

No. 11-85

In the Supreme Court of the United States

AMY, THE VICTIM IN THE “MISTY”
CHILD PORNOGRAPHY SERIES, PETITIONER

v.

MICHAEL M. MONZEL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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

CHRISTOPHER G. GREEN

Counsel of Record

RACHEL A. RUBENSON

THOMAS J. BASILE

DOUGLAS E. BRAYLEY

ROPES & GRAY LLP

Prudential Tower

800 Boylston Street

Boston, MA 02199

(617) 951-7000

Christopher.Green@ropesgray.com

TABLE OF CONTENTS

Interest of amicus curiae 1
Summary of argument 5
Argument..... 6
I. The first question presented is of the utmost importance to the battle against child pornography, a damaging and ever-growing epidemic that crosses all demographic categories and harms child victims nationwide 6
 A. This Court, Congress, and others have recognized that child pornography is a serious and continuing problem 6
 B. Child victims suffer enormous psychological and financial harm from the production, distribution, and possession of child pornography 9
II. This Court should clarify the interpretation of the Mandatory Victim Restitution Act because divergent judicial applications of Section 2259 are frustrating Congress’ intent to provide restitution to child victims.. 14
 A. Advancements in technology continue to increase the frequency with which courts face issues of restitution to child pornography victims..... 14
 B. The lower courts have been unable to agree on a workable approach to assess victims’ claims for statutorily mandated restitution and greatly need this court to provide clarity..... 15
Conclusion 19

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002)	7
<i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991)	17
<i>In re Amy Unknown</i> , 636 F.3d 190 (5th Cir. 2011)	16
<i>McBoyle v. United States</i> , 28 U.S. 25 (1931)	18
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	6
<i>Osborne v. Ohio</i> , 495 U.S. 103 (1990)	7
<i>United States v. Chow</i> , 760 F. Supp. 2d 335 (S.D.N.Y. 2010)	17
<i>United States v. Crandon</i> , 173 F.3d 122 (3d Cir. 1999)	15
<i>United States v. Faxon</i> , 689 F. Supp. 2d 1344 (S.D. Fla. 2010)	17
<i>United States v. Julian</i> , 242 F.3d 1245 (10th Cir. 2001)	15
<i>United States v. Kennedy</i> , 643 F.3d 1251 (9th Cir. 2011)	15
<i>United States v. Mather</i> , 09-CR-00412, 2010 WL 5173029 (E.D. Cal. Dec. 13, 2010)	16

United States v. McDaniel, 631 F.3d 1204
 (11th Cir. 2011) 16

United States v. Monzel, 641 F.3d 528 (D.C.
 Cir. 2011)..... 16

United States v. Staples, No. 09-14017-CR,
 2009 WL 2827204 (S.D. Fla. Sept. 2, 2009) 16

STATUTES

18 U.S.C. § 1466A..... 7

18 U.S.C. § 2251 7, 8, 15

18 U.S.C. § 2252 7

18 U.S.C. § 2258A..... 2

18 U.S.C. § 2258C..... 2

18 U.S.C. § 2259*passim*

26 U.S.C. § 501(c)(3)..... 1

42 U.S.C. § 5773 1-3

Protection of Children Against Sexual
 Exploitation Act of 1977, Pub. L. 95-225, 92
 Stat. 8 (1978)..... 7

Child Pornography Prevention Act of 1996,
 Pub. L. No. 104-208, 110 Stat. 3009 (1996) 8

Effective Child Pornography Prosecution Act
 of 2007, Pub. L. No. 110-358,
 122 Stat. 4001 (2008) 8, 10, 11

Mandatory Victim Restitution Act of 1996,
 Pub. L. No. 104-132, 110 Stat. 1227 (1996)
 (codified as amended at 18 U.S.C. § 3663A) 8

Adam Walsh Child Protection and Safety Act
 of 2006, Pub. L. No. 109-248, 120 Stat. 587
 (2006) 8, 10

OTHER AUTHORITIES

H.R. Rep. No. 104-863 (1996) (Conf. Rep.) 8

Robert William Jacques, Note, *Amy and
 Vicky's Cause: Perils of the Federal
 Restitution Framework for Child
 Pornography Laws*, 45 Ga. L. Rev. 1167
 (2011) 11

John E.B. Myers, et al., *The APSAC Handbook
 on Child Maltreatment* (2d ed. 2002) 10

National Society for the Prevention of Cruelty
 to Children, *Images of Abuse: A Review of
 the Evidence on Child Pornography* (2006) 10

Ethel Quayle, et al., *Child Pornography and
 Sexual Exploitation of Children Online*
 (2008) 11

S. Rep. No. 104-358 (1996) 8

<i>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)</i>	13
Statement of Ernie Allen, President and CEO, NCMEC, Testimony before the United States Sentencing Commission Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984 (Oct. 20, 2009)	4
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)	4
U.S. Dep't of Justice, The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress 9 (2010), <i>available at</i> http://www.projectsafechildhood.gov/docs/natstrategyreport.pdf	9, 15
Table 5.4, U.S. District Courts—Criminal Defendants Filed, by Major Offense (Excluding Transfers), at http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table504.pdf	14

Janis Wolak, et al., Child Pornography Possessors Arrested in Internet Related Crimes: Findings from the National Online Juvenile Victimization Study (2005)..... 9, 11

INTEREST OF AMICUS CURIAE¹

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 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). In this capacity, NCMEC assists law enforcement and families to find missing children, reduce child sexual exploitation, and prevent child victimization. NCMEC works in cooperation with and receives a grant from the United States Department of Justice’s Office of Juvenile Justice and Delinquency Prevention to perform 19 statutorily-authorized functions. 42 U.S.C. § 5773(b). NCMEC works with federal, state, local, and international law enforcement agencies, state missing children clearinghouses, and private corporations. Because of these roles and functions, NCMEC is specially situated to comment on this Petition.

Pursuant to its congressional authorization, NCMEC serves as a central repository in the United States for information relating to child pornography reports. NCMEC’s statutory functions include the establishment and operation of specific programs to help stop the sexual exploitation of children, includ-

¹ The parties have consented to the filing of this brief in letters filed herewith. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

ing: providing technical assistance and training to law enforcement agencies relating to investigations of child sexual exploitation; working with law enforcement and the private sector to reduce the proliferation of child pornography; operating a child victim identification program to assist law enforcement to identify victims of child pornography; and operating the CyberTipline®, the “9-1-1 for the Internet,” to which the public and electronic service providers can report 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. The CyberTipline launched in 1998 and is authorized by Congress to be a mechanism for members of the public and electronic service providers to report instances of apparent child sexual exploitation, including child pornography. 42 U.S.C. § 5773(b)(1)(P). NCMEC processes and analyzes each CyberTipline report, and these reports are available to law enforcement for potential investigation and prosecution as appropriate.

Since 1998, NCMEC has received over 1,160,000 CyberTipline reports, of which over 1,040,000 reports were identified by the reporting party to include images of apparent child pornography.² Thus far in

² In analyzing CyberTipline reports of apparent child pornography, NCMEC analysts determine whether the reported images are of “apparent” child pornography using the definition in the federal statute as a guideline. Deciding whether particular images constitute actual child pornography under specific

2011, NCMEC has received over 167,000 CyberTipline reports, of which 161,000 reports were identified as including images of apparent child pornography.³ These statistics demonstrate the rapid growth in the frequency of child pornography reports. Between 2009 and 2010, the number of reports received by the CyberTipline increased by 86%, while the proportion of these reports that were identified as including images of apparent child pornography went up by 100%. NCMEC's analysis of these images indicates that the number of images being collected and traded by offenders worldwide continues to expand exponentially, and these images are growing increasingly graphic and violent and often include younger children, including infants.

NCMEC also operates the CVIP, which has a dual mission: (1) to assist federal and state law enforcement agencies and prosecutors with child pornography investigations; and (2) to assist law enforcement in identifying child victims depicted in pornographic images. 42 U.S.C. § 5773(b)(1)(R). CVIP analysts assist law enforcement by reviewing copies of seized child pornography to determine which images include child victims who previously have been identified by law enforcement. NCMEC conducts evidence reviews visually as well as using its Child Recognition and Identification System (CRIS), a proprietary software program that determines whether an image under review shows a previously identified child.

state or federal laws is a matter for law enforcement, judges, and prosecutors in the relevant jurisdictions to determine.

³ The year-to-date statistics cover Jan. 1, 2011 through Aug. 9, 2011.

To date, NCMEC analysts have conducted over 28,000 evidence reviews, comprised of more than 53 million images, at the request of law enforcement. CRIS now contains information on approximately 3,700 child victims who previously have been identified by law enforcement. Ninety-two percent of the child victims identified to NCMEC by law enforcement were located in the United States and 8% were located outside the United States. Six percent of identified children were infants or toddlers; 38% were prepubescent; and 56% were pubescent when the images were created. In 2010, CVIP analysts conducted in excess of 4,800 evidence reviews, comprising more than 13,600,000 images, at the request of law enforcement.

Because of NCMEC's role and expertise relating to the issue of child pornography, a federal district court previously sought its opinion on 18 U.S.C. § 2259 in order to evaluate restitution claims by a victim of child pornography. *See Order, United States v. Paroline*, 08-cr-00061 (E.D. Tex. June 15, 2009). NCMEC also 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 Ernie Allen, President and CEO, NCMEC, Testimony before the House Committee on the Judiciary, The Protecting Children from Internet Pornographers Act (July 12, 2011); Statement of Ernie Allen, President and CEO, NCMEC, Testimony before the United States Sentencing Commission Regional Hearing on the 25th*

Anniversary of the Passage of the Sentencing Reform Act of 1984 (Oct. 20, 2009).⁴

The resolution of the first issue presented in this case—the interpretation of the proximate cause requirement in 18 U.S.C. § 2259(b)(3)(F), 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. As the entity designated by Congress to serve as the national clearinghouse for information relating to child pornography and its child victims, 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 provide clear opportunities for victims of child pornography to receive restitution.

SUMMARY OF ARGUMENT

As this Court and Congress have repeatedly recognized, child pornography presents a serious and growing threat to the children of this nation. This brief seeks to inform the Court of the particular harms suffered by victims of child pornography. Child pornography producers violate and exploit their victims again and again—first by sexually assaulting the child during the production of the pornography, then by recording and disseminating an indelible record of that abuse. Child pornography distribution has grown exponentially since the advent of the Internet, as has the harm that the victims suffer.

⁴ In the last five years, NCMEC has testified 12 times at congressional hearings on issues related to child pornography.

In recognition of the harm that producers and consumers of child pornography cause to their victims, Congress enacted a mandatory restitution law, codified at 18 U.S.C. § 2259. This law provides for the full recovery of losses suffered “as a result of” the sexual exploitation of a child. Yet the courts of appeal are divided, and the district courts are wildly inconsistent, when addressing whether offenders owe restitution only for those losses they proximately caused. For the sake of victims of child pornography, NCMEC urges the Court to grant certiorari and resolve this inconsistency. Until the Court provides clarity, child pornography victims will face uncertain prospects for the recovery of their losses even as they continue to be exploited by offenders nationwide.

ARGUMENT

I. THE FIRST QUESTION PRESENTED IS OF THE UTMOST IMPORTANCE TO THE BATTLE AGAINST CHILD PORNOGRAPHY, A DAMAGING AND EVER-GROWING EPIDEMIC THAT CROSSES ALL DEMOGRAPHIC CATEGORIES AND HARMS CHILD VICTIMS NATIONWIDE

A. This Court, Congress, and Others Have Recognized that Child Pornography is a Serious and Continuing Problem.

This Court consistently has acknowledged the grave and continuing harms inflicted by child pornography. In the landmark case of *New York v. Ferber*, this Court concluded that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” 458 U.S. 747, 757 (1982). In making this finding, this Court cited 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). Since *Ferber*, this Court has noted that, beyond the initial trauma of the sexual abuse suffered by the victims of child pornography, child victims depicted in these images are repeatedly exploited as the images are continually disseminated. *See Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (“The pornography’s continued existence causes the child victims continuing harm . . .”). Because child pornography is “a permanent record of a child’s abuse, [its] continued circulation . . . harm[s] the child who has 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 unique and pervasive harms inflicted by the production, distribution, and possession of child pornography, and has acted repeatedly to combat this growing contagion. Beginning with the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225, 92 Stat. 8 (1978) (codified as amended at 18 U.S.C. § 2251, *et seq.*), Congress has constructed an expansive statutory regime aimed at eradicating the interstate market for child pornography. *See, e.g.*, 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.* As the growth of the Internet and technological innovations facilitated a dramatic increase in offenders’ ability to store, distribute, and acquire child pornography, Congress

passed the 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.*), which recognized that “where 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 (1996); *see also* H.R. Rep. No. 104-863, at 28-29 (1996) (Conf. Rep.). That same Congress also passed the 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), which strengthened the restitution remedies available to victims of federal crimes, including child pornography offenses. *See also* 18 U.S.C. § 2259. In enacting the Adam Walsh Child Protection and Safety Act of 2006, Congress reaffirmed that “[t]he illegal production, transportation, distribution, receipt, advertising and possession of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole.” Pub. L. No. 109-248, § 501, 120 Stat. 587, 623 (2006). Furthermore, in enacting the Effective Child Pornography Prosecution Act of 2007, Congress explicitly found that “[c]hild 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.” Pub. L. No. 110-358, 122 Stat. 4001 (2008).

Despite congressional and judicial efforts to stem its tide, child pornography remains an acute and growing problem across a wide segment of society.

According to a recent Department of Justice report to Congress, both the quantity and severity of child pornography on the Internet has increased dramatically. *See* U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress 9 (2010)*, *available at* <http://www.projectsafchildhood.gov/docs/natstrategyreport.pdf> (“DOJ Report”). Offenders also span all professional, educational, and income levels. A 2000 NCMEC-sponsored study of law enforcement data 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 25, the 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 “NCMEC Study”).

Reflecting this continuing proliferation of illicit material, federal prosecutions for child pornography offenses have increased steadily in recent years, and U.S. attorneys prosecuted a total of 8,352 such cases between 2005 and 2009. DOJ Report, *supra*, at 11. The number of child pornography videos and images submitted to NCMEC for identification of the child victims depicted concomitantly increased by 432% during this same period. *Id.*

B. Child Victims Suffer Enormous Psychological and Financial Harm from the Production, Distribution, and Possession of Child Pornography.

Victims of child pornography incur severe and lasting harms from the permanent memorialization

of the crimes committed against them. Studies indicate that child victims endure depression, withdrawal, anger, and other psychological disorders. John E.B. Myers, et al., *The APSAC Handbook on Child Maltreatment* 64 (2d ed. 2002). Victims also frequently experience feelings of guilt and responsibility for the abuse as well as feelings of betrayal, powerlessness, and low self-esteem. *Id.* at 59. 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-traumatic phase. This psychological harm frequently extends into adulthood and impacts victims' ability to form healthy relationships with others. *Id.* at 59-62.

Child pornography victims also are injured by their inability to remove or control the images 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). The nature of the Internet, which permits the mass circulation of abusive images worldwide and precludes their permanent eradication, exacerbates this harm tremendously. As Congress recognized in enacting the Adam Walsh Child Protection and Safety Act, "technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography," Pub. L. No. 109-248, § 501, 120 Stat. 587, 623 (2006), 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. *See id.*

Because it is impossible to ensure the removal of child pornography images from the Internet or from an unknown offender's personal collection, child victims also suffer a perpetual invasion of their privacy. NCMEC Study, *supra*, at 27. The NCMEC Study revealed that not only those who distribute, but also those who possess child pornography images, add to the ongoing harm to child victims. *Id.* 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, 1193-94 (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.⁵ The Misty series contains still images of Amy being forced to perform a series of extremely graphic acts, including oral copulation, anal penetration, and masturbation. These images are crime scene photos memorializing the criminal acts committed against Amy. Between August 2002 and August 2011, NCMEC received from law enforcement over 3,700 submissions that included images from the “Misty” series. Because most submissions report multiple images, these 3,700 reports contained over 52,000 images of the “Misty” series that had been viewed, traded, and collected by offenders for their personal gratification. In her victim impact statements, Amy has recounted how the harms inflicted by the abuse itself are perpetually multiplied by the continuous circulation of her images on the Internet. 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 has severely impacted virtually every aspect of her life, ranging from

⁵ 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).

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 told 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 Allen are emblematic of the profound and lasting harms suffered by the numerous victims of the child pornography epidemic.

II. THIS COURT SHOULD CLARIFY THE INTERPRETATION OF THE MANDATORY VICTIM RESTITUTION ACT BECAUSE DIVERGENT JUDICIAL APPLICATIONS OF SECTION 2259 ARE FRUSTRATING CONGRESS' INTENT TO PROVIDE RESTITUTION TO CHILD VICTIMS

A. Advancements in Technology Continue to Increase the Frequency with Which Courts Face Issues of Restitution for Child Pornography Victims.

The steady growth in the number of reports submitted to NCMEC's CyberTipline and images and/or videos submitted to NCMEC's CVIP is a product of the increased volume of child pornography enabled by the growth of the Internet and innovations in mobile technology. Child pornography can be distributed around the world in less than a second and at no cost through various online platforms, including email, peer-to-peer file sharing, and Internet Relay Chat. The inclusion of cameras in mobile phones, coupled with new data features, also allows child pornographers to create and distribute images anytime, anywhere even without a computer. Technology also has resulted in an increase in the frequency with which child pornography cases are brought to the attention of the courts. District Court statistics show a steady increase over the last decade in the number of prosecutions involving sexually explicit material, and specifically, a 64% increase between 2005 and 2009. *See* Table 5.4, U.S. District Courts—Criminal Defendants Filed, by Major Offense (Excluding Transfers), at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table504.pdf>. In 2006 U.S. Attorneys handled

82.8% more child pornography cases than they had in 1994. DOJ Report, *supra*, at 8. Moreover, as described above, technology does not just enable child pornography offenders to commit their crimes more easily; it also amplifies the nature of the harm done to the victim and the number of offenders doing harm to a particular victim. This, in turn, means that more victims must seek restitution against more offenders in more jurisdictions.

B. The Lower Courts Have Been Unable to Agree on a Workable Approach to Assess Victims' Claims for Statutorily Mandated Restitution and Greatly Need This Court to Provide Clarity.

Under 18 U.S.C. § 2259, district courts are required to order restitution from all those convicted of the “sexual exploitation of children”—including anyone who causes “a minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct,” 18 U.S.C. § 2251(a). As courts uniformly have held, such a restitution order is mandatory, regardless of the offender’s ability to pay or the victim’s other possible sources of compensation. *See* 18 U.S.C. § 2259(a)(4); *see also United States v. Kennedy*, 643 F.3d 1251, 1260 (9th Cir. 2011) (“Section 2259 makes restitution ‘mandatory’”); *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001) (same); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999) (same). As the number of child pornography prosecutions in federal courts increases, *see supra* section II.A, district courts necessarily will need to calculate restitution payments more frequently.

Yet the courts of appeal are intractably divided over the proper method for determining an offender's liability for restitution. *See* Petition for Certiorari at 10-17. While the D.C. Circuit in the instant case concluded that Section 2259 requires restitution only for that amount of the victim's loss "proximately caused" by the offense, *see United States v. Monzel*, 641 F.3d 528, 537 (D.C. Cir. 2011), the Fifth Circuit has ruled that Section 2259 requires no such proximate cause showing for certain types of losses, such as medical expenses and lost income. *See In re Amy Unknown*, 636 F.3d 190, 198-99 (5th Cir. 2011). Even courts that agree with the D.C. Circuit on requiring proximate causation cannot agree on the source of that obligation, whether it be common law or congressional intent. *Compare Monzel*, 641 F.3d at 535 ("[O]ur reasoning rests . . . on traditional principles of tort and criminal law") *with United States v. McDaniel*, 631 F.3d 1204, 1209 (11th Cir. 2011) (relying on the "plain language" of section 2259(b)(3)(F), which requires restitution for "any other losses suffered by the victim as a proximate result of the offense").

This uncertainty at the appellate court level has translated into widely divergent restitution awards at the district court level. For example, in *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *4 (S.D. Fla. Sept. 2, 2009), the court ordered the possessor of six images from the "Misty" series to pay restitution to Amy in the amount of \$3,680,153.⁶ Alternatively, in *United States v.*

⁶ Amy has not, however, received this restitution. To date, Amy has received only a small fraction of the approximately \$3 million in restitution she has sought from hundreds of offend-

Mather, 09-CR-00412, 2010 WL 5173029, at *4-6 (E.D. Cal. Dec. 13, 2010), the court ordered the possessor of numerous “Misty” images to pay Amy \$3,000 in restitution, even after acknowledging evidence indicating that Amy had current and future damages of over \$3 million. And in *United States v. Chow*, 760 F. Supp. 2d 335, 343 (S.D.N.Y. 2010), the court refused to order any restitution from an admitted possessor of “Misty” series images, despite recognizing that Amy has suffered more than \$3 million in losses.

Such inconsistent interpretations of Section 2259 not only create unintended barriers to recovery for victims of child pornography who are subject to continuing harm across jurisdictional boundaries, but also undermine the deterrent effect of the law. Mandatory restitution to victims should serve as a strong deterrent to child sexual exploitation, but if Section 2259 is not uniformly applied, potential offenders cannot be on notice of the possible consequences of their actions. *See Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (plurality opinion) (explaining that the “deterrent effect depends not only upon the amount of the penalty but upon its certainty”). Recent technological advances make it easier for offenders to create, distribute, view, and store child pornography literally anywhere. Each additional distribution and viewing of an image harms the victim anew. *See supra* section I.B. The fundamental unfairness of different courts applying the same law

ers. *See United States v. Faxon*, 689 F. Supp. 2d 1344, 1353 (S.D. Fla. 2010) (recounting testimony that Amy had received only \$107,000 in total from 25 court orders—some of which ordered full restitution—after having filed 340 restitution claims).

and yielding wildly divergent results is particularly apparent here, where victims such as Amy face uncertain prospects for obtaining their statutorily entitled restitution for the same harm in the many courts before which their abusers appear. The current unsettled interpretation of Section 2259 also treats criminal defendants unfairly by subjecting those convicted of essentially the same conduct and causing essentially the same type of harm to the uncertainty of restitution orders ranging from nothing to more than \$3 million. *See McBoyle v. United States*, 28 U.S. 25, 27 (1931) (reasoning that “fair warning should be given . . . of what the law intends to do if a certain line is passed”).

Child victims already are traumatized by their initial sexual assault and are further traumatized by the knowledge that their images of abuse will remain on the Internet forever. These child victims deserve clarity in the restitution process. What could have been a streamlined statutory process for affording victims some compensation for the irreversible harm they have suffered has instead turned into a series of prolonged and uncertain court battles. And as NCMEC continues its efforts to assist law enforcement in identifying and rescuing child pornography victims, the number of petitioners will only increase. The time is ripe, and NCMEC urges the Court to act now to clarify the law.

CONCLUSION

For these reasons, The National Center for Missing and Exploited Children requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

CHRISTOPHER G. GREEN
RACHEL A. RUBENSON
THOMAS J. BASILE
DOUGLAS E. BRAYLEY
ROPES & GRAY LLP

AUGUST 2011