No. **09-31215**

En banc in the

United States Court of Appeals

for the

Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL WRIGHT,

Defendant-Appellant,

AMY, CHILD PORNOGRAPHY VICTIM,

Crime Victim-Amicus.

AMY'S AMICUS BRIEF IN SUPPORT OF NEITHER PARTY IN DEFENSE OF THE JUDGMENT BELOW

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

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STATEMENT OF THE CASE

Amy presented the underlying facts concerning her restitution request in her opening brief in the companion case *In re Amy Unknown*, No. 09-41238. Accordingly, she will highlight a few facts specifically relevant to this particular case.

When federal agents executed a search warrant at Defendant Wright's home they discovered 30,000 images and videos in his possession depicting the sexual exploitation of children. USCA5 49. The material included children less than twelve years old engaged in "sexually explicit conduct" including "adult males vaginally and/or anally penetrating minor victims and minors performing oral sex on adults." USCA5 50. Wright pleaded guilty to a one-count information for possessing images depicting the sexual abuse of children in violation of 18 U.S.C. § 2252(a)(4)(B).

The Bureau of Immigration and Customs Enforcement identified 21 known victims among Wright's 30,000 child sex abuse images including Amy. After her counsel was notified, Amy filed a victim impact statement and detailed restitution request outlining $3,367,854 in damages (mostly for lost income and future psychiatric counseling). The prosecutors handling the case supported Amy's request and the defendant objected.

In her victim impact statement, Amy explained in her own words the trauma she suffers from crimes like Wright's:

> There is a lot I don't remember, but now I can't forget because the disgusting images of what he did to me are still out there on the internet…
>
> Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped, But I am powerless to stop it…
>
> It is hard to describe what it feels like to know that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it. It's like I am being abused over and over and over again…
>
> I know those disgusting pictures of me are stuck in time and are there forever for everyone to see…It's like I can't escape from the abuse, now or ever…The truth is, I am being exploited and used every day and every night somewhere in the world by someone…

PSR at 15-20.

Amy also explained why providing a victim impact statement is so important: "Even though I am scared that I will be abused or hurt again because I am making this victim impact statement, I want the court and judge to know about me and what I have suffered and what my life is like. What happened to me hasn't gone away. It will never go away…" *Id.* at 20.

Amy supported her restitution request with a report from Dr. Joyanna Silberg, a licensed forensic child psychologist. Dr. Silberg noted that while Amy was treated for sexual abuse and responded well when she was younger, her condition drastically deteriorated at age 17 when she realized her child sex abuse images were widely distributed on the Internet. PSR at 4. Dr. Silberg concluded that each discovery that another defendant collected and traded Amy's images "re-traumatized her again." *Id.* at 3. Dr. Silberg explained that "Amy describes constantly being in a state of waiting for 'the other shoe to drop,' as someone new finds her pictures, and discovers this painful and 'dirty' secret about her." Report of Psychological Consultation at 4-6.

At sentencing, the district court granted a fraction of the restitution Amy was seeking. The court awarded restitution of $529,661 based on the future projected costs of $512,681 for counseling and $16,980 for Amy's expert witness fees.

Wright appealed, challenging the restitution award. He argued that he did not proximately cause any of Amy's losses. The Government responded with a brief fully defending the award. The Government "assumed" that the statute generally required proof that a victim's losses were proximately caused by a defendant, but contended that evidence in the record established the necessary proximate cause. Gov't Br. at 32-33 & n.11.

On April 20, 2011, following oral argument, a panel of this Court reversed the district court's restitution award, concluding that the district court failed to adequately explain why it ordered Wright to pay some parts of Amy's restitution request but not others. *United States v. Wright*, 639 F.3d 679 (5th Cir. 2011).

The three judges on the panel, however, also filed a special concurring opinion. In it, they expressed their disagreement with the panel decision in *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), reasoning that Section 2259 contains a general proximate cause requirement. *See id.* at 686 (Davis, J., specially concurring). They urged that this issue be reheard en banc.

On June 2, 2011, Wright filed a petition for rehearing en banc. The Government filed a petition for panel rehearing, recounting its support for rehearing en banc in the parallel case of *In re Amy Unknown.* The Government requested that, following rehearing there, this case be "dispose[d] of…accordingly." Gov't Pet. Panel Rehearing at 6. The Government did not specifically discuss how the district court's restitution award should be re-determined.[1]

[1] On June 3, 2011, Amy sent a letter to the Clerk of Court in the Eastern District of Louisiana "withdraw[ing] with prejudice the request for criminal restitution filed in the above-named case on July 15, 2009 on behalf of Amy." The parties apparently agree that this letter is irrelevant to this appeal because "the district court currently lacks jurisdiction to address [Amy's] counsel's letter." Gov't Pet. for Panel Rehearing p. 8 n.4 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (district court divested of jurisdiction over a case when notice of

On January 25, 2012, this Court granted rehearing en banc in this case and the companion case of *In re Amy Unknown*.

On February 6, 2012, the Clerk issued a letter directing the parties to answer the question: "How would the nexus standard you urge be applied to the facts…?"

On February 22, 2012**,** the Court granted Amy's motion to file an amicus brief in support of the judgment below.

ARGUMENT

This Court should affirm the district court's award of substantial restitution in this case. In her brief in *In re Amy Unknown*, Amy explains how the child pornography restitution statute should be properly construed. She hereby adopts those arguments by reference and offers a few additional responses to Wright's opening brief.

I. THE COURT OF APPEALS DECISIONS CITED BY WRIGHT ARE UNPERSUASIVE

A. The Cases Cited by Wright Were Decided in a Non-Adversarial Posture and are Accordingly Non-Precedential Dicta

Wright relies prominently on the fact that three recent Court of Appeals decisions have imposed a general "proximate result" limitation on Section 2259. Wright Br. at 13 (*citing United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011);

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appeal filed)); *see also* Letter of Michael Wright to Lyle W. Cayce, Clerk, U.S. Court of Appeals for the Fifth Circuit, Doc. 00511504289 (June 9, 2011). As a result, this appeal currently stands in the posture of Amy requesting substantial restitution, which the district court awarded to her; any further requests for action by the district court remain outstanding and undecided.

United States v. Aumais, 656 F.3d 147 (2d Cir. 2011); *United States v. McGarity*, ---F.3d---, No. 09-12070, 2012 WL 370104 (11th Cir. Feb. 6, 2012)). Wright, however, fails to reveal a critical factor necessary to assess the weight of these three decisions: none of them involved adversarial briefing on the "proximate result" issue.

Not surprisingly, in all three of these cases, the defendant argued that Section 2259 is subject to a proximate cause requirement. And, perhaps surprisingly, in all three cases *the Government joined the defendants*.[2] Most importantly, in none of the three cases cited was a crime victim represented or an alternative position advanced.[3]

Since all three cases were decided in a non-adversarial posture, the resulting decisions are entitled to little weight. As this Court explained, "[w]ithout

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[2] *See* Gov't Br. at 96, *U.S. v. McGarity*, No. 09-12070-AA ("the government agrees [with the defendant] that § 2259 requires a showing of proximate cause."); Gov't Br. at 26, *U.S. v. Aumais*, No. 10-3160 (arguing "the government did establish by a preponderance of evidence that Amy was proximately harmed by Aumais"); Gov't Br. at 48, *U.S. v. Kennedy*, No. 10-30065 ("because [defendant's] actions were the proximate[] cause [of] the harm to the victims, the restitution order was proper.…").

[3] The lack of counsel representing victims in these cases is not unusual. Most child pornography victims cannot obtain attorneys. The few victims who have legal counsel, such as Amy, are frequently unable to effectively monitor appellate dockets around the country for cases challenging their restitution orders, much less seek leave to participate in appeals. Indeed, it is precisely because the important voice of the crime victims is not being heard in such cases that the Appellate Legal Clinic of the S.J. Quinney College of Law at the University of Utah is providing pro bono assistance in this important case.

opponents, the adversary system cannot function." *United States v. Chagra*, 701 F.2d 354, 361 (5th Cir. 1983). The Justice Department's decision to join the defendants in narrowly construing the statute eliminated any adversarialness "upon which the court[s] so largely depend[] for illumination of difficult" issues. *Baker v. Carr*, 369 U.S. 186, 204 (1962). These Circuit Courts never considered an alternative interpretation—that is, the substantial legal arguments for reading Section 2259 broadly.

Since the Government failed to challenge the proximate result requirement in these three cases, the Courts' discussions of this issue is dicta. In each case, the Courts' determination of whether Section 2259 contains a proximate cause requirement was unnecessary to the outcome of the case; the Government simply stipulated on this issue. [4] Accordingly, the views expressed were "unnecessary to the decision in the case and therefore not precedential." *Holt v. State Farm Fire & Cas. Co.*, 627 F.3d 188, 194 (5th Cir. 2010) (*quoting Black's Law Dictionary*).[5]

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[4] As counsel were finalizing this brief, they became aware of another non-adversarial decision that concluded that § 2259 contains a general proximate cause requirement: *United States v. Kearney*, ---F.3d---, 2012 WL 639168 (1st Cir. Feb. 29, 2012). The First Circuit proceeded on the basis that "[t]he government does not dispute that a proximate cause test applies.," *id.* at *13, and focused on the breadth of the proximate cause test rather than its existence. For the reasons discussed in this section, the First Circuit' opinion lacks persuasive value on whether a general proximate cause requirement should be read into § 2259.

[5] For the same reason, Amy also respectfully questions the value of the concurring opinion in *United States v. Wright*, 639 F.3d 679 (5th Cir. 2011). The concurrence concluded that Section 2259 contains a general proximate cause requirement. It

B. The Cases Cited by Wright All Thwart Congress' Plain Intent

The ultimate outcome in these cases also reflects the fundamental unfairness caused by a lack of adversarialness. In each of these three cases, the Court of Appeals vacated a sizeable restitution award to a child pornography victim, remanding with an opinion that signaled that the victims should receive trifling (if any) restitution. As a result, these decisions should not be followed because they clearly derogate Congress' intent in passing a generous remedial child pornography restitution statute.

In *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir 2011), the Ninth Circuit vacated a $65,000 restitution award warning that "it is likely to be a rare case where the government can directly link one defendant's viewing of an image to a particular cost incurred by the victim." The Court cautioned that "[w]hile we do not rule out the possibility that the government could devise a formula by which a victim's aggregate losses could be reasonably divided …we suspect that § 2259's proximate cause and reasonable calculation requirements will continue to present *serious obstacles* for victims seeking restitution in these sorts of cases." *Id.* (emphasis added).

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does so, however, in the context of a non-adversarial case, without any briefing or oral argument presenting an opposing point of view. In contrast, the panel's decision in *In re Amy Unknown* was reached in an adversarial posture after participation, briefing and argument on both sides of the proximate result issue.

Similarly, in *United States v. Aumais*, 656 F.3d 147, 155 (2d Cir. 2011), the Second Circuit vacated a $48,483 restitution award concluding that while it was not going to "categorically foreclose payment of restitution to victims of child pornography from a defendant who possesses their pornographic images," it was unwilling to do so unless there was some specific psychological evaluation that linked the victim's losses to the defendant's conduct. The Court cautioned that awarding restitution without a specific linkage would produce a "baffling and intractable issue…in terms of damages and joint and several liability." *Id.* at 155.

Finally, in *United States v. McGarity*, ---F.3d---, No. 09-12070, 2012 WL 370104 at *39 (11th Cir. Feb. 6, 2012), the Eleventh Circuit vacated a $3.3 million award to a child pornography victim because it was not supported by proximate cause. The Circuit Court also expressed its "concern regarding the proper assessment and allocation of damages under § 2259." *Id.*

In summary, these three opinions illustrate the bleak prospects for child pornography victims when courts impose a general proximate cause requirement onto the statute. Child pornography victims will continue face—as the Ninth Circuit declared— "serious obstacles" to obtaining restitution for their losses.

This alone should lead this Court to reject these interpretations because in this Circuit a statute will not be construed to "obstruct Congress's intent," *Planned Parenthood of Houston and Southeast Tex. v. Sanchez*, 403 F.3d 324, 341 (5th Cir.

2005), or to "thwart [a statute's] manifest purpose. *Kelly v. Boeing Petroleum Services, Inc*., 61 F.3d 350, 363 (5th Cir. 1995).

Instead, in this Circuit, a "fundamental principle" of statutory construction is "common sense." *Burlington Northern & Santa Fe Ry. Co. v. Poole Chemical Co*., 419 F.3d 355, 364 & n.46 (5th Cir. 2005). Common sense dictates that a mandatory restitution statute should not be construed in such a way that the acknowledged victim receives nothing.

II. SECTION 2259's PLAIN LANGUAGE REQUIRES A RESTITUTION AWARD FOR THE "FULL AMOUNT" OF A VICTIM'S LOSSES WITHOUT THE NEED FOR HER TO SHOW THAT A DISCRETE LOSS WAS THE "PROXIMATE RESULT" OF A PARTICULAR DEFENDANT'S CRIME

A. Section 2259 Does Not Contain a General "Proximate Result" Requirement

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 then enumerates six separate categories of losses:

> (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).

Wright re-interprets this statute to require a victim to prove that she suffered each of the losses listed in subsections (A) through (E) "as a proximate result of the [defendant's] offense" even though no such requirement appears in the statute. Indeed, Wright concedes in his brief that *"[f]or each specific category of loss listed, Congress did not state that the loss must result, much less proximately result from the offense."* Wright Br. at 10 (emphasis added).

Wright's revealing concession should end any debate. This Court has repeatedly counseled that "when the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language." *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 630 F.3d 431, 438 (5th Cir. 2011) (*quoting United States v. Clayton*, 613 F.3d 592, 596 (5th Cir. 2010)). The unambiguous plain language means that Amy can recover the full amount of her enumerated losses in sections (A) through (E) without proving proximate result. No absurdity results from this interpretation. If anything, an absurdity results from Wright's interpretation: Amy gets nothing under a "mandatory" statute which requires district court's to award victims the "full amount" of their losses.

Acknowledging that the statute's plain language does not support his position, Wright speculates that the "likely reason for the omission [of a general proximate result requirement] is that Congress did not envision that a victim would claim restitution for medical services, physical therapy, transportation, lost income or attorney's fees that did not proximately result from the offense." Wright Br. at 11. This Court has soundly rejected precisely this sort of speculation that a statute should not be applied "according to its terms. This court does not second-guess Congress's policy decisions." *Dwyer v. Fidelity Nat'l Property and Cas. Ins. Co.*, 565 F.3d 284, 290 (5th Cir. 2009). Wright's presumption contradicts the clear Congressional intent that victims receive the "full amount of [their] losses." 18 U.S.C. § 2259(b)(3); *see also* § 2259(b)(1).

Wright tacitly acknowledges the ultimate implication of his position by refusing to admit how much restitution, if any, Amy would receive under his theory. In doing so, he contravenes this Court's direction to counsel to answer the question "[h]ow would the nexus standard you urge be applied to the facts…?" Apparently Wright's answer to this question is that—as applied to these or similar facts—child pornography victims like Amy receive nothing.

Wright also tries to void the statute's plain language by appealing to "traditional common law requirements." Wright Br. at 9. Amy already refuted this argument in her companion brief and will not repeat that analysis here. *See* Amy's

Opening Br. on the Merits at 47-58 (explaining why Section 2259 adheres to a well-established tort principle that multiple wrongdoers are all jointly responsible for losses caused to an innocent victim). But one additional point is warranted.

Concerning the "common law," this Court has repeatedly stated that it will not "use the common law definition of any term where it would be inconsistent with the statute's purpose, notably where the term's definition has evolved." *United States v. Guidry*, 456 F.3d 493, 509 (5th Cir. 2006) (*citing Moskal v. United States*, 498 U.S. 103, 116–17 (1990) (rejecting the common law definition for the term "falsely made" because "Congress' general purpose in enacting a law may prevail over this rule of statutory construction, [*i.e.*, the common-law meaning rule]"); *Taylor v. United States*, 495 U.S. 575, 592–96 (1990) (refusing to find that the term "burglary" in a sentencing enhancement statute was limited to the common law meaning of the terms); *Perrin v. United States*, 444 U.S. 37, 45 (1979) (defining the term "bribery" based on contemporary understanding because the common law definition has evolved and now the term includes bribery of individuals acting in private capacity). Applying Wright's limited—and allegedly "common law"—interpretation of "proximate result" is clearly inconsistent with Congress' avowed purpose of providing generous restitution to child pornography victims.

Wright's invocation of the "common law" over the statute's plain language also ignores the ambiguity surrounding the "proximate cause" doctrine. This Court

has long recognized the "historic confusion attendant with the use of the phrase 'proximate cause.'" *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 983 (5th Cir. 1978) (citing *Prosser on Torts*). The Supreme Court also recently observed that "[c]ommon-law 'proximate cause' formulations varied, and were often both constricted and difficult to comprehend." *CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2637 (2011). This Court should not impose a "confus[ing]" or "difficult to comprehend" term onto the statute when Congress chose different language.

If Congress wanted to graft a general "proximate result" limitation onto the child pornography restitution statute, it would have been simple to do so. Other restitution statutes explicitly contain such a requirement, defining "victim" as the individual "directly and proximately harmed" by the crime. 18 U.S.C. § 3663(a)(2); 18 U.S.C. § 3663A(a)(2).

In contrast, the child pornography restitution statute more broadly defines "victim" as the individual "harmed" by the crime. The child pornography restitution statute also begins with the phrase "[n]otwithstanding section 3663 or 3663A…" clearly signaling an explicit intent to supersede any restrictions that might be found there. The Court should not import words from other restitution statutes into a statute where Congress did not use them and in fact, impliedly rejected them.

B. Section 2259's Legislative History Supports Amy's Interpretation

Instead of relying on the statute's plain language, Wright's main argument is that a "Senate Report" proves that Congress intended to impose a general proximate result requirement. Wright Br. at 7 (argument heading I). Wright misidentifies the report: it is not a report of the full Senate, but more narrowly a report of the Senate Judiciary Committee.

In this Circuit, "[i]nferences drawn from a statute's legislative history…cannot justify an interpretation that departs from the plain language of the statute itself." *In re Ramba, Inc*., 416 F.3d 394, 401 (5th Cir. 2005). Legislative history "is a useful interpretive tool only in cases of ambiguity or absurdity." *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 630 F.3d 431, 439 (5th Cir. 2011); *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring) ("we are a Government of laws, not of committee reports"). As Wright concedes, the child pornography restitution statute lacks any ambiguity.[6] And it is hardly "absurd" to construe a statute to give innocent victims of child pornography full restitution for therapy and other losses.

To the extent the Court wants to consider the statute's legislative history, the legislative history confirms the statute's plain language. Section 2259 was a small part of a much larger enactment: the Violence Against Women Act (VAWA).

[6] *See* Wright Br. at 10 ("[f]or each specific category of loss listed, Congress did not state that the loss must result, much less proximately result from the offense.").

Wright relies exclusively on a September 10, 1993, Senate Judiciary Committee Report about VAWA. That report contains a few sentences addressing the restitution provision. These sentences begin by providing an overview of the restitution provision, describing it as one that "*mandates* restitution to the victims of sexual exploitation and sexual assault." S. REP. 103-138 (1993 WL 355617) at 43 (emphasis added).

The Committee Report then briefly mentions proximate cause, but does not indicate that it is some sort of global requirement that a victim must demonstrate to obtain restitution. The brief discussion in the Committee Report does not address any of the six separate categories of losses:

> Section 113. Mandatory restitution: *This section requires sex offenders to pay costs incurred by victims as a proximate result of a sex crime*. Under current law, a court may, but is not required, to order "restitution" or the payment of costs incurred. Often, it is simply assumed that the defendant does not, and will never, have the resources to pay the victim's costs. *This section reverses those assumptions, requiring the court to order the defendant to pay the victim's expenses.* The entitlement to a restitution award or the amount of the award, but only the method and schedule of payment [sic – incomplete sentence in original]. In determining the method of payment, the judge may take into account other obligations of the defendant, including obligations to financial dependents.

S. REP. 103-138 at 56 (emphases added).

Wright relies exclusively on the first sentence in this paragraph. But this abbreviated description should hardly be read as circumscribing the entire statute. The sentence simply does not address the specific question presented in this case.

Amy acknowledges that Section 2259 imposes a proximate result limitation on one category of losses—the catch-all "other" uncategorized losses covered by subsection (F). *See* 18 U.S.C. § 2259(b)(3)(F). That's the plain language of that part of the statute. Presumably the Senate Judiciary Committee was highlighting that sweeping provision when it referenced proximate result, not grafting new limitations onto the statute's more narrowly defined loss categories.

The more salient piece of the Senate Judiciary Committee Report is the sentence stating that the statute "reverses those assumptions [about restitution not being available], *requiring* the court to order the defendant to pay *the victim's expenses*" (emphasis added). Clearly the Senate Committee never intended that Wright's snippet would be used to undermine its broader intent to hold "sex offenders" accountable for their victim's losses. Such an interpretation is flatly at odds with the legislative history demonstrating that the Committee expected restitution to be routinely and generously awarded to victims of child pornography.

Wright also ignores other parts of the Senate Judiciary Committee Report that hurts his interpretation. The Report includes identical restitution language found elsewhere in VAWA without mentioning any intent to create a general "proximate result" limitation. VAWA created a new criminal prohibition of crossing a state line or acting within Indian country with the intent to injure or intimidate a spouse or intimate partner. *See* S. REP. 103-138 at 79-80 (chapter

110A) (currently codified in 18 U.S.C. § 2261). The new chapter also provided restitution for such offenses with language paralleling the pertinent parts of Section 2259. *See* S. REP. 103-138 at 81 (chapter 110A) (currently codified in 18 U.S.C. § 2264). For example, the domestic violence restitution provision utilizes the same "proximate result" language found in Section 2259's catch-all provision:

> (2) For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for–
> (A) medical services relating to physical, psychiatric, or psychological care;
> (B) physical and occupational therapy or rehabilitation;
> (C) lost income;
> (D) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and
> (E) any other losses suffered by the victim as a proximate result of the offense.

S. REP. 103-138 at 81 (describing a provision currently codified in 18 U.S.C. § 2264). Most importantly, in describing this language, the Senate Report does not indicate that restitution for domestic violence victims is limited to losses that are the "proximate result" of a defendant's crime. *See* S. REP. 103-138 at 61.

This parallel language also reveals the broad significance of this case to many different crime victims. If Wright's interpretation is accepted, not only will victims of child pornography face serious and perhaps insurmountable barriers in obtaining restitution, but victims of domestic violence and victims of sexual assault who seek restitution under identical statutes will be similarly barred. *Compare* 18

U.S.C. § 2248 & 18 U.S.C. § 2264 *with* 18 U.S.C. § 2259 (same exact "proximate result" language appears in the unspecified catch-all clause in all three statutes).

VOWA's legislative history about these parallel statutes confirms that Congress did not intend to impose a general proximate cause requirement on these provisions. For example, the November 20, 1993, House Judiciary Committee Report describes the sexual assault restitution provision as "*mandat[ing]* that the court shall order restitution for any offense under chapter 109A of title 18 of the United States Code. The court's order must direct that the defendant pay *to the victim[] losses* as determined by the court and that the United States Attorney enforce the restitution order by all available and reasonable means." H.R. REP. 103-395 (1993 WL 484760) at 32 (Nov. 20, 1993) (emphasis added).

The House Judiciary Committee Report then lists the separate categories of restitution losses, with the term "proximate" appearing only in the last one:

> This section defines the "full amount of the victim's losses" to include any costs incurred by the victim for: (1) medical services relating to physical, psychiatric, or psychological care, (2) physical and occupational therapy or rehabilitation, (3) lost income, (4) attorney's fees, including costs incurred in obtaining a protection order, (5) temporary housing (6) transportation, (7) necessary child care, (8) language translation services, and (9) any other losses suffered by the victim as a proximate loss [sic] of the offense.

H.R. REP. 103-395 at 32-33.

This legislative history confirms Amy's central argument: the House Judiciary Committee intended that the statutes it was enacting "mandate"

restitution for a well-recognized compilation of "victim's losses." The legislative history does not even hint that the "proximate" limitation applies anywhere other than the statute's undefined catch-all category.

The Senate Judiciary Committee Report and the House Judiciary Committee Report are but two of the many congressional reports dealing with VAWA including H. Rep. 103-324, H. Rep. 103-489, H. Conf. Rep. 103-694, and H. Conf. Rep. 103-711—all which discuss VAWA. Wright's approach of relying on a single sentence from a single Committee report written almost a year before VAWA's passage is precisely the kind of "exercise in looking over a crowd and picking out your friends" that has brought legislative history into some disfavor. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

While it might arguably be possible to support Wright's position by extrapolating a single fragment of legislative history from one of the numerous congressional Committee reports, Wright's interpretation clearly misses a very large forest for a very small tree. *See Shannon v. United States*, 512 U.S. 573, 583 (1994) ("We are not aware of any case…in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute."). VAWA's overriding goal is to provide justice to women, children, and other victims of domestic violence and sexual exploitation.

Full restitution for crime victims was clearly Congress's goal. As the Seventh Circuit explained:

> Congress intended to provide victims of sexual abuse with expansive relief for "the *full* amount of…[their] losses" suffered as a result of abuse, § 2259(b)(3)(B) (emphasis added). Congress chose unambiguously to use unqualified language in prescribing full restitution for victims. Indeed, in the legislative history of the contested statute, Congress cites the United States Supreme Court's landmark decision in *New York v. Ferber,* 458 U.S. 747 (1982). In that case, the Court discussed, at great length, the devastating and long term effects that the sexual exploitation of children can have both upon the victims of that abuse and greater society. *Id.*

United States v. Danser, 270 F.3d 451, 455 (7th Cir. 2001).

Similarly, in reviewing later legislative history connected with the statute, the Tenth Circuit 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." *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001) (*quoting* SEN. REP. NO. 104-179, at 42-44 (1995)). Limiting Section 2259's impact by imposing a general, ill-defined proximate cause requirement not found in the statute's text flatly contradicts the congressional plan.

C. Congress Knew How to Draft a Restitution Statute with a General "Proximate Result" Limitation Because at the Same Time Congress Enacted Section 2259 it Enacted Another Restitution Provision with a General "Proximate Result" Limitation

Wright's reliance on legislative history suffers from an even more fundamental flaw. Wright relies on a *report* written by the Senate Judiciary

Committee while ignoring an important piece of statutory *text* enacted by the full Congress. In the same legislation containing Section 2259, Congress adopted a different restitution provision that specifically includes a general proximate cause requirement. The fact that Congress explicitly wrote such a requirement elsewhere in the same law clearly indicates that it did not intend to do so in the child pornography restitution statute.

The Public Law that contains the child pornography restitution statute (18 U.S.C. § 2259) also includes a restitution provision for telemarketing fraud victims (18 U.S.C. § 2327). *See* Pub. L. 103-322, Title XXV, § 250002(a)(2), Sept. 13, 1994, 108 Stat. 2082. Like Section 2259, Section 2327 requires mandatory restitution for victims of telemarketing fraud for the "full amount" of their losses.

Unlike the child pornography restitution statute, however, this provision is worded differently and includes a general proximate result limitation. The telemarketing restitution provision provides: "For purposes of this subsection, the term 'full amount of the victim's losses' means all losses suffered by the victims as a proximate result of the offense." 108 Stat. 2082 (currently codified in 18 U.S.C. 2327(b)(3)).

This provision is extremely significant because it demonstrates the incongruity of Wright's position. If Congress truly wanted to limit child pornography victims to losses that were a proximate result of a defendant's crime,

it could have drafted a much shorter version of the "full amount of the victim's losses" clause, exactly as it did in the telemarketing restitution provision.

In such a scenario, there would be no need to enumerate six different categories of losses in subsections (A) through (F) if Congress' intent was to limit child pornography victims to "losses suffered [] as a proximate result of the offense." The clear reason for six separate subsections was to differentiate the well-defined losses which did not require proximate cause (i.e., those losses identified in subsections (A) through (E)), from the more attenuated, uncategorized, and unpredictable losses which require proximate cause (i.e., subsection (F)).

Further underscoring the imposition of a general proximate cause requirement in the telemarketing fraud statute is the fact that its definition of "victim" cross-references Section 3663A(a)(2) which in turn defines "victim" as an individual "directly and *proximately harmed* as a result of" the commission of a specified federal crime. *See* 18 U.S.C. § 2327(c) (cross-referencing 18 U.S.C. § 3663A(a)(2)).

In clear contrast, the child pornography restitution statute more broadly defines "victim" by providing that a "victim" is "the individual *harmed* as a result of a commission of a crime under this chapter"—omitting entirely the cross-reference to Section 3663A(a)(2) and its "proximate" harm language. 18 U.S.C. § 2259(c).

This Court has explained that "[i]t is axiomatic that courts should strive to give operative meaning to every word in a statute." *Tesfamichael v. Gonzales*, 411 F.3d 169, 175 (5th Cir. 2005). Wright tries to equate the enumerated but broad provisions in Section 2259 with the much narrower and limiting provisions in Section 2327. Congress employed different words purposely: it wanted broader and more generous restitution for victims of child pornography—a crime of violence directed against children—than for victims of telemarketing fraud—an economic crime directed against adults.

This Court should give a different construction to these two provisions in the same law because "Congress chose to use different words in different sections." *Id.* at 174-75. As the Supreme Court explained:

> We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.

Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 341 (2005).

D. Amy's Lack of Specific Awareness of Wright's Crime (Among Hundreds of Others) Does Not Preclude Restitution

Wright believes that Amy should receive zero restitution because "[t]here was no evidence that Amy knew Wright or knew he had seen her image." Wright Br. at 15. The Court should reject this argument because nothing in Section 2259

requires a crime victim to know the name of the defendant who is invading her privacy by collecting her child sex abuse images.

Wright's argument is essentially an effort to re-litigate the district court's factual determination that Amy is a "victim" of his offense. Wright apparently abandoned this issue in the district court,[7] failed to specifically appeal this issue, did not brief this issue before the initial panel, and does not advance this argument directly in his en banc brief. Accordingly, this Court must proceed on the district court's factual finding: namely, that Amy was "harmed" as the result of Wright's offense. *See* 18 U.S.C. § 2259(c) (defining a "victim" of a child pornography offense as an individual "harmed" by it).

Since Amy was harmed by Wright, she was entitled to seek restitution from him. Nothing in Section 2259 requires Amy to know the names or identities of the "sex offenders" who are collecting her images in order to receive restitution. Amy's legal counsel keeps her generally apprised of the federal criminal cases involving her images, but does not engage in the meaningless exercise of reciting each and every name in the now 1500 federal cases in which Amy's child sex abuse images were discovered.

[7] Wright's sentencing memorandum was filed under seal and Amy cannot review it. None of the pleadings filed in this Court, however, indicate that Wright contested the district court's "victim" finding.

This approach is consistent with the advice Amy's counsel received from Amy's forensic psychiatrist.[8] This Court should not construe Section 2259 to require legal counsel to add to Amy's trauma by providing her with the names of defendants and the details of hundreds of criminal cases in which she is seeking restitution.

Wright's real argument here is "[t]here was no evidence that Amy incurred an incremental loss by virtue of Wright viewing her image, or conversely, that she would have suffered a smaller loss had Wright not done so." Wright Br. at 15. But the premise of this argument is absurd. If the Court accepts Wright's approach then any defendant in any case can similarly maintain that he alone did not cause any "incremental" harm to Amy. The result is that no defendant will be liable for restitution since it is impossible to pinpoint blame on any one person.

Congress clearly did not intend to allow child pornography defendants to escape their responsibility to pay restitution by passing the buck to a crowd of offenders. *Cf. United States v. Oldbear*, 568 F.3d 814, 821 (10th Cir. 2009) (rejecting as irrelevant an "everybody-is-doing-it defense").

[8] In a few cases, Amy learns the defendant's identity. This will be one such case since Amy—consistent with her psychiatrist's advice—will attend the en banc oral argument at which Wright's name will presumably be mentioned.

E. The Burden on Apportioning Losses among Various Wrongdoers Should Fall on Wright, a Guilty Criminal, Rather than on Amy, an Innocent Crime Victim

Wright's final argument is that it is somehow unfair for him to be on the hook for all of Amy's restitution. Wright contends that he "could not possibly foresee that he would be held responsible for *all* of Amy's losses when he was only one of what likely are thousands of people who have viewed or will view her image." Wright Br. at 17.

Wright's self-serving argument contravenes well-established equitable principles manifested by Congress in Section 2259. Wright had a choice whether to commit his crime—whether to "knowingly possess" child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Amy had no choice. She was forced to suffer a gross invasion of privacy by Wright. As a result of crimes like Wright's, Amy now faces significant financial burdens including a lifetime of psychiatric counseling which will cost hundreds of thousands of dollars. Wright does not dispute these amounts. Who should bear the burden of paying for Amy's losses: Amy, who had no choice? Or Wright, who willfully committed the crime? (In his case thirty thousand times).

Congress made a well-founded public policy choice to shift the burden of paying for these losses directly onto the shoulders of those responsible for causing the damage. Wright and others like-minded "sex offenders" can clearly "foresee" that they may have to pay for all the losses a victim suffers—whether it's three

dollars or three million dollars—because the federal criminal code requires it. If Congress can remove an entire category of speech from First Amendment protection based on the negative impact of that speech on a victim, they can certainly—"constitutionally"—make one defendant pay the full amount of Amy's damages.

If Wright wants to recoup his losses, he can pursue contribution litigation against other convicted criminals so each of them pays their fair share. Although this might be challenging, as Amy has demonstrated by the over 700 restitution requests she has filed all over the country, it's not impossible. Once again, the question remains, who should bear the burden of equalizing the payouts: the victim or the criminal?

Congress appropriately decided that these litigation hardships should be borne by Wright and other convicted child pornography offenders. Considerable logic supports this view. At the very least, this Court should respect Congress' choice.

CONCLUSION

For the reasons set forth by Amy here and in her companion brief in *In re: Amy Unknown,* this Court should not impose a general "proximate result" limitation onto Section 2259. This is the *only* position Wright advances in his en banc brief and his legal argument should be rejected. Since Wright does not

advance any fallback arguments, the Court should affirm the judgment below in its entirety.[9]

DATED this 2nd day of March, 2012.

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[9] In particular, Wright does not allege that the district court erred in granting Amy one part of her restitution request (therapy expenses) but not another (lost income). Accordingly, this issue has been waived.

Although the original panel reversed the judgment below on this fact-specific ground, their opinion fails to show that Wright preserved this argument in the district court. 639 F.3d at 686. Accordingly, the panel should not have reached this issue because Wright waived it below.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. 29(d), because this brief contains fewer than 7,000 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.

Respectfully submitted,

/s/ Paul G. Cassell
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CERTIFICATE OF SERVICE

I certify that on March 2, 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.

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