No. 09-41238

En banc *In the*

United States Court of Appeals

for the

Fifth Circuit

IN RE: AMY UNKNOWN,

Petitioner,

Consolidated with

No. 09-41254

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

DOYLE RANDALL PAROLINE,

Defendant-Appellee,

v.

AMY UNKNOWN,

Movant-Appellant.

AMY'S OPENING BRIEF ON THE MERITS

On Petition and Appeal from the United States District Court for the Eastern District of Texas

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CERTIFICATE OF INTERESTED PERSONS

These two consolidated cases (No. 09-41238 and No. 09-41254) both arise out of a criminal case which was prosecuted in the United States District Court for the Eastern District of Texas captioned *United States of America v. Doyle Randall Paroline*, Criminal No. 6:08cr61. The Government is represented by John M. Bales, Traci L. Kenner, Amanda L. Griffith, Michael R. Dreeben, Lanny A. Breuer, Greg D. Andres, and Michael A. Rotker. The defendant is an individual, represented by Stanley G. Schneider, F.R. "Buck" Files, and Tom Moran.

The underlying criminal prosecution arises out of a violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). In this action, the undersigned counsel, James R. Marsh, Esq., and Paul G. Cassell, Esq., represent one of the victims whose image was possessed by the defendant, specifically Amy, the victim in the "Misty" child pornography. Amy proceeds here (as she did in the court below) under a pseudonym to protect her privacy as a victim of child sexual assault.

Because one of the two cases is a mandamus petition, the United States District Court for the Eastern District of Texas (Davis, J.) is a nominal respondent. Fed. R. App. P. 21(b)(4).

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STATEMENT OF JURISDICTION

Amy proceeds in this Court by way of two different vehicles: first, in No. 09-41238, a Crime Victims' Rights Act (CVRA) petition, over which the Court possesses jurisdiction pursuant to 18 U.S.C. § 3771(d)(3); and, second, in No. 09-41254, a direct appeal, over which the Court possesses jurisdiction pursuant to 18 U.S.C. § 1291. The Court previously consolidated these two cases.

STATEMENT OF ISSUES

1. Is Amy entitled to de novo review of the district's legal interpretation of the 18 U.S.C. § 2259?
2. Should 18 U.S.C. § 2259 be construed to contain a general requirement that a child pornography victim establish that her losses were the "proximate result" of a defendant's crime even though no such general requirement is found in the plain language of the statute.
3. Is Amy entitled to the restitution for the "full amount" of her losses, as the statute directs, or only for a part of those losses.

STATEMENT OF THE CASE

When she was eight and nine years old, Amy was repeatedly bound and raped by her uncle in order to produce child pornography. The images of her abuse memorialize Amy being forced to endure rape, cunnilingus, fellatio, and digital penetration as a young girl. Amy was sexually abused specifically for the purpose

of producing child sex abuse images—child pornography the defendant was ultimately convicted of possessing. USCA5 337, 1084-85.[1] After this initial abuse was discovered, Amy received significant psychological counseling and (as reflected in her therapist's notes) by the end of her treatment in 1999, Amy was "back to normal" and engaged in age-appropriate activities such as dance.

Sadly, Amy's condition drastically deteriorated as she realized that her child sex abuse images are widely collected and traded. As her psychologist explained in Amy's victim impact statement, the "Misty" series depicting Amy is one of the most widely-trafficked sets of child sex abuse images in the world. As a result, Amy continues to be "known, revealed and publicly shamed, rather than anonymous . . . " USCA5 358.

The collection and trading of Amy's child sex abuse images on the Internet has caused "long lasting and life changing impact[s] on her" that "are more resistant to treatment that those that would normally follow a time limited trauma, as her awareness of the continued existence of the pictures and their criminal use in a widespread way leads to an activation in these system." The "re-victimization" Amy suffers from the continued collection and distribution of her images will last throughout her entire life:

[1] Citations in this brief to "USCA5 ___" are to the original record on appeal. Unattributed quotations in the fact section come from Amy's victim impact statement, which remains under seal in the district court in this case and is filed under seal in the record in the U.S. v. Wright companion case.

> It is expected that she will continue to struggle with the enduring effects of these traumatic experiences as described above over her lifetime. She will require weekly therapy, and it is likely there will be periods where more intensive inpatient treatment or rehabilitation services will be required over the course of her lifetime.

USCA5 358.

One of the criminals who joined in the collective world-wide exploitation of Amy is the defendant in this case: Doyle Randall Paroline. On January 9, 2009, he pleaded guilty to one count of possession of material involving the sexual exploitation of children, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). The National Center for Missing and Exploited Children (NCMEC) identified Amy as one of the children featured in the child sex abuse images he collected.[2] Amy is depicted in two of the child sex abuse images Paroline possessed.

The United States Attorney's Office notified Amy's attorney that she was a victim in this case.[3] Amy's counsel then filed a detailed Victim Impact Statement on her behalf, describing not only the harm she suffered from the sexual abuse when she was a child, but also the harm she continues to endure from knowing that

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[2] "Child pornography" is not the best term for the images of eight-year-old Amy being bound and raped. "In the context of children . . . there can be no question of consent, and use of the word pornography may effectively allow us to distance ourselves from the material's true nature. A preferred term is 'abuse images' and this term is increasingly gaining acceptance among professionals working in this area." Sharon W. Cooper, et. al., Medical, Legal, & Social Science Aspect of Child Sexual Exploitation 258 (2005).

[3] Amy's attorney currently receives, on average, one notification each day of a new federal criminal case involving Amy's child sex abuse images; total federal notifications now exceed 1500.

she is powerless to stop the collection and trading of her child sex abuse images on the Internet. USCA5 336-360. In her request for restitution, Amy sought $3,367,854 from Paroline. USCA5 349. This amount reflects the total amount of Amy's losses from the production, distribution and possession of child pornography, primarily costs for future psychological care and future lost income. USCA5 349.

On June 10, 2009, the district court (Davis, J.) sentenced Paroline to 24 months custody in the Bureau of Prisons and 120 months of supervised release. USCA5 33. During sentencing, the district court reviewed Amy's Victim Impact Statement and decided to sever the restitution issue from the other sentencing issues. The district court later received extensive briefing on the restitution question from Amy, the Government, Paroline, the National Center for Missing and Exploited Children, and the National Crime Victim Law Institute.

On August 20, 2009, the Court conducted a restitution hearing pursuant to 18 U.S.C. § 3664(d)(5). Amy's counsel presented arguments in support of her restitution request. The Government fully supported Amy's restitution request and told the district court that "[l]ooking at 2259 it appears that Congress is saying to Mr. Paroline you are now responsible for the entire amount of the damages that can be proven." USCA5 214.

The Court later received supplemental briefing from Paroline and Amy and held a second restitution hearing on October 28, 2009, where Paroline presented additional evidence and arguments opposing Amy's restitution request.

On December 7, 2009, the district court issued a memorandum opinion and order refusing to award any restitution, even though restitution is "mandatory" under 18 U.S.C. §§ 2259(a) and (b)(4). *United States v. Paroline*, 672 F.Supp.2d 781 (E.D. Tex. 2009). The court began by making a factual finding that Amy was a "victim" of Paroline's crime because she was harmed by his crime. The district court explained "the continual online distribution and possession of the child pornography images re-victimizes these child victims, stripping them of any control over the disclosure of their abuse and exposing them to further shame and humiliation." *Id.* at 787.

The district also noted that this Court previously held that a possessor of child pornography causes

> the children depicted in those materials to suffer as a result of his actions in at least three ways: (1) because the dissemination of the images perpetuates the abuse initiated by the producer of the materials, a consumer who merely receives or possesses child pornography directly contributes to the child's continued victimization; (2) because the mere existence of the child pornography invades the privacy of the child depicted, the recipient of the child pornography directly victimizes the child by perpetuating the invasion of the child's privacy; and (3) because the consumer of child pornography instigates, enables, and supports the production of child pornography, the consumer continuously and directly abuses and victimizes the child subject.

Id. at 786 (*citing United States v. Norris*, 159 F.3d 926, 929-30 (5th Cir. 1998)). The district court held that based on "the Fifth Circuit's reasoning in *Norris*, and the overwhelming amount of literature and briefing regarding the harm caused to a child depicted in child pornography, the Court finds that the Government has met its burden of establishing that Amy was 'harmed as a result of' Paroline's possession of pornographic images depicting Amy's sexual abuse." *Id.* at 787 (*citing* 18 U.S.C. § 2259(c)). The court therefore found that Amy was a "victim" of Paroline's crime. *Id.* at 785.

The district court next concluded Section 2259 requires that "a victim's losses be proximately caused by the defendant's conduct to be recoverable in restitution." *Id.* at 791. The district court explained that this conclusion was dictated by "general restitution and causation principles." *Id.*

The district court then applied the new proximate cause requirement to Amy's restitution request. Although the district court recognized that a "significant" amount of Amy's losses "are attribute[able] to the widespread dissemination and availability of her images and the possession of those images by many individuals such as Paroline," it nonetheless refused to award her any restitution: *Id.* at 792.

> The Court . . . realizes that it is incredibly difficult to establish the amount of a victim's losses proximately caused by any one defendant convicted of possession. However, the Court's sympathy does not dispense with the requirement that the Government satisfy its burden

> of proving the amount of Amy's losses proximately caused by Paroline's possession of her two images. Although this may seem like an impossible burden for the Government, the Court is nevertheless bound by the requirements of the statute.

Id. at 792-93. The district court admitted that its interpretation of the child pornography statute rendered it "unworkable." *Id.* at 793 n.12. The court concluded: "While Congress was obviously well intended in attempting to create a statutory framework to help compensate victims of child pornography, it has unfortunately created one that is largely *unworkable* in the context of criminal restitution." *Id.* at 793 n.12 (emphasis added).

Amy then promptly sought review of the district court's denial of her request for restitution. Under the Crime Victim's Rights Act (CVRA), 18 U.S.C. § 3771(a)(6), Amy has a "right" to restitution "as provided in law." Accordingly, on December 17, 2009, Amy challenged the district court's adverse restitution ruling by petitioning this Court for a CVRA writ of mandamus, as provided in 18 U.S.C. § 3771(d)(3). The Government filed a response, arguing that while it met its burden of proof on the restitution issue, it did not think the district court's error was clear and indisputable. Gov't Resp. 22-23. Paroline responded as well.

Acting within the 72-hour time frame specified by the CVRA,[4] a divided panel of this Court declined to grant any relief. *In re Amy*, 591 F.3d 792 (5th Cir.

[4] Because some crime victim's petitions must be decided rapidly to avoid continuing denials of victims' rights in the district court, the CVRA provides a

2009). The majority noted that under the "usual standard for mandamus petitions," a mandamus petitioner must show a right to relief that is "clear and indisputable"—a demanding standard of review that this Court has held must be applied to CVRA petitions. *Id.* at 793 (*citing In re Dean*, 527 F.3d 391 (5th Cir. 2008)). Under this standard, the majority concluded that "the district court did not so clearly and indisputably abuse its discretion as to compel prompt intervention by the appellate court." *Id.* at 795 (internal citation omitted).

Judge Dennis vigorously dissented. He observed that "Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse." *Id.* at 796 (Dennis, J., dissenting) (*quoting United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999)). Criticizing the district court's decision to read a proximate cause requirement into the statute, Judge Dennis declared that "Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation. Under the district court's analysis, the intent and purposes of § 2259 would be impermissibl[y] nullified because the problem of allocating restitution present here will be found in virtually every case . . . " *Id.* at 797 (Dennis, J., dissenting).

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right to a decision within 72 hours. 18 U.S.C. § 3771(d)(3). Amy moved to waive this right to a decision within 72 hours, but the motion became moot when this Court acted within the specified timeframe.

Amy then sought a panel rehearing and rehearing en banc. Amy also sought to avoid the demanding "clear and indisputable" error standard for mandamus relief by filing a notice of appeal in the district court and pursuing an appeal before this Court. On January 25, 2010, this Court granted Amy's motion to consolidate cases and treated Amy's mandamus petition as her opening brief on the merits of the appeal.

The Government then filed a motion to dismiss the appeal, arguing that Amy could not appeal from the denial of her restitution request below. The Court carried the motion with the case and ordered full briefing on the merits. The Government then filed its response brief. Concerning the district court's denial of Amy's request for restitution, the Government appeared to reverse course. While the Government supported full restitution in the district court, in its response brief before this Court the Government tersely asserted that "the government cannot assail the [district] court's legal conclusion that victim's losses must be proximately caused by the defendant's criminal conduct." Gov't Resp. at 42.

After oral argument, on March 22, 2011, a unanimous panel of this Court granted Amy's petition for panel rehearing on her mandamus petition and concluded that the district court had "clearly and indisputably erred in grafting a proximate causation requirement onto the CVRA." *In re Amy*, 636 F.3d at 192. The panel explained that Congress had included a "proximate" causation

requirement only to a catchall category of restitution losses, not to the specific enumerated restitution losses (e.g., psychiatric counseling expenses). *Id.* at 198-99. The panel reversed the district court's decision to read into the statute a general proximate cause requirement in view of the fact that "the statute manifests a congressional purpose to award broad restitution." *Id.* at 199. In light of its ruling on Amy's mandamus petition, the panel did not reach the issue of whether Amy could take an appeal.[5]

Both Paroline and the Government sought rehearing en banc of the panel's decision.[6] The Government's brief argued that a general proximate cause requirement should read into Section 2259 which could be satisfied by showing that losses to a victim were a "reasonably foreseeable" consequence of the crime.

On January 25, 2012, this Court granted rehearing en banc of Amy's two consolidated cases: her mandamus case, No. 09-41238, and her appeal case, No. 09-41254. The same day, the Court also granted rehearing en banc in another case

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[5] Chief Judge Jones also wrote a short concurring opinion discussing the "jurisdictional conundrum" raised by Amy's mandamus petition and direct appeal. Regarding the mandamus petition, Chief Judge Jones noted that this Court's decision in *In re Dean*, 572 F.3d 391 (5th Cir. 2008), applying a "clear and indisputable" standard for relief, was at odds with the decisions of several other circuits. *Id.* at 197 n.9. She also observed that the courts of appeals had employed "conflicting reasoning" in determining whether crime victims can pursue an appeal of adverse restitution rulings, an issue that she believed as one of great "difficulty." *Id.* at 196-97 (Jones, J., concurring).

[6] Unless otherwise indicated, references to "the panel opinion" are to this, the most recent panel decision.

which involves the same issue and where Amy is the crime victim, *United States v. Wright*, No. 09-31215.

Since then, Amy contacted the Government—as she has done repeatedly over the last several years—to determine how much (if any) restitution the Government will support for her in this case. To date, the Government has refused to tell Amy how much restitution it will support her receiving.

STANDARD OF REVIEW

Amy Is Entitled to De Novo Review of Whether 18 U.S.C. § 2259 Contains a General "Proximate Result" Requirement

The central issue before the Court is how to construe the child pornography restitution statute, 18 U.S.C. § 2259(b). The district court rejected Amy's request for more than three million dollars in restitution based on its legal conclusion that Section 2259 contains a general proximate cause requirement. Ordinarily, the Court would review this issue of law de novo, without deference to the district court. *United States v. Love*, 431 F.3d 477, 479 (5th Cir. 2005).

Both the Government and the defendant have previously argued, however, that Amy cannot obtain ordinary appellate review. They contend that her mandamus petition (No. 09-41238) only permits the Court to undertake deferential review of the district court's ruling for "clear and indisputable" error under *In re Dean*, 527 F.3d 391 (5th Cir. 2008) (concluding that deferential mandamus review applies to CVRA petitions filed by crime victims). The opposing parties further

contend that Amy's direct appeal (No. 09-41254) must be dismissed because she lacks the ability to appeal the denial of her request for restitution.

The Court should reject the argument that this Court lacks the ability to review the district court's legal construction of an important restitution statute for four reasons. First, this Court, acting en banc, should overrule *In re Dean* and construe the CVRA's appellate provision to fulfill Congress' intent by giving crime victims the same appellate rights that other litigants enjoy—a position that four other courts of appeals have taken.

Second, even under the conventional mandamus review principles adopted in *In re Dean*, Amy is entitled to have this Court exercise its "supervisory" mandamus power in view of the important and recurring nature of the legal question at issue in this case.

Third, in ruling on Amy's mandamus petition, the Court must first construe the legal requirements of Section 2259. Once the Court properly interprets the statute, it will be "clear and indisputable" that the district court misapplied the mandatory restitution statute below and its decision must be reversed.

And fourth, Amy is entitled to take a direct appeal from the district court's denial of her request for restitution.

A. The Court Acting En Banc Should Overrule *In re Dean* and Construe the CVRA as Guaranteeing Crime Victims the Right of Ordinary Appellate Review

Since it is acting en banc, this Court should overrule the panel decision *In re Dean*, 527 F.3d 391 (5th Cir. 2008). *In re Dean* held that crime victims seeking appellate protection of their rights under the Crime Victims' Rights Act must satisfy the demanding common law requirements for mandamus petitioners of proving a clear and indisputable error. *See id.* at 394. Four circuits now disagree with *Dean.* Forcing crime victims like Amy to demonstrate that a district court "clearly and indisputably" erred in handling a crime victims issue essentially sounds a death knell for meaningful protection of crime victims before this Court. In the new and evolving field of crime victims' rights, it will be the rare crime victim who can establish that a district court "clearly and indisputably" erred in handling a crime victims' rights issue. Such an approach frustrates Congress' intent. The full Court should reconsider *Dean* and reverse it en banc.

Dean's holding contravenes the plain language of the CVRA. The CVRA provides:

> If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall *take up and decide* such application forthwith within 72 hours after the petition has been filed.

18 U.S.C. § 3771(d)(3) (emphasis added). *Dean* did not independently analyze the standard of review issue, but instead erroneously relied on a Tenth Circuit decision, *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008). *In re Antrobus* focused almost exclusively on the phrase "writ of mandamus" and relied on the rule of statutory construction involving "borrow[ed] terms of art." *See Dean*, 527 F.3d at 393 (*citing In re Antrobus*, 519 F.3d at 1124).

Because Congress used the term "mandamus," courts could reasonably assume the term "comes with a common law meaning, *absent anything pointing another way.*" *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S.Ct. 2238, 2245 (2011) (emphasis added and internal citation omitted)). In the CVRA, something "pointing another way" stands out immediately in the statute's very next sentence! Congress instructed appellate courts to "*take up and decide* such application," 18 U.S.C. § 3771(d)(3) (emphasis added), which is a clear statement that Congress meant to overrule discretionary mandamus standards.

Under conventional mandamus standards, "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. U. S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976); *accord In re Dean*, 527 F.3d at 394 (for writ of mandamus to issue, "the issuing court, *in the exercise of its discretion* . . . [must be] satisfied that the writ is appropriate under the circumstances") (internal citation omitted) (emphasis added).

Permitting a court of appeals to decline to protect a crime victim's right in "the exercise of its discretion" disregards the congressional command that appellate courts shall "take up and decide" the victims' application. As one of the CVRA's Senate sponsors directly explained when the CVRA was enacted, Congress was changing traditional discretionary mandamus standards for CVRA cases:

> [W]hile mandamus is generally discretionary, this provision [18 U.S.C. § 3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to *broadly defend* the victims' rights.
>
> Without the right to seek appellate review and a guarantee that the appellate court will hear *the appeal* and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to *remedy errors of lower courts and this provision requires them to do so for victim's rights*.

150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Jon Kyl) (emphasis added).

A good illustration of how *In re Dean* differs from congressional intent can be found in the original panel decision in this case. Faced with a CVRA petition arguing that the district court ignored the legal requirements of a "mandatory" restitution statute, the panel did not "take up and decide" the legal issue Amy presented. Instead, the panel merely ventured that "[a]lthough this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither

clear nor indisputable that Amy's contentions regarding the statute are correct." *In re Amy*, 591 F.3d 792, 794-95 (5th Cir. 2009).

Congress required appellate courts to "decide" an application, that is, to "make a final choice or judgment about." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2006). Here, the original panel never made a final choice or judgment about whether Amy was in fact legally entitled to receive restitution. This discretionary approach to appellate review contravenes the CVRA. As one leading authority on crime victims' rights explained:

> [T]he problem in review of victims' rights is not the unavailability of writ review, but rather the discretionary nature of writs. The solution to the review problem is to provide for nondiscretionary review of victims' rights violations . . . One could not credibly suggest that criminal defendants' constitutional rights are to be reviewed only in the discretion of the court . . . The solution of Congress in [the CVRA] is excellent, providing for a nondiscretionary writ of mandamus.

Douglas E. Beloof, The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review, 2005 BYU L. Rev. 255, 347; accord Paul G. Cassell, Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision, 87 DENV. U.L. REV. 599, 621-25 (2010) (concluding *Dean* is flatly at odds with the language of the CVRA).

Another provision in the CVRA also indicates that the statute provides ordinary appellate review. The CVRA directs that "[i]n *any* court proceeding"—which includes appellate court proceedings—"the court shall *ensure* that the crime

victim is afforded the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1) (emphasis added). The congressional requirement that appellate courts "ensure" that crime victims are "afforded" their rights would be fatally compromised if those courts could only examine district court proceedings for clear and indisputable errors. In this case, for example, the original panel decision did not "ensure" that Amy had been afforded her right to restitution by the district court.

Instead of following the Tenth Circuit, *Dean* should have followed the Second, Third, Ninth, and Eleventh Circuits. The Second Circuit held that "[u]nder the plain language of the CVRA . . . , Congress has chosen a petition for mandamus as a mechanism by which a crime victim may *appeal* a district court's decision denying relief" under the CVRA, and therefore, "a petition seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir. 2005) (emphasis added).

Likewise, the Ninth Circuit stated in *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011, 1017 (9th Cir. 2006) (Kozinski, J):

> [T]he CVRA contemplates active review of orders denying victims' rights claims even in routine cases. The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition . . . and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact,

> contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.

The Eleventh Circuit, too, disagrees with *Dean*, giving crime victims ordinary appellate review. *See In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (awarding mandamus relief without requiring showing of traditional mandamus factors). The Third Circuit also disagrees, albeit in an unpublished decision. *In re Walsh*, 229 Fed. Appx. 58, 60-61 (3d Cir. 2007) (citing the 2nd and 9th Circuit decisions).

Finally, *Dean* violates a cardinal rule of statutory construction that a "statute should be read to avoid rendering its language redundant if reasonably possible." *Arana v. Ochsner Health Plan*, 352 F.3d 973, 978 (5th Cir. 2003). *Dean* interpreted the CVRA's language "the movant may petition the court of appeals for a writ of mandamus," 18 U.S.C. § 3771(d)(3), to mean only that the movant may petition for a discretionary writ of mandamus. But before the CVRA, a crime victim could (like anyone else) seek mandamus under the All Writs Act. *See* 28 U.S.C. § 1651. Thus, under the panel's interpretation, the CVRA mandamus provision is rendered utterly superfluous.

If any doubt remains about the victims' right to relief under the plain language of the CVRA, the CVRA's legislative history unequivocally demonstrates that Congress wanted crime victims "broadly" protected through traditional appellate review. The case on which *In re Dean* relied—*In re Antrobus*—did not even acknowledge the legislative history of the CVRA's mandamus petition. In

contrast, in this Circuit when a statute is ambiguous, the Court turns to legislative history. *See In re Condor Ins., Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010). A statute is "ambiguous if it is susceptible to more than one reasonable interpretation . . . " *Id.* (internal quotation omitted). The Second, Third, Ninth and Eleventh Circuits have all interpreted the CVRA mandamus petition provision as giving crime victims regular appellate review—strong evidence that a "reasonable interpretation" of the statute is the one which protects crime victim rights.

That interpretation is fully confirmed by the legislation history. One of the co-sponsors of the CVRA stated directly that the law "required" appellate courts to "broadly defend" crime victims and "remedy errors of lower courts," as quoted above. *See* 150 CONG. REC. S10912 (Oct. 9, 2004) (statement of Sen. Jon Kyl). Moreover, flatly contradicting *Dean*'s conclusion that the CVRA simply imports a "common law tradition," 527 F.3d at 393, Senator Feinstein stated directly that the Act would create "*a new use* of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of their rights by a trial court to the court of appeals." 150 CONG. REC. S4262 (statement of Sen. Diane Feinstein) (emphases added); *see also id.* (statement of Sen. Jon Kyl) (crime victims must "be able to have . . . the appellate courts *take the appeal* and order relief" (emphasis added)).

It is well settled that statements made by the sponsors of legislation "deserve to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin SNG, Inc*., 426 U.S. 548, 564 (1976); *see, e.g., United States v. Cuellar*, 478 F.3d 282, 299 (5th Cir. 2007) (looking to floor statement of bill's sponsors to determine congressional intent). *Dean* erred in not even considering the expressed views of the co-sponsors, Senators Kyl and Feinstein. *See Kenna,* 435 F.3d at 1015 (giving significant weight to Senators Kyl and Feinstein's unchallenged remarks about the CVRA and noting that "they expressed . . . a consensus, at least in the Senate"). In sum, *Dean*'s approach defies the basic architecture of the CVRA, for "without the ability to enforce [victims'] rights in the criminal trial and *appellate* courts of this country, any rights afforded are, at best, rhetoric." 150 CONG. REC. S10912 (statement of Sen. Jon Kyl) (emphasis added).

B. Even Under Traditional Mandamus Standards, Amy is Entitled to have the District Court's Erroneous Legal Conclusion Reviewed Through This Court's Supervisory Mandamus Power

Even if this Court en banc decides to adhere to *In re Dean*, Amy is still entitled to have the district court's legal interpretation of Section 2259 reviewed de novo. *In re Dean* merely holds that traditional mandamus standards of review apply to this Court's review of a CVRA petition. 527 F.3d at 394. In most cases, this would require a crime victim to meet a demanding three-prong test: "(1) the petitioner has no other adequate means to attain the desired relief; (2) the petitioner

has demonstrated a right to the issuance of a writ that is clear and indisputable; and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is appropriate under the circumstances." *Id.* (internal citations omitted).

But this Circuit has also clearly recognized that in some circumstances it can grant a writ of mandamus without a showing of clear error. This doctrine is known as the power to issue "supervisory" writs of mandamus. As the Court explained, "Since [1957] the courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process." *In re McBryde*, 117 F.3d 208, 223 (5th Cir. 1997).

The district court's ruling in this case is precisely such a threat to the proper functioning of the judicial process. Amy sought millions of dollars in restitution under a "mandatory" restitution statute. Indeed, the statute's title is "**Mandatory Restitution,"** 18 U.S.C.A. § 2259 (West. 2012) (emphasis in original), and the statute specifically provides: "The issue of a restitution order under this section is *mandatory*." 18 U.S.C. § 2259(b)(4); *accord* 18 U.S.C. § 2259(a) ("The court *shall* order restitution for any offense under this chapter [i.e., any child pornography offense]" (emphasis added)); 18 U.S.C. § 3771(a)(6) (a crime victim has "the *right* to full and timely restitution . . . "). Yet despite this mandatory statute, the district court refused to award Amy even one dollar in restitution from a criminal who it

specifically found had harmed her. Such a patent violation of the congressional mandate warrants this Court's supervisory intervention.

This Court has also repeatedly recognized that supervisory mandamus is appropriate to resolve important and unsettled issues of law. *See, e.g.*, *In re Burlington Northern, Inc.*, 822 F.2d 518, 522 (5th Cir. 1987) (affording mandamus relief without a showing a clear error because, among other things, the legal issue presented was of a recurring nature, and the decision would be far reaching); *In re EEOC,* 709 F.2d 392, 394 (5th Cir.1983) (noting that mandamus is appropriate if "resolution of an important, undecided issue will forestall future error in trial courts, will eliminate uncertainty, and will add significantly to the efficient administration of justice"); *Constructora Subacuatica Diavaz, S.A. v. M/V Hiryu*, 718 F.2d 690, 692 (5th Cir. 1983) (noting that court's "supervisory jurisdiction permits us to issue mandamus for the review of new, important, and unsettled questions").

The issue of how to construe the child pornography statute clearly presents new, important, and unsettled questions of law. Accordingly, this Court should review the district court's legal interpretation de novo using its supervisory mandamus power.

C. Even Under Traditional Mandamus Standards, This Court Must First Construe Section 2259

Even if the Court employs traditional standards of mandamus review, Amy is entitled to have this Court first review the district court's legal determinations de novo. Before this Court decides whether the district court committed error in refusing to award Amy any restitution, it must construe Section 2259's scope. Discussing the application of traditional mandamus standards, the Third Circuit has explained:

> "The 'clear and indisputable' test [must be] applied *after* the statute has been construed by the court entertaining the petition." *Douglas*, 812 F.2d at 832 n. 10 (emphasis added). "'The requirement that a duty be "clearly defined" to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt . . . As long as the statute, once interpreted creates a peremptory obligation for the officer to act, a mandamus action will lie.'" *Id.* (citation omitted) (ellipsis in original).

United States v. Palmer, 871 F.2d 1202, 1209 (3d Cir. 1989).

This Court has taken the exact same position as the Third Circuit, albeit in an unpublished decision. *See In re Beazley Ins. Co.*, No. 09-20005 (5th Cir. May 4, 2009) (per curiam), *available at* 2009 WL 7361370 ("Even in a mandamus proceeding, we must review *de novo* the district court's interpretation of the law.")

In this case, Amy is entitled to restitution under a "mandatory" statute. Accordingly, the Court must first construe Section 2259. It is a clear "abuse of discretion to rely on erroneous conclusions of law." *United States v. Jones*, 664

F.3d 966, 981 (5th Cir. 2011). Once this Court has construed the statute, it should then grant mandamus relief because the district court has indisputably failed to perform its mandatory duty to award "full" restitution to Amy. Accordingly, Amy is entitled to mandamus relief. *See, e.g., In re Ford Motor Co.*, 591 F.3d 406, 415 (5th Cir. 2009) (granting mandamus relief where the district court had relied on "an erroneous conclusion of law").

D. Amy is also Entitled to Ordinary Appellate Review because she is Entitled to Take a Direct Appeal of the Denial of Her Request for Restitution

For the reasons just explained, Amy is entitled to de novo review of the district court's legal conclusion through her mandamus petition (No. 09-41238). Amy is also entitled to ordinary appellate review because she is entitled to take an ordinary appeal of the denial of *her* request for restitution (No. 09-1254).

1. Amy can Appeal under the Broad Language of 28 U.S.C. § 1291

Amy is entitled to take a direct appeal from the decision below under the broad provisions of 28 U.S.C. § 1291. Enacted in 1948, Section 1291 confers on courts of appeals general power to review "all final decisions" of the district court. This far-reaching statute ensures that "[t]he courts of appeals have jurisdiction to review virtually every action taken by the district court . . . " 15A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3903 at 132 (1992 & 2009 Supp.).

The Government does not dispute that the district court's erroneous failure to give Amy any restitution is reviewable on appeal before this Court on a *Government* initiated appeal.[7] Nonetheless, the Government takes the hegemonic position that because *it* decided to drop any pursuit of Amy's restitution claim (for reasons never explained to Amy), Amy is therefore barred from seeking protection from this Court of *her* "right" to "mandatory" restitution. *See* 18 U.S.C. § 3771(a)(6); 18 U.S.C. § 2259(b)(4).

The Government reaches this remarkable conclusion through a convoluted construction of Section 1291. As Amy understands the Government's position, the Government agrees that non-parties can appeal in criminal cases under Section 1291—a concession obviously dictated by numerous decisions by this Court. *See, e.g.*, *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1974) (unindicted co-conspirators had standing to challenge passage in indictment); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (newspaper had standing to appeal order restricting access to bail hearing").

Indeed, the Government apparently agrees that even crime victims can appeal in criminal cases under Section 1291—a concession dictated by the need to

[7] In its brief in support of rehearing, the Government seems to argue that the district court erred in failing to award Amy any restitution whatsoever. *See* Part III.C, *infra* (discussing Government's current position in this case).

avoid conflicting with *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (rape victim allowed to appeal district court's "rape shield statute" ruling).

Finally, the Government apparently believes that even appeals involving the CVRA are proper under Section 1291, provided that either the defendant or the Government takes them. Both the Government and defendants have routinely appealed CVRA issues under § 1291.[8]

Despite conceding that all these issues are properly appealed under Section 1291, the Government nonetheless attempts to carve out an exemption for crime victims' appeals that implicate a final judgment. The Government's argument fails to confront Section 1291's broad plain language:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1291. The statute clearly does not draw distinctions between a government appeal, a defendant's appeal, or a crime victim's appeal—not to mention distinctions between a crime victim's appeal regarding, for example, an erroneous rape shield ruling (as in *Doe*) or an erroneous restitution ruling (as here).

[8] *See, e.g., United States v. Moussaoui*, 483 F.3d 220, 226-33 (4th Cir. 2007) (jurisdiction over government appeal involving CVRA issues proper under Section 1291); *United States v. Vampire Nation*, 451 F.3d 189, 195 (3d Cir. 2006) (jurisdiction over defense appeal involving CVRA issue proper under Section 1291).

This Court applies the plain meaning of a statute unless doing so would lead to an "absurd result." *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 416 (5th Cir. 2010). There is nothing absurd about allowing a crime victim to seek appellate review of a district court decision denying her restitution. Accordingly, this Court should follow the plain language of Section 1291 and allow Amy to take an appeal from an adverse final decision against her.

2. This Court's Jurisprudence, Not Section 1291, Limits Non-Party Appeals

Amy agrees with the Government that crime victims and other non-parties should not have an unconstrained right to take appeals in criminal cases. But the proper constraints are not found by inventing new restrictions absent from the plain language of Section 1291. Instead, these restriction come from applying existing limitations found in this Court's controlling jurisprudence on non-party appeals.

This Court has specific holdings regarding the circumstances in which a non-party can appeal. It previously held that "this Circuit applies a three-part test when deciding whether a non-party may appeal. We inquire whether the non-party actually participated in the proceedings below, the equities weigh in favor of hearing the appeal, and the non-party has a personal stake in the outcome." *See SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 329 (5th Cir. 2001) (internal quotation omitted).

Amy indisputably meets each of these three prongs. The Government cannot make any reasonable challenge to Amy's satisfaction of this three-prong test in light of her actual participation in the restitution hearing below, the equities that exist between Amy (an innocent victim of child pornography) and Paroline (a criminal who the district court found had harmed her) and Amy's clear interest in receiving restitution.

The limitations found in *Forex Asset Management* provide a sensible framework for crime victims appeals under Section 1291. Under those limitations, a crime victim could not appeal whenever he had some marginal dissatisfaction with the outcome of a criminal case. Rather, the crime victim could appeal only where he was clearly aggrieved by a trial court ruling. As a practical matter, this would probably confine crime victims' appeals largely to restitution matters (and, perhaps, a few analogous circumstances).

The standards articulated for non-party appeals in *Forex Asset Management* and related cases allow Amy to proceed with an appeal here. As explained, "[t]he Fifth Circuit has been lenient in hearing the appeals of non-parties." *Forex Asset Management LLC* , 242 F.3d at 329 (*quoting In re Beef Indus. Antitrust Litig.,* 589 F.2d 786, 788 (5th Cir.1979)). Indeed, in this Circuit, "'[i]f the decree affects [a third party's] interests, he is often allowed to appeal.'" *Forex Asset Mgmt. LLC*, 242 F.3d at 329 (*quoting Castillo v. Cameron Cnty., Tex.*, 238 F.3d 339 (5th

Cir.2001) (*quoting United States v. Chagra*, 701 F.2d 354, 358-59 (5th Cir.1983))).[9]

3. Other Circuits have Allowed Crime Victims to Appeal Adverse CVRA and Restitution Rulings

The Government may argue that some other circuits have restricted the ability of crime victims to appeal. The Government will have to concede, however, that significant case law supports the right of a crime victim to appeal. As Chief Judge Jones recently explained:

> Before the passage of the CVRA, this court heard appeals from non-parties with a direct interest in aspects of criminal prosecutions. *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975) (holding that unindicted co-conspirators had standing to challenge passages in an indictment);*United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (allowing newspaper to appeal order restricting access to court hearing). A rape victim was authorized in *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981), to appeal the trial court's ruling on a rape shield law. Most important, the Third Circuit held, albeit perfunctorily, that "We have appellate jurisdiction pursuant to 28 U.S.C. § 1291" to hear the appeal of a purported victim seeking restitution under the VWPA. *United States v. Kones*, 77 F.3d 66, 68 (3d Cir. 1996).

In re Amy Unknown, 636 F.3d 190, 195-96 (5th Cir. 2011) (Jones, J., concurring).

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[9] The fact that both *Forex Asset Management* and *Castillo* (civil cases) also interchangeably quoted *Chagra* (a criminal case) makes clear that this Circuit's non-party appeal doctrine does not draw artificial distinctions between criminal and civil cases—much less the distinctions between permissible non-party appeals in criminal cases (i.e. press appeals of criminal trial closure orders allowed under *Chagra* and rape victim appeals of rape shield rulings allowed under *Doe*) and impermissible non-party appeals in criminal cases that would be required to grant the Government's motion to dismiss.

Instead of relying on this persuasive case law, the Government will likely rely on cases such as *United States v. Hunter*, 548 F.3d 1308 (10th Cir. 2008), which held that a crime victim cannot appeal an adverse CVRA ruling. In so ruling, *Hunter* emphasized that crime victims can seek appellate review of adverse rulings through a CVRA mandamus petition as Amy has done here. *Id.* at 1317.

Hunter is also distinguishable from the current case in at least three ways. First, *Hunter* treated the victims' appeal as one from the final criminal *judgment* in the case, and particularly as one from the ultimate prison sentence. *Hunter* was therefore able to conclude that "[w]hile non-parties may have an interest in aspects of the case, they do not have a tangible interest in the outcome" of the defendant's prison sentence. *Id.* at 1312.

But this reasoning has no application to a crime victims' appeal of an adverse restitution decision, as Chief Judge Jones recently explained: "In the specific context of restitution, *Hunter*'s distinction could not be less accurate. A restitution order implicates only the pecuniary interests of a criminal defendant, and the dispute over how much restitution is due occurs between a criminal and his victim—in fact, the victim's ability to pursue this dispute without government involvement is precisely the issue in this case [i.e., *In re Amy*]." *In re Amy Unknown*, 636 F.3d 190, 196 n.8 (5th Cir. 2011).

Here, in clear contrast, Amy has an obvious "tangible interest" in the outcome of her appeal seeking more than three million dollars in restitution. And Amy is appealing not just from the *judgment* in the case below, but from the *order* in the case below denying her request for restitution.

Second, *Hunter* relied on a provision allowing crime victims "to re-open a plea or sentence only if . . . the victim petitions the court of appeals for a writ of mandamus within 14 days." 18 U.S.C. § 3771(d)(5), *discussed in Hunter*, 548 F.3d at 1315. *Hunter* reasoned that the circuit's earlier ruling rejecting the victims' CVRA mandamus petition barred any further effort to obtain relief via an appeal. Whatever the soundness of this reasoning in the context of a victim's challenge to a prison sentence, the immediate next sentence in the statute states: "This paragraph *does not affect* the victim's *right to restitution* as provided in title 18, United States Code." 18 U.S.C. § 3771(d)(5) (emphases added). This language surely indicates that Congress did not want any burden placed on crime victims attempting to protect their right to restitution.

Third and perhaps most fundamentally, *Hunter* simply did not consider all of the relevant court of appeals authorities on the issue. *United States v. Perry*, 360 F.3d 519 (6th Cir. 2004), carefully reviewed a number of cases that had concluded that crime victims could not take an appeal from an adverse restitution ruling under the old Victim-Witness Protection Act (VWPA). The Sixth Circuit found these

cases no longer persuasive because they relied upon the fact that "[u]nder the VWPA, a court did not have to award restitution. Restitution fell within the district court's discretion, which meant that a decision to award restitution, or award arguably insufficient restitution, was not fairly traceable to any statutory violation." *Perry*, 360 F.3d at 531.

In view of the "pro-victim" structure of modern restitution statutes, the Sixth Circuit in *Perry* refused to follow the older decisions. *Id.* at 524-27. Proceeding under the provisions of the *Mandatory* Victims Restitution Act (MVRA), *Perry* explained that the earlier VWPA cases rested on the proposition that "the victim had no right to receive anything at all" and that restitution "does not turn on the victim's injury, but on the penal goals of the State." *Id.* at 530. Under the new mandatory restitution provisions, however, "[n]one of this is true anymore." *Id.* Of course, here Amy likewise proceeds under a "mandatory" restitution statute.

The D.C. Circuit recently relied on *Hunter* to conclude that a crime victim cannot take an appeal from a criminal judgment. *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011), *cert denied*, 132 U.S. 756 (2011). But since *Monzel* was decided outside this Circuit, it did not follow the law of this Circuit that "'[i]f the decree affects [a third party's] interests, he is often allowed to appeal.'" *Forex Asset Mgmt. LLC*, 242 F.3d at 329 (*quoting Castillo v. Cameron Cnty., Tex.*, 238

F.3d 339 (5th Cir.2001) (*quoting United States v. Chagra,* 701 F.2d 354, 358-59 (5th Cir.1983))).

More persuasive is the Sixth Circuit's analysis in *In re Siler*, 571 F.3d 604 (6th Cir. 2009). There, the Court allowed a crime victim to appeal a CVRA issue under Section 1291. Citing precedent from this Circuit, the Sixth Circuit explained: "We have cited with approval cases from other circuits holding that appeals may be taken by nonparties who were treated on all sides as de facto parties but who never formally intervened." 571 F.3d at 608 (*citing In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 788-89 (5th Cir. 1979)). The Sixth Circuit found this reasoning compelling, noting that "if the [district court] decree affects [a non-parties'] interests, he is often allowed to appeal." 571 F.3d at 608 (*quoting West v. Radio-Keith-Orpheum Corp.* 70 F.2d 621, 623-24 (2d Cir. 1934) (Hand, J.)).

For all these reasons, the Court should follow the reasoning of the Sixth Circuit in *Siler* allowing crime victims appeals of CVRA issues and the reasoning of the Third Circuit in *Kones* and the Sixth Circuit in *Perry* allowing crime victims appeals of restitution decisions.

ARGUMENT

At stake in this case is whether Amy and countless other victims of child pornography in this Circuit will receive restitution from the criminals who harmed them. The district court below specifically found that Paroline harmed Amy (a

factual finding not challenged here). Amy then sought substantial restitution for the substantial losses she has incurred (and will incur) as a victim of child pornography.

Remarkably, even though Congress specifically made "full" restitution "mandatory" for such crimes, the district court awarded Amy nothing. Now Paroline asks this Court to affirm the district court's decision and the Government apparently seeks essentially the same outcome.

This Court should reject the parties' position and instead construe the statute to achieve the goal Congress so plainly intended. Congress directed that district courts must award child pornography victims restitution for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). As the panel opinion in this case properly concluded, nothing in the statute requires a child pornography victim to trace out and apportion her losses to each and every defendant who harmed her. The statute does not contain any generally applicable requirement that a victim show that her losses were the "proximate result" of a particular defendant's crime. And such a burden would, as a practical matter, make Congress' enactment "unworkable" as the district court below specifically concluded.

Instead of construing the statute in ways which make it unworkable, this Court should simply follow the statute's plain language. The district court awarded Amy $0 in restitution. This Court should accordingly reverse the decision below.

I. 18 U.S.C. § 2259 IS A MANDATORY STATUTE REQUIRING DISTRICT COURTS TO AWARD FULL RESTITUTION TO CHILD PORNOGRAPHY VICTIMS

This case revolves around how to construe 18 U.S.C. § 2259—the "child pornography restitution statute." Congress passed this remedial legislation almost twenty years ago to fully compensate victims of child pornography for losses they suffer. As such, the "broad and inclusive" language of Section 2259 should be given a generous construction to effectuate its remedial purpose. *Canal Ins. Co. v. Coleman*, 625 F.3d 244, 253 (5th Cir 2010).

The remedial purpose behind Section 2259 is readily apparent: In adopting this law, Congress intended "to make whole . . . victims of sexual exploitation." *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). This remedial purpose is extensively reviewed in *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001), which noted that Congress generally sought "to ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." *Id.* at 1247 (*quoting* SEN. REP. NO. 104-179, at 42-44 (1995)). The relevant congressional reports quote extensively from the leading case of *New York v. Ferber*, 458 U.S. 747 (1982), which found long-term serious physiological, emotional, and mental harms to victims who were sexually exploited through the production, distribution, and possession of child pornography:

> The use of children as subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been

> found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.
>
> Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place.

Julian, 242 F.3d at 1247 (*quoting Ferber*, 458 U.S. at 758-60 nn.9-10) (collecting legislative history relying on this passage).

To address these serious harms, Section 2259 makes restitution for child pornography victims "mandatory." The section broadly provides that "in addition to any other civil or criminal penalty authorized by law, the court *shall* order restitution for any offense under this chapter." 18 U.S.C. § 2259(a) (emphases added). To underscore the mandatory nature of restitution under the statute, Congress repeated later in the statute: "*Order mandatory*. The issuance of a restitution order under this section is *mandatory*." 18 U.S.C. § 2259(b)(4)(a) (emphasis added).[10]

Section 2259's provisions are also broader than other restitution statutes. Section 2259 extends its protections to any "victim" who is simply "harmed" by a crime of child pornography, requiring neither "proximate harm" nor "direct harm." *See* 18 U.S.C. § 2259(c) ("For purposes of this section, the term 'victim' means the

[10] The Crime Victim's Rights Act, 18 U.S.C. § 3771(a)(6)—which gives crime victims a "right" to "full and timely restitution as provided in law"—also makes restitution mandatory.

individual *harmed* as a result of a commission of a crime under this chapter . . . "). By purposely omitting the narrowing qualifiers "directly" and "proximately" found in other general restitution statutes, the reasonable inference is that Congress decided not to burden child pornography victims with any obligation to demonstrate a "direct" or proximate" harm as prerequisite to receiving restitution. *cf.* 18 U.S.C. § 3663(a)(2).

Section 2259 fits into a pattern of statutes addressing "a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms." *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007) (*citing* Child Pornography Prevention Act of 1996, Pub. L. 104-208, § 121, 110 Stat. 3009-26 ("Congress finds that . . . where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years . . . ")).

Congress also expanded the categories of losses for which child pornography victims are entitled to restitution. *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001), compared Section 2259 with the other general restitution statutes, finding a striking contrast:

> We note that § 2259 and the other two mandatory restitution statutes associated with violence against women and children which were adopted at the same time, *see* 18 U.S.C. §§ 2248 & 2264, *are much broader* than § 3663A [the Mandatory Victim Restitution Act] . . .

> [T]hese three statutes use the terms "full amount of the victim's losses" for "any costs incurred" for physical, psychiatric, or psychological care, and also include restitution for "any other losses suffered by the victim as a proximate result of the offense."

Id. at p. 1247 (emphasis added).

In adopting Section 2259, Congress clearly wanted child pornography victims to have an "expansive remedy" for recovering all their losses, rather than a "cumbersome procedure" that would make recovery difficult. *See United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (rejecting defense argument that under Section 2259 child pornography victims have to file claims for future counseling costs as they arise; "[w]e do not believe that Congress sought to create such a cumbersome procedure for victims to receive restitution.").

II. THE DISTRICT COURT SHOULD HAVE AWARDED AMY THE "FULL AMOUNT OF HER LOSSES" WITHOUT THE NEED TO SHOW "PROXIMATE RESULT"

A. Under the Plain Language of the Statute, the "Proximate Result" Requirement Extends Only to Subsection (F) and is not Impliedly Read Backwards Through Subsections (A)–(E)

Under the broad plain language of 18 U.S.C. § 2259, child pornography victims do not need to prove that all their losses were the "proximate result" of a defendant's crime. Section 2259 requires that the district court "*shall* direct the defendant to pay the victim (through the appropriate court mechanism) the *full amount* of the victim's losses . . . " 18 U.S.C. § 2259(b)(1) (emphases added). The

statute goes on to list six separate categories of damages that form these losses, each separated by semi-colons:

> (3) Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—
> (A) medical services relating to physical, psychiatric, or psychological care;
> (B) physical and occupational therapy or rehabilitation;
> (C) necessary transportation, temporary housing, and child care expenses;
> (D) lost income;
> (E) attorneys' fees, as well as other costs incurred; and
> (F) any other losses suffered by the victim *as a proximate result* of the offense.

18 U.S.C. § 2259(b)(3) (emphasis added).

The district court made a factual finding that Amy was a "victim" of Paroline's child pornography crime—a factual finding that Paroline did not cross-appeal. Accordingly, this case does not present any issues concerning Amy's status as a "victim." Instead, the sole legal issue is how to interpret the statute's "proximate result" language contained in subsection (F).

Although Congress placed the "proximate result" language only in subsection (F) of the restitution statute, the Government and the Defendant nonetheless argue that Congress implicitly intended that phrase be read backwards through the other five preceding sections. This interpretation contradicts the plain language of the statute. Congress required sexual abuse victims to establish that their losses were the "proximate result" of a defendant's crime only for subsection

(F). If Congress wanted the "proximate result" limitation to run throughout the statute, it could have easily placed the phrase at the beginning of the list of losses or at the very end of the list in a stand-alone clause. Congress did neither. Instead, it placed the phrase in the middle of one of six separate subsections. The parties' position thus makes no syntactical sense**.**

Courts do not typically read a phrase found in one subsection of a statute into other subsections. For instance, in *United States v. Naftalin*, 441 U.S. 768 (1979), a litigant urged that a limiting phrase found in only one subsection of a statute "should be read into all three subsections." *Id.* at 773. The Supreme Court summarily rejected this argument explaining tersely that "[t]he short answer is that Congress did not write the statute that way." *Id.*

Similarly here, Section 2259's plain language is dispositive. "In the absence of clearly expressed legislative intention to the contrary, the plain language of the statute is to be recognized as conclusive." *Fiber Sys. Int'l., Inc. v. Roehrs*, 470 F.3d 1150, 1157 (5th Cir. 2006). When interpreting a statute, "a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In the child pornography

restitution statute, Congress placed a "proximate result" limitation in one subsection but not others—end of story.

The parties ignore the statute's plain language. They instead ask this Court to ignore the "first and last" canon of statutory construction in favor of an obscure ninety-year-old case stating 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 Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920).

In some situations such a rule may conceivably make sense. "But there are lists, and then there are other lists." *In re Amy Unknown*, 636 F.3d 190, 199 (5th Cir. 2011), *rehearing en banc granted*, ---F.3d--- (2012). For instance, in *Porto Rico Railway* a statute provided jurisdiction over "all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States *not domiciled in Porto Rico*, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000." 253 U.S. at 346 (emphasis added). The issue in that case was whether to read the phrase "not domiciled in Porto Rico" as applying to only the immediately preceding phrase or to earlier phrases separated by commas in the statute's list. The Supreme Court found "[n]o reason" why the clause "should not be read as applying to" all the phrases. *Id.*

Concerning Section 2259's list, not only do significant contextual and policy reasons counsel against such a reading (as explained momentarily), but the list's grammar does as well. As the panel opinion in this case explained, the list in Section 2259 contrasts sharply with the list in *Porto Rico Railway:*

> Here, the statute does not present the types of recoverable costs in a series, separated by commas. Instead, it begins a sentence ("'full amount of the victim's losses' includes any costs incurred by the victim for--") and then lists six different endings for that sentence. From the double-dash that opens the list to the semicolons that separate each of its elements, the grammatical structure of § 2259(b)(3) is unlike the statute in *Porto Rico Railway.* The latter was a blurry composite of lists, separated by commas and without any numbering or introductory punctuation. Grammar alone counsels against applying the rule of *Porto Rico Railway* to the current statute.

In re Amy *Unknown*, 636 F.3d at 199.

In addition, the statutory construction canon in *Porto Rico Railway* applies, by its own terms, only where "several words are followed by a clause which is applicable *as much* to the first and other words as to the last . . . " *Porto Rico Ry., Light & Power Co.*, 253 U.S. at 348 (emphasis added). There is good reason why the qualifying words found in subsection (F) do not apply "as much" to the five earlier subsections. As the panel opinion in this case carefully explained, in drafting Section 2259, Congress referred to losses that were the "proximate result" of the defendant's crime only in the catch-all provision, not in the other provisions involving more precisely-defined and readily-determinable kinds of losses (e.g., medical expenses, lost income, attorneys' fees):

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

In re Amy Unknown, 636 F.3d at 199. Because there is an obvious and clear policy based reason why Congress restricted the catch-all category of losses but not the other defined categories, the language of Section 2259 contains no "ambiguity, much less one offering *two equal interpretations* (a prerequisite for the application of the principle of statutory construction in question)." *United States v. Hagerman*, ---F.Supp.2d---, 2011 WL 6096505, at *7 (N.D.N.Y. 2011) (emphasis in original).

Furthermore, reading the language of subsection (F) back through the five previous subsections plainly violates the well-established canon of statutory construction known as "the rule of the last antecedent." 2A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.33 (7th ed. 2011) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent."). According to that rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (emphases added). This Court has repeatedly applied "the familiar grammatical principle known as the last-antecedent rule." *See, e.g., Johnson v. Manpower Professional Services, Inc.*, 2011 WL 4584757, at *6 (5th Cir. 2011) ("[T]he doctrine of last antecedent has been

generally applied as a canon of statutory and constitutional interpretation. . . . "); *United States v. Campbell*, 49 F.3d 1079, 1086 (5th Cir. 1995) (rejecting reading of a statute that "contradicts the well-established canon of construction named the 'doctrine of the last antecedent,' which requires that 'qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to or including others more remote'") (*quoting Quindlen v. Prudential Ins. Co.*, 482 F.2d 876, 878 (5th Cir. 1973)); *Free v. Abbott Labs., Inc.*, 164 F.3d 270, 276 (5th Cir. 1999) ("under the 'last antecedent' canon of statutory construction, a qualifying phrase in a statute 'usually is construed to apply to the provision or clause immediately preceding it'" (*quoting* SUTHERLAND ON STATUTORY CONSTRUCTION § 47.33)).

Notably, in *Barnhart*, the Supreme Court relied on "the rule of the last antecedent" in reversing a Third Circuit decision that erroneously held that "[w]hen a sentence sets out one or more specific items followed by '*any other*' and a description, the specific items must fall within the description." *Barnhart*, 540 U.S. at 26 (emphasis added). In *Barnhart*, the Supreme Court held that the words "which exists in the national economy" referred only to the noun "any other kind of substantial gainful work" (and not also to the noun "previous work") in the clause "only if . . . he is not only unable to do his previous work but cannot . . .

engage in any other kind of substantial gainful work which exists in the national economy." *Id.* at 24–27.

Subsection (F) begins with exactly the same two words at issue in *Barnhart*: "*any other* losses suffered by the victim . . . " Accordingly, as one district court has recognized in agreeing with Amy's interpretation of Section 2259, "[t]his finding [from *Barnhart*]—that the words 'any other' do not create a 'contrary intention' sufficient to overcome the rule of the last antecedent—appears particularly instructive here, where the statute at issue involves the use of the words 'any other' in the last loss listed." *United States v. Hagerman*, ---F.Supp.2d---, 2011 WL 6096505 at *8 (N.D.N.Y. 2011).

The panel's approach also properly followed the canon of construction that a statute must be interpreted as "mandated by [its] grammatical structure." *In re Frieouf*, 938 F.2d 1099, 1103 (10th Cir. 1991) (*citing Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (relying on the location of commas in 11 U.S.C. § 506(b) to provide interpretation of statute)). As the panel properly recognized, in Section 2259, Congress separated the categories of restitution by semi-colons. This indicates a clear break between each category, because a semicolon is "the punctuation mark . . . used to indicate a major division in a sentence where a more distinct separation is felt between clauses or items on a list than is indicated by a comma . . . " *Cain Rest. Co. v. Carrols Corp.*, 273 Fed.Appx. 430, 433 (6th Cir.

2008) (internal quotations omitted); *see also United States v. Weisser*, 411 F.3d 102, 113 (2d Cir. 2005) (one clause not read through other clauses in list "because a semi-colon separates that clause from the other clauses . . . "). Indeed, it is a general principle of federal criminal law statutes that clauses separated by semi-colons signal separate offenses:

> [w]hen Congress crafts a statute to create distinct offenses, it typically utilizes multiple subsections or *separates clauses with semicolons* to enumerate the *separate* crimes. *See, e.g.*, *Jones v. United States*, 526 U.S. 227, 252 (1999) (interpreting the three subsections of 18 U.S.C. § 2119, the federal carjacking statute, as creating three distinct crimes); *see also* 18 U.S.C. § 922(a)-(p) (defining separate firearm offenses). Here, unlike most statutes that create multiple offenses, § 371 is a single sentence, divided only by commas. The fact that Congress declined to structure § 371 in such a manner undermines the interpretation advanced by the Government and supports our single-offense rendering of the statute.

United States v. Rigas, 605 F.3d 194, 209 (3d Cir. 2010) (emphases added).

Precisely in accord with this approach to signaling separate offenses, in Section 2259 Congress delineated distinct restitution categories by separating them with semi-colons. As one district court explained in agreeing with Amy's interpretation of Section 2259, the use of semicolons "create[s] a wall around each grouping of items preventing the qualifying language from one grouping from applying to another. This use of semicolons is consistent with grammatical rules on the principal use of the semicolon—to separate *independent* clauses of a sentence." *United States v. Hagerman*, 2011 WL 6096505, at *19 (N.D.N.Y. 2011) (*quoting*

Commercial Aluminum Cookware Co. v. U.S., 938 F.Supp. 875, 883 (Ct. Int'l Trade 1996)).

For all these reasons, the "proximate result" limitation contained in subsection (F) applies only to subsection (F).

B. By Mandating that Defendants Pay Full Restitution, Congress Adopted a Well-Established Tort Principle That Multiple Wrongdoers are All Jointly Responsible for Losses Caused to an Innocent Victim

Under the plain language of Section 2259, Amy does not need to establish that each dollar of her losses "proximately resulted" from Paroline's crimes. Perhaps because of this, the District of Columbia Circuit in *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011), recently refused to rely on the "proximate result" language in Section 2259(B)(3)(f) to impose a global proximate cause burden on crime victims. *See id.* at 535 (rejecting rationale of other circuits resting on language of the "catch-all" provision).[11] Instead, *Monzel* employed what it

[11] The parties may argue that it is significant that a plurality of the circuits have read a proximate cause requirement into the entire statute. What the parties must acknowledge, however, is that in most of the cases which narrowly construe the child pornography restitution statute, the courts of appeal did not receive adversarial briefing on the issue.

Unfortunately most child pornography victims do not have legal counsel. The few victims like Amy who do have counsel are barely able to file restitution requests in the hundreds of district court sentencings which occur monthly throughout the country. For example, while Amy recently filed several hundred restitution requests in district courts nationwide, she is currently and recently represented in only a handful of appeals. Indeed, counsel is only aware of two other appellate cases involving Section 2259, *In re Amy* in the Fifth Circuit and

called "traditional principles of tort and criminal law" to read such a requirement into the statute. *Id.*

This Court should not follow *Monzel*'s approach which both misapprehends and misapplies traditional legal principles. For starters, the court in *Monzel* seemed to believe that vague "traditional principles" can trump a statute's plain meaning. But courts must enforce Congress' chosen words, even when doing so creates divergent principles of law. In enacting a statute to provide restitution for child pornography victims, Congress confronted a new problem and put in place a statutory regime designed "to make whole . . . victims of sexual exploitation." *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). That explicit and well-supported public policy goal should have overriding importance in construing the statute, rather than applying outdated common law principles concerning proximate cause.[12]

United States v. Monzel in the D.C. Circuit (discussed below), where the victim has counsel. Not surprisingly, these two cases have produced the most extended discussion of the statute's "proximate result" language.

[12] The child pornography restitution statute is not the only example of Congress eschewing hard-to-define proximate cause principles. For example, in *CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630 (2011), the Supreme Court held that the Federal Employers' Liability Act (FELA) does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The Court explained that historically "[c]ommon-law 'proximate cause' formulations varied, and were often both constricted and difficult to comprehend." *Id.* at 2637. Accordingly, it applied a causation standard that is "relaxed" compared to common-law tort litigation. *Id.* at 2636-37.

Even if applying traditional tort and criminal law principles, *Monzel* should not be followed. *Monzel* cited two cases for the "presumption" that proximate cause is the form of causation intended in all statutes: *United States v. Gypsum Co.*, 438 U.S. 422, 437 (1978) and *Morisette v. United States*, 342 U.S. 246, 263 (1952). But as one perplexed district court judge concluded after reading the two cases *Monzel* cited for support, "with all due respect, the undersigned can find no *presumption* of proximate cause recognized in the two Supreme Court cases cited by the D.C. Circuit . . . which regard *mens rea*, not proximate cause." *United States v. Hagerman*, ---F.Supp.2d---, 2012 WL 6096505 at *8-9 (N.D.N.Y. 2011).

The judge in *Hagerman* went on to question *Monzel*'s reasoning, even assuming its premises to be true:

> Granted, a common law principle may certainly serve as a valuable extrinsic aid when interpreting a statute-if the common law principle pertains to the subject with which the statute deals. However, it is unclear to the undersigned how a common law principle that proximate causation is usually required in the determination of civil or criminal *liability* pertains to the subject of whether proximate causation is required during a determination of a criminal *sentence*, which occurs only after liability has been determined. Clearly, criminal statutes can require mere factual causation (instead of proximate causation). This would appear to be especially so where the portion of the criminal statute in question regards merely a sentence, not liability (thus ameliorating due process concerns).

Id. at *9 (emphasis in original).

Even if *Monzel* is correct that a general presumption of proximate cause exists, Congress has, in fact, expressed an intent to rebut that presumption. It was

"the 'intent and purpose' of the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A—which included 18 U.S.C. § 2259— . . . 'to expand, rather than limit, the restitution remedy.'" *Id.* at *9 (*citing U.S. v. Ekanem*, 383 F.3d 40, 44 (2d Cir.2004); S.Rep. No. 104–179, at 22–23 (1996), *reprinted* in 1996 U.S.C.CA.N. 924, 933).

On a fundamental level, a *Monzel*-style general proximate cause requirement makes no sense. A well-recognized equally important general principle of tort law is that the wrongdoer—not the innocent victim—must bear the loss when disentangling harm stemming from multiple causes. Congress clearly had that principle in mind when it created a statutory regime giving sexual abuse victims restitution for the "full amount" of their losses. 18 U.S.C. § 2259(b)(3). As William L. Prosser recognized in his *Handbook of the Law of Torts*, when "there is a joint enterprise, and a mutual agency, so that the act of one is the act of all . . . liability for all that is done must be visited upon each." PROSSER AND KEETON ON TORTS, § 52, at 346 (5th ed. 1984).[13]

Congress adopted this principle in Section 2259 by requiring restitution in the "full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). It refused to allow

[13] In this case, Paroline was in a de facto joint enterprise with other child pornography viewers. As "the consumer of [Amy's] child pornography [he and others] 'create[d] a market' for [her] abuse by providing an economic motive for creating and distributing the materials." *United States v. Goff*, 501 F.3d 250, 260 (3d Cir. 2007) (*citing United States v. Osborne*, 495 U.S. 103, 109-12 (1990); *Ferber*, 458 U.S. at 755-56))

district courts to apportion restitution in child pornography cases, requiring instead that the district courts (in Prosser's words) "visit upon each" offender the full damage the victim suffered.

Congress also recognized that the illicit trade in child pornography is a joint enterprise, albeit a large and amorphous one. Although the defendant may not have produced Amy's child pornography images, he was part of—in Prosser's words—the "joint enterprise and mutual agency" which received, possessed and distributed her images to ever more willing and eager consumers.

Each possession and each distribution of Amy's child sex abuse images combine to produce what Prosser calls a "single indivisible result:"

> Certain results, by their very nature, are obviously incapable of any logical, reasonable, or practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it.
>
> . . .
>
> Such entire liability is imposed both where some of the causes are innocent, as where a fire set by the defendant is carried by a wind, and where two or more of the causes are culpable. It is imposed where either cause would have been sufficient in itself to bring about the result, as in the case of merging fires which burn a building, and also where both were essential to the injury, as in the vehicle collision suggested above [where two vehicles collide and injure a third person]. It is not necessary that the misconduct of two defendants be simultaneous. One defendant may create a situation upon which the other may act later to cause the damage . . . Liability in such a case turns not upon causation, but on the effect of the intervening agency

> upon culpability. *A defendant, if liable at all, will be liable for all the damage caused.*

PROSSER AND KEETON ON TORTS, § 52, at 347-48 (5th ed. 1984) (emphasis added)

The *Monzel* court discusses this passage from Prosser about expanding liability and paradoxically interprets it as somehow narrowing a child pornography defendant's liability. *Monzel* concluded that a child pornography defendant's "possession of [the victim's] image, which . . . added to her injuries, was not 'sufficient in itself' to produce all of them, nor was it 'essential' to all of them." *Monzel*, 641 F.3d at 538 (*quoting* Prosser). *Monzel* attributed a child pornography victim's suffering not to each individual defendant acting to produce a result, but to "her knowledge that each day, untold numbers of people across the world are viewing and distributing images of her sexual abuse." *Id.*

The *Monzel* court clearly missed the main point of Prosser's thesis by divorcing the entirety of a victim's suffering (something that cannot be linked precisely to a particular defendant) from an individual defendant's liability (something that clearly can be linked).[14] It is true, for example, that Amy would

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[14] *Monzel* also suggests that without a proximate cause requirement, child pornography defendants will be subject to potentially limitless liability. *See* 641 F.3d at 537 n.7. But as the panel carefully explained:

> Restricting the "proximate result" language to the catchall category in which it appears does not open the door to limitless restitution. The statute itself includes a general causation requirement in its definition of a victim: "For purposes of this section, the term 'victim' means the

have suffered severe psychological injury even if Paroline had never viewed her abuse images. In that sense, Paroline was not the *sole* cause of Amy's injuries. But that hardly means that Paroline should escape liability altogether.

As Prosser states, a wrongdoer should be held liable where his action was "sufficient in itself to bring about a result." Here, Paroline's individual crime by itself was "sufficient" to bring about "a result." The district court found as a matter of fact that Paroline's viewing of Amy's abuse images harmed her and resulted in her being a "victim" of Paroline's crime. *See* 18 U.S.C. § 2259(c) (a child pornography "victim" is one "harmed as a result" of such a crime). Put another way, if Paroline was the only defendant in the world to view Amy's child sex abuse images, his crime alone would be "sufficient" to bring about the "result" of psychological harm to Amy.

> individual harmed *as a result* of a commission of a crime under this chapter . . . " 18 U.S.C. § 2259(c) (emphasis added). The district court displayed due care in analyzing whether Amy is a victim of Paroline's crime of possessing—but not creating—images of her sexual assault. *Paroline*, 672 F.Supp.2d at 785–87. The finding that Amy is a victim under § 2259(c) rests on the Supreme Court's reasoning in *New York v. Ferber*, 458 U.S. 747 (1982) as well as this court's holding in *United States v. Norris*, 159 F.3d 926 (5th Cir.1998) . . . Given the statute's built-in causation requirement and the volume of causation evidence in the context of child pornography, fears over excessive punishment are misplaced.

In re Amy Unknown, 636 F.3d 190, 200-01 (5th Cir. 2011), *rehearing en banc granted*, ---F.3d--- (2012).

Monzel also found that a single defendant's illegal viewing of child sex abuse images was not "essential" to a victim's harm because the victim will be harmed by other criminals viewing the images. *See id.* at 538. But this again misses the main point of Prosser's theory. Where a result is "obviously incapable of any logical, reasonable, or practical division" then "each must be charged with all of it."

To borrow one of Prosser's hypotheticals, just as a tortfeasor cannot say he should escape liability for sinking a barge because someone else's acts would have sunk the barge regardless, a child pornography defendant cannot claim that he should avoid paying restitution because other defendants have inflicted the same injury as well. *See, e.g., Kilburn v. Socialist People's Libyan Arab Jamahiriya,* 376 F.3d 1123, 1129 (D.C. Cir. 2004) (noting that when "application of a 'but for' standard to joint tortfeasors could absolve them all, . . . courts generally regard 'but for' causation as inappropriate"); RESTATEMENT (THIRD) OF TORTS § 27 (2010) ("[C]ourts have long imposed liability when a tortfeasor's conduct, while not necessary for the outcome, would have been a factual cause if the other competing cause had not been operating.").

In this case, Amy's harm is "obviously incapable of any logical, reasonable, or practical division." As the district court recognized, apportioning Amy's harm among the numerous past, present, and future defendants is impossible. But all of

them have contributed to Amy's images going "viral" on the internet, thereby contributing to Amy's psychiatric "death by a thousand cuts." It would defy common law principles—and common sense—to allow a convicted felon to escape paying full restitution because he was one criminal among many causing Amy harm.

Congress clearly did not envision that child pornographers could avoid paying restitution because "everyone is doing it." On the contrary, Congress required that district courts "shall direct [a convicted child pornography] defendant to pay the victim . . . *the full amount of the victim's losses*. . . " 18 U.S.C. § 2259(b)(1).

In addition to these traditional principles, more recent evolution of tort law supports Amy's interpretation of the child pornography restitution statute. As recognized in the recent *Restatement (Third) of Torts*, no single approach to proximate causation exists in the federal and state courts. *See* RESTATEMENT (THIRD) OF TORTS § 29 cmts. (2010) (discussing various approaches to proximate causation in federal and state courts). Indeed, the very term "proximate causation" has fallen into disfavor because "it is an especially poor [term] to describe the idea to which it is connected," which is a limitation on the scope of liability. RESTATEMENT (THIRD) OF TORTS, *Special Note on Proximate Cause* (2010).

In part due to repeated and widespread confusion over how to define proximate cause, the American Law Institute recently adopted a two-pronged approach which asks: (1) whether the wrongdoer's conduct was a necessary condition of the harm (i.e., a but-for or factual cause); and (2) whether the harm was the product of the risks that made the wrongdoer's conduct unlawful in the first place (i.e., scope of liability or proximate cause). RESTATEMENT (THIRD) OF TORTS, §§ 27, 29 (2010).

Under this modern definition of "proximate cause" it is indisputable that Paroline caused Amy's injuries and can be held liable for them all. Under the first prong—but-for or factual causation—the issue is whether the wrongdoer's conduct was a necessary condition to cause the victims' harm. *See* RESTATEMENT (THIRD) OF TORTS, § 27 (2010) (discussing factual causation). In this case the district court answered that question by finding that Paroline harmed Amy. This finding is correct and was not challenged on appeal. It is the continued viewing of Amy's abuse images on the internet and the resulting invasion of her privacy interests which this viewing caused—and will continue to cause—which creates on-going harm during her lifetime. As the Supreme Court explained, "[a] child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography . . . It is the fear of

exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *Ferber,* 458 U.S. at 759 n. 10.

Likewise under the second prong, Amy's harms are caused by risks which made Paroline's crime unlawful in the first place. Clearly Congress was extremely concerned about victims like Amy and the injuries caused by the distribution of their child sex abuse images. As the district court explained in the *Monzel* case:

> The legislative history of 18 U.S.C. § 2252 makes clear that it criminalizes the possession of child pornography for the purpose of protecting the nation's children, both from the original traumatic acts of sexual abuse and from the additional harm resulting from the victims' knowledge of the circulation of images depicting their abuse. *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009, 26–28 (1996) (listing congressional findings, which include concern that "child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years"). The "risk" inherent in [a defendant's] participation in the child pornography market by receiving and possessing such images therefore includes the risk that the children whose abuse is depicted will suffer as a result.

United States v. Monzel, 746 F.Supp.2d 76, 88 (D.D.C. 2010).

In light of these principles, Amy's argument that Section 2259 does not impose a general proximate cause requirement makes perfect sense. Congress' overriding goal was to ensure "full" restitution for child pornography victims. In accord with *Ferber*, Congress recognized that individuals who collect and share child pornography are a significant cause of the victims' injuries, which is a primary harm Congress sought to compensate.

To the extent that basic tort principles guide this Court's interpretation of Section 2259, victims should be permitted to obtain restitution for their losses without a specific showing of "proximate result" except when they are requesting miscellaneous damages under subsection (F) where Congress specifically imposed such a requirement.

III. PROPER APPLICATION OF THESE PRINCIPLES TO THIS CASE REQUIRES A GENEROUS RESTITUITON AWARD TO AMY.

For the foregoing reasons, this Court should rule that the Section 2259 does not contain a general proximate cause requirement. Accordingly, this Court should reverse the district court's erroneous invention of a general "proximate result" requirement in Section 2259 and remand for an award of full restitution to Amy. Of course, in doing so, this Court need not make factual findings as to the exact dollar amount of losses incurred by Amy.

In a letter to counsel, however, the Court asked for briefing on "[h]ow would the nexus standard you urge be applied to the facts" of this case. Letter to Counsel (Feb. 6, 2012). Accordingly, Amy applies the facts of this case, first under her proposed interpretation of the statute, and then under the parties' proposed interpretation. Only Amy's construction fulfills Congress's intent to award generous restitution to the victims of child pornography.

A. Under Amy's Proposed "Harm" Standard, She is Entitled to Recover Full Restitution from Paroline

In contrast to the unworkable standards and methodologies advanced by the parties, Amy proposes a simple standard (adopted by the panel) that follows the statute's plain language and will be easy for district courts to apply. It also fully comports with Congressional intent in child pornography cases "to ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001) (internal quotation omitted).

In keeping with the statutory mandate that child pornography victims receive the "full amount" of their losses, 18 U.S.C. § 2259(b)(1), the panel directed that the district court should simply do what the statute says and award victims the "full amount" of their losses resulting from child pornography crimes. This is the result that the plain language of the statute directs. *See* 18 U.S.C. § 2259(b)(1) ("The order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim's losses . . . ").

Essential to this formulation is that there must be a "nexus" between the defendant's crime and the victim's losses. The nature of that connection is found in the plain language of Section 2259 rather than through "judge-made limitations patently at odds with the purpose of the legislation." *In re Amy*, 591 F.3d 792, 797 (5th Cir. 2009) (Dennis, J., dissenting).

Section 2259 clearly delineates the nexus required for an award of restitution. A victim seeking restitution must first establish that she is a "victim" of a federal child pornography offense which means she is an "individual *harmed as a result of* a commission of a crime under this chapter [i.e., the chapter concerning child pornography]." 18 U.S.C. § 2259(c) (emphasis added). It is this requirement that any claimed "harm [be] a result of" an enumerated federal child pornography offense that guides a district court's decision to award restitution. As the panel in this case cogently explained:

> Restricting the "proximate result" language to the catchall category in which it appears does not open the door to limitless restitution. The statute itself includes a general causation requirement in its definition of a victim: "For purposes of this section, the term 'victim' means the individual harmed *as a result* of a commission of a crime under this chapter . . ." 18 U.S.C. § 2259(c) (emphasis added) . . . Given the statute's built-in causation requirement and the volume of causation evidence in the context of child pornography, fears over excessive punishment are misplaced.

In re Amy Unknown, 636 F.3d 190, 200-01 (5th Cir. 2011).

Once an individual establishes that she is a "victim" of a covered child pornography offense, Section 2259 outlines the process a district court must follow. The first paragraph in the statute states that a district court "shall order" restitution to the victim. 18 U.S.C. § 2259(a). The second paragraph in the statute then states that the district court "shall direct the defendant to pay the victim . . . the full amount of the victim's losses as determined by the court pursuant to

paragraph (2).” 18 U.S.C. § 2259(b)(1). Paragraph (2) provides for enforcement through 18 U.S.C. § 3664.

Subsection (b) then mandates that the district “shall direct the defendant to pay the victim . . . the full amount of the victim’s losses as determined by the court pursuant to paragraph (2).” 18 U.S.C. § 2259(b)(1). Subsection (b) also provides that for purposes of the provision “the term ‘full amount of the victim’s losses’ includes *any* costs incurred by the victim for” psychiatric care, lost income, and other losses. 18 U.S.C. § 2259(b)(3) (emphasis added).

By using the term “any” cost, Congress wanted to ensure that child pornography victims would not be forced to itemize and apportion each and every loss they suffered among multifarious defendants. The plain meaning of “any” is “any and all.” *See Torres v. O’Quinn*, 612 F.3d 237, 245-46 (4th Cir. 2010) (“[W]hen the word ‘any’ is ‘used as a function word to indicate the maximum or whole of a number or quantity,’ for example, ‘give me [any] letters you find’ and ‘he needs [any] help he can get,’ the word ‘any’ means ‘all.’”) (*citing Webster's Third New International Dictionary* 97 (2d ed.1981) (internal quotation omitted); *see also Webster's New Universal Unabridged Dictionary,* 96 (1st ed.2003) (defining “any” as “every; all”).

Implementing the restitution award is equally straightforward. The district court, though its probation office, will obtain an itemized list from the child

pornography victim detailing the five categories of losses for which no proximate cause is required: psychological counseling, occupational therapy, child care expenses, lost income, and attorney's fees and costs. 18 U.S.C. § 2259(b)(3)(A)–(E). After resolving any challenges to the specific numbers offered, the district court awards that amount as restitution.[15]

Under this interpretation of the child pornography restitution statute, the district court will have to resolve any evidentiary challenges to the victim's numbers and the basis for those numbers. For example, a defendant can argue that a victim inflated the costs of psychological counseling services or that she should not really lose any income. Of course, *any* interpretation of Section 2259 will require district judges to make these kinds of factual determinations. What Amy's interpretation does is eliminate any additional litigation beyond these straightforward, factually-based determinations.

In this particular case, Amy's restitution is simple to calculate: She is entitled to a restitution award of $3,367,854, for the full amount of the losses she documented in her victim impact statement.[16] As the Third Circuit previously held,

[15] The district court could also award restitution for a sixth category of "any other losses" suffered by a victim, but only upon a showing that those losses resulted "as a proximate result of the offense." 18 U.S.C. § 2259(b)(3)(F). In counsel's experience, victims rarely seek restitution under this "catch all" clause.

[16] While Amy submitted extensive documentation to support her losses, in other cases there is an alternative method for calculating loss. Congress has established statutorily presumed minimum damages of $150,000 per violation. "Masha's Law,"

"[t]here is nothing in [§ 2259] that provides for a proportionality analysis." *United States v. Crandon*, 173 F.3d 122, 126 n.2 (3d Cir. 1999). Moreover, in Section 2259 Congress intended "to make *whole* . . . victims of sexual exploitation." *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (emphasis added). Once the defendant was convicted of possessing Amy's child sex abuse images, the overriding concern at sentencing should have been insuring that *she* was made whole. The only way to make Amy whole is to award her the full amount of her documented losses.

B. The Defendant's Conclusion that Amy Should Receive No Restitution Demonstrates His Flawed Interpretation

Paroline's proposed application of the law to the facts in this case is stark and constricted: Amy should get nothing. Paroline wants to deconstruct this generous remedial statute, turning it into a parsimonious regime that is "largely unworkable." *United States v. Paroline*, 672 F.Supp.2d 781, 793 n. 12 (E.D. Tex. 2009), *rev'd*, *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011). As the difficulty of awarding even modest restitution to victims under a proximate cause regime

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which is found at 18 U.S.C. § 2255, provides that anyone who is a victim of a violation of various federal child pornography offenses—including the defendant's crimes in this case—can bring a civil action and is deemed to have suffered losses of at least $150,000. *See United States v. Estep*, 378 F.Supp.2d 763, 773 n.4 (E.D.Ky. 2005). Remarkably, the parties apparently want the district court in this case to withhold from Amy even the congressionally established *minimum* damage award.

demonstrates,[17] it is almost impossible for a child pornography victim to show precisely how her losses were "proximately" caused.

A well-known rule of statutory construction directs that "if one construction is *workable and fair* and the other is unworkable and unjust, the court will assume the legislature intended that which is workable and fair." 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SOUTHERLAND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2011) (emphasis added). In other cases, this Court has declined to interpret

[17] While a number of district courts have awarded Amy generous restitution, other district courts have read a general proximate cause requirement into the statute and concluded that proximate cause was not established. All of these decisions deny child pornography victims *any* restitution. *See, e.g.*, *United States v. Chow*, 760 F.Supp.2d 335, 342 (S.D.N.Y. 2010) ("The Court respectfully disagrees with the district courts that have found proximate cause to exist in cases such as this one, involving only possession of widely distributed materials"); *United States v. Covert*, 2011 WL 134060, at *6,*9 (W.D. Pa. Jan. 14, 2011) (expressing desire not to turn Section 2259 into a strict liability statute, but noting victim's counsel's position on Section 2259 is "not unreasonable"); *United States v. Faxon*, 689 F.Supp.2d 1344, 1360-361 (S.D. Fla. 2010) (court has no conceivable idea as to how many defendants may be involved, so there is no way to apportion restitution to one defendant); *United States v. Patton*, 2010 WL 1006521, at *2 (D. Minn. March 16, 2010) (without specific evidence of proximate cause, any award would be an "arbitrary calculation"); *United States v. Solsbury*, 727 F.Supp.2d 789, 796-97 (D.N.D. 2010) (the child pornography restitution scheme "is currently unworkable in the criminal arena" . . . [T]hese troublesome cases cry out for an appropriate restitution remedy, but the subject is "one best determined by Congress—not by a variety of conflicting and inconsistent awards and decisions as have evolved over the past year"); *United States v. Van Brackle*, 2009 WL 4928050, at *3-*4 (N.D. Ga. Dec. 17, 2009) (despite the government's argument that restitution can be awarded without proof of proximate cause, restitution without such proof would be pure speculation and risk violating the Eighth Amendment); *United States v. Woods*, 689 F.Supp.2d 1102, 1112 (N.D.Iowa 2010) (proximate cause required for restitution award and "[u]nfortunately" the court is unable to find proximate cause).

important Acts of Congress so as to render them unworkable. *See, e.g., Payne v. U.S.*, 289 F.3d 377, 389 (5th Cir. 2002). "Axiomatic in statutory interpretation is the principle that laws should be construed to avoid an . . . unreasonable result." *United States v. A Female Juvenile*, 103 F.3d 14, 16–17 (5th Cir. 1996). "Statutes should be interpreted to avoid untenable distinctions . . . whenever possible." *Sykes v. Columbus & Greenville Ry.*, 117 F.3d 287, 291 (5th Cir. 1997) (internal quotation omitted).

If this Court adopts Paroline's restrictive interpretation of the child pornography restitution statute, then Amy and countless other child pornography victims will receive no restitution whatsoever. As the district court concluded in this case after adopting Paroline's interpretation, it is impossible for victims like Amy to apportion psychological counseling and losses among defendants in other jurisdictions, defendants who have not yet been apprehended and prosecuted, and others (both inside and outside this country) who will illegally view their child sex abuse images.

Congress cannot have intended that child pornography victims bear such a Sisyphean task in which "the intent and purposes of § 2259 would be impermissibly nullified . . . in virtually *every* case . . . " *In re Amy*, 591 F.3d at 797 (Dennis, J., dissenting) (emphasis in original). Instead, Congress broadly commanded that district courts award restitution in every single case for "the full

amount of the victim's losses." 18 U.S.C. § 2259(b)(1). This Court should accordingly reject Paroline's proposed interpretation of the statute.

C. The Government's Proposed Interpretation of Section 2259 is Unknown and Unworkable

Applying the Government's proposed interpretation of the statute to the facts of this case produces . . . a mystery. Unlike Amy and the defendant, the Government has yet to reveal its view on the proper result in this case even though Amy submitted her restitution request to the Government more than two-and-a-half years ago.

Perhaps to end this mystery, this Court's briefing letter requested that each of the parties explain "[h]ow would the nexus standard you urge be applied to the facts in each of the above cases . . . ?" Letter from Lyle W. Cayce, Clerk, to Counsel in *In Re Amy Unknown*, No. 09-41238 (Feb. 6, 2012). Amy, too, is curious about how the Government's theory will operate. For more than a year-and-a-half in cases all over the country, Amy has been asking the Government to tell her how much of her standard $3.3 million restitution request the Government is willing to support. Repeatedly the Government has declined, replying most recently that this issue remains "under review."

As one example, after this Court granted en banc review in this case, Amy formally invoked her CVRA right "to confer" about the restitution issue, 18 U.S.C. § 3771(a)(5), in an e-mail to the Department. On February 13, 2012, during a

telephone conference call with the Chief of Criminal Appeals for the Justice Department's Criminal Division and other high-ranking attorneys, Amy asked for an estimate on what the Government is willing to support. The Government declined to provide any number and, indeed, even declined Amy's request that it at least commit to provide such a number in its brief to this Court on March 23, 2012.[18] As a result of this evasion, Amy is unable to provide specific analysis about the Department's as-of-yet-unknown approach. Two possible inferences jump quickly to mind.

The first inference is that the Government's theory must be complex. If after years of "review" the Government still is unable to explain how its interpretation

[18] Amy believes that the Government's on-going refusal to tell her how much restitution it will support violates the Crime Victim's Rights Act. In passing the CVRA, Congress was concerned that crime victims "were kept in the dark by prosecutors too busy to care . . . " 150 CONG. REC. 7296 (Apr. 22, 2004) (statement of Sen. Diane Feinstein). To remedy the problem of crime victims being "kept in the dark," Congress gave victims "the simple right to know what is going on, to participate in the process where the information that victims and their families can provide may be material and relevant . . . " *Id.*

Under the CVRA, government prosecutors are obligated to use their "best efforts" to ensure that crime victims are afforded their rights, including their rights to "full and timely restitution," to "confer with the Attorney for the Government in the case," and to be "treated with fairness." 18 U.S.C. § 3771(c)(1), 18 U.S.C. § 3771(a)(5), (6), & (8). In accordance with these rights, the Government should at least tell Amy how much restitution it will support. If the Government does not reveal that number in its March 23, 2012 brief, Amy intends to file a motion urging that the Government's failure to do so violates her rights under the CVRA and seeking an appropriate remedy.

works in a real world case, the position might be so complicated as to be impractical.

A second inference, however, seems at least as likely. Due to the Government's caginess, Amy is beginning to believe that the Government does not want to reveal the full implications of its theory because it will mean admitting that Amy will receive only de minimus restitution. Amy's concerns on this score are heightened by a close reading of the Government's previously-filed pleadings in this case.

In its brief supporting rehearing, the Government argued that this Court should import a new, general "proximate result" requirement into the statute and then interpret that burden in light of a "reasonable foreseeability standard." The Government proclaimed that such a standard will render convicted child pornography offenders "responsible for a *broad range* of losses suffered by their victims." Gov't Resp. Def.'s Pet. Reh'g at 17 (emphasis added).

While it might be true, as the Government states, that Amy could still receive a broad *range* of restitution, she would not receive the broad *amount* of restitution that Congress plainly intended and what is needed to make victims whole. Amy is concerned that the Government's theory leads to victims receiving only a trifling amount of restitution.

A quick illustration will demonstrate Amy's fear. Amy is requesting $3.3 million in restitution. The question under the Government's theory is what part of that loss a defendant like Paroline could "reasonably foresee" that he "proximately" caused. Apparently the Government believes that Paroline could not reasonably foresee the entire $3.3 million loss stemming from his crime because the Government argues against what it describes as an "unlimited remedy." *Id.* at 10.[19]

But then the question devolves to what fraction of the $3.3 million could Paroline foresee? On this point, Paroline can hide in a crowd of more than 1500 currently convicted criminals who have all contributed to Amy's losses. Since 2006, Amy has received more than 1500 notices of *federal* criminal cases involving her images. But Amy's losses stem not just from federal cases, but also from state cases. The number of state cases involving Amy's images presumably exceeds the number of federal cases. Yet Amy lacks any way of knowing the precise number because she only receives notifications in federal cases.

In addition, Amy's harm stems not just from the invasion of her privacy caused by apprehended criminals like Paroline, but also from criminals who have not yet and may never be caught, both inside and outside this country. Adding all

[19] Of course, another way to describe an "unlimited remedy" is as a remedy for "the full amount of the victim's losses"—the words and intent that Congress placed into the statute. 18 U.S.C. § 2259(b)(1).

of these "causes" together, it is reasonable to estimate that Paroline is among, at least, 10,000 other criminals who have already collected Amy's images. *Cf.* Gov't Resp. Def.'s Pet. Reh'g at 15 (conceding that "innumerable others" have possessed Amy's images).

In addition, Amy is not seeking restitution solely for *past* losses, but also *future* losses. Based on the current rate of notifications (approximately one new federal notice per day) and the fact that these notifications represent the proverbial tip of the iceberg, a reasonable estimate of the total number of persons who will collect Amy's images over the course of her lifetime is around 100,000. (Amy is currently 21 years old, and accordingly has a life expectancy of at least four or five more decades.)

Applying the Government's "reasonable foreseeability" test, straightforward math produces the result that Amy will receive from Paroline restitution of approximately $33 (the $3,300,000 restitution request, divided by 100,000 viewers). Of course, $33 does not even cover the cost of a single psychiatric session, much less the "full amount of the victim's losses" that Congress made "mandatory" under Section 2259. 18 U.S.C. § 2259(b)(3) & (4).

While it is technically true, as the Government argues, that Amy is receiving $33 in restitution for a "broad range" of losses (the $33 can be divided, for instance, into $22 in lost income, $7 in psychiatric expenses, $3 in occupational

therapy, and $1 child care), she is clearly not receiving a "broad amount" of her losses from Paroline.

Amy respectfully suggests that the Government's cleverly-hedged language promising victims a "broad range" of restitution is misleading.

This simple illustration points to the underlying flaw in the Government's approach. Once the Government adopts a "reasonably foreseeability" formula, the only logical calculation possible is the fraction of loss caused by a defendant in light of all the other defendants and collectors (i.e., the approximately 1/10,000th fraction identified above)

Amy is skeptical that the Government's approach will result in substantial restitution for her and countless other victims of child pornography offenses. If the Government's interpretation of the statute will lead to victims receiving the generous restitution Congress intended, then why did *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011)—which followed the Government's approach—reach the opposite conclusion?

The *Kennedy* decision—which was issued by the circuit court with the largest criminal docket in the country—upheld the "proximate cause" requirement which the Government urges in this case.[20] In *Kennedy*, the Ninth Circuit held that

[20] The Ninth Circuit decided *Kennedy* in a non-adversarial posture without the benefit of a brief from a crime victim. In that case, both the defendant and the

while a defendant's viewing of child sex abuse images "were one cause of the generalized harm . . . Vicky suffered due to the circulation of [her] images on the internet, it is not sufficient to show that they were a proximate cause of any particular losses." *Id.* at 1264. The Ninth Circuit concluded that "Section 2259's proximate cause and reasonable calculation requirements will continue to present *serious obstacles* for victims seeking restitution in these sorts of cases." *Id.* at 1266 (emphasis added). Despite urging by the victims, the Government failed to seek further review in *Kennedy* even though it effectively renders restitution unobtainable in the Ninth Circuit.

Now the Government asks this Court to likewise deprive child pornography victims in Texas, Mississippi, and Louisiana of the ability to obtain restitution. In short, under the Government's "analysis, the intent and purposes of § 2259 would be impermissibility nullified because the problem of allocating restitution present here will be found in virtually *every* case where a child depicted in electronically disseminated pornography seeks restitution from those who unlawfully possess those images." *In re Amy*, 591 F.3d 792, 797 (5th Cir. 2009) (Dennis, J., dissenting). This is clearly why Congress directed courts to award child pornography victims restitution for the "full amount of the victim's losses." 18 U.S.C. § 2259(b)(3).

Government urged the Circuit to read a general "proximate cause" requirement into the statute.

If Paroline does not want to bear the full amount of, for example, Amy's therapy expenses, he can sue other defendants for contribution.[21] As the panel explained in adopting Amy's interpretation of the statute, "[h]olding wrongdoers jointly and severally liable is no innovation. It will, however, enable [a defendant] to distribute 'the full amount of the victim's losses' across other possessors of Amy's images. Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient." *In re Amy Unknown*, 636 F.3d 190, 201 (5th Cir. 2011).

The Government never explains why Amy must bear the burden of collecting piecemeal restitution from numerous different defendants scattered around the country. Congress wisely decided that this burden should fall on convicted criminals like Paroline. Congress's sound public policy choice should be respected by this Court.

CONCLUSION

For all these reasons, the Court should reverse the decision of the district court and remand for a restitution award to Amy for the full amount of her losses.

Respectfully submitted,

/s/ Paul G. Cassell

[21] Amy's counsel maintains records of all restitution that she has received and will provide those records to any defense attorney seeking to file a contribution action against other defendants.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) (for which Amy has moved, without opposition, for an extension to 19,000 words) because this brief contains less than 19,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point type.

CERTIFICATE OF SERVICE

I certify that on February 24, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Paul G. Cassell
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