

**In The
Supreme Court of the United States**

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AMY, THE VICTIM IN THE
MISTY CHILD PORNOGRAPHY SERIES,

Petitioner,

v.

MICHAEL M. MONZEL, et al.,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

◆

**BRIEF OF *AMICUS CURIAE*
THE NATIONAL CRIME VICTIM LAW
INSTITUTE SUPPORTING PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the criminal justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving victims' rights nationwide. This case involves fundamental rights and interests of crime victims across the country because it concerns the standard required for victims

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of *amicus*' intention to file it.

of child abuse images² to receive restitution under federal law.



SUMMARY OF THE ARGUMENT

As is extensively briefed by counsel for the victim in this case, there exists a circuit split among the federal circuits regarding the interpretation of the appropriate standard of review to apply under the statute requiring mandatory restitution for child victims of sexual exploitation, 18 U.S.C. § 2259. The Court should grant certiorari to resolve this split. Sup. Ct. Rule 10(a). It should also grant certiorari because the petition raises “an important question of federal law that has not been, but should be, settled by this Court. . . .” Sup. Ct. Rule 10(c). The issue presented is important because the current status of the law is wanting, leaving victims with different sets of protection based solely on where the prosecution of the crime against them is taking place. This undermines the intent and mandatory nature of § 2259, which Congress intended to fully compensate those children harmed by the distribution, possession, and viewing of images of their sexual abuse. It also undermines the clear language and intent of

² While the term “child pornography” is commonly used to describe an image that depicts a child being sexually abused, its use dilutes the reality of the victimization the image depicts. Consequently, throughout this brief, the term “child abuse image” is used instead of “child pornography.”

the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, which is to afford all victims enforceable rights, including the right to be treated with fairness. It is important for this Court to take up and decide the petition so that it can promulgate a clear standard in this emerging field of law, and thus allow for consistent enforcement of victims' rights.

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ARGUMENT

I. VICTIMS OF CHILD ABUSE IMAGES ARE HARMED BY THE SUBSEQUENT DISTRIBUTION, POSSESSION, AND VIEWING OF THESE IMAGES.

There is no dispute that victims of child abuse images are harmed not just by the initial production of the images, but by the subsequent distribution, possession, and viewing of those images. Indeed, social scientists, courts across the country (including this Court), and Congress have each determined that the viewing, possession, and distribution of child abuse images causes significant and long-term harm to the victims of such images, perpetuating the original abuse and furthering the emotional and psychological damage done to the victim. *See, e.g.,* Tory J. Caeti, *Sex Crimes, Part I: Child Pornography*, Law Enforcement Training Network, 11 (2004), *available at* <http://www.twlk.com/law/tests/letn1640102ct.pdf> (“Even if the child never sees the images again, he knows that they exist. In short, it forever invades the child’s privacy, complicating moral and normal

sexual development.”); Briefing Note on Child Abuse Images and the Internet, Children’s Charities’ Coal. On Internet Safety (July 25, 2010), at 3, *available at* <http://www.chis.org.uk/2010/07/25/briefing-on-child-abuse-images-and-blocking> (“For as long as the images remain on public view on the internet the abused child is in a very real sense being ‘re-abused’ and being put at risk of further harm.”); Susan G. Creighton, *Child Pornography: Images of the Abuse of Children*, NSPCC Information Briefings, 4 (November 2003), *available at* http://ec.europa.eu/justice_home/daphnetoolkit/files/projects/2003_017/childpornography.pdf (stating that victims of child abuse images manifest many similar symptoms to those linked with other forms of sexual exploitation, and “[f]eelings of powerlessness, shame and fear of disclosure [are] all heightened”).

As this Court recognized, “[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children” and “the harm to the child is exacerbated” by the circulation of these images. *New York v. Ferber*, 458 U.S. 747, 759 (1982). *See also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (“[A]s a permanent record of a child’s abuse, the continued circulation itself would harm the child who had participated.”). *See generally, e.g., United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998) (noting, in receipt of child pornography case, that “the pornography’s continued existence causes the child victims of sexual abuse continuing harm by haunting those

children in future years”) (internal citation omitted); *United States v. Church*, 701 F. Supp. 2d 814, 820 (W.D. Va. 2010) (stating that “[n]ot only is the production and initial distribution of child pornography injurious to the child victim, but so too is each subsequent distribution and each subsequent viewing”).

Congress, too, has recognized the harm that befalls victims of child abuse images. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, tit. I, § 121, subsec. 1(2), 110 Stat. 3009-26 (Sept. 30, 1996) (“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.”); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(1)(A), 2(D), 120 Stat. 587, 623-24 (July 27, 2006) (“[T]he illegal production, transportation, distribution, receipt, advertising and possession of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography. . . . Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.”). See generally *United States v. Brunner*, No. 5:08cr16, 2010 WL 148422, *2 (W.D. N.C. Jan. 12, 2010) (“[B]y both legislative intent and judicial construction, the law is clear that the children depicted in child pornography are victims not only of the

makers of the pornography but also of its possessors.”).

Congress clearly intended to address this well-recognized harm that befalls victims of child abuse images through the passage of § 2259, including through awarding restitution. However, there is a dispute among the circuits as to how to calculate the amount of restitution that only this Court can resolve.

II. CIRCUITS ARE SPLIT AS TO THE PROPER INTERPRETATION OF § 2259, AN IMPORTANT ISSUE WHICH RESULTS IN DISPARATE TREATMENT OF VICTIMS OF CHILD ABUSE IMAGES, AND WHICH THIS COURT SHOULD RESOLVE.

Congress intended that victims of child abuse images be fully compensated. This intent can be seen in the broad language of § 2259, which largely eliminates the usual proximate cause standard required before victims are entitled to restitution; requires that victims be entitled to restitution in full; and allows for the practice of joint and several liability to ensure that victims are, in fact, fully compensated.

Unlike other restitution statutes, § 2259’s definition of victim does not provide that a “direct” or “proximate” harm must befall the individual in order

for the victim to receive restitution.³ Compare § 2259(c) (providing that a “victim” is an “individual harmed as a result of a commission of a crime [relating to the sexual abuse and exploitation of children]. . . .”) with 18 U.S.C. § 3663(a)(2) (defining victim as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered. . . .”) and 18 U.S.C. § 3663A(a)(2) (same). The lack of a proximate cause requirement is underscored by the language of § 2259(b)(3), which, on its face, requires the establishment of proximate causation only for a catch-all category of “other losses” suffered by the victim. 18 U.S.C. § 2259(b)(3)(F); see generally Pet’r Petition for a Writ of Cert., pp. 10-17.

In addition to mandating an award of restitution to a broad category of victims, § 2259 also requires that an award of restitution fully compensate victims for their losses. 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 victim’s losses* as determined by the court pursuant to paragraph (2).”) (emphasis added). Paragraph 2 requires that an order for restitution “shall be issued and enforced in accordance with section 3664. . . .” 18 U.S.C. § 2259(b)(2). Section 3664(h) provides:

³ As a victim of crime, the victim is also entitled to restitution under the CVRA, which provides that victims of crime have a “right to full and timely restitution as provided by law.” 18 U.S.C. § 3771(a)(6).

If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

18 U.S.C. § 3664(h).

While the statute grants courts discretion to apportion liability or to hold the defendant jointly and severally liable, this discretion is circumscribed by the mandatory nature of 18 U.S.C. § 2259, which requires that victims of child abuse images be compensated in whole for their losses in each case. *See* 18 U.S.C. § 2259(a) (“[T]he court *shall* order restitution for any offense under [Chapter 110]”) (emphasis added) *and* 18 U.S.C. § 2259(b)(4)(A) (“The issuance of a restitution order under this section is mandatory.”) *along with* 18 U.S.C. §§ 2252A(a) and (b) (enumerating possession of child pornography and conspiracy to do so as offenses under Chapter 110).

Further, § 2259 states that a court may not decline to award the victim full compensation because the victim may also be entitled to compensation from another source. *See* 18 U.S.C. § 2259(b)(4)(B)(ii) (“A court may not decline to issue an order under this section because of – the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance *or any other source.*”) (emphasis added). Thus, the fact that the

victim's harm was at the hands of multiple defendants – from each of whom the victim would be entitled to compensation – does not alter the victim's statutory right to full restitution from the defendant in the current case.

Despite the broad language of § 2259, there is huge variation among the circuits as to what Congress intended by full restitution, which turns largely on courts' interpretations of the "proximate cause" and "joint and several liability" standards discussed above. *See also* Pet'r Petition for a Writ of Cert., pp. 9-17. The result is that under current interpretations of the law, those victimized in one jurisdiction may be awarded no restitution, while those in another are awarded restitution in full.⁴ For instance, a victim whose perpetrator is tried in the Northern District of Florida may be able to receive full restitution. *See United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204 (S.D. Fla. Sept. 2, 2009) (awarding \$3,680,153 in restitution under § 2259, which requires that the victim be awarded the full amount of her losses). However, a victim whose

⁴ The difference in appellate standards applied by the circuits, as is thoroughly detailed in Petitioner's brief at pages 29 to 39, creates similar problems with disparate access to justice. *Amicus curiae* will not address this issue here because Petitioner has briefed it well, *amicus* has fully briefed this issue in its Brief of *Amicus Curiae* the National Crime Victim Law Institute Supporting Petitioners, *Fisher v. District Court*, No. 10-1518 (July 18, 2011), and because the restitution issue alone is a sufficient ground for this Court to accept certiorari.

perpetrator is tried in Maine, or indeed, even the *Southern* District of Florida, may well receive no restitution at all. See *United States v. Faxon*, 689 F. Supp. 2d 1344, 1360-61 (S.D. Fla. 2010) (denying request for restitution, despite finding that the victims had suffered compensable losses, because the government failed to adequately present causal evidence tying the specific defendant to the harm); *United States v. Berk*, 666 F. Supp. 2d 182, 192-93 (D. Me. 2009) (acknowledging that some of the harm to the victims resulted from the widespread availability of their images on the internet and individuals' possession of those images, and that defendant caused a portion of that harm, but refusing to award any restitution because the government did not adequately present causal evidence tying the specific defendant to the harm).

The implications are clear: allowing the existing circuit split to stand will allow disparate enforcement of federal law to continue. Not only does this fly in the face of the plain language and intent of § 2259, but the CVRA, which, as discussed above, applies to victims of child abuse images, contains a provision requiring that victims be treated with “fairness.” 18 U.S.C. § 3771(a)(8). Congress intended that this concept of fairness “include[] the notion of due process.” 150 CONG. REC. S4269 (Apr. 22, 2004) (statement of Sen. Kyl). “The fundamental purpose of procedural due process is to ensure fairness in the manner in which government exercises its power.” *Pollock v. Baxter Manor Nursing Home*, 706 F.2d 236,

237 (8th Cir. 1983) (McMillian, J., dissenting) (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring)). To ensure fairness, the due process clause should encompass “the consistent application of the laws as written by the legislature. . . .” Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body*, 40 U. Mich. J. L. Reform 93, 146 n.265 (1996).

The current state of the law does not allow for such consistency. Instead, the mere happenstance of where a perpetrator happened to view the child abuse images, or where the perpetrator resided, may result in a victim being unable to, among other things, receive counseling services to begin to address the harm incurred. *But see* 18 U.S.C. § 2259(b)(3)(A) (mandating compensation for “medical services relating to physical, psychiatric, or psychological care”). To have such different interpretations of the plain language of the same federal law leads to disparate justice for victims.⁵ 150 CONG. REC. S4270 (Apr. 22, 2004) (statement of Sen. Kyl) (“[A]ll victims of crime deserve to have their rights protected. . . .”).



⁵ Indeed, the same is true for defendants, who may find themselves required to pay millions of dollars in restitution or to pay nothing for their crimes depending on where they are tried.

CONCLUSION

Allowing the existing circuit split to stand would severely impact the ability of an untold number of victims to enforce their statutorily mandated rights. Rather than allow an inconsistently-applied standard in an emerging and burgeoning field of law, the Court should take up and decide this important issue.

Respectfully submitted,

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