No. 12-651

In The Supreme Court of the United States

AMY AND VICKY, CHILD PORNOGRAPHY VICTIMS,

Petitioners,

v.

JOSHUA OSMUN KENNEDY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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Motion of the National Crime Victim Law Institute for Leave to Participate as *Amicus Curiae* in Support of Petitioners

The National Crime Victim Law Institute (NCVLI) respectfully moves for leave to file, as *amicus curiae*, the attached brief in support of the Petition for a Writ of Certiorari. The attorneys for petitioners and for the United States have consented to this filing. The consent of the attorney for respondent Joshua Osmun Kennedy and of the Honorable Richard A. Jones on behalf of the United States District Court for the Western District of Washington was requested but refused.

NCVLI is a nonprofit educational and advocacy organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to promote balance and fairness in the criminal justice system through crime-victim – centered legal advocacy, education, and resource sharing. NCVLI actively participates as *amicus curiae* in cases involving victims' rights nationwide. In particular, NCVLI seeks to highlight the difficulties that children who have been sexually exploited and filmed[1] face in procuring

[1] While the legal term "child pornography" is commonly used to describe an image that depicts a child being raped or otherwise sexually abused, its use dilutes the reality of the victimization depicted. "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. Using the term abuse images accurately describes the

(Continued on following page)

restitution under federal law and to explain the remedies that Congress crafted to help them overcome these hurdles. The legal standard of causation required to secure such restitution is the question presented in this case.

Respectfully submitted,

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DECEMBER 21, 2012

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process and product of taking indecent and sexualized pictures of children, and its use is, on the whole, to be supported." 1 SHARON W. COOPER ET AL., MEDICAL, LEGAL, & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 258 (2005). Thus, this brief uses terms such as "images of child abuse," "images of child rape," and "images of children being sexually exploited" instead of "child pornography."

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INTEREST OF THE *AMICUS CURIAE*

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 promote balance and fairness in the criminal justice system through crime-victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through researching and analyzing developments in crime-victim law; providing information on crime-victim law to crime victims and other members of the public; providing technical assistance to attorneys; and promoting the work of the National Alliance of Victims' Rights Attorneys. 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 children who have been sexually exploited and filmed to receive restitution under federal law.[1]

[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 been given at least ten days' notice of *amicus curiae*'s intention to file this brief.

SUMMARY OF ARGUMENT

1. The federal courts of appeals are intractably divided over the question presented. Eight circuits, including the Ninth Circuit below, require victims to prove that the defendant's criminal actions proximately caused their losses in order to receive restitution under any of the six subsections of 18 U.S.C. § 2259(b)(3). The Fifth Circuit, sitting *en banc,* has expressly rejected that view. But even courts on the majority side of the split cannot agree on the justifications for their holdings and the type of liability that defendants face when a victim proves proximate causation, thereby resulting in grossly disproportionate awards across the circuits.

2. Congress purposely did not burden victims with proving proximate causation. In 1994, Congress enacted the Violence Against Women Act (VAWA), which requires child molesters to pay restitution for "the full amount of the victim's losses." 18 U.S.C. § 2259. VAWA is part of a larger statute, simultaneously enacted, that also mandates restitution for victims of sexual abuse and telemarketing fraud for "the full amount of the victim's losses." 18 U.S.C. §§ 2248, 2327. But while Congress explicitly included a proximate-causation requirement in § 2327, the telemarketing provision, it excluded such language from the child-abuse-images and sexual-abuse provisions of §§ 2248 and 2259. Two years later, when Congress amended § 2259, it expressly declined to change the scope of restitution, even though the same bill added proximate-causation requirements to two

other restitution provisions. Having chosen to require proof of proximate causation under two sections but not a third, Congress must have intended to allow victims to recover under § 2259 even if they could not prove proximate causation.

3. The question presented is one of increasing and recurring national importance. The number of children who are sexually exploited and filmed has increased dramatically in recent years. The proper interpretation of § 2259 is crucial, because victims face a number of hurdles to obtaining the restitution they deserve. Requiring proximate causation would add another impediment to victims' ability to receive full judgments and collect full restitution.

4. Section 2259 should be read to promote full compensation of victims, like other statutory and common law schemes designed to recompense victims who suffer intentional wrongs or face difficult problems of proof. Congress and state legislatures have relaxed the common law's proximate-causation requirement where a party would face strong disincentives to bringing a claim or significant problems of proof. Even the common law distinguishes between negligent tortfeasors and intentional wrongdoers. Like joint and several liability for intentional torts, § 2259 holds intentional wrongdoers fully responsible for making victims whole, even where fellow wrongdoers are unidentified or judgment-proof.

5. This case is an excellent vehicle involving a full adversarial presentation of the issues. Unlike

many other cases, in which the victims do not participate and the United States and the criminal defendant *agree* that § 2259 requires proof of proximate causation, the victims here are active participants represented by experienced counsel.

ARGUMENT

I. The Circuits Are Split over Whether 18 U.S.C. §§ 2259(b)(3)(A)-(E) Require Proof of Proximate Causation of Victims' Losses

1. Children who have been sexually exploited and filmed face substantial obstacles to recovering restitution for their many losses. For this reason, Congress passed the Mandatory Restitution for Sexual Exploitation of Children Statute to require convicted defendants to compensate their victims fully. The Act requires that a court order the defendant to pay the victim the "full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). It defines those losses to include six specified categories:

* * *

> (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 courts of appeals are intractably divided over whether subsection (F)'s proximate-causation requirement applies only to that subsection or whether it extends to all six subsections of § 2259(b)(3). The divergent streams of appellate case law have led to incompatible outcomes for different victims and defendants and reveal an issue ripe for this Court's consideration.

The Ninth Circuit below held that the "proximate result" language extends to all six categories of loss. Pet'r Br. 7-8. But in deciding this case, the court gave too little weight to the statute's plain language. Section 2259 requires proof of a proximate result only in subsection (b)(3)(F), the "any other losses" provision of the statute.[2] As petitioners' brief amply

[2] Courts have awarded restitution under the "other losses" language for damages not enumerated under the statute but still connected to the defendant's crimes. *See, e.g.*, *United States* v. *Doe*, 488 F.3d 1154, 1161-62 (9th Cir. 2007) (permitting restitution for costs of a specially designed alternative learning program and for a management fee to the case worker); *United*

(Continued on following page)

explained, where Congress has intended to require victims to prove proximate cause to secure restitution, it has said so clearly. *See* Pet'r Br. 28; *infra* pp. 9-11.

The Ninth Circuit also contravened the rule of the last antecedent, which requires reading a limiting clause to modify only the phrase it immediately follows. Pet'r Br. 29-31. If Congress had meant to extend the proximate-causation requirement to all of subsection (b)(3), it would have said so at the beginning of subsection (b)(3), not at the very end in subsection (b)(3)(F).

Congress wanted to ensure that victims could recover at least the first five categories of losses, such as medical and therapy expenses ((b)(3)(A)-(B)), transportation and child-care costs ((b)(3)(C)), lost income ((b)(3)(D)), and attorneys' fees ((b)(3)(E)), without facing the proximate-causation hurdle. By applying a stricter proximate-causation requirement to the entire statute, the Ninth Circuit has undermined this legislative purpose. In fact, the Ninth Circuit's approach will often thwart victims, who will find it difficult or impossible to prove that a particular defendant proximately caused a particular share or component of the harm. That problem is especially

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States v. *Searle*, 65 F. App'x 343, 346 (2d Cir. 2003) (awarding restitution to cover the purchase of a larger car and renovations to create an additional bedroom for a guardian who took the children in when their father discovered images of abuse of one of them and became unable to care for them).

severe for victims, like Amy and Vicky, who have suffered at the hands of many different distributors, viewers, and possessors of their images. Precisely because so many different people have victimized them, tracing losses to particular actors will be all but impossible. That is why Congress wrote the MVRA's core compensatory guarantees so broadly.

2. This issue has divided the federal courts of appeals eight to one. Eight courts of appeals, including the Ninth Circuit below, have held that a victim must prove that the defendant's criminal actions proximately caused the losses for which she seeks to recover. *See* Pet'r Br. 14-15 (collecting cases). But the Fifth Circuit, after carefully reviewing the issue *en banc*, explicitly rejected the decisions of the other courts of appeals and held that the "proximate cause" language in the statute applies only to the "other losses" covered by subsection (b)(3)(F). *In re Amy Unknown*, Nos. 09-41238, 09-41254 & 09-31215, 2012 WL 5835827, at *21 (5th Cir. Nov. 19, 2012) (*en banc*); *see* Pet'r Br. 15.

Even the circuits on the majority side of the split are divided over the rationales for their holdings; they offer widely divergent reasoning. Pet'r Br. 16-17. The circuits are further divided on the type of liability that defendants face after a victim proves proximate causation. The Seventh Circuit, for instance, makes distributors, but not possessors, of images of children being sexually abused fully liable for all of the victims' losses. And the First Circuit permits a victim to show proximate causation in the aggregate by a

group of criminal defendants, even if the individual defendant's actions would not have sufficed to cause the entire harm. *See id.* at 16-17.[3] This confusion over the type of liability authorized has led to wildly different awards in cases based on the same facts. *See id.* at 22-23; *see also id.* at 18 n.9.

These conflicting strands of appellate case law confirm that the issue has percolated long enough and is now ready for this Court's consideration. Only this Court can resolve the entrenched circuit conflict to bring uniformity to this area of law.

II. Congress Intended to Make Restitution Easily Accessible to Victims

1. Congress has repeatedly acknowledged that children who are sexually exploited and filmed suffer enduring harm each time perpetrators distribute or view the images of their abuse. "Child pornography is a permanent record of a child's abuse and the distribution of child pornography images re-victimizes the child each time the image is viewed." Effective Child

[3] A panel of the Seventh Circuit found that Amy and Vicky were not entitled to any restitution unless the government could prove on remand that the defendant actually distributed images of Amy and Vicky, rather than just viewed them. *United States* v. *Laraneta*, No. 12-1302, 2012 WL 5897610, at *8-9 (7th Cir. Nov. 14, 2012). In the First Circuit, however, a victim could arguably recover from a defendant who merely possessed her images if she were able to prove that she was harmed collectively by the distribution and possession of her images.

Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(3), 122 Stat. 4001, 4001 (2008); *see* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(1)(A), 120 Stat. 587, 623.

To counteract and protect against this unique harm, Congress enacted a comprehensive statutory scheme to eradicate the market for images of child abuse and to make victims whole through restitution. In 1994, Congress enacted the Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1902, as part of a broader legislative act called the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub. L. No. 103-322, 108 Stat. 1796. VAWA requires sex offenders to pay restitution for "the full amount of the victim's losses." 18 U.S.C. § 2259.

Another subpart of the VCCLEA, Pub. L. No. 103-322, 108 Stat. 1903, also mandates restitution for victims of sexual abuse and telemarketing fraud. For both crimes, as for crimes involving images of child abuse, the VCCLEA mandates restitution for "the full amount of the victim's losses." 18 U.S.C. §§ 2248, 2259 & 2327. Unlike the child-abuse images and sexual-abuse provisions, however, the telemarketing provision explicitly limits restitution to "all losses suffered by the victim as a proximate result of the offense." 18 U.S.C. § 2327(b)(3). Congress knew how to require proof of proximate causation when it wanted to, but chose to differentiate between victims of sexual exploitation and those of telemarketing fraud. "[W]here Congress includes particular language

in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see also Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (citation omitted)).

2. Two years after VAWA, Congress passed the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, § 201, 110 Stat. 1214, 1227. That Act reaffirmed Congress's expansion of restitution for victims by limiting judicial discretion in awarding restitution. *See* 18 U.S.C. § 2259(b)(4). Though it amended § 2259, the MVRA left its definition of "victim" unchanged: the "individual harmed as a result of a commission of a crime." 18 U.S.C. § 2259(c). The Senate Committee underscored that it "intend[ed] no change to the scope of restitution authorized by the mandatory restitution provisions of the Violence Against Women Act." S. REP. NO. 104-179, at 19 (1996) (citations omitted).

By contrast, Congress *did* add proximate-causation requirements to other restitution provisions. The MVRA amended the definition of "victim" in 18 U.S.C. § 3663(a)(2), a more general restitution provision covering a much wider range of offenses, to include only persons "directly and proximately harmed as a result of the commission of an offense."

MVRA § 205, 110 Stat. at 1230. It also included an identical limitation in new § 3663A(a)(2). *Id.* § 204, 110 Stat. at 1228. Had Congress thought the proximate-causation language superfluous, it would not have amended § 3663 or included it in § 3663A. Courts should not construe provisions worded differently to mean the same thing, especially when Congress amended the two provisions on the same occasion. Thus, victims under § 2259 must be able to recover restitution even if they cannot prove proximate causation.

III. Victims Face Many Obstacles to Securing Restitution Awards and Collecting Restitution

1. The question presented is one of increasing national importance. In recent years, the number of perpetrators and children who are sexually exploited and filmed and the number of images traded on the Internet have increased dramatically. U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 9 (Aug. 2010) [hereinafter NATIONAL STRATEGY REPORT], *available at* http://www.justice.gov/criminal/ceos/downloads/natstrategyreport.pdf; *see also* MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 1 (Dec. 2007) (NCJ 219412) [hereinafter FEDERAL PROSECUTION REPORT], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf. There has also been a rise in the number

of images depicting sadistic and violent abuse, particularly of infants and toddlers. NATIONAL STRATEGY REPORT, *supra*, at 9. Nevertheless, prosecution rates for child exploitation crimes remain lower than prosecution rates for violent, drug, and weapons crimes. FEDERAL PROSECUTION REPORT, *supra*, at 2. Furthermore, the anonymity of the Internet has helped perpetrators avoid detection, thereby emboldening more perpetrators to access the images. *See* NATIONAL STRATEGY REPORT, *supra*, at 11-17, 23-25.

2. Even when perpetrators are identified and prosecuted, few courts order restitution because they are unable to identify the victim. Many victims are never identified; one study found that police could not identify the victim in 92% of cases involving the possession or distribution of images of children being sexually exploited. DAVID FINKELHOR & RICHARD ORMROD, U.S. DEP'T OF JUSTICE, CHILD PORNOGRAPHY: PATTERNS FROM NIBRS 7 (Dec. 2004), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/204911.pdf. The globalization of the child-abuse-image market has made it even harder to track perpetrators and identify victims. NATIONAL STRATEGY REPORT, *supra*, at 11-17, 23-25.

3. Though victims are permitted to hire their own counsel to seek restitution, in practice they need the cooperation of prosecutors to secure restitution. Yet federal prosecutors do not always pursue restitution. *Compare* 18 U.S.C. § 3664(d)(1) (requiring prosecutors to promptly provide lists of amounts of restitution to which victims are entitled), *with* John Schwartz,

Child Pornography, and an Issue of Restitution, N.Y. TIMES, Feb. 3, 2010, at A19 (noting that some federal prosecutors decline to pursue restitution). In one such case, U.S. District Judge Patrick Schiltz ordered the government to seek restitution on behalf of Amy or explain its failure to do so. Order, *United States* v. *Buchanan*, No. 09-00045 (D. Minn. Jan. 4, 2010), ECF No. 44. Judge Schiltz criticized the government for failing to seek restitution not only in the case at hand, but also in other cases involving images of children being sexually exploited. *Id.*

4. Furthermore, many defendants are seemingly partially or wholly judgment-proof. A majority of suspects arrested for possessing images of children being sexually exploited have incomes at or below $50,000 per year. JANIS WOLAK ET AL., NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 3 (2005). Defendants' assets are often inadequate to compensate victims for the severe losses they have imposed.

In short, victims face many difficulties in proving causation, procuring restitution awards, and collecting full restitution from defendants. Congress sought to help victims by mandating full compensation. Thus, it reasonably decided that the risks created by these difficulties should fall on codefendants, not victims. That approach accords with other statutory and common-law doctrines that relax causation

requirements or authorize joint and several liability, as the next part explains.

IV. Like Other Statutory and Common-Law Schemes, 18 U.S.C. § 2259 Should Be Read to Promote Full Compensation of Victims

Legislatures and courts are especially solicitous of victims who suffer intentional wrongs or face particularly difficult problems of proof. The Mandatory Restitution for Sexual Exploitation of Children Statute follows in this long tradition. Like the common law and other statutory schemes, it reflects a value judgment that justice requires reducing victims' burden of proof and increasing defendants' exposure to liability.

A. Legislatures Have Historically Created Statutory Schemes that Diminish the Proof of Causation Required

As this Court has recognized, Congress on occasion lowers the common law's proximate causation requirement. Congress has often done so where a party would face strong disincentives to bringing a claim or particularly significant problems of proof at trial.

For example, in the Federal Employers' Liability Act (FELA), Congress "relaxed" the causation standard to serve the Act's "humanitarian" and "remedial goal[s]." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2636 (2011). FELA does not "incorporate 'proximate cause' standards developed in nonstatutory

common-law tort actions" but rather holds railroads liable if their "negligence played *any part* in bringing about the injury." *Id.* at 2634 (emphasis added). This statutory causation standard is lower than that required for negligence actions at common law.

Congress similarly relaxed the causation standard for hazardous waste cases brought under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). As one commentator notes, hazardous-waste cases raise especially difficult problems of proving who released the waste and which substance might have caused the injury. *See* John Copeland Nagle, *CERCLA, Causation and Responsibility*, 78 MINN. L. REV. 1493, 1500, 1509 (1994). The courts of appeals have held that CERCLA allows plaintiffs to establish liability without proving causation because it contains no causation language. *See id.* at 1507 nn.70-71 (collecting cases).

State legislatures have enacted similar statutes dispensing with the need to prove proximate causation. Fifteen states have expanded liability for convicted drug traffickers by enacting drug-dealer liability laws that permit a third party to bring a civil suit against a drug dealer for harms suffered due to their drug dealing, including injuries caused by users of their drugs. Nicolas Reiter, Note, *Dollars for Victims of A "Victimless" Crime: A Defense of Drug Dealer Liability Acts*, 15 J.L. & POL'Y 1329, 1330 (2007); *see, e.g.*, Drug Dealer Liability Act, CAL. HEALTH & SAFETY CODE §§ 11700-11730. As state legislatures have recognized, proving causation of this kind of harm is

difficult under traditional tort rules. These statutes therefore typically permit plaintiffs to recover from defendants who have knowingly engaged in drug trafficking, even if plaintiffs cannot prove that particular defendants provided drugs to the persons who harmed those particular plaintiffs. Reiter, *supra*, at 1342-44.

Recognizing the effectiveness of these statutory schemes, Congress likewise dispensed with requiring proof of proximate causation under the MVRA. Congress is especially concerned about victims who were raped and filmed as children and face particular difficulties in tying the harms they have suffered to specific viewers of their images. *See supra* Parts II-III. Thus, Congress chose to permit these victims financial recovery without having to clear the virtually insurmountable hurdle of proving proximate causation.

B. Victims of Intentional Torts Need Offer Less Proof of Causation than Other Victims

Even at common law, plaintiffs alleging intentional torts enjoy less stringent causation standards than plaintiffs in negligence cases. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 37 & n.27 (W. Page Keeton et al. eds., 5th ed. 1984) (noting that "[m]ore liberal rules" govern the showing of consequences and proof of intentional or "morally wrong" conduct). "[C]ausation standards for liability have

historically been more encompassing for intentional torts than for mere negligence." Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. Rev. 1431, 1464 (2012). A number of courts relax or dispense with the requirements of proximate causation and foreseeability in intentional-tort cases, *see id.* at 1465 n.142, because "many of the limitations upon liability that are subsumed under the doctrine of 'proximate cause,' as usually expounded in negligence cases, do not apply to intentional torts," *Tate* v. *Canonica*, 5 Cal. Rptr. 28, 33 (Cal. Dist. Ct. App. 1960). The same logic applies even more strongly to criminal restitution for crimes involving intentionally possessing or distributing images of children being sexually exploited.

C. At Common Law, Intentional Tortfeasors Are Jointly and Severally Liable for Victims' Injuries

1. The effect of the MVRA is analogous to joint and several liability for intentional torts: it holds intentional wrongdoers fully responsible for making victims whole even where fellow wrongdoers cannot be located or are judgment-proof. Under joint and several liability, a plaintiff may recover the total amount of her damages from any liable defendant, even if other defendants would also be liable for her injuries. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 (2000). Joint and several liability has been the rule for intentional tortfeasors since at least 1799 and remains good law today even

in jurisdictions that explicitly reject joint and several liability for negligence. *See id.* § 12 cmt. a & reporter's note to cmt. b; *see, e.g.*, *Smith ex rel. Smith* v. *Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 233 & n.27 (S.D.N.Y. 2003) (holding defendants jointly and severally liable under New York tort law for injuries from September 11, 2001 attacks because the actions required "proof of intent").

2. The reasons for retaining joint and several liability for those who act intentionally and cause harm apply even more strongly to criminal actors. As the Restatement notes, the "primary consequence" of joint and several liability is to place "the risk of insolvency" on the responsible tortfeasors, rather than the victim. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 10 cmt. a. By shifting the burden of insolvency, the Act increases an injured, innocent victim's prospect of being made whole, regardless of whether other unknown or missing defendants may also be responsible for her injuries.[4] Intentional tortfeasors are also subject to punitive

[4] While, unlike criminal defendants, intentional tortfeasors found jointly and severally liable may attempt to collect from other responsible defendants in civil cases, they will collect only if other defendants are solvent. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 10 reporter's note to cmt. b. Thus, placing full liability on a criminal defendant here is little different from placing joint and several liability on one defendant where his codefendants are insolvent, a risk accepted at common law. In both scenarios, a victim's total recovery is capped by the total amount of her losses.

damages at common law, because their wrongful conduct merits greater liability. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1979). In other words, fairness does not limit recoveries to an intentional tortfeasor's proportionate share of the harm – the needs to punish and compensate fully often take precedence.

Thus, the common law rested on the widely shared view that perpetrators should compensate their victims for all their losses and bear the risk of a fellow perpetrator's insolvency. The Act codified that imperative to make victims whole, regardless of whether other defendants may be judgment-proof or may be found later.

V. This Case Is an Excellent Vehicle Involving a Fully Adversarial Presentation of the Issues

1. As discussed above, Congress intended for victims like Amy and Vicky to receive full restitution. Nevertheless, significant obstacles keep victims from knowing about cases, participating in cases, and, especially, retaining counsel and appearing in those cases. This case is an unusually strong vehicle for addressing this recurring issue because the victims here are actively involved as parties and represented by experienced counsel.

While many victims are affected by the issue of proximate causation, few are parties on appeal and so able to litigate the issue fully. In many previous cases

raising the question presented here, the victim did not independently participate. *See, e.g.*, *United States* v. *Kearney*, 672 F.3d 81 (1st Cir. 2012), *petition for cert. filed* (U.S. Sept. 28, 2012) (No. 12-6574); *United States* v. *Evers*, 669 F.3d 645 (6th Cir. 2012); *United States* v. *Aumais*, 656 F.3d 147 (2d Cir. 2011); *United States* v. *McDaniel*, 631 F.3d 1204 (11th Cir. 2011). Even where the victim attempts to participate, she may be able to do so only as *amicus curiae*. *See, e.g.*, *United States* v. *Burgess*, 684 F.3d 445 (4th Cir. 2012).[5] We are aware of only one appellate case, *Evers*, in which the issue of restitution for a victim other than Amy or Vicky was heard on appeal regarding 18 U.S.C. § 2259, and that victim did not participate as either a party or *amicus* at the appellate level.

When the victim is not able to intervene or participate, the two parties to the case – the criminal defendant and the United States – have demonstrated they will both *agree* that the statute requires proof of proximate causation, and no one will represent the view of the victims protected by the statute. *E.g.*, *In re Amy Unknown*, 2012 WL 5835827, at *14 (showing the government supporting a proximate-causation requirement); *Burgess*, 684 F.3d at 455

[5] Vicky was a victim in the *Kearney*, *McDaniel*, and *Burgess* cases, and Amy was a victim in the *Aumais* case, and both were represented by counsel. Even so, they had difficulty participating fully in cases that implicated their own interests in restitution: they had no role in *Kearney* and *Aumais*, did not orally argue the matter in *McDaniel*, and were allowed only a brief oral argument in *Burgess*.

(same); *see also* Pet'r Br. 7 (noting the government's agreement with the proximate cause requirement in the case below). Thus, most cases that present this issue will not permit the Court to hear a full adversarial presentation on behalf of victims as to why the statute does not require proof of proximate causation.

Here, by contrast, the victims filed timely restitution requests after they were notified of respondent Kennedy's conviction. Pet'r Br. 4. They are represented by a former law clerk to this Court who has argued before this Court and went on to serve as a federal district judge. He is now a prominent law professor who specializes in victims' rights, coauthors the leading casebook on victims' rights, and has testified before Congress many times on victims' rights. The involvement of *amicus curiae* NCVLI on behalf of victims should further contribute to the adversarial presentation of the issue.

2. Furthermore, unlike earlier cases, this case comes before this Court after the circuit split emerged and solidified. In its *en banc* ruling in November 2012, the Fifth Circuit considered the position of the other circuits and explicitly rejected them. It thus refused to extend the proximate causation requirement of subsection (b)(3)(F) to the preceding subsections ((b)(3)(A)-(E)). *In re Amy Unknown*, 2012 WL 5835827, at *21. Thus, this case arises after the courts of appeals have become intractably divided. Only this Court can resolve the confusion and inconsistency over the meaning of this important federal statute.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

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