No. 12-8561

In the Supreme Court of the United States

DOYLE RANDALL PAROLINE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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In *Burrage* v. *United States*, 134 S. Ct. 881 (2014), this Court held that the 20-year mandatory minimum sentence for unlawfully distributing a drug when "death or serious bodily injury results from the use of such substance," 21 U.S.C. 841(a)(1) and (b)(1)(A)-(C), does not apply "when use of a covered drug supplied by the defendant contributes to, but is not a but-for cause of, the victim's death or injury"—"at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury." 134 S. Ct. at 885, 892. *Burrage*'s analysis of causation does not affect the disposition of this case: possessors of child pornography are the actual cause of harm to victims and must be ordered to pay restitution.

In contrast to the statute at issue in *Burrage*, which concerned an element of a criminal offense

carrying a mandatory prison term, causation-in-fact of harm can be established in child-pornography restitution cases under "aggregate causation" principles, which are an established feature of the tort-law backdrop for 18 U.S.C. 2259. Also in contrast to *Burrage,* once causation is shown, the amount of the sanction (restitution) can be apportioned to reflect the defendant's relative contribution to the victim's losses. See U.S. Br. 47-49; U.S. Reply Br. 18-22. But even if the Court declined to recognize aggregate causation in light of *Burrage,* "but-for" causation can be satisfied here: each possessor of a victim's images causes her harm, and it should not be necessary to establish the precise degree of incremental loss in order to justify restitution of a reasonably apportioned amount. Under either approach, a victim should not be denied restitution because she is harmed by 1000 individuals rather than one.

A. Aggregate Causation Is An Accepted Theory Of Tort Law That Applies To Restitution For Child Pornography Possession Offenses

In *Burrage*, this Court rejected a "contributing cause" theory of factual causation in the context of a 20-year mandatory minimum sentence triggered when "death or serious bodily injury results from the use of" a covered drug supplied by the defendant, 21 U.S.C. 841(b)(1)(C). 134 S. Ct. at 887-892. The Court explained that, "[i]n the usual course," a defendant's wrongful conduct is an "actual cause" of an injury if "the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." *Id.* at 887-888 (citations and internal quotation marks omitted); see *id.* at 889 (describing "but-for" causation as a "traditional background principle[]"). The Court,

however, also recognized that "courts have not *always* required strict but-for causation" and that "contextual indication[s]" to the contrary may make an alternative to a "but-for" standard appropriate. *Id.* at 888, 890. The contextual differences between the statutory schemes in this case and *Burrage* demonstrate that Congress intended to allow an aggregate causation showing to justify restitution for child-pornography possession offenses.

1. The causation language at issue in *Burrage* ("results from") defines a crime that requires a 20-year mandatory minimum sentence. See 21 U.S.C. 841(a)(1) and (b)(1)(C). To establish criminal liability, the government must prove its case at trial beyond a reasonable doubt. *Burrage*, 134 S. Ct. at 892. And the consequence of conviction is increased punishment in the form of a mandatory minimum sentence that cannot be apportioned to reflect the defendant's relative culpability or the presence of other contributing causes.

The causation language at issue here ("as a result of") appears in a restitution statute requiring sentencing courts to order defendants convicted of child-pornography offenses to pay restitution to their victims. 18 U.S.C. 2259(a), (b)(4)(A) and (c), 3664(e). To justify restitution, the government must prove its case during a sentencing hearing by a preponderance of the evidence. 18 U.S.C. 3664(e). Restitution, unlike a sentence of imprisonment, serves important compensatory purposes. And sentencing courts have discretion to award restitution in an amount that acknowledges the contribution of others and that is proportionate to the defendant's relative contribution to the victim's collective losses. See pp. 10-11, *infra*.

Given those contextual differences, the government can establish that a possessor of child pornography is a cause-in-fact of the victim's harm by showing that the defendant belongs to a class of similarly situated individuals who have collectively caused her harm by possessing images depicting her sexual abuse. In contrast to difficulties in assessing "probabilities and percentages" to determine whether death resulted from a drug trafficker's distribution of a drug that combined with others to cause death—which *Burrage* found irreconcilable with the reasonable-doubt standard and notice issues in criminal cases, 134 S. Ct. at 892—applying an aggregate-cause standard here raises no such concerns. Congress has already determined that the contribution of defendants like petitioner is "important enough" and is not "too insubstantial" (*ibid.*) to warrant restitution because it mandated restitution once it is established that a person is a victim of an offense. 18 U.S.C. 2259(a), (b)(4)(A) and (c); see U.S. Br. 15-17. And when a defendant possesses child pornography, the child depicted is indisputably a victim of the offense. See *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990); *New York* v. *Ferber*, 458 U.S. 747, 759 (1982).

2. In *Burrage*, the Court declined to adopt the "contributing" cause approach that the government endorsed, after noting that several courts had adopted it, but the American Law Institute's Model Penal Code had not, 134 S. Ct. at 890, and, although "[o]ne prominent authority on tort law" had advanced that rule, the authors acknowledged in a footnote that "no judicial opinion ha[d] approved th[at] formulation," *ibid.* (brackets in original) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41 n.40,

p. 268 (5th ed. 1984) (*Prosser & Keeton*)). The United States has relied on that formulation here, U.S. Br. 21, and *Burrage* does not foreclose its adoption in the restitution context. Although *Prosser & Keeton*'s *formulation* was novel, the principle itself was not: both commentators and courts have found actual causation in circumstances where the defendant's conduct was neither a "but-for" nor an "independently sufficient" cause of the plaintiff's harm, but where each defendant contributed to the harm and declining to find actual causation would exonerate the entire class. Given the tort-like aspects of restitution and the nature of child-pornography offenses, applying that principle best effectuates Congress's intent under Section 2259. U.S. Br. 19-27.

A number of prominent authorities on tort law (beside *Prosser & Keeton*) have advanced a comparable aggregate causation approach. See 1 Dan B. Dobbs et al., *The Law of Torts* § 189, p. 635 (2d ed. 2011); Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1774, 1788-1803 (Dec. 1985). And while "the American Law Institute declined to do so in its Model Penal Code" (*Burrage*, 134 S. Ct. at 890), it adopted precisely that alternative rule of causation in the tort-law context. See 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27, Reporters' Note cmt. g (2005) (Even though "none of the alternative causes is sufficient by itself, * * * together they are sufficient and perhaps necessary elements of multiple sufficient causal chains.").

Moreover, "[a]lthough no judicial opinion ha[d] approved *this formulation*" as of 1984, the "results reached in reported cases [we]re almost uniformly

consistent with it." *Prosser & Keeton* § 41 n.40, p. 268 (emphasis added). In *Chipman* v. *Palmer*, 77 N.Y. 51 (1879), for example, the defendant, who owned a boarding house upstream from the plaintiff's boarding house, was found liable for discharging sewage into the stream which, along with the discharge from other homes and large hotels, caused a "stench" that injured the plaintiff's business. *Id.* at 52. As the court explained in *United States* v. *Luce*, 141 F. 385 (C.C.D. Del. 1905), citing a number of other nuisance cases:

> It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained. * * * The extent to which the [defendant] has contributed to the nuisance, may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing alone, might amount to little or nothing. But it is when all are united together and contribute to a common result, that they become important as factors, in producing the mischief complained of.

Id. at 412 (citation and internal quotation marks omitted); see also *Indianapolis Water Co.* v. *American Strawboard Co.*, 57 F. 1000, 1003-1004 (C.C.D. Ind. 1893); *Warren* v. *Parkhurst*, 92 N.Y.S. 725, 725-727 (Sup. Ct. 1904), aff'd, 93 N.Y.S. 1009 (App. Div. 1905), aff'd, 78 N.E. 579 (N.Y. 1906). Those cases are fully consistent with an *aggregate* "but-for" theory of causation.

Between 1984 and Section 2259's enactment in 1994, several other courts reached results consistent with *Prosser & Keeton*'s alternative rule and some expressly adopted its precise formulation. These more modern cases generally arose in the context of asbestos liability, where it was often difficult (if not impossible) to prove the extent to which exposure to each defendant's product caused the plaintiff's illness or death. The impact of asbestos exposure is cumulative, the resulting illnesses develop over time, and multiple exposures to multiple defendants' products in unknown amounts is the norm. Faced with such uncertainty, courts did not require plaintiffs to prove that they would not have been harmed "but for" exposure to the individual defendant's product or that the defendant's product was an independently sufficient cause of their harm. See, *e.g.*, *Ingram* v. *Acands, Inc.*, 977 F.2d 1332, 1340-1341, 1343-1344 (9th Cir. 1992); *Spaur* v. *Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858-861 (Iowa 1994); *Eagle-Picher Indus.* v. *Balbos*, 604 A.2d 445, 459 & n.11 (Md. 1992).[1]

The limited number of judicial opinions and the concentration of those opinions in particular areas reflects that "but-for" causation generally is the correct test and that an alternative formulation is only needed in circumstances where mechanical application of that test (or an independently sufficient alternative) fails to achieve a sound result. That is the case here. Background principles of tort law provide a solution that effectuates Congress's clear intent to compensate victims and to make defendants understand concretely

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[1] Although those cases generally use a "substantial factor" formulation, it is clear that the courts are not equating "substantial factor" with an "independently sufficient" cause.

that possessing child pornography causes real harm to real children.

B. An Incremental "But-For" Causation Standard May Be Appropriate If Properly Framed

If the Court declines to adopt an aggregate causation standard, it should not find actual cause missing in cases like this. That result would be contrary to Congress's intention to mandate restitution for a crime that, Congress knew, would often involve countless possessors of a victim's images. See *Ferber*, 458 U.S. at 759 n.10 (referring to "the mass distribution system for child pornography"); Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, § 702(1), 100 Stat. 1783-84 (reproduced at 18 U.S.C. 2251 note) ("child exploitation has become a multi-million dollar industry"). Instead, it should adopt a "but-for" standard that properly accounts for what would otherwise be an insurmountable burden of proof. The government has explained that a particularized "but-for" causation standard is unworkable in this context to the extent it requires the government to prove, for example, "that petitioner's specific conduct caused Amy to miss an extra day of work, or to need an additional therapy session." U.S. Br. 24-27. That reality does not mean, however, that each defendant has not caused Amy some additional, incremental harm, even if it cannot be precisely ascertained.

Each violation of the child-pornography possession statute *does* cause Amy some degree of harm—at the very least, in the form of an invasion of privacy when a person possesses images of her sexual abuse. U.S. Br. 16-17. And that remains true even if the specific violation cannot be traced to additional losses (*e.g.*, additional therapy sessions). To the extent the

Court declines to adopt an aggregate-causation approach, it would therefore be appropriate to recognize that petitioner (and other defendants like him) are the "but-for" cause of some (albeit immeasurable) amount of harm.

If the Court adopts that approach, however, it should make clear that such incremental "but-for" causation would be established as a matter of law—and would not require particularized proof of harm as a matter of fact. A highly particularized "but-for" (or independently sufficient) causation standard would be an "insuperable barrier" to restitution for victims like Amy. *Burrage*, 134 S. Ct. at 891. If petitioner had not possessed Amy's images, she still would have suffered substantial harm as a result of countless other defendants just like him. And it is practically impossible to know whether her losses would have been slightly lower if one were to subtract one defendant, or ten, or fifty. As the lower courts have recognized, requiring evidence that petitioner's specific conduct caused Amy to miss an extra day of work, or to need an additional therapy session, would impose an insurmountable burden. See J.A. 296 (acknowledging that "but-for" causation erects an "impossible burden"); *United States* v. *Kennedy*, 643 F.3d 1251, 1266 (9th Cir. 2011) ("[I]t 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.").

As the government also explained in its opening brief, Congress mandated restitution for victims of child-pornography possession offenses. U.S. Br. 15-16. And Congress did so with full awareness of how the child-pornography marketplace works and of the repetitive and continuing harm inflicted on child vic-

tims by the class of individuals that possess their images. *Id.* at 16-17. In that statutory scheme, it is inconceivable that Congress intended to adopt a causation requirement that renders restitution unavailable for virtually 100% of the victims of child-pornography possession offenses.[2]

C. Amy's Renewed Arguments For Holding Petitioner Responsible For All Of Her Aggregate Losses Are Without Merit

In her supplemental brief, Amy reiterates the argument that defendants like petitioner should be liable for the "full amount" of her aggregate losses. See Supp. Br. 1, 3-5, 9-10. That argument fails for the reasons set forth in the government's opening and reply briefs—*e.g.*, Amy's losses are not "indivisible" and the statute does not require a defendant to pay the "full amount" of losses caused by other defendants. See U.S. Br. 42-47; U.S. Reply Br. 9-18. Rather, reasonable apportionment is the appropriate outcome.

Amy conflates a "contributing cause approach" with liability for the "full amount" of her collective losses. See Supp. Br. 1. One does not flow inexorably from the other. To the contrary, many courts that have recognized or applied a theory of aggregate or contributing cause have rejected joint-and-several liability in favor of apportionment. See pp. 6-7, *supra* (citing cases). Thus, the choice is not all or nothing. And the flexibility of a sentencing court to award

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[2] This result contrasts with *Burrage*, in which the Court noted that the government has proved but-for causation in some "death results" prosecutions and, in any event, the defendant remains liable for the underlying drug crime with "a substantial default sentence." 134 S. Ct. at 891.

restitution in an amount commensurate with the defendant's relative contribution and culpability sharply distinguishes this case from *Burrage*. See *United States* v. *Doe*, 488 F.3d 1154, 1159-1160 (9th Cir.) (noting that restitution has never required exactitude or "mathematical precision"), cert. denied, 552 U.S. 964 (2007).

The new authorities Amy cites (Supp. Br. 3-4) do not suggest otherwise. *The "Atlas,"* 93 U.S. (3 Otto) 302, 308-309 (1876), is an example of "but-for" causation because the presence of both ships was necessary for the collision. See U.S. Reply Br. 13-15. *Northup* v. *Eakes*, 178 P. 266, 267 (Okla. 1918), involved a truly indivisible injury (a burned-down barn) caused by the negligent disposal of oil into a stream by multiple defendants. See U.S. Reply Br. 12-13.[3] *Phillips Petroleum Co.* v. *Hardee*, 189 F.2d 205, 211-212 (5th Cir. 1951), addresses when a lost crop constitutes an indivisible injury and finds that, under Louisiana law, defendants may be found jointly and severally liable. But the same court answered the same question the opposite way, under Florida law, more than a decade later, see *Wm. G. Roe & Co.* v. *Armour & Co.*, 414 F.2d 862, 867-871 (5th Cir. 1969), and the later decision provides more apt guidance here, *id.* at 869-870

[3] The difference between situations in which discharge pollutes a waterway or a plaintiff's land, see, *e.g.*, *Watson* v. *Pyramid Oil Co.*, 248 S.W. 227, 228 (Ky. Ct. App. 1923), and when it causes a fire that destroys a building, is well recognized. See *Prosser & Keeton* § 52, pp. 345-346 & nn. 5-6. In the former circumstance, the damages "must be separated by means of the best proof the nature of the case affords and [each defendant's] liability ascertained accordingly." *Watson*, 248 S.W. at 228.

(explaining basis for apportionment where separate and independent acts "intermingl[e]").

Respectfully submitted.

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MARCH 2014