No. 12-8561

In The
Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

vs.

AMY UNKNOWN and UNITED STATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR AMICUS CURIAE THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT AMY

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QUESTION PRESENTED

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. §2259?

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National District Attorneys Association is the oldest and largest professional organization representing criminal prosecutors in the world. Its members come from the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors with responsibility for prosecuting criminal violations in every state and territory of the United States. Its purposes are:

(1) To foster and maintain the honor and integrity of the prosecuting attorneys of the United States in both large and small jurisdictions by whatever title such attorneys may be known;

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[1] On September 3, 2013, Counsel for Respondent, Amy Unknown, filed a consent to the filing of amicus curiae briefs, in support of either party or of neither party. On September 6, 2013, Counsel for Respondent, Wright, filed a consent to the filing of amicus curiae briefs, in support of either party or of neither party. On September 6, 2013, Counsel for Respondent, United States, filed a consent to the filing of amicus curiae briefs, in support of either party or of neither party. On September 6, 2013, Counsel for Petitioner, Paroline, filed a consent to the filing of amicus curiae briefs, in support of either party or of neither party. 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 persons other than the Amici or their counsel made a monetary contribution to this brief's preparation or submission.

(2) To improve and to facilitate the administration of justice in the United States;

(3) To promote the study of the law and legal research, the diffusion of knowledge and the continuing education of prosecuting attorneys, lawyers, law enforcement personnel, and other members of the interested public by various means including, but not limited to, arranging conferences and fostering periodic meetings for the discussion and solution of legal problems affecting the public interest in the administration of justice; and

(4) To cause to be published and to distribute articles, reports, monographs, and other literary works on legal subjects or other related subjects;

(5) To provide to state and local prosecutors the knowledge, skills and support to ensure that justice is done and the public safety and rights of all are safeguarded.

The mission of the National District Attorneys Association is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people. Prosecutors across the nation deal with cases where child sexual assault and molestation are photographed, circulated, and perpetuated (sometimes referred to as "child pornography"). They also deal with victim restitution issues on a broad scale. The issues in this case concerning what causal relationship may be required for the mandatory

restitution provision of 18 U.S.C. §2259 directly involve both of these prosecutorial concerns.

SUMMARY OF THE ARGUMENT

Images of child sexual abuse are purposefully and intentionally transferred traded and possessed by a vast network of like-minded criminals, who achieve sexual gratification from these atrocities captured on digital media. The advancement in technology allows for both anonymity and ease with regard to the online movement of these images. The proliferation of these abusive images via the Internet creates repeated harm to the victims of these child abuse images. The mandatory restitution provision of 18 U.S.C. §2259 allows victims, like Amy, to recover the "full amount" of her losses from those criminals who possess her sexual abuse images. Petitioner plead guilty to the possession of *inter alia*, images of Respondent Amy's sexual abuse. Amy is therefore entitled to recover the full amount of her losses from Petitioner. This court should affirm the Fifth Circuit's *en banc* opinion.

ARGUMENT

I. CHILD PORNOGRAPHY IS NOT "KIDDIE PORN," NOR IS IT "PORNOGRAPHY." IT IS A CRIME SCENE DISPLAYING THE SEXUAL ABUSE AND EXPLOITATION OF CHILDREN CAPTURED IN TIME AND EXISTING IN PERPETUITY.

The term most often used to describe the criminal acts of producing, distributing, possessing, or receiving images depicting the sexual assault and exploitation of children is "child pornography." This word, at best, fails to accurately describe the atrocities caught on camera, and at worst provides a mechanism to normalize these repulsive acts. Professionals in the field assign a more accurate name, calling them child abuse images. "Child pornography is unrelated to adult pornography, it clearly involves the criminal depiction and memorializing of the sexual assault of children and the criminal sharing, collecting, and marketing of the images."[2] If we begin with an accurate name for this behavior, then we are more apt to not be fooled when criminals argue that they "simply possessed two images."[3] Congress has underscored the very real harm of possessing these child abuse images in its findings of the Adam Walsh Child Protection and Safety Act of 2006 by stating "every instance of

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[2] U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* (2010).

[3] Pet. Br. 26, note 17.

viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."[4]

A. The Proliferation of Child Abuse Images Has a Deleterious Effect on its Victims, One of Which Congress has Sought to Remedy to the Extent Money can do so.

18 U.S.C. §2259 is designed to provide restitution for victims, like Amy, who suffer continued exposure and abuse at the hands of those, like Petitioner, who purposefully whet their sexual appetites with her sexual abuse images.[5] As the *en banc* Fifth Circuit noted, the language "reflects a broad restitutionary purpose."[6] While money is a poor method of attempting to make one, like Amy, whole; it is the only mechanism which comes close. The restitution victims receive helps pay for a host of expenses which Congress has recognized as being directly related to the injuries caused.[7]

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[4] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §501(2)(D), 120 Stat. 623.

[5] *See also*, *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999). "Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."

[6] *In re Amy Unknown*, 701 F.3d 749, 752 (5th Cir. 2012) (*en banc*).

[7] 18 U.S.C. §2259(b)(3)(A)-(F).

B. The Link Between Possession of Child Abuse Images and Sexually Abusing Children is Strong.

A 2008 study compared inmates convicted of possession, receipt, or distribution of child abuse images but having no reported history of hands-on child sexual abuse (74% of the group) and those convicted of possession, receipt, or distribution of child abuse images and who had a known history of hands-on child sexual abuse (26% of the group).[8] The goal of the study was to determine if those with no history of hands-on offenses were "merely" collectors of these images.[9] The inmates were participating in an intensive residential sex offender treatment program, and the results were based on self-reporting. The results showed that by the end of the treatment, 85% of the group admitted to having at least one hands-on sexual offense (an increase of 59% from the known hands-on offenders).[10] Those who ultimately admitted to committing hands-on sexual abuse but

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[8] Michael L. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. Fam. Violence 183 (2009). *See also*, U.S. Sentencing Commission, Report to Congress, Ch. 4 (December 2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Chapter_04.pdf.

[9] *Id.*

[10] *Id.* at 187.

who had no known prior history, also admitted to having an average of 8.7 victims each.[11]

Findings from the second wave of the National Juvenile Online Victimization Study found that many arrests made for possession of child pornography involved "dual offenses . . . of possession . . . and child sexual victimization were detected in the course of the same investigation."[12] Child Protective Service Agencies also know enough to react when child pornography is found in a home which also has children. For instance, The Dallas Morning News reports that in the spring of 2007 Petitioner Paroline and his wife were in the process of adopting two toddler sisters, one of which was a prior victim of sexual assault.[13] Upon being notified of Petitioner's arrest by the FBI for possession of these child sexual abuse images "Texas Child Protective Services ordered the [adoption] agency to take the two sisters."[14]

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[11] *Id.*

[12] National Center for Missing and Exploited Children: *Child Pornography Possessors Arrested in Internet-Related Crimes – Findings from the National Juvenile Online Victimization Study*, Page 16, *available at* http://www.missingkids.com/en_US/publications/NC70.pdf (last visited October 17, 2013).

[13] Lee Hancock, The Dallas Morning News, *In just a few clicks of child porn, several lives are ruined*, November 28, 2010, *available at* http://www.dallasnews.com/news/state/headlines/20101128-In-just-a-few-clicks-of-5077.ece?nclick_check=1 (last visited November 14, 2013).

[14] *Id.*

The Child Exploitation and Obscenity (CEOS) section of The Department of Justice has also argued that "whether there is a causal connection or even a correlation between child pornography and child molestation, those who collect child pornography exploit and victimize the children in those images, and create a demand for the production of more child pornography regardless of whether they have ever personally molested a child."[15] Indeed, this Court has also described the impact child abuse images have on its victims.[16] Lastly, possessors of these abusive images not only use them for sexual gratification. Such images are also as a tool to groom children in order "to break down the child's barriers to sexual behavior, ..."[17] Congress has commented on this link finding that "child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual

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[15] Alexandra Gelber, *Response to* "A Reluctant Rebellion," U.S. Dep't of Justice, 6 (2009), *available at* http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2010/009c_Reluctant_Rebellion_Response.pdf (last visited October 17, 2013).

[16] "A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982).

[17] Candace Kim, *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children*, APRI Update Volume 1, Number 3 (2004).

activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity."[18]

America's prosecutors are also acutely aware of the link between possession of these images and the physical sexual abuse of children. This is why the prosecution of possession of these images is crucial to defeat the market creation for these images, and to keep children safe.

II. ADVANCEMENTS IN TECHNOLOGY ALLOW LIKE MINDED CRIMINALS TO COLLECTIVELY AND KNOWINGLY CREATE A VAST MARKETPLACE FOR THE ENJOYMENT AND PERPETUATION OF THE SEXUAL ABUSE AND EXPLOITATION OF CHILDREN.

The advancement of technology has done much to improve our nation, and the Internet is no exception. We are a far cry from the early days of dial-up technology which required significant patience to upload, download or even perform a routine search, and at a maximum, meager download speed of 64 kilobits per second.[19] Today's technology can achieve Internet

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[18] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 104-208, §121, 110 Stat. 3009-26.

[19] Federal Communications Commission, Communications History, *available at* http://www.fcc.gov/omd/history/internet/making-connections.html (last visited November 14, 2013).

download speeds in excess of 35 megabits per second.[20] In addition to faster internet service, the Internet itself allows for almost complete anonymity. With the exception of capturing an Internet Protocol (IP)[21] address and the ability to trace that IP to a particular location and user, there is very little identifying information necessary to search, upload, or download child abuse images. The anonymity afforded to Internet users creates two problems as they relate to the field of child abuse images: First, it allows those who achieve sexual gratification from looking at child abuse images the opportunity to engage with other likeminded criminals without the need to expose their real identity. They create and maintain a network of anonymous cohorts which exists for the purpose of furthering their criminal and deviant choices. Second, law enforcement professionals must continually try to outsmart the anonymous criminal by ferreting out who among them is searching for or allowing the download/transfer of child abuse images, and via which technology. Thus, law enforcement conducts

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[20] Ken Burnside, Radio Shack, Tech Channel, *available at* http://techchannel.radioshack.com/fastest-internet-service-available-2657.html (last visited November 14, 2013).

[21] "An Internet Protocol is a set of rules that govern Internet activity and facilitate completion of a variety of actions on the World Wide Web. Therefore an Internet Protocol address is part of the systematically laid out interconnected grid that governs online communication by identifying both initiating devices and various Internet destinations, thereby making two-way communication possible," *available at* http://whatismyip address.com/ip-address (last visited November 14, 2013).

massive scale operations to find and then ultimately track these criminals.[22]

The use and advancement of technology allows many avenues in which criminals can search for and offer up child abuse images using the Internet. Following are explanations of the most typical methods used by criminals to acquire and share child abuse images.

A. Peer-to-Peer Networks (P2P)

Peer-to-Peer networks (P2P) are rapidly increasing as a means to acquire and offer child abuse images. A report to Congress in 2003 observed that, of the avenues in which crimes are reported to the National Center for Missing and Exploited Children (NCMEC) via their CyberTipline, P2P networks made up approximately 1%.[23] However, in a 2010 report to Congress analyzing Operation Roundup and FairPlay data, more than 20 million unique IP

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[22] Two major law enforcement tools used to identify individual IP addresses and catalog suspected child abuse images include Operation Fairplay, developed in 2006 and supported by the Wyoming Division of Criminal Investigations and the Palm Beach County State's Attorney Office; and Operation Roundup, developed in 2009 by the University of Massachusetts under a grant from the National Institute of Justice.

[23] *File Sharing Programs: Child Pornography is Readily Accessible Over Peer to Peer Networks*, Testimony before the H. Comm. on Gov't Reform, United States General Accounting Office, GAO-03-537T (statement of Linda D. Koontz, Director, Information Management Issues), 10 (March 13, 2003).

addresses were associated with offering child abuse images via P2P networks.[24]

There are two model types of P2P networks; the centralized and decentralized models.[25] The centralized model creates a database of all the files available for sharing by its users (those connected to the network). When one user enters a search term, the server acts as a pointer and directs the requester to another user who has the available file (sharer). The user then connects directly with the sharer in order to transfer the file.[26] One issue with this model is that the owner of the server/broker is locatable and ultimately vulnerable to litigation. This was evidenced in the court proceedings and subsequent take down of the most well-known centralized Peer-to-Peer network, Napster.[27]

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[24] U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress*, 12 (August 2010).

[25] *File Sharing Programs: Child Pornography is Readily Accessible Over Peer to Peer Networks*. Testimony before the H. Comm. on Gov't Reform, United States General Accounting Office, GAO-03-537T (statement of Linda D. Koontz, Director, Information Management Issues), 15-20 (March 13, 2003).

[26] *Id.*

[27] *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001). *See also*, Sergeant Josh Moulin, *What Every Prosecutor Should Know About Peer-to-Peer Investigations*. Child Sexual Exploitation Program Update Volume 5, Number 1, 2010. National District Attorneys Association, National Center for Prosecution of Child Abuse.

The decentralized model is the most used model, because unlike the centralized model, it does not store the filenames of its users. This model begins with connected users operating on the same network using the same protocol. While there are many protocols available, the Gnuetella network/protocol is the most well-known,[28] while BitTorrent is the most popular amongst today's users.[29] When a user connects to the network, he is either identified as an ultrapeer or a node (also called a leaf).[30] The ultrapeer typically has faster internet connections, is not hindered by a firewall, and generally has a history of stable connections.[31] Ultrapeers keep the network running fast by being responsible for many nodes. They are also connected to other ultrapeers. Before a user can search for and download files, he must install client

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[28] In addition to the Gnutella network, there are many others such as: eDonkey, eMule, KaZaa, LimeWire, Shareaza, Bearshare and others.

[29] Hyunggon Park, et al. Peer-to-Peer Networks – Protocols, Cooperation, and Competition, 1, *available at* http://medianetlab.ee.ucla.edu/papers/chapter_P2P_hpark.pdf.

[30] Matei Ripeanu, et al. *Mapping the Gnutella Network: Properties of Large Scale Peer-to-Peer Systems and Implications for System Design*, 3, *available at* http://people.cs.uchicago.edu/~matei/PAPERS/ic.pdf (last visited November 14, 2013).

[31] Sergeant Josh Moulin, *What Every Prosecutor Should Know About Peer-to-Peer Investigations*. Child Sexual Exploitation Program Update Volume 5, Number 1, 2010. National District Attorneys Association, National Center for Prosecution of Child Abuse, *available at* http://www.ndaa.org/pdf/UpdateGreen_v5.pdf (last visited November 14, 2013).

software which is compatible with the network being used. The software is easily customized by the user and allows him to determine which files he is willing to share, how many nodes can download from him at any particular time, and for how long he will allow his files to be accessed by other nodes.[32] When a user on the network searches for a potential file to be downloaded, he usually inputs search terms into the query field, similar to how one uses a search engine like Google, or Yahoo. The search terms are then sent to all available nodes, and any matching files/ directories are sent back to the requester with the information on where the requester can retrieve them.[33] The user can then directly connect with any one peer to download a file, or download pieces of the same file from multiple peers. Because each file has a unique digital fingerprint known as a hash value,[34] the user can be certain he has downloaded the complete file (even if piecemealed together from multiple

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[32] *Id.*

[33] *File Sharing Programs: Child Pornography is Readily Accessible Over Peer to Peer Networks*, Testimony before the H. Comm. on Gov't Reform, United States General Accounting Office, GAO-03-537T (statement of Linda D. Koontz, Director, Information Management Issues), 15-20 (March 13, 2003).

[34] There are two main types of hash values, SHA-1 and MD5. SHA-1 was created by the National Security Agency (NSA) and is published in the National Institute of Standards and Technologies as a Federal Information Processing Standard. MD5 was created by Ronald Rivest, a cryptographer and professor at the Massachusetts Institute of Technology.

peers) by matching the hash values of the original file with the completed file.

B. Bulletin Board System (BBS)

The use of the Bulletin Board System (BBS) predates the expansion of the Internet. As such, the use of this system drastically declined as the use of the World Wide Web increased. However, criminals intent on sharing and acquiring child abuse images have been steadily using this system because of its anonymity (one need only create a username and password), and because this old technology often flies under the radar of law enforcement investigations.[35] The computer code which designed the BBS was written to mimic a cork-board where information could be posted or taken off the board by a user.[36] Boards designed for special interests allow like-minded users to discuss topics (threads), upload files, download files, or in some cases create direct connections between users for private conversations (chats). This last capability provides a uniquely frightening

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[35] U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress*, 11 (2010).

[36] Wired, This day in Tech, *Feb. 16, 1978: Bulletin Board Goes Electronic*, *available at* http://www.wired.com/thisdayintech/2010/02/0216cbbs-first-bbs-bulletin-board/ (last visited November 14, 2013).

opportunity for the online solicitation of children for sexually deviant purposes.[37]

C. File Transfer Protocol (FTP)

Another older but increasingly popular method of transferring files between users is File Transfer Protocol (FTP). There are several programs which allow for the transmission of files using this protocol, but each operates in relatively the same manner. Under FTP, computers "talk" to each other for the purpose of transferring files using a specified software program such as *Fetch* designed at Dartmouth for Macintosh users.[38] A user connects via the Internet to a server. However, instead of typing in "http://" (which stands for Hypertext Transfer Protocol) at the beginning of the Uniform Resource Locater (URL),[39] the user types in "ftp." This indicates access to an FTP server. There is also a requirement for the user to logon, but this may be done anonymously. The user connects to the server via a particular port (of which there are many). The user then begins what appears

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[37] U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress*, 11 (2010).

[38] Dartmouth, Computing at Dartmouth, *available at* http://www.dartmouth.edu/comp/email-cal/other/collaboration-tools/ftp/ (last visited November 14, 2013).

[39] Indiana University, University Technology Information System, What is a URL?, *available at* http://kb.iu.edu/data/adnz.html (last visited November 14, 2013).

to be a dialogue with the server as a means of acquiring whatever file the user is looking for.

D. Chat Rooms

Chat Rooms became wildly popular in the mid-1990s when America Online (now AOL Inc.) introduced its People Connection.[40] There were virtually countless rooms based on topic and interest. A chat room is joined by downloading software to run the application, and then creating a username or nickname and a password. The user will choose a chat room based on his preference. Inside the chat room there will be other like-minded chatters and the conversation can consist of text-based chat (written word), voice chat (spoken word), graphic chat (using avatars or other images), and even video chat. These rooms can also allow for the upload and download of files. In addition, two or more people in a chat room can decide to engage in private conversations outside of the main chat room in order to discuss topics or transmit files. This technology is similar to instant messaging (IM), except IM is mostly geared toward person-to-person chat, while chat rooms are designed for groups of chatters.

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[40] AOL Inc., History & Overview, *available at* http://corp.aol.com/about-aol/overview (last visited November 14, 2013).

While chat room use has declined, aspects of chat rooms exist as part of many multiplayer online games such as: MineCraft™,[41] Halo®,[42] World of Warcraft®[43] and others.

E. The Deep Web and The Onion Router (TOR)

While the previously mentioned avenues in which criminals acquire and trade child abuse images are a constant source of concern for law enforcement and allied professionals, perhaps there is no greater impediment to detection by law enforcement than the use of the Deep Web[44] and ultimately The Onion

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[41] Minecraft is a trademark of Notch Development AB, and is a game where multiple players join to create and break blocks through different worlds as they combat enemies and go on adventures, *available at* https://minecraft.net/ (last visited November 14, 2013).

[42] Halo is owned by Microsoft Studios and is a first-person shooter game where players work with each other to help destroy enemies, *available at* http://www.halowaypoint.com/en-us (last visited November 14, 2013).

[43] World of Warcraft was developed by Blizzard Entertainment, and it allows users to play heroic characters who inhabit a world of magic, mystery, and adventure, *available at* http://us.battle.net/wow/en/game/guide/ (last visited November 14, 2013).

[44] The Deep Web is a group of websites which cannot be reached by regular search engines, and require the use of an anonymity software such as TOR. The Baltimore Sun, What is the 'Deep Web'? and other questions about the shadowy virtual world of Silk Road, *available at* http://articles.baltimoresun.com/2013-10-03/business/bal-silk-road-deep-web-explainer-20131003_1_satoshi-nakamoto-bitcoin-silk-road (last visited November 14, 2013).

Router (TOR).[45] The Deep Web has made news recently because of the arrest of Ross Ulbricht, a 26 year old who maintained the website known as the Silk Road.[46] The Silk Road is one of several major websites which essentially act as a pointer or meeting place for buyers and sellers of legal and illegal activity (child pornography, drugs, weapons, etc. . . .). While the original Silk Road website was taken down as part of the arrest of Ulbricht, it was right back up and operational within a month.[47] Aside from traditional money as a means in which to pay for services or goods, the use of digital money such as Bitcoin[48] is both increasing and difficult to track.

Each of the aforementioned methods for sharing and acquiring files has at least one thing in common,

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[45] The Onion Router (TOR) is an anonymity software and network which allows users to essentially hide their IP addresses by bouncing the user through a vast interconnected system of users (volunteers) for the purpose of concealing the identity and location of the user. The TOR Project, *available at* https://www.torproject.org/ (last visited November 14, 2013).

[46] Discovery Communications LLC, What Is The Deep Web, *available at* http://news.discovery.com/tech/what-is-the-deep-web-130708.htm (last visited November 14, 2013).

[47] Laurie Segall, How Silk Road was Reborn, CNN Money November 6, 2013, *available at* http://money.cnn.com/2013/11/06/technology/new-silk-road/ (last visited November 14, 2013).

[48] "Bitcoin uses peer to peer technology to operate with no central authority or banks; managing transactions and the issuing of bitcoins is carried out collectively by the network. Bitcoin is open-source; its design is public, nobody owns or controls Bitcoin and everyone can take part." Bitcoin Project, *available at* http://bitcoin.org/en/ (last visited November 14, 2013).

that is, the user specifically asks for the particular file being acquired. The use of modern technology by criminals makes up an interconnected and deeply committed marketplace for the shared purpose of acquiring and offering child abuse images.

III. VICTIMS OF THESE CRIMES ARE ENTITLED TO RESTITUTION FOR THE FULL AMOUNT OF THEIR LOSSES, IRRESPECTIVE OF WHETHER THOSE LOSSES PROXIMATELY RESULTED FROM A PARTICULAR DEFENDANT'S CRIME.

Some causation is certainly a condition precedent to an order of restitution under 18 U.S.C. §2259; however the degree of causation required is dependent upon which specific provision under the statute restitution is being sought. Petitioner Paroline would have this Court read a proximate causation requirement for each provision of the statute and not "parse commas versus semicolons or debate grammar."[49] But statutes are built of words and sentences, so statutory interpretation necessarily requires attention to grammar and punctuation. One cannot simply ignore them when they are inconvenient, as Petitioner urges this Court to do.

A. The Plain Meaning Rule

The starting point (and in this case, also the ending point in the statutory construction) is the

[49] Pet. Br. 26.

language of the statute itself. Each of the enumerated subsections of the definition paragraph can be read as a complete and independent sentence. That is to say, when defining "the full amount of the victim's losses," subsections (A) through (E) specifically enumerate types of compensable losses. They require no additional information to be either clear or actionable. These types of compensable losses are definite and tangible, and can be proven via fee schedules and bills. On the other hand, subsection (F) is an amorphous area for compensable loss. As such, it contains language necessary for its understanding vis-a-vis the "proximate result" language. Without this, the catch-all provision could be read to interpret compensable losses wholly unrelated to the offense at hand. This would be an absurd result. "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[50] As this Court held in *Hooper v. California*, "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[51] "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like

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[50] *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) citing *National Labor Relations Board v. The Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) "[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.

[51] *Hooper v. California*, 155 U.S. 648, 657 (1895).

this Court, is bound by and swears an oath to uphold the Constitution."[52] More, reading the proximate result language into the specifically enumerated subsections as opposed to only the catch-all subsection is contrary to the plain language of the statute itself. The statute includes the language "notwithstanding §3663 or §3663A . . . " in directing courts to order restitution. Section 3663A defines "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."[53] This definition is directly at odds with the definition of victim in §2259 which specifically does not use the language "directly and proximately harmed." "In interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[54] When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."[55]

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[52] *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

[53] 18 U.S.C. 3663A(a)(2).

[54] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992), citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68, 3 L.Ed. 150 (1810).

[55] *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981); *see also*, *Ron Pair Enterprises*, supra, 489 U.S. at 241, 109 S.Ct. at 1030.

B. Grammar and Punctuation Clarify Meaning

The plain meaning of the statute is reinforced by the chosen punctuation. Subsections (3)(A)-(F) are each unique categories of compensable loss. Each subsection contemplates multiple types of compensable loss within the particular category. For instance subsection (A) allows for compensable losses related to medical services. Through the proper use of punctuation, the contemplated medical losses are further annotated into physical, psychiatric, or psychological. A different reading makes the chosen groupings by Congress seem indiscriminate, as opposed to carefully thought out and separated by semicolons. There would then be no logical reason for creating six subsections of losses instead of thirteen. Rather, a plain reading of the statute shows that, if a victim has another type of loss which does not directly fall into one of these enumerated and contemplated categories, her hope for restitution is not doomed. She can make a claim under subsection (F), the catch-all provision. However in this case, she would have the additional burden to prove this uncontemplated loss was a proximate result of the offense.

Petitioner's argument that upholding the *en banc* Fifth Circuit's decision would render restitution in criminal sentencing a "strict liability proposition"[56] illustrates a flawed reading of the plain language of

[56] Pet. Br. 17.

the statute. The conditions precedent to being considered a "victim" require that one be "harmed as a result of a commission of a crime under this chapter."[57] First, not any child exploited in photographs can seek restitution from any defendant. Rather the exploited child must be among the sexual abuse images possessed, transferred, received, etc. by that particular defendant. Second, that child must illustrate harm. This is hardly a strict liability offense.

Although this is not a strict liability statute, this Court is familiar with strict liability legislation, and has upheld criminal convictions resulting therefrom. Perhaps one of the most important cases to be decided on this issue relating to statutory interpretation is *United States v. Dotterweich*.[58] Dotterweich, the president of Buffalo Pharmacal Company was criminally convicted of three counts of violating the Federal Food, Drug, and Cosmetic Act of 1938,[59] which makes it a misdemeanor to introduce or deliver for introduction into interstate commerce any drug that is adulterated or misbranded. This legislation makes Dotterweich and other similarly situated executives vicariously liable for the crimes of others, even if they were not directly involved in the criminal activity. The Circuit Court of Appeals reversed Dotterweich's conviction maintaining that the corporation was the

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[57] 18 U.S.C. §2259(c).

[58] *United States v. Dotterweich*, 320 U.S. 277 (1943).

[59] 21 U.S.C. §§301-392 (1938).

only "person" subject to prosecution unless Buffalo Pharmacal Company was a counterfeit corporation serving as a screen for Dotterweich. This Court however, reversed the Court of Appeals' decision by addressing the lower court's faulty interpretation of the statute as the basis for its decision. This Court noted " . . . regards for the purposes of the legislation"[60] (protection of the lives and health of the people) "should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."[61] As *Dotterweich* is an illustration of strict liability legislation, the case at bar is a far cry from strict liability.

The use of semicolons and commas were of primary importance in *United States v. Rigas*.[62] The Rigases were convicted in the Southern District of New York for conspiracy to defraud the United States, in violation of 18 U.S.C. §371.[63] They were subsequently indicted in the Middle District of Pennsylvania for the same crime but with respect to the tax

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[60] *Dotterweich*, 320 U.S. at 280.

[61] *Id*. *See also*, *United States v. Park*, 421 U.S. 658 (1975), upholding *Dotterweich*.

[62] *United States v. Rigas*, 605 F.3d 194 (3d Cir. 2010).

[63] The Rigases were father (CEO) and son (CFO) of Adelphia, a cable television provider. Adelphia collapsed amid over leveraging of shares and assumption of debt by the Rigases. Their indictment in New York claimed the Rigases attempted to hide the financial ruin of Adelphia from the Securities and Exchange Commission (SEC) and the public.

evasion portion of their criminal acts.[64] The Rigases claimed the subsequent prosecution in Pennsylvania subjected them to double jeopardy,[65] and moved for dismissal of the indictment.[66] Their argument was "18 U.S.C. §371 creates a single statutory offense of conspiracy that can be violated in alternative ways," therefore they could "only be tried once for a single conspiratorial agreement in violation of that statute."[67] The text of 18 U.S.C. §371 reads

> [i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

The district court denied the motion, and the Rigases appealed.[68] On appeal the Rigases argued the proper test to consider the overall issue was the totality of the circumstances,[69] while the Government argued to use the *Blockburger* test.[70] The lower court believed

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[64] *Rigas*, 605 F.3d at 200-203.

[65] U.S. CONST. amend. V.

[66] *Rigas*, 605 F.3d at 203.

[67] *Id.*

[68] *Id.*

[69] *United States v. Liotard*, 817 F.2d 1074, 1077 (3d Cir. 1987).

[70] *Blockburger v. United States*, 284 U.S. 299, 304 (1932). "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine

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that utilizing either test before determining whether §371 creates a single offense "puts the cart before the horse."[71] Therefore, in determining whether Congress intended to create a single offense or multiple offenses, a plain reading of the text was paramount.[72] "When Congress crafts a statute to create distinct offenses, it typically utilizes multiple subsections or separates clauses with semicolons to enumerate the separate crimes."[73] Finding only a single offense, the court held "[h]ere, unlike most statutes that create multiple offenses, §371 is a single sentence, divided only by commas. The fact that Congress declined to structure §371 in such a manner undermines the interpretation advanced by the Government and supports our single-offense rendering of the statute."[74] In similar fashion, the text of §2259, in using multiple subsections with semicolons, supports the idea that Congress intended to make separate and distinct categories of compensable loss.

In addition, this Court need not find itself constrained to punctuation only. In fact, this Court has departed from such punctuation analysis in the past, when to allow primary importance on this analysis

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whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

[71] *Rigas*, 605 F.3d at 205.

[72] *Id.* at 207.

[73] *Id.* at 209.

[74] *Id. see*, *e.g.*, *Jones v. United States*, 526 U.S. 227, 252 (1999) (interpreting 18 U.S.C. §219, the federal carjacking statute, as creating three distinct crimes).

would be "incomplete and runs the risk of distorting a statute's true meaning."[75] In *National Bank v. Independent Insurance Agents*, this Court ultimately held the punctuation (placement of quotation marks) to be a result of a "scriveners error" when it considered also the whole provision of the statute, its object, and policy.[76] *National Bank v. Independent Insurance Agents* was an "unusual case," and "[a]gainst the overwhelming evidence from the structure, language, and subject matter of the 1916 Act there stands only the evidence from the Act's punctuation, too weak to trump the rest."[77] On the other hand, this Court has held that a plain reading of a statute when supported by the grammatical structure illustrate Congress' intent on a matter.[78] Such is the instant case, where Congress intended to provide greater protection to this special population when it chose not to include the proximate result language in either its definition of "victim" or in any other enumerated provision save the catch-all. The use of commas and semicolons support this plain reading.

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[75] *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 454 (1993).

[76] *Id.* at 455 (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)).

[77] *United States Nat'l Bank of Oregon*, 508 U.S. at 462.

[78] *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 (1989).

C. When Congress Chooses to Include a General Proximate Cause Requirement, it Knows How to do so.

As part of the Violence Against Women Act of 1994, Congress demonstrated its keen ability to legislate according to its intent. For example, in §2248 Mandatory Restitution for Sex Crimes, subsection (b)(3)(E) the definition of "full amount of the victim's losses" includes the language "plus any costs incurred in obtaining a civil protection order" in the same category as contemplated attorneys' fees.[79] Immediately following this in §2259 Mandatory Restitution for Sexual Exploitation and Other Abuse of Children, subsection (b)(3)(E) noticeably does not contain the civil protection order costs language. Rather, broader language "as well as other costs incurred" is used.[80] Presumably, Congress intended to use this broader language according to its understanding that one category of victims might have different needs than another. In any case, this is a clear demonstration that "[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."[81]

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[79] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §40113, 108 Stat. 1904.

[80] *Id.* at 108 Stat. 1907.

[81] *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

In contrast, 18 U.S.C. §2327, part of the same Public Law, but concerning Telemarketing Fraud, creates a general proximate cause requirement for compensable losses.[82] Section 2327(b)(3) does not have a list of enumerated categories like §2248 and §2259; rather, it simply defines "full amount of the victim's losses" as "all losses suffered by the victim as a proximate result of the offense."[83]

The differences between §2327 and both §2248 and §2259 illustrate an important distinction – that is, when Congress chooses to include a general proximate cause requirement, it knows how to do so. Had Congress intended to treat mandatory restitution uniformly regardless of the type of crime, it simply needed to use the singular paragraph of general proximate cause it used in the Telemarketing Fraud section. The fact that it chose not to use uniform language, demonstrates both that the plain reading of §2259 does not include a general proximate cause requirement, and Congress did not intend to create a general proximate cause requirement.[84]

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[82] Violent Crime Control and Law Enforcement Act, §250002, 108 Stat. 2083.

[83] *Id.*

[84] *See Meghrig v. KFC Western Inc.*, 516 U.S. 479 (1996). The Court examined two analogous statutes, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) when considering a citizen suit regarding the ability to recover cleanup costs from contributing parties in certain circumstances. Holding that "Congress . . . demonstrated in CERCLA

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IV. JOINT AND SEVERAL LIABILITY IS THE APPROPRIATE MECHANISM FOR PETITIONER TO REAPPORTION RESTITUTION.

Petitioner pled guilty to a violation of 18 U.S.C. §2252 for possession of 150-300 images of minors engaged in sexually explicit conduct.[85] This statute requires as a condition precedent to guilt, that the actor "knowingly" possess these abusive images.[86] There can be no dispute therefore that Petitioner *knowingly* possessed sexual abuse images of Amy. In fact, the Dallas Morning News reported that Petitioner "says Internet child porn eased stress from his new business . . . and he admits to being aroused and sometimes masturbating."[87] As previously described, the technology available for acquiring sexual abuse images of Amy, and others like her, require the user to purposefully seek them out. Consistent with Petitioner's guilty plea, it requires no inference that he *purposefully* sought out the abuse images he possessed. As also previously argued, Petitioner, and others like

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that it knew how to provide for the recovery of cleanup costs, and that language used to define the remedies under RCRA does not provide that remedy."

[85] *In re Amy Unknown*, 701 F.3d 749, 752 (5th Cir. 2012) *en banc*.

[86] 18 U.S.C. §2252(a)(4)(B).

[87] Lee Hancock, The Dallas Morning News, *In just a few clicks of child porn, several lives are ruined*, November 28, 2010, *available at* http://www.dallasnews.com/news/state/headlines/20101128-In-just-a-few-clicks-of-5077.ece?nclick_check=1 (last visited November 14, 2013).

him, create the demand for these abusive images, which in turn fuel the supply, thus ultimately creating a marketplace. If Petitioner intentionally possessed images capturing the rape and sexual abuse of Amy, than aside from being a criminal act, his actions are also consistent with an intentional tort.

Petitioner argues that the "*en banc* Fifth Circuit's holdings create an absurd result . . . and that joint and several liability would create a judicial nightmare."[88] This argument however seems to track that of negligent tortfeasers, rather than that of intentional tortfeasors such as Petitioner.

The harm to Amy, and others like her, is that the rapes and sexual abuse she endured as a child live in perpetuity, and for the sexual gratification of others. As this Court understood in *Ferber*, "[a] child who has posed for a camera must go through life knowing the recording is circulating within the mass distribution system for child pornography."[89] When Petitioner purposefully sought out and possessed the sexually abusive images of Amy, his actions either intentionally or

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[88] Pet. Br. 54.

[89] *New York v. Ferber*, 458 U.S. 747, 760 (1982) (citing David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)). *See also Violent Crime Control and Law Enforcement Act* of 1994, Pub. L. No. 104-208, §121, 110 Stat. 3009-26. Findings by Congress that "child pornography permanently records the victim's abuse, and its continued existence causes the child victims . . . continuing *harm* by haunting those children in future years."

recklessly created the very harm for which Amy seeks restitution. It does not matter that others create the same harm. Undoubtedly there are and will be countless people who purposefully seek out and possess these images of Amy's repeated sexual assault. The harm inflicted on Amy by Petitioner is 100% Petitioner's fault; so is it also 100% the fault of any other person who knowingly possesses these images. In other words, Petitioner's conduct creates an indivisible harm for which he is entirely responsible. The burden to reapportion costs related to restitution should be upon Petitioner and others like him. It should not be on Amy and others like her. If the purpose of restitution is to make Amy whole, to the extent money can do so, then putting the burden on her to describe with particularity the specific harm each defendant's actions contribute creates the opposite effect. Instead, Amy arguably suffers greater harm with this approach, not to mention the impossibility of dividing indivisible harm. On the other hand, in the instant case Amy has presented a quantifiable amount of loss based upon the harm caused by Petitioner and others like him. This loss includes future medical and psychological counseling as well as lost wages. Petitioner is responsible for the full amount of Amy's losses, and the fact that someone else is or will be is Petitioner's burden, not Amy's.

Consider also, albeit in the criminal context, the notion of vicarious liability. A group of like-minded individuals agree to rob a bank. Two perpetrators enter the bank with loaded firearms. During the

robbery, Perpetrator 1 uses his firearm and kills a bank teller. The two flee the bank and enter the "get-away car." The car is driven by a third perpetrator, who never enters the bank and never possesses a firearm. Through good police work, the three perpetrators are captured. Each of the three men are responsible for the actions of the others. The get-away car driver is as responsible for the bank robbery and the death of the bank teller as Perpetrator 1 (who pulled the trigger.) So too, is Perpetrator 2 (who never used his firearm). In other words, it is irrelevant to the criminal prosecution of Perpetrator 2 or the get-away driver, that Perpetrator 1 gets convicted and receives a life sentence for the robbery of the bank and the death of the bank teller.

The marketplace for production, distribution, receipt, and possession of child abuse images relies on an interconnected and interdependent parasitic relationship. Those who consume child abuse images need, expect, and want children to be sexually abused and violated in order to create said images. Those who create the images (and this is especially true in Amy's case) do so for, among other reasons, the people who want the images. In some cases the consumers and the producers will never meet or even know of each other. However, the very nature of the child pornography marketplace is clandestine and reliant upon these like-minded perpetrators. No argument is being advanced that Petitioner is criminally vicariously liable for the sexual abuse of Amy or the hundreds of other child abuse images he possessed. However,

Petitioner did enter a de facto conspiratorial enterprise with those who created and distributed these images. He is ultimately then, as much responsible for the single harm Amy suffers as any other member of the enterprise.

Aside from the internal structure outlined in §2259, Congress has provided a mechanism via 18 U.S.C. §3664(h) to aid courts in finding a balance that both allows victims to recover the full amount of their losses, "and ensures that no defendant bears more responsibility than is required for full restitution."[90] This provision also ensures that Amy cannot recover sums of money untold; rather, she is capped at the calculated full amount of her losses.[91] Therefore any argument that Amy can recover a greater sum of money than the full amount of her losses is unfounded.

CONCLUSION

Injury to victims like Amy, require a great deal of continued care and associated expenses. The criminal actions of Petitioner are responsible for the very injury suffered by Amy, and others like her. Congress recognized this link and sought to hold offenders accountable for this injury via 18 U.S.C. §2259. This statute was written to reflect this broad

[90] *In re Amy Unknown*, 701 F.3d 749, 769 (5th Cir. 2012) *en banc*.

[91] *Id.* at 770 (internal citations omitted).

restitutionary purpose, and there was no general proximate cause requirement written into the statute. The *en banc* Fifth Circuit correctly recognized this, and properly held Petitioner accountable for the full amount of Amy's losses. For the aforementioned reasons, this Court should affirm the lower court's holding.

Respectfully submitted,

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