

No. 12-8561

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

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DOYLE RANDALL PAROLINE, PETITIONER

*v.*

THE UNITED STATES OF AMERICA, ET AL.

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

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**BRIEF FOR THE NATIONAL CENTER FOR MISSING AND  
EXPLOITED CHILDREN AS AMICUS CURIAE IN SUPPORT  
OF RESPONDENT AMY UNKNOWN**

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**INTEREST OF AMICI<sup>1</sup>**

The National Center for Missing and Exploited Children (NCMEC) was established in 1984 as a private, non-profit 26 U.S.C. 501(c)(3) organization and has been designated by Congress as “the official national resource center and information clearinghouse for missing and exploited children.” 42 U.S.C. 5773(b)(1)(B).

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<sup>1</sup> The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

NCMEC provides services to law enforcement, families, and the public that assist in the prevention of child abductions, the recovery of missing children, and the provision of services to combat child sexual exploitation. NCMEC receives a grant from the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention that enables it to perform 22 functions, several of which relate to online child pornography crimes. 42 U.S.C. 5773(b); E. Clay Shaw, Jr. Missing Children's Assistance Reauthorization Act of 2013, Pub. L. No. 113-38, 127 Stat. 527 (2013). NCMEC works with federal, state, local, and international law enforcement agencies, state missing children clearinghouses, and private corporations to further its programs of work. Because of these roles and functions, NCMEC is specially situated to comment on this case.

NCMEC serves as a central repository in the United States for information relating to child pornography reports. NCMEC's functions include operating specific programs to help stop the sexual exploitation of children, including: providing technical assistance and training to law enforcement agencies relating to child sexual exploitation cases; working with law enforcement, state educational agencies, child welfare agencies, and private sector industry leaders to reduce the proliferation of child pornography; operating a child victim identification program to assist in the identification of victims of child pornography; and operating the CyberTipline<sup>®</sup> reporting mechanism to which the public and electronic service providers can report apparent child sexual exploitation. See 42 U.S.C. 5773 *et seq.*; 18 U.S.C. 2258A; 18 U.S.C. 2258C.

NCMEC's expertise on the issue of child pornography stems from two of its core programs: the CyberTipline and the Child Victim Identification Program (CVIP). The CyberTipline serves as a national clearinghouse for tips and leads relating to child sexual exploitation. Launched in 1998, the CyberTipline is a mechanism for members of the public and electronic service providers to report instances of apparent child sexual exploitation, including online child pornography. 42 U.S.C. 5773(b)(1)(P). NCMEC processes each CyberTipline report and makes these reports available to law enforcement for their potential investigation and prosecution.

Since 1998, NCMEC has received more than 2,107,000 CyberTipline reports, of which more than 1,967,000 reports related to images of apparent child pornography. From January 1, 2013 through October 31, 2013, NCMEC received more than 420,000 CyberTipline reports, of which more than 409,000 related to child pornography. The number of reports received through the CyberTipline has grown steadily each year, from 223,374 to 326,310 to 415,650 in 2010, 2011, and 2012, respectively. NCMEC's analysis indicates that the number of images being collected and traded by offenders worldwide continues to expand exponentially, and these images include graphic and violent abuse and feature young children, including infants.

NCMEC also operates CVIP, which has a dual mission: (1) to provide information relevant to child pornography investigations; and (2) to assist in the identification of child victims depicted in pornographic images. 42 U.S.C. 5773(b)(1)(R). CVIP analysts review

copies of seized child pornography submitted by law enforcement to determine which image or video files include child victims who previously have been identified by law enforcement. NCMEC also utilizes its Child Recognition and Identification System (CRIS), a proprietary software program, to determine whether a file under review shows a previously identified child. If it appears a child in an image or video was previously identified by law enforcement, CRIS generates a Child Identification Report that includes information on the series<sup>2</sup> and contact information for the law enforcement agency that originally identified the child.

To date, CVIP analysts have conducted over thirty-nine thousand CRIS reviews, consisting of more than ninety-eight million image and video files. CRIS now contains information on approximately 5,278 child pornography victims identified by law enforcement. Based upon information reported to NCMEC, 92% of the child pornography series identified by law enforcement were produced in the United States, and 8% were produced outside the United States. Approximately 6% of identified children were infants or toddlers; 39% were prepubescent; and 55% were pubescent when the images were created. The files depict several types of sexually exploitative activity, including oral copulation (84%), anal and/or vaginal penetration (76%), use of foreign objects or sexual devices (52%), bondage and/or

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<sup>2</sup> Offenders often name a collection or “series” of child pornography images and/or videos taken of a single or multiple child victims over a period of time. A series typically includes pornographic and non-pornographic images of the child victim(s).

sado-masochism (44%), urination and/or defecation (20%), and bestiality (4%).<sup>3</sup>

In 2012 CVIP analysts conducted in excess of four thousand four hundred CRIS reviews comprising more than nineteen million images and videos. The number of images and videos reviewed by NCMEC has risen steadily each year, from 13,673,167 to 17,306,044 to 19,052,069 in 2010, 2011, and 2012, respectively, illustrating the growing task of monitoring the distribution of child pornography.

Because of NCMEC's unique role and experience relating to the issue of child pornography, NCMEC has testified before Congress and the United States Sentencing Commission regarding the proliferation of child pornography and the devastating effect that child pornography has on its victims. See Statement of Michelle Collins, Vice President, Exploited Children Division and Assistant to the President, NCMEC, Testimony before the United States Sentencing Commission (Feb. 15, 2012); Statement of Ernie Allen, President and CEO, NCMEC, Testimony before the House Committee on the Judiciary, The Protecting Children from Internet Pornographers Act (July 12, 2011).<sup>4</sup>

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<sup>3</sup> Percentages are from January 1, 2007 through December 31, 2011. The percentages do not sum to 100 because some series contain images depicting content in multiple categories.

<sup>4</sup> In the last five years, NCMEC was requested to testify twelve times before congressional committees on issues related to child pornography, sex trafficking, sex offenders, online safety, and missing children.

The resolution of the issue presented in this case—the interpretation of the proximate cause requirement in 18 U.S.C. 2259(b)(3), which provides for restitution to child pornography victims—will have a profound effect on the ability of child victims to receive monetary compensation for the trauma they have suffered. Because of its unique role, NCMEC has extensive knowledge regarding the problem of child pornography and a strong interest in a consistent interpretation of 18 U.S.C. 2259 to enable victims of child pornography to receive restitution.

### **SUMMARY OF THE ARGUMENT**

As this Court and Congress have repeatedly recognized, child pornography presents a serious and growing threat to the children of this nation. Child pornography causes lifelong psychological, financial, and social harms to victims extending far beyond the harm inflicted during its creation. Individuals who possess child pornography violate and exploit their victims by viewing a record of the child's sexual abuse for personal gratification, thereby causing permanent injury to the victim. This problem is pervasive and has been growing steadily in recent years, making it increasingly important that victims of child pornography like Amy be able to recover restitution for the harm caused to them.

Victims of child pornography suffer an indivisible harm relative to the perpetrators, thus making recovery of losses based on proximate cause ineffective. Relying on proximate cause to apportion losses among the offenders would result in a victim never making a

full recovery because each offender would be able to claim his act alone did not cause the injury. Because the injury to victims of child pornography is indivisible, joint and several liability provides the most effective means to ensure that a victim is able to recover her or his full losses. A system that attempts to apportion liability among defendants across jurisdictions would result in disparate and uncertain recovery to the victim. Only joint and several liability fulfills Congress' intent to place the full cost of the losses on the shoulders of the perpetrators rather than on the victim.

## ARGUMENT

### I. CHILD PORNOGRAPHY CAUSES ITS VICTIMS INJURY THAT EXTENDS FAR BEYOND THE HARM INFLICTED DURING ITS CREATION

#### A. Child Pornography Has Been Recognized By Courts And By Congress As A Grave Threat To Children

This Court has consistently acknowledged the grave and continuing harms inflicted by child pornography. In the landmark case of *New York v. Ferber*, this Court recognized that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” 458 U.S. 747, 757 (1982). Indeed, the Court noted several studies indicating that “[p]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution.” *Id.* at 760 (internal quotation omitted). The damage inflicted by child pornography extends far beyond the initial trauma of the sexual abuse suffered during its creation. “The pornography’s continued existence causes the child victims continuing harm”; they are repeatedly exploited as images of them are disseminated and viewed, by an ever growing list of perpetrators. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). Because child pornography is “a permanent record of a child’s abuse, [its] continued circulation \* \* \* harm[s] the child who ha[s] participated. Like a defamatory statement, each new publication \* \* \* cause[s] new injury to the child’s reputation and emotional well-being.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002).

Congress likewise has recognized the pervasive harms of child pornography and has adopted a series of statutes directed at eradicating the interstate market for child pornography. See, *e.g.*, Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. 2251 *et seq.*); Obscene Visual Representations of the Sexual Abuse of Children, 18 U.S.C. 1466A; Sexual Exploitation of Children, 18 U.S.C. 2251; Certain Activities Relating to Material Involving the Sexual Exploitation of Minors, 18 U.S.C. 2252 *et seq.*

The growth of the Internet and other technological innovations have greatly facilitated offenders' ability to store, distribute, and acquire child pornography. "[W]here children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the victims of sexual abuse continuing harm by haunting those children in future years." S. Rep. No. 104-358, at 2, 104th Cong., 2d Sess. (1996); see also H.R. Conf. Rep. No. 104-863, at 28-29, 104th Cong., 2d Sess. (1996). See, *e.g.*, Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. 2251 *et seq.*) (making it illegal to persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct for purposes of producing visual depictions of the conduct; setting fines and statutory minimums for offenders convicted of child pornography). In recognition of this problem, Congress strengthened the restitution remedies available to victims of federal crimes, including child pornography offenses. Mandatory Victim Restitution Act of 1996, Pub. L. No. 104-

132, § 201, 110 Stat. 1214, 1227 (1996) (codified as amended at 18 U.S.C. 3663A); see also 18 U.S.C. 2259.

In recent years, Congress has made explicit findings that child pornography harms the victim each time it is viewed. Not only the production, but also the “distribution, receipt, advertising and possession” of child pornography “is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole.” Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623 (2006). “Child pornography is a permanent record of a child’s abuse and the distribution of child pornography images revictimizes the child each time the image is viewed.” Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102, 122 Stat. 4001 (2008). Finally, Congress has enacted multiple pieces of legislation directly related to combating child pornography’s increased technological sophistication. Protect Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (2008) (improving the Internet Crimes Against Children Task Force; increasing resources for regional computer forensic labs); E. Clay Shaw, Jr. Missing Children’s Assistance Reauthorization Act of 2013, Pub. L. No. 113-38, 127 Stat. 527 (2013) (authorizing appropriations for NCMEC for FY2014-2018).

**B. Despite Extensive Efforts To Combat It, Child Pornography Is Pervasive, And The Problem Is Growing**

Despite efforts to stem its tide, child pornography remains a pervasive, and indeed growing, problem. The United States Sentencing Commission and the Department of Justice confirm that the quantity and severity of child pornography on the Internet has increased dramatically. See U.S. Sent'g Comm'n, *Federal Child Pornography Offenses* 5–6 (2012) (Sentencing Commission Report); U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* 9 (Aug. 2010), <http://www.projectsafefchildhood.gov/docs/natstrategyreport.pdf> (DOJ Report).

This trend is dramatically illustrated by the sheer volume of files submitted by law enforcement to NCMEC in which Amy is pictured. In the first seven years that NCMEC reviewed files depicting Amy (November 26, 2002 to 2009), NCMEC processed more than 35,000 files in the series. In the four years from 2009 to 2013, this number has now doubled, to more than 70,000.<sup>5</sup> One reason for this dramatic increase is that child pornography is now a crime of international distribution. Sentencing Commission Report at vii. Images are transmitted to offenders around the world via the Internet; once distributed in this manner, it is

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<sup>5</sup> The number of image or video files pertaining to “Amy” represents separate instances in which her image or video files are seen and does not indicate the total number of unique or distinct files.

impossible to eradicate all copies. *Ibid.* International law enforcement, including agencies from Denmark, Germany, Canada, New Zealand, and Australia have disclosed to NCMEC that Amy's image and video files have been seen in their criminal investigations.

In recent years, the demand for child pornography files has found increasing outlets in technological advances, including the move to digital recording devices, more storage capacity, and faster Internet speeds. Sentencing Commission Report at 5. The ready availability of digital cameras (with no need for an outside developer), recording devices, and smart phones has facilitated the creation of new child pornography, while increased storage capacity and faster Internet speeds have permitted offenders to view and share larger numbers of photos and videos. *Id.* at 5, 42. In particular, the growing popularity of "peer-to-peer" file sharing, which permits direct, anonymous file-sharing between two or more users without cost to either user, has made distribution a common aspect of child pornography offenses. *Id.* at 5. It is estimated that 57% of global Internet traffic in 2011 was peer-to-peer traffic. *Id.* at 51.

Collectively, these technological changes have facilitated offenders' ability to create, possess, and distribute ever-larger volumes of child pornography. The U.S. Sentencing Commission has noted an "exponential" increase in the volume and ready accessibility of child pornography. Sentencing Commission Report at 6. Alarming, this increase includes graphic images involving very young victims, a genre of child pornography that previously was not known to be widely cir-

culated. *Ibid.* There also has been an increase in the distribution of images depicting violent, sadistic acts. U.S. Sentencing Commission data between 2002 and 2008 also show a 65% increase during that period for sentencing enhancements due to sadistic, masochistic, or violent images. DOJ Report at 22.

Reflecting this trend, federal prosecutions for child pornography offenses have also increased steadily in recent years, and U.S. attorneys prosecuted a total of 8,352 such cases between 2005 and 2009. DOJ Report at 11. The number of child pornography videos and images submitted to NCMEC in connection with the process of identifying the child victims concomitantly increased by 432% during this same period. *Ibid.*

Viewing of child pornography also directly harms additional victims by “driv[ing] a market for the production of new content and thus encourag[ing] production and direct exploitation and abuse.” Michael C. Seto, *Internet Sex Offenders* 56 (2013). See also Sentencing Commission Report at vii. High demand for child pornography leads individuals to sexually abuse children and “commission” the abuse for profit or status. DOJ Report at 17.

The rising demand is often channeled through online communities of child pornographers. These online communities both desensitize offenders to the reprehensibility of their actions and encourage the participation of new individuals. Child Exploitation and Obscenity Unit, U.S. Dep’t of Justice, Child Pornography, <http://www.justice.gov/criminal/ceos/subjectareas/childporn.html> (last visited on October 30, 2013) (DOJ

Website). Often, participation in these communities requires the victimization of additional child victims, because the communities “value the production of new child pornography images.” Sentencing Commission Report at 96. There is evidence that offenders produce new images and videos in order to gain access. *Ibid.* In one investigation, the Federal Bureau of Investigation interviewed a man who admitted to molesting his daughter and videotaping the sometimes violent assaults. He told agents that he did this because he needed “fresh” images for other people on the Internet before they would trade their own newest images with him. His daughter was nine at the time and said her father began abusing her when she was five. DOJ Report at 18. One examination of three such communities found that there was a definitive hierarchy with “producers, posters of new materials, and prolific re-posters at the top of the pyramid.” Sentencing Commission Report at 96. Thus, child pornography files are used as the coin in trade to rise in status within these communities, a process that often involves harm to additional child victims.

Even as it offers a community for offenders, the Internet also offers perceived anonymity. According to the Department of Justice, child pornographers were previously “lonely and hunted individuals because the purchasing and trading of such images was extremely risky”; today, however, the child pornography market has “exploded.” DOJ Website. The Internet also permits distribution and communication across geographic boundaries, further expanding the market for child pornography as well as complicating law enforcement

action against offenders. Sentencing Commission Report 3.

Child pornography offenders span all professional, educational, and income levels. A 2000 study of law enforcement data funded by the Department of Justice showed that, while the majority of all individuals in the study who were arrested for possession of child pornography were white males over the age of twenty-five, their income and educational levels varied greatly. See Janis Wolak et al., *Child Pornography Possessors Arrested in Internet Related Crimes: Findings from the National Online Juvenile Victimization Study 2-3* (2005) (the DOJ Study). A little over half of the offenders were single, divorced, or widowed (62%), while the remainder were married or living with a partner (38%). They were distributed fairly evenly among urban (22%), suburban/large town (41%), and small town/rural (33%) settings. *Ibid.* Forty percent of arrested possessors were “dual offenders” who both sexually victimized children and possessed child pornography, with both crimes discovered in the same investigation; an additional 15% were dual offenders who attempted to sexually victimize children by soliciting undercover investigators who posed online as minors. *Id.* at viii.

### **C. Offenders In Possession Of Child Pornography Cause Severe Harms To Victims**

Victims of child pornography incur severe and lasting harms from the repeated viewing of their abuse by others for sexual gratification. Studies indicate that child victims are at a higher risk for depression, guilt, poor self-esteem, feelings of inferiority, interpersonal

problems, delinquency, substance abuse, suicidal thoughts, and post-traumatic stress disorders than other child sexual assault victims. Tink Palmer, *Behind the Screen: Children who are the Subjects of Abusive Images in Viewing Child Pornography on the Internet* 71 (Ethel Quayle & Max Taylor eds. 2005). Victims also frequently experience feelings of guilt and shame. Sentencing Commission Report 111. The feelings of guilt and shame can be so powerful that some victims deny the abuse even in the presence of photographic evidence. *Ibid.*

The symptoms of distress exhibited by child victims of sexual abuse continue from the actual sexual exploitation, through the time of disclosure, and into the post-disclosure phase. This psychological harm frequently extends into adulthood and impacts victims' ability to form healthy relationships with others. Sentencing Commission Report 113-114. In fact, one study of 100 victims interviewed about the effects of their abuse reported that "initial feelings of shame and anxiety did not fade but intensified to feelings of deep despair, worthlessness, and hopelessness." Richard Wortley & Stephen Smallbone, U.S. Dep't of Justice, Community Oriented Policy Services No. 41, *Child Pornography on the Internet* 15 (2012).

Child pornography victims are particularly injured by their inability to remove or control the images and videos of their sexual abuse. Studies have demonstrated that child victims experience intense feelings of powerlessness from knowing that there is nothing they can do to prevent others from viewing their pornographic images. See generally National Society for the

Prevention of Cruelty to Children, *Images of Abuse: A Review of the Evidence on Child Pornography* (2006). This harm is exacerbated by the fact that the Internet allows for wide circulation of abusive images and videos worldwide and precludes their permanent eradication. As Congress has recognized, “technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography,” Pub. L. No. 109-248, § 501, which in turn allows child pornography to be distributed to an ever growing audience of offenders.

A significant part of the healing process for children traumatized by sexual abuse is the ability to control when, how, and to whom to disclose their abusive experiences. See generally Ethel Quayle et al., *Child Pornography and Sexual Exploitation of Children Online* (2008). Children victimized through the distribution and possession of child pornography images are forever deprived of that capability. *Id.* at 50–51. The repeated uncontrolled distribution and possession of child pornography images online re-victimizes children and exposes them to further trauma and the attendant physical and mental repercussions. *Ibid.*

Child victims suffer a perpetual invasion of their privacy because it is impossible to ensure the removal of images and videos of the victim’s abuse from an unknown offender’s personal collection or from continued distribution on the Internet. DOJ Study at 27. The DOJ Study revealed that those who possess child pornography files add to the ongoing harm to child victims. *Ibid.* Indeed, each notification to a child victim that a new offender has been arrested for possessing images

of his or her abuse can further exacerbate a victim's psychological injuries. See Robert William Jacques, Note, *Amy and Vicky's Cause: Perils of the Federal Restitution Framework for Child Pornography Laws*, 45 Ga. L. Rev. 1167, 1193–1194 (2011).

The experiences of “Amy” and other child victims provide apt illustrations of the unique harms that are suffered by victims of child pornography and that Section 2259 seeks to redress. Amy's abuse began at the hands of her uncle when she was only four years old and was recorded in a set of images known as the “Misty” series. Between August 2002 and September 2013, NCMEC received over 4,900 submissions from law enforcement that included images or videos from the Misty series, most of which reported multiple images of Amy. These 4,900 reports contained a total of over 70,000 images of the Misty series that had been viewed, traded, and collected by offenders for their personal gratification. Law enforcement from all fifty states, Guam, Puerto Rico, international U.S. military basis, and Canada have submitted media including images from the Misty series. The Misty series contains still images of Amy being forced to perform a series of explicit sexual acts, including oral copulation, anal penetration, and masturbation. These images are crime scene photos memorializing the criminal acts committed upon Amy.

In her victim impact statements, Amy recounts how the harms inflicted by the abuse itself are perpetually multiplied by the continuous circulation of her images. In her words: “I am being exploited and used every day and every night somewhere in the world by

someone. How can I ever get over this when the crime that is happening to me will never end? How can I get over this when the shameful abuse I suffered is out there forever and being enjoyed by sick people?” Victim Impact Statement of Amy, the Victim in the Misty Series at 3, *United States v. Berk*, No. 08-cr-00212-GZS (D. Me. Oct. 16, 2009). Amy explained that this debilitating trauma and constant fear of being recognized have severely impacted virtually every aspect of her life, ranging from obtaining a driver’s license to maintaining a job and building relationships with other people. *Id.* at 1–3.

“Vicky,” a victim depicted in another widely circulated series of child pornography images, has attested to similar harms. In her victim impact statement, Vicky tells of chronic nightmares and panic attacks so severe that they forced her to leave college, stating “[e]very time [the images] are downloaded I am exploited again, my privacy is breached, and my life feels less and less safe. I will never be able to have control over who sees me raped as a child.” Second Amended Motion for Victim Restitution, Exhibit Victim Impact Statement of Vicky at 1–2, *United States v. Ontiveros*, No. 2:08-cr-00081-JVB-APR-1 (N.D. Ind. Mar. 31, 2011). Certain viewers of Vicky’s images even have sought to contact her directly, *id.* at 3–4, further illustrating the lasting harm caused by the proliferation of child pornography.

Another child victim, Masha Allen, testified before Congress that “because [the abuser] put my picture on the Internet, the abuse is still going on. Anyone can see them. People are still downloading them—we get

notices from the FBI every time someone is arrested for it.” Sexual Exploitation of Children Over the Internet: What Parents, Kids, and Congress Need to Know About Child Predators: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 109th Cong. 442 (2006) (Statement of Masha Allen). The words of Amy, Vicky, and Masha are emblematic of the profound and lasting harms suffered by many victims of the child pornography escalation.

**II. PETITIONER’S PROXIMATE CAUSE STANDARD FAILS TO ACKNOWLEDGE THE INDIVISIBLE NATURE OF THE HARM, AND WOULD BE ENTIRELY INEFFECTIVE FOR COMPENSATING VICTIMS**

**A. The Injury Caused By Child Pornography Is An Indivisible Harm**

Amy’s injury, as well as the injury of any other victim of child pornography, is an indivisible harm because it is not capable “of any logical, reasonable, or practical division.” Restatement (Second) of Torts § 433A, comment i (1965). Rather, it is a single injury that would be impossible to divide “except upon a purely arbitrary basis for the purpose of accomplishing the result.” *Ibid.* It would be arbitrary and illogical to claim that one defendant who possessed an image of Amy’s abuse caused a certain amount of her injury, while another defendant caused a different amount. The Restatement (Second) of Torts provides that a “broken leg, or any single wound” is an example of an indivisible harm “since it is impossible, except upon a purely arbitrary basis for the

purpose of accomplishing the result, to say that one man has caused half of it and another the rest.” *Ibid.* While substantially more debilitating than a broken leg, similar to this type of injury, Amy’s injury is a single injury. That it is a long-term, multifaceted injury, not a short-term physical wound, makes no difference to this analysis.

That the harm is indivisible is further evidenced by the fact that victims describe the trauma as a whole, rather than referring to any individual perpetrator. Victims have commented that the trauma they suffer is “never ending,” and they experience it “every[]day”: “unlike other forms of exploitations, this one is never ending. Everyday [sic] people are trading and sharing videos of me as a little girl being raped in the most sadistic ways.” Sentencing Commission Report at 113. Victims have reported “fear[ing] that strangers they see on the street have seen images of their abuse, and they are ashamed and embarrassed that a teacher, a potential date, or a stranger in public will recognize them.” *Ibid.* As discussed above, see Section I.C., *supra*, Amy has explained that the constant fear of being recognized has severely impacted virtually every aspect of her life, ranging from obtaining a driver’s license to maintaining a job and building relationships with other people. Victim Impact Statement of Amy the Victim in the Misty Series at 1–3, *United States v. Berk*, No. 08-cr-00212-GZS (D. Me. Oct. 16, 2009). Similarly, Vicky focuses on the fact that “[s]he will never be able to have control over who sees me raped as a child.” Second Amended Motion for Victim Restitution, Exhibit Victim Impact Statement of Vicky at 1–2, *United*

*States v. Ontiveros*, No. 2:08-cr-00081-JVB-APR-1 (N.D. Ind. Mar. 31, 2011). Child victim Masha Allen testified before Congress that she was “more upset about the pictures on the Internet than [she was] about what [her abuser] did to [her] physically.” See Statement of Masha Allen.

It is this generalized trauma—indivisibly resulting from the acts of each offender and their collective whole—that causes the harms suffered by victims of child pornography, including depression, guilt, poor self-esteem, feelings of inferiority, interpersonal problems, delinquency, substance abuse, suicidal thoughts, and post-traumatic stress disorders. Tink Palmer, *Behind the Screen: Children who are the Subjects of Abusive Images in Viewing Child Pornography on the Internet* 71 (Ethel Quayle & Max Taylor eds. 2005). Indeed, as child pornography images continue to circulate, many victims report that their initial feelings of shame and anxiety did not fade, but instead “intensified” to “deep despair, worthlessness, and hopelessness.” Richard Wortley & Stephen Smallbone, U.S. Dep’t of Justice, Community Oriented Policy Services No. 41, *Child Pornography on the Internet* 15 (2012).

**B. Requiring A Victim To Determine Exactly What Part Of An Indivisible Injury Was Proximately Caused By Each Perpetrator Is Not Feasible And Would Result In A Victim Being Unable Fully To Recover Her Or His Losses**

Because the injury to victims of child pornography is indivisible, using proximate cause as a vehicle to allo-

cate a victim's losses over multiple defendants is not feasible. Such a system would result in victims never receiving full recovery because each offender would be able to claim that his act alone did not proximately cause Amy's injury. This reality underlies the policy behind joint and several liability, which provides a solution to recovery of losses when the harm is indivisibly caused by multiple actors. "Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm." Restatement (Second) of Torts § 433A, comment i (1965).

Here, each offender was a substantial factor in Amy's injury for two reasons. First, he possessed pornographic images of Amy, which alone caused severe harm to Amy each time it was viewed. See *supra* p. 10; Part I.C. Secondly, each offender's action combined indivisibly with the actions of other offenders to create the market for child pornography, without which these images would not have been produced and distributed on such a massive scale. The demand for child pornography drives the market for its production and distribution. See *supra* pp. 13-14. Without an audience of offenders, the crime of child pornography would wither rather than continue to grow at an alarming rate as it has done in recent years. See *supra* Part I.B. Offenders participate in a system of distribution and consumption that collectively causes harm to the victim. Thus, even though no individual perpetrator can be shown to

have caused the whole of the harm independently, each is a substantial factor who must be held responsible for the indivisible whole of the harm. Otherwise, the victim is left without a means for full recovery.

### **III. JOINT AND SEVERAL LIABILITY ALLOWS FULL RECOVERY FOR THE VICTIM AND PROPERLY PLACES THE BURDEN OF THE COST ON THE PERPETRATORS RATHER THAN THE VICTIM**

#### **A. Joint And Several Liability Is An Effective Solution Even If The Court Does Not Have Jurisdiction Over Each Perpetrator**

Courts may order an individual defendant jointly and severally liable for a victim's full losses. Under 18 U.S.C. 2259(b)(2), a restitution order must be "issued and enforced in accordance with section 3664," which states, "[i]f 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). As the Fifth Circuit held, even if Section 3664(h) does not *require* joint and several liability under the circumstances of this case, it does not "either expressly or through implication" *forbid* applying joint and several liability to a single defendant before a district court when more than one defendant in other jurisdictions are jointly responsible for the harm. *In re Amy Unknown*, 701 F.3d 749, 770 (2012).

Nonetheless, Petitioner contends that Section 3664(h) only allows for joint and several liability when a single district court judge is sentencing multiple defendants in one case. Pet. Br. 52. The Second, Seventh, and Eighth Circuits have followed this approach. *United States v. Fast*, 709 F.3d 712, 723 n.6 (8th Cir. 2013); *United States v. Laraneta*, 700 F.3d 983, 992–993 (7th Cir. 2012), cert. denied, 187 L. Ed. 175 (2013); *United States v. Aumais*, 656 F.3d 147, 156 (2d Cir. 2011). The Second Circuit recently expanded on this line of reasoning by stating, “[i]f the district court lacks the power to ‘make each defendant liable for payment of the full amount’—because it does not have jurisdiction over all of the responsible parties—the plain language of the statute leaves the court only one option: to ‘apportion liability among the defendants.’” *United States v. Lundquist*, 731 F.3d 124, 141–142 (2013) (quoting 18 U.S.C. 3664(h)).

But apportioning liability among defendants does not solve the court’s concern that it lacks jurisdiction over all responsible defendants. In fact, it exacerbates it. How can the court apportion liability *among* defendants when it only has jurisdiction over one? Apportioning liability requires the capacity to review the conduct of each contributing defendant and determine which portion of the entire cost of the harm is due by each. Since the court is not reviewing the facts of all other defendants’ conduct, the court would have to be able to determine a single defendant’s proportional liability in a vacuum, which would result in arbitrary allocations. Furthermore, even if the court were to review the facts and circumstances of each defendant’s con-

duct, apportioning liability is not possible because the harm of child pornography is indivisible, *supra* Part II.A. If a court were to ignore the indivisibility of the harm and apportion liability on an arbitrary basis with the facts and circumstances of each defendant's conduct in mind, temporal problems would quickly arise as new defendants are convicted or if any given conviction is overturned. As the number of convicted offenders changes, district courts constantly would have to reapportion the losses among them.

The unique problem in child pornography cases is that multiple offenders, some of which are unknown, from multiple jurisdictions are jointly responsible for an indivisible harm. Joint and several liability resolves this problem while individual apportionment cannot. Each court attempting to determine an individual defendant's liability without coordination with other courts would result in disparate and uncertain recovery for the victim. The most workable solution is to make each defendant jointly and severally liable regardless of whether each responsible defendant is before a given court. Each individual defendant would then be responsible for seeking contribution from other convicted defendants.<sup>6</sup>

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<sup>6</sup> Even if a victim withdraws a request for restitution from a particular defendant, a convicted defendant who has been ordered to pay restitution may nonetheless seek contribution from any other responsible defendant. See, *e.g.*, Restatement (Second) of Torts § 886A (1979) (“[W]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.”).

**B. Between An Innocent Victim And A Guilty Perpetrator, Any Individual Perpetrator Should Bear The Cost Of The Harm**

Joint and several liability properly places the burden of the full cost of the harm caused to a victim on the shoulders of the guilty perpetrators rather than on the innocent victim. Without this mechanism, a victim may never be able to recover the full amount of her or his losses and would bear the cost by default, which would be a far greater injustice than any single guilty perpetrator bearing the full cost.

Congress intended that a victim of child pornography receive restitution for the “full amount of the victim’s losses.” 18 U.S.C. 2259(b)(1). Thus, the focus of the statute is on making victims whole. But a system that reviews each defendant’s conduct in a vacuum, with uncoordinated district courts apportioning liability piecemeal, shifts the focus from restoring the victim’s losses to protecting the defendants from shouldering a burden they collectively participated in placing on the victim. Congress directed full victim compensation, and only joint and several liability can achieve that clear directive. Because the victim’s losses are an indivisible whole, the only feasible way to recover the full amount of the losses is via joint and several liability. In any other system, the statute’s promise of full recovery becomes ephemeral, and offenders pay only a small price compared to the massive damage their collective crime has wreaked on the victim. If the statute is to be followed, any individual perpetrator must pay the full

cost of victim's indivisible harm rather than leaving the victim to bear the cost.

**CONCLUSION**

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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