing in the criminal law between "cause in fact" and "proximate cause").[15/] The interpretive issue posed by Section 2259(c), therefore, is not *whether* it requires a causal connection, but what *type* of connection Congress required for victim status. Although general causation language

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[15/] "Proximate cause" is an "unfortunate" term because it does not involve "a question of causation" at all. Prosser § 42, at 273. Instead, the phrase is merely a "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); see also *Johnson* v. *Greer*, 477 F.2d 101, 106 (5th Cir. 1973) (agreeing with Dean Prosser's criticism of the term "proximate cause" and agreeing that "legal cause" or "responsible cause" would be a "more appropriate term").

is sometimes interpreted to require proof of both cause in fact and proximate cause, see *Sandwich Chef of Texas, Inc.* v. *Reliance Nat. Indemn. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003) (explaining that *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992), held that the "by reason of" causal language in the civil RICO statute "require[s] a showing that the fraud was the 'but for' cause and 'proximate' cause of the injury"), the text of Section 2259, when read as a whole, indicates that Congress intended for victim status to turn on proof that the defendant's conduct was a cause in fact of the victim's overall harm, and nothing more. See *United States* v. *Morton*, 467 U.S. 822, 828 (1984) ("[W]e do not * * * construe statutory phrases in isolation; we read statutes as a whole."). For one thing, Section 2259(c) does not expressly require proof of proximate causation, an omission this Court deemed significant in declining to read a proximate-cause requirement into a statute requiring proof that "death resulted." *United States* v. *Carbajal*, 290 F.3d 277, 283 (5th Cir. 2002). For another thing, a different provision of the very same statute uses specific "proximate result" language in enumerating the victim's compensable losses, see 18 U.S.C. § 2259(b)(3)(F), which implies that Congress deliberately omitted a proximate-cause requirement from the definition of a victim. See *Russello*

v. *United States*, 464 U.S. 16, 23 (1983) (disparate use of statutory language is presumptively deliberate).

Accordingly, an individual, like Amy, is "harmed as a result of" a crime involving the possession of her images as long as the possessory conduct of the defendant and other possessors was a cause in fact of her harms. And, as every court to consider the issue has concluded, this causal requirement exists in possession cases because a possessor's "participation in the audience of individuals who viewed the images" has caused the victim's emotional injuries and the related invasion-of-privacy harms. See *United States* v. *Kennedy*, 643 F.3d 1251, 1263 (9th Cir. 2011); see also, *e.g.*, *United States* v. *McGarity*, 669 F.3d 1218, —, 2012 WL 370104, at *36 (11th Cir. Feb. 6, 2012) ("Here, the record before the district court of the harm done to Amy, both by her uncle and by possessors of child pornography like James Freeman, is unassailable. Accordingly, the district judge did not err in finding that Amy was a victim within the meaning of Section 2259(c)."); *United States* v. *Aumais*, 656 F.3d 147, 152 (2d Cir. 2011) ("We conclude that Amy is a victim as defined by Section 2259(c)."). And Amy's statement and Dr. Silberg's report provide a sufficient evidentiary foundation for the district court to have found, by a preponderance of the

evidence, see 18 U.S.C. § 3664(e), that Amy suffered these harms as a result of Wright's membership in the class of possessors of her images. And because Amy suffered identifiable losses in treating these harms, the district court was required to order Wright to pay restitution to Amy. See 18 U.S.C. § 2259(b)(1) (court "shall direct the defendant to pay" restitution to the "victim"); 18 U.S.C. § 2259(b)(4)(A) (issuance of an order of restitution under this section "is mandatory"); compare, *e.g.*, *United States* v. *Norris*, 217 F.3d 262, 271-272 (5th Cir. 2000) (vacating restitution award Section 3663(a) because the individuals who sought restitution "suffered no losses").[16/]

B. Section 2259(b)(3) Conditions All Of The Victim's Recoverable Losses On A Showing That They Proximately Resulted From The Offense.

Because Amy is a victim with identifiable losses, the next question concerns the extent to which the evidence must show that her losses must have been proximately caused by Wright's conduct.

[16/] As *Norris* indicates, proof that a victim suffered identifiable losses is a necessary condition for an award of restitution, but it is not sufficient. "A party must suffer pecuniary loss to receive restitution, but a party may suffer an actual loss without seeking restitution." *United States* v. *Conner*, 537 F.3d 480, 493 n.1 (5th Cir. 2008) (Garza, J., concurring in part and dissenting in part). In this case, Amy has suffered identifiable pecuniary losses and she has elected to seek restitution; accordingly, Section 2259 mandates an award of restitution in her favor.

An order of restitution under Section 2259 must direct the defendant to pay the victim the "full amount of the victim's losses as determined by the court." 18 U.S.C. § 2259(b)(1). The term "full amount of the victim's losses" includes five specifically enumerated categories of compensable losses, 18 U.S.C. § 2259(b)(3)(A)-(E), and a sixth catchall category applicable to "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. § 2259(b)(3)(F). Seven circuits have already considered whether the "proximate result of the offense" language in the catchall category applies to the preceding categories of enumerated losses, and they all agree that it does. See *Kearney*, 2012 WL 639168, at *13 (noting that, with the exception of this Court's since-vacated decision in *Amy II*, "all other circuit decisions have said they interpret the statute as using a proximate causation standard connecting the offense to the losses") (citing and following *United States* v. *Evers*, 669 F.3d 645, —, 2012 WL 413810, at *10-11 (6th Cir. Feb. 10, 2012); *McGarity*, 669 F.3d at —, 2012 WL 370104, at *38; *Aumais*, 656 F.3d at 153; *Kennedy*, 643 F.3d at 1261; *United States* v. *Monzel*, 641 F.3d 528, 536-537 (D.C. Cir. 2011); *United States* v. *Crandon*, 173 F.3d 122, 125-126 (3d Cir. 1999)). This Court should reach the same conclusion and reject, as "contrary to the [statute's] plain

language," *McDaniel*, 631 F.3d at 1208-1209, Amy's argument that the proximate-result language is limited to the catchall category.[17/]

1. The Statutory Text Reflects Congress's Intent To Condition All Recoverable Losses On A Showing Of Proximate Cause.

"[C]ommon statutory construction principles dictate that the phrase [proximate result in Section 2259(b)(3)(F)] modifies the preceding list." Catharine M. Goodwin et al., *Federal Criminal Restitution* § 7:26, at 308 (2011). Subsection (F) refers to "other" losses proximately resulting from the offense, which implies that Congress understood that the preceding allowable categories of compensable losses must be shown to have proximately resulted from the offense as well. And this interpretation of the text is consistent with the "fundamental canon of statutory construction," *Wright*, 639 F.3d at 686 (Davis, J., concurring specially), that "[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 Railway,*

[17/] Amy states that "a plurality of the circuits" have adopted this interpretation, Amy *Paroline* Br. 47, but that is incorrect: every circuit that has decided the issue has embraced this interpretation. The only contrary decision was this Court's decision in *Amy II*, but that decision was vacated when the Court granted rehearing en banc, see 5th Cir. R. 41.3, and accordingly, it is no longer "citable precedent." *Henderson* v. *Ft. Worth Indep. School Dist.*, 584 F.2d 115, 115 (5th Cir. 1978) (en banc) (per curiam).

Light & Power Co. v. *Mor*, 253 U.S. 345, 348 (1920) (Brandeis, J.); see also *Federal Maritime Comm'n* v. *Seatrain Line, 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."). As the Eleventh Circuit explained, this interpretive canon applies to the statutory list of compensable losses in Section 2259(b)(3) and confirms that the modifying phrase "as a proximate result of the offense" in the catchall category is "equally applicable to medical costs, lost income, and attorney's fees as it is to 'any other losses.'" *McDaniel*, 631 F.3d at 1208; see also *Wright*, 639 F.3d at 687 n.1 (Davis, J., specially concurring) (citing *McDaniel* approvingly).[18/]

If there were any doubts about the proper construction of this statutory list, moreover, those doubts should be resolved by construing the statute to "effectuate the general purpose of Congress." *Porto Rico*, 253 U.S. at 348. Here, although Section 2259 reflects a clear legislative purpose to impose a broad restitution remedy in favor of exploited child victims, it

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[18/] In *McDaniel*, the government argued that the catchall's proximate-result language did not extend to the enumerated categories of losses, but in a post-*McDaniel* brief filed in the Supreme Court, the Solicitor General explained that Section 2259(b)(3) conditions restitution on a showing that all of the victim's claimed losses proximately resulted from the offense. See Brief for the United States, *United States* v. *Monzel*, No. 11-85 (filed Oct. 17, 2011).

should not be understood to have bestowed a remedy unbounded by any limiting principle. That is especially so because this statute authorizes the imposition of a criminal sanction, and thus is unlike the jurisdiction-conferring statute at issue in *Porto Rico*, 253 U.S. at 346. As a result, the better view is to presume that Congress adhered to the usual balance in the law of remedies: to hold defendants fully accountable for the losses associated with their conduct but in a manner that respects the deeply-rooted principle of proximate causation. Nor is there anything absurd about the conclusion that Congress would have intended for this limiting principle to apply to all categories of losses because the very purpose of a proximate-cause limitation is to "prevent 'infinite liability.'" *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011) (quoting Prosser § 41, at 264).[19/]

[19/] The D.C. and Second Circuits have reached the same conclusion by reasoning that the "as a result of" language in the definition of a "victim" incorporates a proximate cause requirement. See *Monzel*, 641 F.3d at 535-536; *Aumais*, 656 F.3d at 153. In so holding, these courts have relied on the maxim that Congress legislates against the backdrop of common-law principles of tort law. *Id.* This reasoning fails to take into account that Congress required proof of proximate cause within the loss subsection of the same statute, which suggests that Congress intended a different standard of causation to govern the victim-status inquiry than the losses determination. Second, the statutory definition of a "victim" requires a connection between the "harm[]" and the crime, whereas the "proximate result" requirement in Section 2259(b)(3) requires a connection between the "losses" and the offense. Once a person, like Amy, shows that she has been harmed as a result of an offense, she is a victim entitled to restitution (continued...)

Wright agrees that Section 2259 requires that all recoverable losses must proximately result from the offense, Br. 7-11, but he mentions the statutory analysis set forth above only in passing, and instead purports to divine Congress's intent from a Senate Judiciary Committee report, *id*. at 8-10. Congress's intent to condition all of the victim's recoverable losses on a proximate-result requirement flows from the statutory text, however, so there is no need to go behind that text. See *Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[I]t is the statute, not the [legislative history], which is the authoritative expression of the law.").[20/]

[19/](...continued)
without a further showing assuming she has suffered identifiable losses. Proximate cause comes into play only in determining the amount of her losses, not whether she is a victim.

[20/] Amy contends that the same Senate Judiciary Committee report Wright cites supports her position that proximate cause is not required. Amy *Amicus* Br. 15-16. The fact that Wright and Amy can both claim that the same piece of legislative history supports their opposite interpretations further counsels against looking beyond the statutory text to determine the statute's meaning.

2. As Seven Circuits Have Recognized, Amy's Contrary Reading Of The Statute Is Unpersuasive.

Amy advances several arguments why a proximate-result limitation should not apply to the enumerated categories of losses and why this Court should not follow the *Porto Rico* interpretive canon that informs the statute's meaning. None is persuasive.

a. Amy reads Section 2259 to allow a victim to recover for the enumerated categories of losses without any limitation while simultaneously conditioning recovery of non-enumerated other losses on a proximate-result limitation. Yet she offers no persuasive explanation why Congress would have wanted a two-tiered compensatory regime that uses "a different (and higher) causation standard [for the catchall] than that required for the listing of harms it is attached to." Goodwin § 7:26, at 308. Nor does she explain what purpose would be served by a dichotomous approach to causation and recovery within a single subsection of the same statute. Instead of adopting an interpretation that leads to this "illogical result," *id.*, the Court should embrace the more sensible reading of the statute – adopted by seven other circuits – that treats the "proximate result" language in the catchall category of "other losses" as being equally applicable to the five preceding categories of enumerated losses. Cf. *United*

States v. *Bass*, 404 U.S. 336, 339-340 (1971) (where a modifier "undeniably applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three"). Amy's principal response – that "'Congress did not write the statute that way,'" Amy *Paroline* Br. 40 (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)) – is not correct: the statute, read as a whole, reflects Congress's intent to impose an across-the-board proximate-cause requirement for all categories of losses. In other words, Congress did write the statute "that way."

Amy asserts that these decisions' uniform analyses of the proximate-cause issue should not be followed because they are "dicta." Amy *Amicus* Br. 6-7. That is incorrect. These courts' conclusions that proximate cause was required for all categories of losses were holdings – statements essential to the courts' dispositions – and their analyses of this issue were integral aspects of their decisions and products of their "full and careful attention." *In re: Cajun Electric Power Coop., Inc.*, 109 F.3d 248, 256 (5th Cir. 1997). Their conclusion that proximate cause was required by the statute possesses none of the "distinctive earmarks and weaknesses of dictum" because the excision of those statements from the opinions would "seriously impair[]

the analytical foundations of the holding." *Id.*; compare *In re: Hearn*, 376 F.3d 447, 453 (5th Cir. 2004) (defining dictum as a "mere judicial comment made during the course of a judicial opinion [that is] unnecessary to the decision").[21/]

b. Amy claims that Congress could have more clearly expressed its intent to make the proximate-result limitation applicable to all categories of losses by, for example, placing the "proximate result" language before the double-dash that opens the list of compensable losses. Amy *Paroline* Br. 45-46; see also *Amy II*, 636 F.3d at 199. This argument is beside the point: the Court's duty is to interpret the words Congress wrote, not the words it could have written. Cf. *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004) (statutory interpretation focuses on "the existing statutory text"); *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it."). And as the Supreme Court recently reiterated, "[w]hen we interpret

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[21/] Amy also suggests, apparently as a further reason to dismiss these considered decisions, that "most" child pornography victims are not represented by counsel, Amy *Amicus* Br. 6 n.3, but this assertion, even if correct, fails to recognize that she and Vicky – the victims in the majority of the recent decisions interpreting Section 2259 – have long been represented by counsel who have actively participated in the appellate litigation before this Court and other circuits as well. See *Monzel*, 641 F.3d at 535-537 (rejecting Amy's argument that proximate cause is not required).

a statute, we cannot allow the perfect to be the enemy of the merely excellent. Congress expressed itself clearly in [the statute], even if armchair legislators might come up with something even better." *Tapia* v. *United States*, 131 S. Ct. 2382, 2389 (2011). Here, the text, as Congress chose to write it, reflects its intent to make the proximate-result limitation applicable across the board.[22/]

c. Amy contends (Amy *Paroline* Br. 41, 45-46) that differences in the punctuation and syntax between the statute at issue in *Porto Rico* (*i.e.*, a list of objects embedded in a single paragraph separated by commas) and Section 2259 (*i.e.*, a list broken out into different subsections separated by semicolons) demonstrate that the proximate-result language is limited to the catchall category of losses. She is once again incorrect, not only because "[e]ither punctuation device is an acceptable method of separating clauses," *Wright*, 639 F.3d at 687 n.3 (Davis, J., concurring specially) (citing Bryan

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[22/] The fact that another mandatory restitution statute governing telemarketing fraud enacted at the same time as Section 2259 defines the full amount of the victim's losses to mean "all losses suffered as a proximate result of the offense," 18 U.S.C. § 2327(b)(3); see Amy *Amicus* Br. 21-23, is not determinative of the question posed here because Section 2327 does not include a list of compensable losses. At most, this shows that Congress has varied the precise coverage of enumerated categories of losses in different restitution statutes. Indeed, two other statutes, 18 U.S.C. § 2248 and 18 U.S.C. § 1593, which provide for mandatory restitution for sexual abuse and human trafficking offenses, parallel Section 2259. The decision to break out specific categories of losses simply reflects Congress's decision to emphasize that certain such losses are compensable. See *Kearney*, 2012 WL 639168, at *14 n.13.

A. Garner, *The Redbook: A Manual on Legal Style* 1-15 (2d ed. 2006)), but also because "[p]unctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute * * * to give effect to what otherwise appears to be its purpose and true meaning." *Barrett* v. *Van Pelt*, 268 U.S. 85, 91 (1925). More recently, the Supreme Court explained that, "[n]o more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning." *U.S. Nat. Bank of Oregon* v. *Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993). And, heeding this admonition, the Supreme Court in *United States* v. *Hayes*, 555 U.S. 415 (2009), held that a statute's use of clauses separated by a line break and a semicolon did not determine Congress's intent, as the court of appeals had concluded, *id*. at 423, and that even though Congress perhaps could have "better conveyed" its intentions had it written the statute differently, its "less-than-meticulous" drafting did not obscure its intentions. *Id*. at 423. The same is true here: Congress's choice of "[p]unctuation [should] not be used to emasculate [the] statute." *In re: Vose's Estate*, 276 F.2d 424, 428 (3d Cir. 1960).

d. Nor, again contrary to Amy (Amy *Paroline* Br. 42), do grammatical differences between Section 2259 and the *Porto Rico* statute

compel a different conclusion. Courts "do[] not review congressional enactments as a panel of grammarians," *Flora* v. *United States*, 362 U.S. 145, 150 (1960), and "there is no rule of law that compels [courts] to assert the strictest tenets of English grammar over the demonstrable intent of the legislators." *Entertainment Productions, Inc.* v. *Shelby County, Tenn.*, 588 F.3d 372, 387 (6th Cir. 2009). Although grammar may sometimes be helpful in confirming the meaning of statutory text, the Supreme Court has cautioned against "apply[ing] the rules of syntax to defeat the evident legislative intent." *Costanzo* v. *Tillinghast*, 287 U.S. 341, 344 (1932); see also *Dole* v. *United Steelworkers of America*, 494 U.S. 26, 40 (1990) ("While the grammar of this text can be faulted, its meaning is clear."); cf. *Lamie*, 540 U.S. at 534 ("The statute is awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue.").[23/]

[23/] Amy implies that the age of the *Porto Rico* decision justifies a refusal to follow it. Amy *Paroline* Br. 41 (referring to *Porto Rico* as an "obscure ninety-year-old" decision). But Supreme Court precedent "must be followed by the lower federal courts," *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982), regardless of its perceived wisdom, *id.*, or its age, cf. *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010) (reaffirming nineteenth-century precedent interpreting the Second Amendment). In actuality, the age of the *Porto Rico* decision reinforces its relevance because Congress is presumed to be familiar with Supreme Court precedents and to expect that its legislation will be interpreted in conformity with those precedents. See, *e.g.*, *Porter* v. *Nussle*, 534 U.S. 516, 528 (2002); *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995). It should come as no surprise to Congress, then, that courts would interpret the statutory list of compensable losses in Section 2259(b)(3) against the backdrop of the *Porto Rico* decision.

e. Amy asserts (Amy *Paroline* Br. 43-44) that her construction of Section 2259(b)(3) accords with the rule that "a qualifying phrase in a statute usually is construed to apply to the provision or clause immediately preceding it." *Free* v. *Abbott Labs. Inc.*, 164 F.3d 270, 276 (5th Cir. 1999). Yet even the primary authority on which she relies concedes that this rule of the last antecedent "is not * * * absolute and can assuredly be overcome by other indicia of meaning." *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003) (citing 2A Singer, *Statutes and Statutory Construction* § 47.33 at 369 ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.")). Unlike the statute at issue in *Barnhart*, Section 2259 does contain "other indicia of meaning" that counsel against reading it to dispense with a proximate-result requirement. The rule of the last antecedent, therefore, poses no impediment to the Court's ability to interpret this statute in the same, reasonable way that seven other courts of appeals have interpreted it: to extend the proximate-cause requirement to all categories of compensable losses. See *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 331 (1993) (declining to apply the rule of the last antecedent, even though it might have made sense as a grammatical matter, because doing so would have defeated

another "more reasonable" interpretation).[24/]

3. The Government's Construction Of Section 2259 Avoids Any Possible Constitutional Questions.

For the reasons set forth above, Section 2259 clearly requires proof of proximate cause for all categories of losses. Construing the statute in this manner, we note, also has the added virtue of avoiding any potential constitutional questions that might otherwise arise from the contrary construction. See generally *Rust* v. *Sullivan*, 500 U.S. 173, 190 (1991) ("[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available.").

Section 2259 serves an obvious compensatory function for victims who suffer identifiable losses, but it remains "a criminal penalty and a component of the defendant's sentence." *Adams*, 363 F.3d at 365. As such, an order requiring a defendant to pay mandatory restitution without regard for a proximate-cause limitation could, in theory, be challenged on the ground that it subjected the defendant to excessive punishment. Indeed, in

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[24/] Nor, as Amy asserts (*Paroline* Br. 42-43), is the applicability of the *Porto Rico* rule defeated on the ground that the proximate-result language in the catchall does not apply "as much" to the enumerated categories preceding it. To the contrary, the catchall's reference to "other" losses proximately resulting from the offense indicates that Congress envisioned that all categories of compensable losses were subject to the same proximate-result limitation.

the wake of *United States* v. *Bajakajian*, 524 U.S. 321 (1998), which held that an order of criminal forfeiture was subject to scrutiny under the Excessive Fines Clause of the Eighth Amendment because forfeiture "constitute[s] punishment for an offense," *id*. at 328, some courts of appeals have subjected mandatory restitution awards to Excessive Fines Clause scrutiny as well. See, *e.g.*, *United States* v. *Newsome*, 322 F.3d 328, 342 (4th Cir. 2003); *United States* v. *Dubose*, 146 F.3d 1141, 1145-1146 (9th Cir. 1998); see also *United States* v. *Lessner*, 498 F.3d 185, 205-206 (3d Cir. 2007) (assuming arguendo that "mandatory restitution implicates the Eighth Amendment").

The district court in *Paroline* cited these decisions to support its conclusion that a proximate-cause requirement applies to all categories of losses under Section 2259. In that court's view, Amy's contrary reading of the statute would result in "a restitution order that is not limited to losses proximately caused by the defendant's conduct [and] would, under most facts, including these, violate the Eighth Amendment." *United States* v. *Paroline*, 672 F. Supp. 2d 782, 788 n.9 (E.D. Tex. 2009); see also *United States* v. *Berk*, 666 F. Supp. 2d 182, 188 n.5 (D. Me. 2009) ("The Court has serious concerns about whether a restitution order of the sort the Victims propose – one not limited to losses proximately caused by the offense of

conviction – would withstand constitutional scrutiny.").

This Court did not "share" the *Paroline* district court's excessive-punishment concern, *Amy II*, 636 F.3d at 201, but that was not because the Court found this concern irrelevant or misplaced; rather, it was because the Court believed this concern could be mitigated by the "possibility" that a defendant who paid excessive restitution could seek contribution from other non-paying defendants, *id*. But as we explain *infra*, pp. 84-87, there is no federal cause of action for contribution in this setting, so this possibility cannot mitigate this risk. The better approach, therefore, is for the Court to interpret Section 2259(b)(3) in accordance with its text to require proximate cause for all categories of losses.

C. The District Court Must Order Wright To Pay Amy The Full Amount Of Her Losses That Proximately Resulted From Wright's Offense.

The parties agree, over Amy's objection, that Section 2259(b)(3) conditions an award of restitution on a showing that the victim's losses proximately resulted from the defendant's offense. This agreement "implies more harmony than there is," *Kearney*, 2012 WL 639168, at *13, however, because the parties and Amy have a fundamental disagreement about the meaning and content of that standard, and its application in possession

cases.

At one extreme, Amy's position is that proximate cause is not required outside of the catchall category, and therefore, every individual possessor of her images is liable to her for the full amount of her claimed losses, jointly and severally with other possessors. Amy *Paroline* Br. 47-63, 73; Amy *Amicus* Br. 27-28. Wright takes an equally extreme position in the other direction: he contends that the government has not met its burden of proving the extent to which he has contributed to Amy's overall harms. Wright Br. 13-16; see *id*. at 15 ("[T]he government failed to prove a specific loss suffered by Amy as a proximate result of Wright's possession of her image."). According to Wright, the fact that Amy would need therapy even if he had never possessed her images means that none of her losses proximately resulted from his offense. Wright Br. 13-15; *id*. at 15 ("There is no evidence Amy incurred any incremental loss by virtue of Wright viewing her image, or conversely, that she would have suffered a smaller loss had Wright not done so.").

The Court should reject the competing, all-or-nothing approaches advanced by Amy and Wright because they are unsound and incorrect; instead, the Court should embrace the government's balanced approach,

under which proximate cause is required but may be satisfied by proof that addresses the aggregate harms caused by all possessors. Cf. *United States* v. *Vaknin*, 112 F.3d 579, 588 (1st Cir. 1997) (rejecting the "extreme positions" advanced with respect to the proper standard of causation under the VWPA).

1. The Government's Position: Wright's Conduct Was A Cause Of Amy's Losses And A Reasonably Foreseeable Consequences Of That Conduct.

The First and Sixth Circuits have concluded that the statutory proximate-cause standard under Section 2259(b)(3) requires proof that the victim's "losses" (1) were caused in fact by the defendant's offense, and (2) were a reasonably foreseeable consequence of that offense. See *Kearney*, 2012 WL 639168, at *14; *Evers*, 669 F.3d at —, 2012 WL 413810, at *11. This Court should adopt this approach.

a. Causation In Fact. The causation-in-fact standard is a familiar one: it requires proof sufficient to permit the court to find, by a preponderance of the evidence, that the defendant's conduct was *a* cause of the victim's losses. Where the conduct involves the possession of the victim's images, this requirement will be satisfied if the evidence shows (as it does here) that the victim's losses relate to the treatment of the harms she

has suffered as a result of a defendant-possessor's invasion of her privacy. As other circuits have recognized in upholding restitution awards to Vicky, she is entitled to compensation for counseling costs relating to the treatment of the injuries she suffered as a result of the invasion of her privacy. See *Kearney*, 2012 WL 619138, at *14 (possessor/distributor liable for Vicky's "mental-health treatment"); *McDaniel*, 631 F.3d at 1209 (possessor liable for Vicky's "clinical therapy"). That conclusion faithfully applies traditional tort law principles of causation to this setting.

Under basic tort-law principles, an act is generally regarded as the "cause" of an event if the event would not have occurred but-for the actor's conduct. Prosser § 41, at 265. The but-for test "serves to explain the great[] number of cases," but there is "one situation in which it fails." *Id*. at 266. That important, but "relatively infrequent[]" scenario, *id*. at 268, arises when two or more causes join together to bring about a result, and either one of them, operating alone, would have been sufficient to cause the same result. The classic example is where a defendant sets a fire, which then merges with a fire set by another defendant, and the combined fires then burn the plaintiff's property, but either fire, standing alone, would have led to the same result. In that scenario, neither defendant's conduct can be said

to have been a "but-for" cause of the harm, yet it is clear that the plaintiff's inability to differentiate and prove whose fire burned his property should not absolve the defendants of liability. See Prosser § 41, at 266. In the common-law tradition, courts recognized an alternative causation standard for these types of multiple-tortfeasor cases, known as the "substantial factor" test, in order to avoid the absurdity of what Judge Posner has described as the "let me off because the other guy may have done it" defense to liability. See *BCS Services, Inc.* v. *Heartwood 88, LLC*, 637 F.3d 750, 754 (7th Cir. 2011).

Modern authorities endorse this alternative approach to causation using a slightly different rubric, what Dean Prosser has described as the "more helpful" lexicon of "aggregated" harm. This multiple-tortfeasor standard of causation provides that, "[w]hen the conduct of two or more actors is so related to an event that their combined conduct, *viewed as a whole*, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event." Prosser § 41, at 268 (emphasis added); see also Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 reporters' n. cmt. g (2010) (causation exists even where "none

of the alternative causes is sufficient by itself, but together they are sufficient" to cause the injury); see also *id.* § 36 cmt. a ("[E]ven an insufficient condition * * * can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm.").

The First Circuit recently endorsed this "widely accepted" approach to causation involving multiple possessors of an exploited child victim's images, and, in doing so, emphasized that the "[r]esults reached in reported decisions are 'almost uniformly consistent' with this principle." *Kearney*, 2012 WL 639168, at *15 (quoting Prosser). In upholding a restitution award to Vicky, the *Kearney* court reasoned that, because causation "exists on the aggregate level," there is "no reason to find it lacking on the individual level." *Id.* "Taken as a whole," the court explained, the conduct of the viewers and distributors of the child pornography depicting the victim "caused the losses she has suffered." *Id.* To illustrate the point, *Kearney* discusses a case that is addressed by the Restatement's reporters in which a liquor store was found not liable under a dramshop statute because the two "sips" of wine that it provided to the intoxicated driver did not substantially contribute to the driver's elevated blood-alcohol level. See *Kearney*, 2012 WL 638169, at *15 n.14 (citing Restatement (Third) of Torts:

Liability for Physical and Emotional Harm § 27, reporters' n. cmt. i (2010)). "In discussing the 'difficulty with such small potential causes,' the reporters remark 'what if the driver had obtained wine from two dozen different sources and drank two gulps from each source, resulting in his intoxication? The conclusion that none of the sources was a cause of his intoxication is obviously untenable.'" *Kearney*, 2012 WL 639168, at *15 n.14. It is just as "obviously untenable" to conclude that an individual possessor is not liable to Amy for being a member of the class of possessors who caused her overall harms. The evidence in this case shows that the conduct of Wright, no less than Paroline and other possessors and downloaders of Amy's images, viewed in the aggregate, has invaded Amy's privacy and caused her to incur, and continue to incur, financial losses to treat those injuries. Wright's conduct, therefore, is a cause in fact of Amy's losses relating to those injuries.

The causation approach we advocate focuses on an aggregated approach, and although this standard prevents possessors from escaping liability based on the failure to prove their specific contribution to the victim's overall harm, the standard does serve to limit a defendant's responsibility in two important ways. First, even though a possessor will

generally be liable to the victim for counseling and other costs associated with treating the privacy harms he and others have caused, a possessor cannot be held liable for treatment costs the victim has incurred *before* the defendant possessed those images. A defendant who invades the victim's privacy today plainly did not "cause" the victim to incur expenses associated with the treatment of those injuries that were inflicted by other persons' invasions of her privacy days, weeks, months, or years earlier. See *United States* v. *Inman*, 411 F.3d 591, 595 (5th Cir. 2005) (reversible plain error to order restitution for transactions that occurred two years before the conduct alleged in the indictment). In addition to limiting liability for pre-offense costs, the requirement of causation in fact also limits a defendant's liability for any post-offense costs that are attributable exclusively to the treatment of a distinct injury unrelated to the privacy injury the possessor caused. If, for example, a hypothetical victim was required to undergo a series of surgical procedures to treat injuries relating to the initial acts of sexual abuse she suffered, a possessor cannot be held liable for those costs, even if they were incurred after he committed his offense, because his conduct – invading the victim's privacy – did not cause the victim to suffer those distinct losses.

b. Foreseeability. Even though a defendant's conduct may have been a cause in fact of the victim's losses, "[i]njuries have countless causes, and not all should give rise to legal liability." *McBride*, 131 S. Ct. at 2637. Some losses, in other words, are too far removed on the causal chain to justify the imposition of liability. *Id*. ("To prevent infinite liability, courts and legislatures appropriately place limit on the chain of causation that may support recovery on any particular claim."). The defendant's actions may have caused those losses, but the law recognizes that he did not "proximately" cause them, and therefore, the law does not hold him liable for those costs. As we have explained, Section 2259(b)(3) imposes a proximate cause limitation.

The First and Sixth Circuits recently concluded that Section 2259's proximate-cause requirement focuses on whether the victim's losses were "reasonably foreseeable consequences" of the defendant's conduct. See *Kearney*, 2012 WL 639168, at *14 ("Vicky clearly suffered harms that will require substantial mental-health treatment. These harms, and Vicky's resulting need for mental-health treatment, were reasonably foreseeable at the time of Kearney's conduct."); *Evers*, 669 F.3d at —, 2012 WL 413810, at *11 (affirming restitution award to a minor victim's guardian, who was

determined to be a victim in his own right under Section 2259(c), for lost income because those losses were reasonably foreseeable consequences of the defendant's actions). That view is not only sensible, it also is consistent with this Court's adoption of a "reasonable foreseeability" standard for proximate causation in analogous contexts. See *In re: Fisher*, 640 F.3d 645, 648 (5th Cir.) (person seeking victim status under the CVRA is "proximately harmed" if their harm was "a reasonably foreseeable consequence of the [defendant's] criminal conduct"), aff'd on denial of motion to reconsider, 649 F.3d 401 (2011); cf. *In re: Great Lakes Dredge & Dock Co., LLC*, 624 F.3d 201, 212 (5th Cir. 2010) (employing a similar foreseeability approach to proximate cause under maritime law).

Applying this standard here, the Court should conclude, as the First Circuit did, that it is reasonably foreseeable to a possessor of child pornography like Wright that the victim depicted therein will incur the kinds of costs for which Amy seeks restitution, namely, future counseling needs to treat her harms and lost wages stemming from her inability to hold gainful employment. These are mainstream consequences of a possessory offense that are a "readily foreseeable result of * * * possession of child pornography," and it is fair and appropriate to hold a defendant liable for

those costs. *Kearney*, 2012 WL 639168, at *14; see also *id*. (Congress's explicit inclusion of medical services costs as reimbursable expenses indicates its belief that such costs "were sufficiently foreseeable").

Of course, the foreseeability standard, like the cause-in-fact standard, will operate to preclude a possessor from being held liable for any pre-offense costs the victim incurred: past costs, by definition, cannot be foreseeable. See *United States* v. *Carreon*, 11 F.3d 1225, 1235 (5th Cir. 1993) (defining foreseeability as forward looking). There may also be exceptional cases in which certain claimed losses would not be reasonably foreseeable to a possessor. As the D.C. Circuit hypothesized, even though a defendant-possessor can reasonably foresee the victim's need for counseling and the victim's inability to work as a result of his conduct, he likely could not foresee that he would be held to pay the victim for medical costs relating to the treatment of injuries she suffers in a car accident on the way to a counseling session made necessary by his possessory conduct. See *Monzel*, 641 F.3d at 538 n.7.

c. Calculating How Much Of Amy's Losses Wright Caused. A possessor like Wright thus is responsible to Amy for the full amount of her post-offense losses that he is proven to have caused and that were reasonably foreseeable to him. The final question concerns how to determine how much of Amy's proven losses Wright caused, and thus how much is owes her.

The determination of the "full amount of the victim's losses" that the defendant caused should proceed in two steps. The district court must initially determine the pool of Amy's provable losses in accordance with the causation standard we have outlined above and in light of the existing record evidence and any supplemental evidence that Amy may wish to submit to support her claim. Thus, at a minimum, the court may not order Wright to pay Amy any costs she incurred prior to March 26, 2009, the date of his offense (which would include her expert fees and the portion of her 2009 counseling costs before that date), and it must find, by a preponderance of the evidence, that the record reasonably supports her claim for any future losses and that those losses were reasonably foreseeable consequences to Wright of his conduct. Once made, these determinations

will determine the pool of proven, compensable losses.[25/]

At that point, the district court must determine how much of that pool of proven losses Wright caused. We recognize that there is a lack of consensus among courts on this difficult issue, owing to both the complexity of the issue and the broad discretion accorded district courts in determining the amount of restitution. In recognition of this discretion, and the complexity of this issue, the courts of appeals have tolerated various approaches as long as the amount ordered reflected a "reasonable estimate" of the victim's losses and was not based on an "arbitrary calculation." See, *e.g.*, *Amy I*, 591 F.3d at 797 (Dennis, J., dissenting); see also *United States* v. *Gutierrez-Avascal*, 542 F.3d 495, 497 (5th Cir. 2008) (propriety of a particular award of restitution is reviewed for an "abuse of discretion"). As is true with respect to any exercise of judicial discretion, different courts may permissibly reach different results in different cases involving the same evidence. See *McCleskey* v. *Kemp*, 753 F.2d 877, 898 (11th Cir. 1985) ("The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within

[25/] The considerations are slightly different for Paroline's case. He committed his offense in July 2008, so there are no pre-offense counseling costs to exclude, and he may rightly be held responsible for Amy's expert costs.

the range of discretion, all are correct in the eyes of the law."); cf. *United States* v. *Anonymous Defendant*, 629 F.3d 68, 78 (1st Cir. 2010) ("There is normally no single appropriate [substantively reasonable] sentence but, rather, a range of reasonable sentencing options."). Thus, other courts of appeals have affirmed a range of awards in favor of Vicky using different approaches, and, in the eyes of the law, each of these results is correct.

But even though there are different, defensible ways to approach this issue, the most reasonable method, in our view, given the facts and circumstances of Amy's situation (or that of any other victim whose images have been widely disseminated and viewed over the Internet) is for the court to divide the pool of Amy's proven losses by the number of defendants convicted of possessing Amy's image, which, today, is approximately 150.[26/] This approach has many virtues among the various

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[26/] The law regarding the calculation of an order of criminal restitution requires the district court to use a reasonable, non-arbitrary method of estimating the amount of victim's losses; mathematical precision is not required. See *United States* v. *Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007); *United States* v. *Laney*, 189 F.3d 954, 967 n.14 (9th Cir. 1999); see also *Amy I*, 591 F.3d at 797 (Dennis, J., dissenting). It is reasonable in our view to use as a divisor the number of individuals who have been proven beyond a reasonable doubt to have possessed Amy's images, in violation of law. Wright may argue that a different number, perhaps the total number of persons who possessed Amy's images, should be used as the divisor, in order to reduce the overall award. Although Wright should be given an opportunity in any remand to persuade the district court to use a different divisor, he must base his arguments and figures on evidence, not speculation. And in making findings regarding an appropriate divisor, the district court

(continued...)

approaches that have been used. It reflects the reality that many individuals have contributed to Amy's harms and losses, and seeks to distribute responsibility for the total amount of proven losses Amy has incurred and will incur in treating those harms among the most culpable and readily-definable population of offenders – those for whom we have the highest degree of certainty as to their guilt and, hence, their concrete contribution to Amy's losses. This approach also avoids the risk of exposing an individual defendant to excessive restitutionary liability – a risk that, contrary to Amy, cannot be mitigated by a non-existent action for contribution, see *infra*, pp. 84-87 – while simultaneously seeking to ensure that Amy will receive a steady stream of incoming payments over time from multiple persons, which, in turn, will enable her to meet her financial obligations as they arise. The object of restitution is of course to make the victim whole, and this approach is a sensible way to achieve that objective.

[26/](...continued)
should take care to ensure that it does not use a divisor that would result in an award of restitution that is so nominal that it would contravene Congress's intent to provide meaningful compensation to exploited child victims. Cf. Amy *Paroline* Br. 69-71 (criticizing a hypothetical approach that would divide Amy's claimed losses by "100,000 viewers" of her images to result in a $33 award).

As noted, other courts have adopted other approaches. Early on, a few courts concluded that every offender was required to pay Amy the $3.4 million she sought, but that approach has not gained much traction and, as we discuss *infra*, there are substantial reasons to doubt its permissibility. Furthermore, in one case where the district court ordered this amount of restitution, the court of appeals vacated the award, albeit on other grounds. See *McGarity*, 669 F.3d at —, 2012 WL 370104, at *34-*39. Other courts have declined to impose the $3.4 million figure Amy seeks and have instead attempted to "apportion" liability amongst all defendants – in effect finding that an individual possessor is responsible to Amy for a discrete share of her total $3.4 million in losses by using formulas that involve (1) awarding Amy a percentage of the $150,000 liquidated-damages provision in 18 U.S.C. § 2255, see *Amy I*, 591 F.3d at 797 (Dennis, J., dissenting) (suggesting Section 2255 provides a benchmark); *United States* v. *Reynolds*, 2011 WL 1897781, *5 (E.D. Cal. May 18, 2011) (unpub.) (awarding Amy $3,000 from a possessor, which represented 2% of the $150,000 liquidated damages figure); (2) using a multi-factor test taking into account considerations such as the number of defendants prosecuted to date for offenses involving the victim's images, the dollar value of the restitution awards, the average

award from reported cases excluding one high outlier, and the degree of likelihood that many more defendants will be convicted for unlawfully possessing or receiving images of Vicky, see *United States* v. *Brannon*, 2011 WL 2912862, *9 (N.D. Ga. May 26, 2011) (unpub.); or (3) using an average-of-prior-awards approach, see *Kearney*, 2012 WL 639168, at *17. We do not rule out the possibility of using these alternative approaches in other cases and contexts, subject to the limitations set forth above, but in our view, the most reasonable approach that implements Congress's intent is to divide Amy's proven losses by the number of convicted offenders.

2. The Competing Proposals By Wright And Amy Are Flawed And Should Be Rejected.

The government's middle-ground approach avoids the diametrically opposite, all-or-nothing approaches advanced by Wright and Amy, each of which is deeply flawed.

a. Wright's Position: No Possessor Owes Amy Any Restitution.

Wright urges this Court to adopt the same rigorous definition of the statutory proximate-result requirement in Section 2259 that the district court adopted in *Paroline* and that has since been adopted by three circuits. Under this standard, the government bears the "incredibly difficult," if not

"impossible," burden, *Paroline*, 672 F. Supp. 2d at 792-793, of determining the extent to which a particular defendant's conduct, viewed in isolation from the conduct of other similar defendants, has contributed to Amy's overall harm. Wright Br. 13-17 (relying on *McGarity*, *Aumais*, and *Kennedy*). Not surprisingly, the courts that have adopted this approach have denied Amy any restitution, concluding that neither her victim impact statement nor Dr. Silberg's report suffice to show the extent to which a particular defendant's conduct increased Amy's overall harm. As a result, these courts denied Amy any restitution despite their acknowledgment that she was a victim who had suffered losses.

This approach is misguided: it transforms a doctrine whose central purpose is to guard against excessive and unforeseeable liability into a complete immunity from liability – a result demonstrably at odds with Congress's intent "to compensate the victims of sexual abuse for the care required to address the long-term effects of their abuse." *United States* v. *Laney*, 189 F.3d 954, 966 (9th Cir. 1999). This Court should reject the precedents adopting this approach on which Wright relies and instead follow the First Circuit's more sensible approach, which rejects a microscopic, disaggregated approach to causation in favor of a more

pragmatic one that focuses on the aggregate harms of possessory offenses. *Kearney*, 2012 WL 639168, at *15. Indeed, the contours of any statutory proximate-cause standard are supposed to be shaped and informed by considerations of "public policy," *CSX Transp.*, 131 S. Ct. at 2637 (quoting *Palsgraf* v. *Long Island R. Co.*, 248 N.Y. 339, 352 (1928) (Andrews, J., dissenting)), and the results reached by the Second, Ninth, and Eleventh Circuits cannot be squared with the pro-victim policies in Section 2259.[27/]

These courts' disaggregated approach to causation incorrectly focuses on the absence of proof that any single additional instance of the possession of Amy's images, in and of itself, increased her overall harm. See Wright Br. 15 (no evidence Amy incurred "an incremental loss by virtue of Wright viewing her image"). This approach splits the proximate-cause inquiry too finely. "[A]lthough such an explanation would be *sufficient* for a finding of causation, it is not *necessary* for such a finding." *Kearney*, 2012 WL 639168, at *15. The better view recognizes that a defendant possessor's conduct

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[27/] Although we agree with Amy (Amy *Amicus* Br. 5-8) that this Court should reject the proximate-cause analysis of the Second, Ninth, and Eleventh Circuits, we disagree with Amy that the court should do so because those cases were decided without "adversarial briefing." Amy *Amicus* Br. 6. In appellate cases where the district court has applied the correct legal standard, the government supported orders granting restitution to the victims and opposed the defendants' claims that restitution was inappropriate. That the government agreed with the defendants as to how the statute should be construed does not mean that the cases were decided in a non-adversarial setting.

contributes to an overall "state of affairs" in which the victim's harm is "worse than would have otherwise been the case" without that conduct. *Id.* As such, a victim's recovery is not conditioned on proof that "a specific defendant's viewing * * * of [a victim's] images" resulted in "specific losses" attributable "to that defendant's actions." *Id.* Indeed, Wright's attempt to absolve himself of liability relies on "skewed 'logic.'" *Id.* In cases where multiple individual tortfeasors cause harm, the refusal to focus on the aggregate harm would permit culpable defendants "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, § 41, at 268-269, quoted in *Kearney*, 2012 WL 639168, at *15.

Nor would this construction of the statutory proximate-cause requirement "further Congress's overriding objective" – "ensur[ing] that victims receive full compensation for the losses they have incurred," *Kearney*, 2012 WL 639168, at *16. Instead, it would "produce a result at odds with" the statute's compensatory purpose. *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 55 (1983); see also *Kearney*, 2012 WL 639168, at *16

("Interpretation and application of the concept of proximate cause must be consistent with the congressional purpose of Section 2259 of ensuring full compensation of losses for the victims of child pornography."). This Court should be wary of embracing an interpretation of Section 2259 that would "functionally preclude[] any award of restitution." *Id.*; see also *Evers*, 669 F.3d at —, 2012 WL 413810, at *6 (rejecting a defendant's "narrow reading" of the definition of a victim in Section 2259(c) because it would "thwart [the statute's] purpose").

Finally, in denying restitution, these courts have emphasized the absence of evidence that the victim had specific knowledge of the defendant's identity. See, *e.g.*, *Kennedy*, 643 F.3d at 1263 (deeming significant the absence of evidence that the victim was notified that the defendant possessed her image and suffered as a result thereof); *Aumais*, 656 F.3d at 154-155 (to the same effect); see also *McGarity*, 2012 WL 370194, at *37-*38 (following *Aumais*). Wright seizes on these statements and urges the Court to deny restitution because "[t]here was no evidence that Amy knew Wright or knew he had seen her image." Wright Br. 15. This Court should not require such proof. It is unclear what purpose, if any, it would serve, or why evidence that a victim had a generalized knowledge of the

existence of a class of persons who have possessed her images should not suffice. Here, for example, Amy knew her attorney was receiving victim impact notices related to prosecutions of persons involving her images; and she represents that her counsel "keeps her generally apprised" of the pendency of these cases, Amy *Amicus* Br. 25, and the fact that he is taking steps to seek restitution from those defendants in those cases. Nothing more should be required. See *id*. at 25 (counsel "does not engage in the meaningless exercise of reciting each and every name" to Amy).

Adoption of such a requirement also ignores the potentially devastating psychological impact of such a knowledge-based requirement. As Amy represents, her counsel's approach of not telling her the names of the offenders "is consistent the advice Amy's counsel received from Amy's forensic psychiatrist." Amy *Amicus* Br. 26; see also Silberg Rep. at 3, 9 (discussing the risks and setbacks for Amy's course of treatment in the event she were to be re-traumatized). There is no warrant for effectively forcing the victim to assume the risk of re-traumatization as the price of seeking restitution, particularly when the victim's decision is informed by concerns for her emotional health and well-being. See Amy *Amicus* Br. 26 (urging the Court not to construe Section 2259 to require counsel to "add to Amy's

trauma"). It defies reality to think that Congress, in enacting a broad remedial statute for the benefit of innocent child victims, would have wanted courts to apply a standard of causation that would "intensify the harm they have already suffered as a condition of obtaining restitution." *Kearney*, 2012 WL 639138, at *14.

b. Amy's Position: Every Possessor Owes Her $3.4 Million Jointly And Severally.

Amy's view is that Section 2259 imposes no causal limitation on her recovery for the enumerated categories of losses for which she seeks recovery, and therefore, she is entitled to a restitution award of more than $3 million dollars from every defendant who possessed her images. She further contends that courts must order possessor-defendants to pay her that amount "jointly and severally" with other possessor defendants sentenced elsewhere. Amy *Amicus* Br. 12-13, 27-28; see also Amy Br. 73 (embracing joint and several liability). According to Amy, her approach poses no risk of excessive punishment because any defendant who believes he has paid more than his fair share may "sue other defendants for contribution." Br. 73; see generally *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 138 (2007) ("Contribution is defined as the tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than

his or her proportionate share."). And, according to Amy, this approach produces a fairer result because it "shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient." *Amy II*, 636 F.3d at 201.

As an initial matter, Amy's construction of the phrase "full amount of the victim's losses" to mean the full amount of losses that she seeks is incorrect: the statute requires that courts order defendants to pay the victim the full amount of losses "suffered by the victim as proximate result *of the offense*," 18 U.S.C. § 2259(b)(3)(F) (emphasis added), which is to say the full amount of the victim's losses that were caused by the defendant's offense, and that were reasonably foreseeable consequences of that offense. Whatever one can say about the extent to which a possessor like Wright caused Amy's losses, the record here, as in other cases, "does not establish that [an individual possessor] caused *all* of Amy's losses." *Monzel*, 641 F.3d at 537 (emphasis in original).

Furthermore, Amy's proposal to hold every possessor-defendant jointly and severally liable for more than $3 million in restitution rests on three critical assumptions: (i) that joint and several liability is statutorily permissible; (ii) that such liability, if permitted, would be warranted in this

case; and (iii) that concerns for overpayment can be mitigated through an action for contribution. None of these assumptions is correct.

(i.) No Statutory Authority. The term "joint and several liability" is traditionally used to describe the liability of multiple defendants in the same case who are each found liable for the same harms to the plaintiff; in that setting, the plaintiff is then entitled to enforce the judgment in full against any one of the defendants. See *McDermott, Inc.* v. *AmClyde*, 511 U.S. 202, 221 (1994) ("Joint and several liability applies when there has been a judgment against multiple defendants."); see also *Coats* v. *Penrod Drilling Corp.*, 61 F.3d 1113, 1116 (5th Cir. 1995) (en banc) (joint and several liability allows "[t]he plaintiff [to] collect his entire judgment from a single defendant"). Some courts, and some members of this Court, have described the restitutionary liability of a defendant convicted of possessing child pornography as "joint and several" with the liability of other defendants subject to restitution orders involving the same losses to the same victim. See *Aumais*, 656 F.3d at 155; *Kennedy*, 643 F.3d at 1265; *Monzel*, 641 F.3d at 538-539; see also *Amy II*, 636 F.3d at 201; *Wright*, 639 F.3d at 691 (Davis, J., concurring specially). But federal criminal statutes governing restitution adhere to the traditional view of "joint and several

liability," and do not authorize this sort of non-traditional "joint and several liability" (*i.e.*, liability among different defendants in different cases in different courts).

Section 2259 incorporates by reference the provisions of 18 U.S.C. § 3664 governing the "issuance" and "enforcement" of restitution orders. See *United States* v. *Witham*, 648 F.3d 40, 45-46 (1st Cir. 2011). Despite suggestions to the contrary, see, *e.g.*, *Amy II*, 636 F.3d at 200-201, neither subsection (h) nor subsection (m) of Section 3664 authorizes non-traditional joint and several liability. Subsection (h) states 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). As the D.C. Circuit has explained, the words "more than 1 defendant" and "each defendant" strongly imply "that Section 3664(h) does not apply to prosecutions where there is only one defendant." *Monzel*, 641 F.3d at 538-539; see also *Aumais*, 656 F.3d at 156 (Section 3664(h) follows the common-law view by permitting joint and several liability when there are "multiple

defendants in a single case"). The statute's use of the definite article "the" in relation to "the court" further implies that Section 3664(h) was intended to allow child-pornography possessors before a single judge to be held jointly and severally liable with other defendants before the same judge, and not, as Amy contends, to allow such liability to be imposed "in different cases, before different judges, in different jurisdictions around the country." *Aumais*, 656 F.3d at 156 (rejecting Amy's proposed reading of Section 3664(h)).

Subsection (m) states that "[a]n order of restitution may be enforced by the United States in the manner provided for" in statutes governing the enforcement of fines "or by all other available and reasonable means." 18 U.S.C. § 3664(m)(1)(A)(i)-(ii). In *Amy II*, this Court stated that the "all other available and reasonable means" language in subsection (m) permits "the court [to] enforce a restitution order [by] * * * joint and several liability." 636 F.3d at 201. But the availability of joint and several liability relates to the *issuance* of an order of restitution by the court, not its *enforcement* by the government. And subsection (m) does not authorize "the court [to] enforce" a restitution order, *Amy II*, 636 F.3d at 201, but instead expands the means by which "the United States" may enforce a restitution

award on behalf of the victim. See 18 U.S.C. § 3612(c) ("The Attorney General shall be responsible for collection of an unpaid fine or restitution.").

(ii.) No Joint and Several Liability. Even if federal law permitted the sort of non-traditional joint and several liability Amy seeks, this case would not warrant its imposition. The traditional tort-law view is that joint and several liability applies where "two or more persons cause a single and indivisible harm," in which case "each is subject to liability for the entire harm." Restatement (Second) of Torts § 875 (1965); see also, *e.g.*, *Burlington Northern & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, —, 129 S. Ct. 1870, 1881 (2009) (joint and several liability under CERCLA reserved for cases involving a "single, indivisible harm"). The universe of indivisible injuries is relatively small, and consists of those that, "by their very nature, are obviously incapable of any reasonable or practical division," such as death, a broken limb, the destruction of a house by fire, and the sinking of a barge. See Prosser, § 52, at 347; Restatement (Second) Torts § 433A, comment *i* (1965).

Amy renews her claim (Amy *Paroline* Br. 47-57) that "that the causes of her injuries cannot reasonably be divided among the unknown number

of possessors and distributors of her images and that [an individual possessor] is therefore jointly and severally liable with other possessors and distributors for the full amount of her losses." *Monzel*, 641 F.3d at 538. But the authorities on which Amy relies "undermine her argument." *Id.* Although a defendant-possessor of Amy's images has undoubtedly contributed to the losses Amy has incurred, the offender's possession of her images "was neither a necessary nor a sufficient cause of all of her losses" in view of the fact that Amy would have "suffered tremendously" due to the acts of her uncle and the acts of other possessors of her images. *Id*. at 538. Amy's losses thus do not flow from a "single, indivisible injury" – the prerequisite to joint and several liability – because no individual possessor caused "the entirety of Amy's losses," *id*. And this Court has held in the CERCLA context that the difficulty of sorting through the "baffling and intractible" problem (*Aumais*, 656 F.3d at 155) of determining the extent of an individual defendant's contribution to an overall harm is an "inadequate ground[] upon which to impose joint and several liability." *In re: Bell Petroleum Services, Inc.*, 3 F.3d 889, 903 (5th Cir. 1993).

Nor may non-traditional joint and several liability be imposed on the theory, elsewhere rejected, that Wright was in a kind of "de facto joint

enterprise with other child pornography viewers" such that "the act of one is the act of all." Amy *Paroline* Br. 50 & n.13 (quoting Prosser § 52, at 346). There is no evidence (or even an allegation) that Wright, Paroline, Monzel, or any other possessor of Amy's images acted "in concert" with any other possessor to distribute or possess Amy's images, and thus no basis for enterprise liability to attach. See *Monzel*, 641 F.3d at 539 n.10 (rejecting Amy's enterprise-liability argument); see also Prosser § 52, at 346. The fact that possessors of Amy's images created an economic incentive for other persons to create and distribute her images, Amy *Paroline* Br. 50 n.13, shows that these individuals are involved in the distribution chain, but it does not show the essential requirement of concerted action.

(iii.) No Right of Contribution. Amy contends that any risk of excessive punishment posed by the imposition of non-traditional joint-and-several liability can be mitigated in the typical tort-law fashion through an action for contribution. See Amy *Paroline* Br. 73; see also *Amy II*, 636 F.3d at 201 ("doubting" that a possessor-defendant of Amy's images would be exposed to excessive punishment in the event that a court ordered him to more than $3 million in claimed losses because of the "possibility" that the defendant could "seek contribution from other persons who possess Amy's

images"). Amy does not actually analyze whether a right of contribution exists, but merely assumes that it does. Her assumption is incorrect. The Supreme Court has held that there is "no general federal right to contribution" among joint tortfeasors. See *Northwest Airlines, Inc.* v. *Transport Workers Union of America AFL-CIO*, 451 U.S. 77, 96-97 (1981). Rather, an action for contribution exists under federal law only if Congress affirmatively creates such a cause of action, which it may do "expressly or by clear implication," *id.*, or if the federal courts, "[i]n areas where federal common law applies, * * * creat[e] a right of contribution" as an incident of their federal common-law-making power. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The application of these principles shows that there is no right of contribution here.

Unlike other statutes, such as CERCLA, nothing in the text of Section 2259 or any other restitution statute refers to "contribution," let alone creates an express right of contribution. Compare *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157, 165-166 (2004) (noting that Congress amended CERCLA to expressly create a "right of contribution"). And, even accepting the continuing validity today of implying rights of action that are not reflected in the statutory text, see *Alexander* v. *Sandoval*,

532 U.S. 275, 286-287 (2001), there simply is no basis for implying a right of contribution here. In 1981, the Supreme Court twice refused to imply a right of contribution in favor of employers sued under anti-discrimination laws, see *Northwest Airlines*, 451 U.S. at 91-93, and coconspirators who violated the antitrust laws, see *Texas Industries*, 451 U.S. at 639-640, because none of the traditional criteria used to imply a right of action showed that Congress intended to create such a remedy under those statutory regimes. Those factors are noticeably absent here as well. Nothing in the legislative history of the restitution statutes contains any indication of "congressional intent to create a cause of action for contribution." *Matter of Walker*, 51 F.3d 562, 566 (5th Cir. 1995). Nor were the restitution statutes "enacted for the special benefit of a class of which [the entity seeking contribution] is a member." *Northwest Airlines*, 451 U.S. at 91-92. To the contrary, these statutes were enacted for the specific benefit of crime victims; a defendant-possessor "can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection." *Id.* at 92 (declining to imply a right of contribution under the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964 in favor of employers because those statutes were enacted to benefit employees, not employers).

Nor is this a case where the Court may appropriately create a nonstatutory right of contribution as a matter of federal common law. The Supreme Court has recognized such a right only once in the context of an injury to a longshoreman. See *Cooper Stevedoring Co*. v. *Fritze Kopke, Inc.*, 417 U.S. 106, 110 (1974). The Court was quick to note, however, that *Cooper* "did not recognize a general federal right to contribution," but was instead a narrow decision that was based on the Court's longstanding federal common lawmaking authority over matters in admiralty. See *Northwest Airlines*, 451 U.S. at 96-97 & n.37; *Texas Industries*, 451 U.S. at 642 ("*Cooper Stevedoring* thus does not stand for a general federal common-law right to contribution."); accord *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 290 (1993). Unlike admiralty, however, there is no history of federal common-law making power with respect to criminal penalties such as restitution. See, *e.g.*, *United States* v. *Brown*, 665 F.3d 1239, 1252 (11th Cir. 2011) ("A district court lacks inherent authority to order restitution and derives it only as explicitly authorized by statute.").[28/]

[28/] Federal courts also may recognize a right of contribution under state law in cases in which state law supplies "the appropriate rule of decision," *Northwest Airlines*, 451 U.S. at 97 n.38, but this principle is inapposite here because federal, not state, law supplies the appropriate rule of decision here. *Id*. Nor is there any "plain indication" from the statutory regime that Congress intended "to incorporate diverse state laws" (continued...)

* * *

Section 2259 conditions Amy's entitlement to restitution on a showing that all of her claimed losses were the proximate result of Wright's offense. As a consequence, Wright's appeal should be dismissed because he knowingly waived his right to appeal a restitution order bounded by a proximate-cause limitation. If the Court disagrees and concludes that Section 2259 does not include an across-the-board proximate-cause requirement, then the judgment should be vacated and the case remanded to the district court with instructions to apply the causation standard this Court adopts and to then order Wright to pay Amy restitution in an amount that reflects how much of Amy's total losses Wright caused.

[28/](...continued)
governing contribution into Section 2259. *United States* v. *Turley*, 352 U.S. 407, 411 (1957) (presumption against incorporating state law into federal statutes).

CONCLUSION

The appeal should be dismissed. Alternatively, the judgment should be vacated and the case remanded for further proceedings.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing Brief for the United States to be served this 26th day of March 2012, by the Court's ECF system, on Robin Schulberg, Esq., and Paul Cassell, Esq.; and that (1) required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, pursuant to Fed. R. App. P. 32(a)(7)(C), the foregoing Brief for the United States is set in a proportionally spaced typeface (Calisto MT, 14-point type) and that it contains 19,923 words, as determined by WordPerfect 12 software, which does not exceed the 20,000 word limit authorized by this Court's order of March 21, 2012.

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